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The Court of Justice of the European Union and International Dispute Settlement: Conflict, Cooperation and Coexistence

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Abstract
One of the significant changes in the landscape of international law in recent decades has been the increase in the number of international courts and other forms of international dispute settlement. The EU has pushed for the inclusion of dispute settlement chapters in its trade and investment agreements, it has joined multilateral treaties that include dispute settlement mechanisms, and it has proposed the establishment of multilateral investment court. The Court of Justice of the European Union has shown a more guarded approach in recent years towards international dispute settlement. This article explores the potential ways to address these sources of conflict and allow the CJEU to coexist with other international courts.

I. INTRODUCTION

Since its establishment in 1952, the Court of Justice of the European Union ('CJEU') has existed alongside other international courts and tribunals. For the most part, the EU's highest court was able to live with these other forms of dispute settlement, as these other bodies did not pose a significant risk of overlap or conflict with EU law. Two main developments led to a greater risk of conflict, however. The first was the increase in the number of new courts, tribunals, and other forms of international dispute settlement.[1] These courts and tribunals were responsible for resolving disputes in the context of international and regional legal orders alongside the EU legal order. It meant that other judicial bodies were capable of interpreting authoritatively and applying areas of law that might impact, directly or indirectly, the development of EU law. The second development was the steady constitutionalising trend of the EU legal order itself. As the EU legal order expanded and developed, international law began to be viewed as a potential threat to the integrity and uniformity of the

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[1] See C PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709.

EU legal order.[2] For example, an EU Member State might seek to avoid its obligations under EU law by pointing to a binding (conflicting) judgment of an international court. This scenario would allow EU law and EU law concepts to be interpreted by an external body, leading to possible diverging interpretations of EU law concepts.[3] Article 344 of the Treaty on the Functioning of the European Union ('TFEU') addresses this situation by forbidding EU Member States from using other forms of dispute settlement mechanisms to resolve disputes concerning EU law.[4] Yet the CJEU has gone beyond this strict negative obligation and has developed further rules about the CJEU's relationship with international dispute settlement bodies.

A view of this landscape shows us various forms of interaction between the CJEU and other dispute settlement bodies, ranging from cooperation, to coexistence, and even conflict. This Article understands 'interaction' in a broad sense. It considers the various ways that the CJEU might come into contact with other dispute settlement bodies and legal orders. At one level, interaction relates to the way the CJEU deals with decisions taken by other courts and tribunals. The CJEU may decide, for example, to refer to the decisions of other international courts in its judicial reasoning, or alternatively to avoid references to those decisions. In these situations, there is no formal legal link between the CJEU and the other tribunal or court and the CJEU is under no obligation to refer to the jurisprudence of other dispute settlement bodies. The CJEU is free to determine what legal effect, if any, a decision of an external body may have in the EU legal order.

A second form of interaction involves situations where there is a more formal link between the EU and the external dispute settlement body. For example, the EU and its Member States can and do join international agreements that include binding dispute settlement procedures. When they conclude such agreements, the CJEU will be called upon to assess whether the agreement and its dispute settlement procedures are compatible with the EU Treaties and EU law.[5] Through this *a priori* assessment of envisaged international agreements, the CJEU has found that some dispute settlement procedures are not compatible with the EU Treaties. For example, the CJEU found that the Draft Agreement to allow the EU to accede to the European

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[2] M Parish, 'International Courts and the European Legal Order' (2012) 23 *European Journal of International Law* 141, 143. One concern is that 'international courts might get EU law wrong without the possibility of correction by the European Court of Justice'.

[3] F de Abreu Duarte, 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System' (2020) 30 *European Journal of International Law* 1187.

[4] Art 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. See *Opinion 1/91*, EU:C:1991:490, para. 35.

[5] The CJEU does this through its Article 218(11) TFEU Opinion Procedure. Art 218(11) TFEU: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised'.

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Convention on Human Rights would undermine the autonomy of EU law.[6] Alongside these Opinions, the CJEU has also addressed the validity of dispute settlement procedures in agreements concluded by the EU and its Member States. In *Achmea* (see Section III.A), for example, the CJEU found that the dispute settlement provisions in a Bilateral Investment Treaty ('BIT') in force between EU Member States was incompatible with EU law and the autonomy of the EU legal order.[7] In *Komstroy* (see Section III.B) the CJEU applied this logic to the Energy Charter Treaty ('ECT') finding that investment arbitration under Article 26 of the ECT between an EU Member State and an investor in another EU Member State is also incompatible with EU law.[8]

These and other judgments have led to growing scholarship that has examined the CJEU's relationship with other international courts and means of dispute settlement.[9] Much of this scholarship presents the CJEU as being opposed to, or even afraid of, other international courts and tribunals.[10] Whereas earlier scholarship on the relationship between the CJEU and other international courts examined these interactions in terms of dialogue between jurisdictions, contemporary debates tend to focus on these sources of conflict. Such commentary is critical of the CJEU's approach in these cases, focusing especially on its conception of autonomy of the EU legal order. It argues that the CJEU's conception of autonomy is overly broad, ill-defined, and shows a lack of engagement with the international legal order.[11] Much of this critical commentary was in response to *Opinion 2/13*, whereas later commentary focuses more on judgments related to investment arbitration. The CJEU now adopts a confrontational approach, examining the EU's relationship with other dispute settlement bodies primarily through the lens of EU autonomy. Another strand of commentary is more supportive of the CJEU and its conception of autonomy. This view has more support from some EU law scholars and members of the Court writing extra-judicially.[12] It offers more theoretical justification and

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[6] *Opinion 2/13*, EU:C:2014:2454.

[7] *Slowakische Republik (Slovak Republic) v Achmea BV ('Achmea')*, Case C-284/16, EU:C:2018:158.

[8] *Republic of Moldova v Komstroy LLC* ('*Komstroy*'), Case C-741/19, EU:C:2021:655.

[9] See M Cremona, A Thies, and RA Wessel (eds), *The European Union and International Dispute Settlement* (Hart Publishing, 2017).

[10] E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35; B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014).

[11] P Koutrakos, 'Editorial: But Seriously, What Is the Principle of Autonomy Really About?' (2018) 4 *European Law Review* 293.

[12] See M Szpunar, 'Is the Court of Justice Afraid of International Jurisdictions?' (2017) XXXVII *Polish Yearbook of International Law* 125; K Lenaerts, J A Gutiérrez-Fons, and S. Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) 81 *ZaöRV* 47. For detailed theoretical discussion of autonomy, see C Eckes, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures* (Oxford University Press, 2019); C Eckes, 'Some

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conceptual clarity to the ambiguous concept of autonomy, and defends against claims that the EU is becoming detached from international law.[13]

These divisions in the academic debate also reflect a division in practice. As mentioned earlier, the CJEU has held that EU Member States may not make use of dispute settlement provisions of the ECT in disputes between themselves (so called 'intra-EU' disputes).[14] However, international tribunals tend to reject this 'intra-EU' exception argument against their jurisdiction, usually on the basis that the CJEU's judgments are not binding on the investment tribunal (see Section III.B). The CJEU and other courts and tribunals appear to be at an impasse. On the one hand, the CJEU continues to emphasize the autonomy of the EU legal order in ways that build barriers between the EU and other dispute settlement bodies. Arbitral tribunals, on the other hand, downplay the relevance of EU law and the CJEU's judgments.[15]

This Article does not seek to relitigate these well-worn debates or to offer further criticism and analysis of CJEU case law. Rather, its aim is to explore some of the ways in which this impasse might be overcome. To do so, the Article takes inspiration from other fields of law and other dispute settlement bodies. Part II, 'Cooperation and Coexistence' first looks at some of the other types of international dispute settlement bodies that have existed alongside the CJEU, focusing on various ways that the CJEU and other dispute settlement bodies have sought to avoid or manage conflict. Part III then turns to examples of recent conflicts between the EU and other legal orders, focusing on the relationship between the CJEU and investor-state arbitration. It focuses on how international tribunals have dealt with objections to their jurisdiction based on arguments in EU law.

After mapping these various forms of cooperation, coexistence, and conflict, Part IV then discusses some ways to address this impasse. It argues that coexistence has come about through mutual respect and comity, including positive forms of dialogue between international dispute settlement bodies. This appears to go against the CJEU's current approach, which has been to ring-fence the EU legal order through formal rules and procedures. Rather than engaging in the logic and language of supremacy and primacy, the CJEU and other courts and tribunals should seek actively to find ways to live alongside one another. While the CJEU has been criticized for not showing a willingness for such pragmatic co-existence, investment tribunals have similarly failed to engage with arguments based on EU law.[16]

(F'note continued)
Reflections on *Achmea*'s Broader Consequences for Investment Arbitration' (2019) 4 *European Papers* 79.

[13] Lenaerts et al, *supra* note 12, p 57 (arguing that 'autonomy must not be confused with complete detachment').

[14] See Part III below.

[15] I Damjanovic and O Quirico, 'Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of *Achmea* and *Vattenfall*: A Matter of Priority' (2019) 26 *Columbia Journal of European Law* 102.

[16] S Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law: The CJEU's Judgment in *Achmea* Put in Perspective' (2019) 44 *European Law Review* 383. 'In fact, investment tribunals have not shown any pragmatism on their side either. Furthermore, it is not just the blunt

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Coexistence thus requires both the CJEU and other dispute settlement bodies actively to find ways to manage conflict. It argues that, from the CJEU side, this would require a conception of autonomy that is capable of safeguarding the EU legal order, but in a way that accepts the reality that this legal order exists alongside (and interacts with) other legal orders. Such a 'pragmatic' approach views autonomy as a necessarily relative concept, one which is to be applied differently depending on a range of circumstances. This conception of autonomy would also reflect the maturity of the EU legal order, one that trusts its own ability to address and manage conflicts arising from outside legal orders. It argues that both the CJEU and international courts and tribunals can find ways to overcome the binary logic of the 'EU law view' and 'international law view' that has led to this impasse.[17]

While the Article focuses on the relatively narrow issue of how international dispute settlement bodies interact, it also tells us something about the interaction between the legal orders themselves. Dispute settlement bodies are established with a primacy function to resolve disputes between parties. Yet in doing so, they also provide authoritative interpretations of the law they apply and participate in the development of their legal order. The CJEU not only resolves disputes involving EU law, but also contributes to the development of a legal system with its own rules relating to the creation, interpretation and validity of those rules. Similarly, other dispute settlement bodies are part of a larger legal order, be it international investment law, the law of the sea, international trade law, human rights law, and so on. Finding ways for dispute settlement bodies to live alongside one another would allow these legal orders to develop and interact without necessarily leading to diverging or conflicting obligations for states.

II. COOPERATION AND COEXISTENCE

In some cases, the CJEU has been able to cooperate with, or coexist alongside, other international courts and tribunals. Cooperation implies that some voluntary positive action is taken to ensure that the legal orders coordinate and interact smoothly. Coexistence, on the other hand, implies a more passive role, where dispute settlement bodies at least avoid direct conflict or confrontation. This Part briefly examines some of the forms of dispute settlement and how they have managed to avoid such conflict with the CJEU.

A. International Court of Justice

The CJEU has developed a close relationship with the International Court of Justice ('ICJ'), the principal judicial organ of the United Nations. Not only does the ICJ play

(F'note continued)
hostility of investment tribunals towards EU law and the CJEU which is worrisome'. See P Koutrakos, 'Managing Inter-legality: Conceptualizing the European Union's Interactions with International Investment Law' in J Klabbers and G Palombella (eds) *The Challenge of Inter-legality* (Cambridge University Press, 2019).

[17] The 'EU law' and 'international law' views are discussed in J Odermatt, *International Law and the European Union* (Cambridge University Press, 2021), ch 1.

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a significant role in resolving international legal disputes between states, it also contributes to the development of the international legal order.[18] The CJEU regularly cites and engages with the judgments of the ICJ and its predecessor, the Permanent Court of International Justice ('PCIJ').[19] To date, there have been no instances where the CJEU has departed from or seriously disagreed with a judgment or finding of the ICJ. Yet the CJEU does not treat the ICJ as a hierarchically superior court and may choose to engage or not with its judgments.[20] In the field of customary international law, for instance, the CJEU often turns to the jurisprudence of the ICJ to determine the existence and content of such rules.[21]

There are few chances of direct collision with the CJEU. One reason is that the CJEU and ICJ deal with very different subject matter; EU Member States will seek to resolve any disputes involving EU law using the CJEU. In cases where EU Member States have made use of the ICJ, they have emphasised that the dispute does not involve the interpretation of EU law. The most recent dispute involving two EU Member States was Germany's proceedings against Italy in the *Jurisdictional Immunities* cases.[22] These cases deal with Germany's allegations that Italy failed to respect the former's sovereign immunity when Italian courts allowed individual claims from war crimes victims against Germany, arguably in violation of a previous ICJ judgment. However, such a dispute does not involve an EU law dimension and would not lead to diverging approaches or interpretations by the two courts. Here, mutual interaction between the CJEU and the ICJ is promoted by a *de facto* division

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[18] See eg C Greenwood, 'Unity and Diversity in International Law' in M Andenas and E Bjorge, *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015).

[19] See J Odermatt, 'The International Court of Justice and the Court of Justice of the European Union: Between Fragmentation and Universality of International Law' in A Skordas (ed), *Research Handbook on the International Court of Justice* (Edward Elgar, forthcoming).

[20] '[T]he CJEU has gradually become more receptive to guidance by its sister court in The Hague in matters falling within the ambit of international law – as evidenced by the increasing number and scope of references to the ICJ's case-law'. E Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface' (2015) 8 *European Journal of Legal Studies* 21, 46. See also E Kassoti and L Louwerse, 'Like Ships in the Night? The CJEU and the ICJ at the Interface' (Geneva Jean Monnet, 2016) Working Paper 06/2016; P Webb, 'The EU: Unifying or Fragmenting Force in International Law?' in A Biondi and G Sangiuolo (eds) *The EU and the Rule of Law in International Economic Relations* (Edward Elgar, 2021), p 368.

[21] For examples in CJEU case law, see J Odermatt, 'The European Union's Role in the Making and Confirmation of Customary International Law' in F Lusa Bordin, A Müller, and F. Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press, 2022).

[22] See *Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Germany v. Italy)*, Application Instituting Proceedings and Request for Provisional Measures (ICJ, April 2022). See ICJ Press Release 2008/44 of 23 December 2008, p 2: 'Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that "specific framework" the Member States "continue to live with one another under the regime of general international law'.

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of labour; conflict is avoided by EU Member States themselves deciding not to submit cases before the ICJ where EU law issues may arise.

What if EU Member States were to employ the ICJ in a case related to Union law? In *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, for example, Belgium declared that the CJEU 'is without jurisdiction in the area'.[23] Yet if two EU Member States were to bring a case before the ICJ, the dispute may still indirectly involve the interpretation of EU law or EU law concepts. In such a case, the European Commission could launch infringement proceedings before the CJEU to prevent the Member States from bringing the case before to the ICJ. In these instances, there is no formal procedure for the ICJ to refer cases or questions to the CJEU. Rather, the CJEU has to trust the procedures built in the EU Treaties.

The situation described above would be similar to that of the *Mox Plant* case.[24] Ireland instituted arbitral proceedings against the United Kingdom under the UN Convention on the Law of the Sea ('UNCLOS') in a dispute related to the UK nuclear facility. The European Commission initiated infringement proceedings against Ireland under Article 344 TFEU for bringing a case involving EU law to a method of settlement outside those in the EU Treaties. At the same time, the Tribunal also addressed the issue of possible diverging and conflicting judgments. The Tribunal President decided to suspend proceedings before the Permanent Court of Arbitration pending resolution of the dispute in the EU:

> The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them.[25]

The Tribunal remained seized of the dispute throughout. It is important to emphasise that these proceedings were not suspended due to the application of any formal procedural rule, or because EU law was viewed as superior. Rather, they were suspended in the spirit of 'mutual respect and comity' and a need to resolve an ongoing international dispute between two states. This approach recognises that both the Tribunal and the CJEU had jurisdiction to interpret UNCLOS, but that overlapping and conflicting cases would not help to resolve the dispute between the parties.

B. WTO

The EU is a founding member of the World Trade Organization ('WTO') and is also active in its Dispute Settlement Body ('DSB'). At the WTO, the EU is treated close to

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[23] ICJ Press Release 2009/36 of 22 December 2009, p 2.

[24] Judgment in *Commission v Ireland*, C-459/03, EU:C:2006:345 ('MOX Plant').

[25] President's Statement of June 13, 2003, *Ireland v United Kingdom*, https://pcacases.com/web/sendAttach/877.

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that of a 'state-like entity',[26] and EU law as analogous to domestic law of a state. The EU's involvement in WTO dispute settlement has given rise to legal issues within the EU legal order, such as the competence to take part in the agreement and the effect of recommendations or rulings of the DSB in the EU legal order. However, the EU's participation in this system of dispute settlement has not given rise to serious conflicts or concerns about EU autonomy. The WTO might be considered a 'special case' given that the EU is a full member of the organization and exercises exclusive competences in most of the areas covered by WTO law. Yet the WTO example can also illustrate how dispute settlement bodies might work to coexist. As with the ICJ discussed above, this has been achieved through viewing the EU and WTO as separate legal orders that are not hierarchically superior to one another. It also shows how the CJEU itself can be somewhat pragmatic. From early on, the CJEU downplayed the relevance of WTO DSB decisions within the EU legal order; it found that nature and logic of the GATT/WTO law precludes it from having direct effect within the EU legal order.[27] Similarly, the WTO DSB has avoided conflict with the CJEU. By treating EU law as a fact, it has avoided addressing questions that could potentially affect EU autonomy. As with the ICJ, interaction has functioned without the need for any special procedures such as requiring the CJEU to have 'prior involvement' in a case or requiring a panel to refer questions related to EU law to the CJEU.

C. European Court of Human Rights

The CJEU and the European Court of Human Rights ('ECtHR') are institutionally separate and distinct entities. Yet there is potential for overlap and conflict between the two courts. As all 27 EU Member States are also European Convention on Human Rights ('ECHR') Contracting Parties, there could be situations where the CJEU and ECtHR interpret certain rights or legal concepts in diverging ways.[28] Moreover, there may be instances where the ECtHR is called upon, directly or indirectly, to interpret provisions of EU law or the case-law of the CJEU. To address these issues, both the CJEU and ECtHR have developed practices over time to avoid and manage conflict. Given the close nature of these two legal orders, it is remarkable that the CJEU and ECtHR have managed to avoid serious divergences and conflict. As with the situations above, this has been managed through a pragmatic approach that seeks to allow the two European courts to exist alongside one another, rather than formal procedural mechanisms.

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[26] C Binder and JA Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) *European Yearbook of International Economic Law* 139, p 167.

[27] Judgment in *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, Joined Cases 21 to 25/72, EU:C:1972:115, paras 19–27; Judgment in *Portugal v Council,* C-149/96, EU:C:1999:574.

[28] S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' 43 *Common Market Law Review* 629, 650; JL Murray, 'The Influence of the European Convention on Fundamental Rights on Community Law' (2011) 33 *Fordham International Law Journal* 1388.

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A key technique to maintaining co-existence between the legal regimes has been the doctrine of 'equivalent protection' developed in *Bosphorus* and later cases.[29] According to this doctrine, the ECtHR will refrain from hearing cases involving the interpretation of EU law, except in cases where the 'equivalent protection' presumption can be rebutted, or in cases where a Member State had discretion in how to implement EU law. There is nothing in the EU Treaties, the Convention or the courts' procedural rules that mention such a presumption. Rather, it has been developed by the ECtHR as a way to coexist with other legal orders. This does not mean that the ECtHR will not fulfil its role to monitor states' compliance with the Convention, even in cases where the violation stems from EU law. In *Matthews*, the ECtHR held that '[t]he Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be "secured"'.[30] The ECtHR seeks to avoid interpreting EU law or EU law concepts. It has emphasised that it is not a court of fourth instance, and thus does not rule on states' compliance with domestic, international or EU law: 'The task of interpreting and applying the provisions of EU law falls firstly to the CJEU…'.[31]

For its part, the CJEU has also taken steps to avoid conflict with the ECtHR. While the CJEU occasionally refers to ECtHR judgments, it does not treat these as hierarchically superior, but to ensure that EU law stays in step with that of the ECtHR. Article 52(3) of the EU Charter of Fundamental Rights, for instance, requires the CJEU to interpret the meaning and scope of Charter rights in the same way as those interpreted by the ECtHR. The two courts do interact, but not in a way that has led to outright conflict or serious divergence. As with the ICJ and WTO examples discussed above, coexistence has been managed through judicial practices developed by the courts themselves.

This situation would arguably change once the Union accedes to the ECHR. While the EU is obliged to join this convention, this has stalled due to the negative opinion of the CJEU in *Opinion 2/13*. Rather than being two co-existing courts, the CJEU would become a court of an ECHR Contracting Party, and the ECtHR would be in a position to determine whether EU law complies with the European Convention. An Accession Agreement is necessary to allow the EU to join the ECHR. Any new agreement will have to address this new relationship and ensure that the autonomy of the EU legal order will not be undermined.[32] However, no matter how carefully drafted the Accession Agreement might be, it will unlikely cover all the scenarios that might arise that could potentially affect EU autonomy. In addition to insulating the EU legal order through procedures, the two courts will also have to develop new rules and doctrines in their case-law to manage pragmatic coexistence. As in the cases discussed above, this also requires placing trust in the EU legal order

[29] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [GC] No 45036/98, ECHR 2005-VI.

[30] *Matthews v United Kingdom*, ECHR 1999-I 251, p 265.

[31] *Somorjai v Hungary*, No 60934/13, para 53 (ECtHR 28 August 2018).

[32] See J Polakiewicz, 'A Council of Europe Perspective on the European Union: Crucial and Complex Cooperation' (2021) 5 *Europe and the World: A Law Review* 1.

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to withstand diverging opinions, and trust in the ECtHR to avoid undermining EU autonomy or entering into direct conflict with the EU Court.

D. Avoiding and Managing Conflict

This Section discussed some examples of the CJEU existing alongside other international courts and tribunals. Rather than provide an exhaustive account of each relationship, it focused on ways that dispute settlement bodies can seek to avoid conflict or overlap. In these instances, the relationships are not managed through concepts of hierarchy and primacy. Likewise, coexistence has not been established due to the introduction of procedural rules, such as a form of preliminary reference procedure. In these cases, the CJEU and other dispute settlement bodies are considered to be somewhat equal, and thus coexistence has been fostered by pragmatic approach. While the CJEU has exclusive powers to interpret and apply EU law, these relationships recognise that it is possible for similar disputes, similar facts, and similar legal questions to come before multiple international dispute settlement bodies, each with *prima facie* jurisdiction. Yet in these instances, no court is claiming superiority. This contrasts sharply with the approaches taken by the CJEU with respect to arbitral tribunals, which demonstrate a conflictual relationship, based on the primacy of EU law.

III. CONFLICT

Since 2009, the EU has possessed exclusive competence in the field of direct foreign investment.[33] The European Commission has maintained that EU Member States could no longer make use of provisions in their BITs allowing for investor-state dispute settlement. Since such tribunals are outside the legal orders of the EU Member States and of the European Union, the CJEU has little possibility to supervise and control the interpretation of EU law. In a series of cases before the CJEU, including *Achmea* and *Komstroy* (discussed later), the Court held that such intra-EU application of these dispute settlement provisions is contrary to EU law. In 2020, the EU Member States agreed upon a plurilateral treaty for the termination of their intra-EU BITs.[34] However, arbitral tribunals have rejected the arguments, put forward by EU Member States and the European Commission, that these tribunals lack jurisdiction on this basis. Rather than seeking ways to coexist with investment arbitration, the CJEU has sought to prevent divergence by essentially forbidding EU Member States to make use of investment tribunals.

A. Achmea

In its 2018 *Achmea* judgment, the CJEU found that the arbitration clauses in intra-EU bilateral investment treaties 'such as' the Agreement on Encouragement and

[33] Art 207 TFEU.

[34] Agreement for the Termination of Bilateral Investment Treaties between the EU Member States, 5 May 2020. https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en.

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Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1991) ('Dutch-Slovak BIT') were incompatible with EU law.[35] This is because arbitral tribunals established under the BIT could be called upon to interpret and apply EU law. Such tribunals would not be in a position to refer questions regarding EU law to the CJEU, since they cannot be considered a 'court or tribunal' within the meaning of Article 267 TFEU. Thus, the Court found that this would have an adverse effect on the autonomy of EU law. Following *Achmea*, it was clear that, according to the CJEU, investment tribunals established under such BITs do not have jurisdiction in intra-EU disputes.

The CJEU's finding in *Achmea* appears to be in line with its previous case law on the autonomy of the EU legal order, including *Opinion 2/13*. In previous cases, the CJEU emphasised the clear link between Article 344 TFEU and the autonomy of the EU legal order.[36] Over time, Article 344 TFEU has evolved from a negative obligation to refrain from submitting disputes concerning the interpretation or application of the Treaties to external dispute settlement procedures, to a more all-encompassing provision related to the autonomy of the EU legal order. In this vein, one can see how intra-EU investor-state dispute settlement ('ISDS') would give rise to similar concerns related to EU autonomy. *Achmea* was also met with criticism, in particular from within the field of international investment law, for adopting an overly broad approach to autonomy. Beyond this criticism, there was considerable discussion, both in academia and before arbitral tribunals, about whether the findings in *Achmea* would also apply to intra-EU dispute settlement in other contexts. For example, it was debated whether the CJEU's reasoning would apply in the context of dispute settlement under the ECT, a multilateral treaty to which the EU is also a party.

Following *Achmea*, respondent parties sought to use the judgment to argue before investment tribunals that they lacked jurisdiction to hear disputes between an EU Member State and an investor in an EU Member State. Since EU Member States were prohibited from participating in intra-EU ISDS based on EU law, it was argued, there could be no valid offer to arbitrate, and therefore the tribunal lacked jurisdiction. These arguments were mostly dismissed.[37] One reason for this is that arbitral tribunals are established under an instrument of public international law and cannot be considered a part of the system of EU law. According to this view, the *Achmea* judgment is valid but only applicable within the EU legal order—it cannot have any bearing on the question on the tribunals' jurisdiction, which is established on the plane of international law. Interestingly, initial reactions to the *Achmea* ruling

[35] See *Slowakische Republik (Slovak Republic) v Achmea BV*, C-284/16, EU:C:2018:158.

[36] Eg *Opinion 1/91*, EU:C:1991:490, para 35; *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, para 282.

[37] J A Bischoff, 'Just a Little BIT of "Mixity"? The EU's Role in the Field of International Investment Protection Law' (2011) 48 *Common Market Law Review* 1527; S Gáspár-Szilágyi and M Usynin 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's *Achmea* Judgment' (2019) 4 *European Investment Law and Arbitration Review* 29, 35.

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tended to downplay the potential ramifications outside the EU legal order. Some commentators noted that the holding in the judgment was rather narrow,[38] predicting that the ruling would only have effect within the EU legal order, and for a very specific range of disputes.[39] Later cases, including *Komstroy*, showed that the CJEU would apply its reasoning in *Achmea* outside the context of BITs between EU Member States.

B. Komstroy

Following *Achmea*, there was discussion about whether the CJEU's reasoning would also apply to dispute settlement under the ECT.[40] In its 'Decision on the *Achmea* Issue' the tribunal in *Vattenfall* noted '[t]he ECJ's reasoning was not specifically addressed to investor-State dispute settlement under the ECT'.[41] With the exception of the decision in *Green Power* (see Section IV.B) investment tribunals have consistently found that they have jurisdiction irrespective of the intra-EU objection based on *Achmea*. These decisions restrict *Achmea* to BITs that did not include the EU as a party: '[I]t is clear that *Achmea* pertains only to BITs concluded between EU Member States'.[42] Unlike the BITs between EU Member States, the ECT is a multilateral treaty that includes the European Union as a party, in addition to states that are not members of the Union. Dashwood argued that since the CJEU's reasoning in *Achmea* applied only to provisions of agreements 'such as' the Dutch-Slovak BIT, this would exclude its application to the ECT context.[43] As a multilateral treaty to

[38] C István Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law After *Achmea*: "Know Well What Leads You Forward and What Holds You Back"' (2018) 19 *German Law Journal* 982 ('notwithstanding the CJEU's apparently anti-arbitration attitude, its holding is rather narrow').

[39] D Kochenov and N Lavranos '*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2021) *Hague Journal on the Rule of Law*: 'In this context, it is important to recall that in contrast to the BIT that was at issue in *Achmea*, most intra-EU BITs do not even list EU law as one of the possible sources of applicable law for arbitral tribunals. Therefore, the risk that arbitral tribunals might systematically misapply or misinterpret EU law is very low indeed'.

[40] See Hindelang, note 16 above, p 384: 'Furthermore, the [*Achmea*] judgment's reasoning seems not to be limited to bilateral investment treaties between the Member States, but will most likely also apply to the Energy Charter Treaty (ECT) in an intra-EU context'.

[41] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (2018), Decision on the *Achmea* Issue, para 161: 'It remains unclear what alleged rule of international law arising from the ECJ Judgment exists and is of application to the present case. The ECJ's reasoning was not specifically addressed to investor-State dispute settlement under the ECT. While there is a certain breadth to the Court's wording, addressing provisions "such as" the dispute resolution provision of the BIT in that case, it is an open question whether the same considerations necessarily apply to the ECT'.

[42] *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, para 680.

[43] A Dashwood, 'Article 26 ECT and Intra-EU Disputes: The Case Against an Expansive Reading of Achmea' (2021) 46 *European Law Review* 415, p 423: 'The fact that the Court of Justice reformulated the first and second questions so as to include an explicit reference to "Article 8 of the BIT" is a strong

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which the EU is a party, tribunals had found that the findings in *Achmea* do not apply in the ECT context.[44]

One reason for rejecting the intra-EU objection is that the tribunals are to establish jurisdiction in accordance with rules of public international law, including the relevant treaty. Under Article 26(6) ECT, a tribunal is to resolve disputes 'in accordance with this treaty and with applicable rules and principles of international law'.[45] Arbitral tribunals have not accepted that references to 'international law' should also include EU law. This has given rise to debates about the nature of EU law and whether it can be considered 'international law' for the purposes of establishing jurisdiction.[46] In *Electrabel SA v Hungary* the tribunal found that 'EU law is international law because it is rooted in international treaties; and both Parties accepted, of course, that the EU Treaties are legal instruments under public international law…'. [47]

In *Komstroy* the Grand Chamber found that its reasoning in *Achmea* did also apply in the context of the ECT. The case arose as a reference for a preliminary ruling from the Paris Court of Appeal concerning the jurisdiction of an arbitral tribunal established under Article 26(1) ECT. The underlying dispute was between the Republic of Moldova and a Ukrainian investor regarding the meaning of "investment" in the context of the ECT. Why did the CJEU have jurisdiction to hear a case involving parties outside the EU? The CJEU found that the 'ECT itself is an act of EU law'.[48] Therefore, since the CJEU has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the European Union, the Court was competent to interpret the provisions of the ECT. Since the ECT is considered an act of EU law, an arbitral tribunal 'such as' that referred to in Article 26(6) ECT 'is required to interpret, and even apply, EU law'.[49] It held that the dispute settlement provisions in the

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(F'note continued)
indication that the Court intended its ruling to apply specifically to arbitration clauses in intra-EU agreements displaying the particular characteristics of art. 8 of the Netherlands/Slovakia BIT'.

[44] *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, paras 678–83: 'The ECT is not such a treaty. Thus, the *Achmea* Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party'.

FREIF Eurowind v Kingdom of Spain, SCC Case No 2017/060, Final Award, March 2021, para 330. Check 'the ECT is a multilateral agreement to which the EU is itself a signatory. The EU therefore consented to its dispute resolution provisions. It is difficult to see how the ECT would violate EU principles of mutual trust, sincere cooperation or the autonomy of EU law in such circumstances'.

[45] The Energy Charter Treaty ('ECT') (concluded 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty.

[46] J Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' (2021) 6(3) *European Papers* 1255.

[47] *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (2012).

[48] *Komstroy*, note 8 above, para 49.

[49] Ibid, para 50.

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ECT 'must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State'.[50] The Court thus confirmed that the intra-EU application of the ECT's investor-state dispute settlement mechanisms is incompatible with EU law. While some had argued that the ruling in *Achmea* was narrow,[51] the CJEU has now applied its logic in the context of the ECT, a multilateral treaty to which the EU itself is a party.

These decisions exhibit different views about the very nature of EU law. In *Komstroy*, the dispute involved two parties—Moldova and a Ukrainian investor—that are outside the EU, and in a dispute that has little connection with the EU. It involved the interpretation of an international agreement—the Energy Charter Treaty—that is a legal act on the plane of international law and includes parties that are not members of the European Union. By considering the ECT to be an act of *EU law*, and thus in a position to interpret that act, the CJEU significantly expands its own jurisdiction. It justifies this expansive approach by reasoning that this is needed to forestall possible future divergences in interpretation, which may then have an impact within the EU legal order. The problem, however, is that the ECT parties decided to give jurisdiction to resolve disputes to arbitral tribunals, and not to the court of a regional organization belonging to some of the ECT parties. While such an approach may be legally justified within the EU legal order, it is highly antagonistic to legal regimes outside that legal order. It seeks to apply the principles of EU primacy to a dispute that, according to Advocate General Szpunar, 'appears at first sight to be unconnected with the European Union'.[52] Given this antagonistic approach, it is perhaps unsurprising that arbitral tribunals have not accepted the CJEU's legal reasoning.

From the perspective of EU law, it is now clear that Article 26 ECT 'is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State'.[53] This was confirmed in *Opinion 1/20*, when the CJEU addressed a request by Belgium regarding the compatibility of the draft modernised Energy Charter Treaty with the EU Treaties, in particular Article 19 TEU and Article 344 TFEU. The CJEU found that it did not have sufficient information about the content of the revised ECT to determine whether it complies with the EU Treaties.[54] Yet on the compatibility of Article 26 ECT with EU law, the Court states that it already ruled on this question in *Komstroy*.[55] It is unfortunate the CJEU decided this in a case

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[50] Ibid, para 66.

[51] See István Nagy, note 38 above, p 996: '[W]hile *Achmea* features an anti-arbitration attitude—which may guide future cases—the ruling's holding is very narrow'.

[52] *Republic of Moldova v Komstroy*, Case C-741/19, ECLI:EU:C:2021:164, Opinion of AG Szpunar, para 26.

[53] *Opinion 1/20*, 16 June 2022, para 47.

[54] Ibid, para 46.

[55] Ibid, para 47: '[T]he Court has already ruled on that question. It is clear from the judgment of 2 September 2021, *Republic of Moldova* (C-741/19, EU:C:2021:655), and in particular from paragraphs

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(*Komstroy*) where the question of the intra-EU application of the ECT was not a key issue in the dispute, and where parties, including other EU Member States, were not able to give their full views and arguments on the question. *Achmea*, *Komstroy*, and *Opinion 1/20* are not decisions that seek to foster coexistence with other legal orders; rather they apply the logic of EU primacy to disputes on the plane of international law. The CJEU could have achieved the same result by using reasoning that could resonate with and be applied by other tribunals. For example, (as discussed in Section IV.A) as the CJEU could have demonstrated how its approach is also justified under public international law and the law of treaties.

C. Intra-EU Jurisdictional Objection

In the light of the *Achmea* and *Komstroy* judgments, arbitral tribunals have heard arguments on the 'intra-EU' jurisdictional objection. For example, the tribunal in *Mathias Kruck and others v Spain* was asked to review its decision on the 'intra-EU' or '*Achmea* question' in light of the 2021 *Komstroy* decision.[56] The tribunal decided that the *Komstroy* judgment did not warrant a reopening of the question. It disagreed with the position of the CJEU that the ECT must be interpreted authoritatively by the EU Courts. Such an approach would mean that the ECT would have a different meaning in intra-EU disputes and non-intra-EU disputes, and that such 'an inherently discriminatory structure' cannot be reconciled with the intention of the ECT contracting parties.[57] While the tribunal accepts that the ECT is binding on the EU Member States and can be considered EU law 'that does not mean that the ECT is transformed into EU law, losing its character as an international agreement subject to and applicable as part of public international law'.[58]

In these cases, respondents have argued essentially that a tribunal does not have jurisdiction because there was no valid offer to arbitrate between an EU Member State and an investor in another EU Member State. From an EU law perspective, the situation is clear: an EU Member State is prohibited under EU law from participating in intra-EU dispute settlement under the ECT. The challenge for respondents is to convince the tribunal, not only that intra-EU cases are prohibited in the light of EU law, but that EU law is of relevance when determining issues of jurisdiction and

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(F'note continued)

40 to 66 thereof, that compliance with the principle of autonomy of EU law, enshrined in Article 344 TFEU, requires Article 26(2)(c) of the ECT to be interpreted as meaning that it is not applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State'.

[56] *Mathias Kruck and others v Spain*, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/15/23, 6 December 2021, para 36:

'[T]he fact that in *Komstroy* the CJEU for the first time directly addresses the question of intra-EU disputes under the ECT is a very specific and particular feature of the *Komstroy* judgment which the Tribunal considers, on balance, warrants reconsideration in this case'.

[57] Ibid, para 40.

[58] Ibid, para 41.

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applicable law. In *Eiser v Spain*, for example, the Tribunal found that these EU law arguments did not apply since the Tribunal is not an institution of the EU legal order.[59]

One reason for this rejection is that the arguments before the tribunals tend to be presented in terms of supremacy and primacy of EU law. Investment tribunals, such as those set up under the ECT, are unlikely to give much weight to such arguments, which are based essentially on the superiority of EU law. EU law might be considered analogous to the domestic law of an ECT contracting party; claims to avoid jurisdiction based on EU law can be viewed as essentially invoking its internal law to avoid an international legal obligation. Indeed, respondents have sought to package their arguments in international law terms. For example, it has been argued that EU law should be considered a 'successive treaty on the same subject matter' under Article 30 VCLT (*lex posterior*) which would give normative priority to EU law. Alternatively, EU law could be viewed as a type of *inter se* modification of the ECT between EU Member States. With the exception of *Green Power* (discussed in Section IV.B) however, such arguments have been rejected. There continues to be a fundamental disagreement. From the perspective of the CJEU, the starting point is EU law and the autonomy and primacy of EU law. For tribunals determining their own jurisdiction, the starting point is the text of the international agreement. Rather than engage in dialogue with other tribunals and employ reasoning based in international law, the CJEU's more antagonistic approach is more likely to provoke conflict between legal orders. The following Part discusses some of the ways that this division might be overcome.

IV. WAYS FORWARD

Part II provided some examples of ways in which the CJEU has been able to live alongside other forms of international dispute settlement. It argued that coexistence has been enabled in these situations because neither legal order has claimed superiority over the other. Moreover, in these situations, the CJEU and other tribunals have found ways to avoid outright conflict. This Part addresses some of the ways that the CJEU and investment tribunals could similarly coexist. The purpose is not to argue which approach is legally 'correct' but to find ways that allow interaction between legal orders.

A. EU Court of Justice Engaging with External Bodies

The CJEU's reasoning in cases such as *Achmea* and *Komstroy* is firmly rooted in the principle of autonomy of EU law. Past cases involving external dispute settlement bodies have also developed the meaning and application of this principle. In

[59] 'The Tribunal's jurisdiction is derived from the express terms of the ECT, a binding treaty under international law. The Tribunal is not an institution of the European legal order, and it is not subject to the requirements of this legal order'. *Eiser Infrastructure Limited and Energía Solar Luxembourg SARL v Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, para 199.

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Opinion 1/17 the CJEU found that the Comprehensive Economic and Trade Agreement between Canada and the European Union ('CETA') was compatible with Union law. It articulated that the EU may in principle join an international agreement that includes binding dispute settlement as long as the agreement does not have an adverse effect on the autonomy of the EU legal order:

> [A]n international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law. Indeed, the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court that is created or designated by such agreements as regards the interpretation and application of their provisions.[60]

Here the Court recognises the importance of engaging with international dispute settlement bodies for the Union's international relations. International dispute settlement might be seen a possible threat to the integrity of the EU legal order, but it is also a way by which the EU can strengthen the international legal order, for example, by ensuring that international legal disputes are resolved using judicial methods. Such support for international dispute settlement is not only in the EU's interests it also aligns with its obligation to promote the 'strict observance and the development of international law' in its international relations.[61] On the one hand, the Union seeks to design, support, and take part in international dispute settlement bodies, which is a way to strengthen enforcement and consistent application of international law. Yet in doing so, the EU must ensure that its interaction with such international dispute settlement does not undermine the integrity of its own legal order.

Rather than viewing autonomy in absolute terms, the CJEU has sought to balance these competing interests and goals. The CJEU will apply the principle of autonomy in a broad or a narrow fashion, depending on a range of circumstances.[62] As an overarching constitutional principle of EU law, autonomy is thus applied in a way that takes into account the type of relationship that will exist between the CJEU and other dispute settlement bodies. Autonomy is by its very nature a relational concept,

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[60] *Opinion 1/17*, EU:C:2019:31, para 106.

[61] Article 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

[62] See E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on *Opinion 1/17*' (2020) 73 *Questions of International Law* 5, p 10: '[I]f the principle of autonomy is understood in a more relational fashion, the safeguards that are needed will depend on the type of relationship that is envisaged. The principle of autonomy should be understood as an overarching constitutional principle, one that is to be safeguarded in different ways, depending on the circumstances'.

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and the CJEU will apply the principle in a way that takes into account the nature of that envisaged relationship. Thus, while critics have rightly pointed out how the principle has been applied in a somewhat inconsistent fashion,[63] this is perhaps to be expected from a court applying the principle in different contexts and relationships. For example, the relationship between the EU and the tribunals established under CETA have far less potential to undermine EU autonomy than the relationship established between the EU and ECHR in *Opinion 2/13*. The point is that the CJEU considers the principle of autonomy to be a relative, relational principle. This recognises that the EU is not the same as a sovereign state, but an international organization 'endowed with a certain autonomy'.[64] Moreno-Lax and Ziegler argue in that regard that autonomy of international organizations is conceptually different from state sovereignty: '[A]utonomy and legal personality of international organisations are different in one important respect: while legal personality is "a yes or no question", autonomy "is a matter of degree"'.[65] This recognizes that the Union cannot be an isolated legal entity, but must live with other organizations, courts, and states. Interacting and engaging with these other entities, including other international dispute settlement bodies, would require an application of the principle in a way that allows engagement with external dispute settlement bodies (or 'discursive autonomy'[66]) rather than seeking to isolate the EU legal order form external effects.[67]

Such an approach would show trust in the EU legal order's ability to withstand and respond to different interpretations of EU law and or diverging views of the nature of EU law. It would allow the CJEU and other bodies to develop practices that foster coexistence. As discussed in Part II, coexistence between the EU and the ICJ, WTO DSB, and the ECtHR has not been managed through the introduction of formal procedures but through a spirit of comity and mutual compromise. Such an approach also recognizes that the EU is a part of a wider international legal order, and as such the EU and its Member States participating in international dispute settlement will always entail some effects on the EU legal order. Rather than viewing autonomy in absolutist binary terms, this approach would require the Court to assess both the external dispute settlement body, but also the ability of the EU legal order to withstand potential conflict. In cases where those external norms can potentially undermine the integrity of EU law, the Court will set up higher boundaries. In cases where

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[63] P Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) 88 *Nordic J Intl L* 1, p 49.

[64] B de Witte, 'European Union Law: How Autonomous Is Its Legal Order' (2010) 65 *Zeitschrift für Öffentliches Recht* 141, p 147.

[65] V Moreno-Lax and KS Ziegler, 'Autonomy of the EU Legal Order a General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation' in KS Ziegler, PJ Neuvonen, and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar, 2022), p 238.

[66] B H Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 168.

[67] See J Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart, 2018).

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there is less chance of conflict, the Court can show trust in its own legal order to address those conflicts if and when they arise.[68] The Court appears to go further than examining cases of actual conflict, but is also concerned with future and even hypothetical conflicts.[69]

B. Tribunals Engaging with International Law and EU Law

The previous Section focused on how the CJEU could apply the principle of autonomy in a way that promotes dialogue and cooperation with other dispute settlement bodies. Such dialogue also requires arbitral tribunals and other dispute settlement bodies to show willingness to engage with arguments based in EU law. As discussed earlier, tribunals have mostly rejected the 'intra-EU' objection to jurisdiction based on the non-applicability of EU law to their legal order. How could arbitral tribunals seek to integrate EU law arguments, without undermining the integrity of their own legal order?

Green Power and SCE Solar v Spain[70] is an example of how a tribunal has sought to overcome the EU law/international law dichotomy that pervades legal arguments in this field. It is exceptional as it is the first time a tribunal has accepted the intra-EU exception. However, it did not come to this conclusion by simply accepting the primacy of EU law; rather, it integrates these EU law arguments into its international law reasoning. Thus, rather than taking an 'EU' or 'international law' perspective, the Tribunal sought to find ways to integrate both, and to overcome the sharp division.

Green Power involved a claim brought by Danish investors against Spain regarding changes it had made to the regulatory framework in the energy market, claiming that this violated the Energy Charter Treaty and international law. As in other cases involving EU Member States, the respondent state sought to rely on the CJEU judgments including *Achmea* and *Komstroy* to challenge the admissibility of the claims and the tribunal's jurisdiction. Spain argued that, since EU primary law and the case law in *Achmea* and *Komostroy* forbid intra-EU cases, there was no valid offer to arbitrate.

One of the key questions facing the Tribunal was whether EU law was even relevant to addressing questions of jurisdiction. The ECT Tribunal has the power to determine its own jurisdiction, which must be established in accordance with the ECT and the applicable rules and principles of international law.[71] Spain argued in this regard that the term 'international law' in the ECT also includes the law of

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[68] Hindelang note 16 above, argues that incompatibility arises when 'there is no other way to contain potential disruptive effects on the uniform application of EU law flowing from an arbitral ruling'.

[69] J Lee, 'The Empire Strikes Back: Case Note on the CJEU Decision in *Slovak Republic v. Achmea BV*, March 6, 2018' (2018) 11 *Contemporary Asia Arbitration Journal* 137, p 145: 'In fact, so crucial does the CJEU view this preservation of uniformity that, in *Achmea*, the Court does not even concern itself whether the arbitral tribunal has actually made any EU law interpretations—whether conflicting or not—instead, the Court seems to be concerned with the mere possibility of a dispute involving questions of EU law'.

[70] *Green Power Partners K/S & SCE Solar Don Benito APS v. Spain*, SCC 2016/135, Award of 16 June 2022.

[71] ECT Article 26(6): 'A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'.

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the European Union.[72] Spain argued that it is EU law in its entirety, not just the EU Treaties, that is part of public international law. The claimants, on the other hand, argued that EU law is not part of international law, and that the ECT does not belong to the EU law system.[73] The parties' submissions revolved around various arguments based on international law and EU law. These arguments often require the tribunal to adopt either an EU law or international law approach to a particular question:

> Moreover, each party has presented its arguments on two planes, the ECT and EU law, each emphasising the plane that better serves its position but also placing itself on the other plane and defending its position in the alternative.[74]

Green Power is remarkable insofar it does not adopt either an 'EU law view' or 'international law view' to the question—instead, it finds that 'the distinction made between separate planes is artificial and obscures the issues that must be decided'.[75] The resolution of the dispute 'must overcome the binary logic of an either "insider" or "outsider" perspective with respect to EU law'.[76] This approach contrasts with the approach in previous cases, in which the tribunal's findings turned on whether it saw EU law as a part of international law.[77]

While Spain also relied on arguments based in EU law, it packaged its arguments in terms of public international law, in particular the rules in the Vienna Convention on the Law of Treaties ('VCLT'). The Tribunal considered the ECT as the starting point for determining its jurisdiction. As such, it turned to the rules in the VCLT to interpret Article 26 ECT.[78] The Tribunal first employs the general rule of treaty interpretation in Article 31 VCLT which requires the Tribunal to examine the 'ordinary meaning' of the terms in Article 26 ECT.[79] The Tribunal found that, on its wording, the offer to arbitrate must be 'unconditional' and that there may be other norms applicable to determine the validity to arbitrate.[80] The Tribunal had to determine whether an EU Member State's unilateral offer to arbitrate under the ECT can be validly given, even though the EU Member States had made another agreement (EU law) that prevents it from making such an offer.[81]

The Tribunal used Article 31 VCLT to examine the terms of the treaty in their context. This rule allows an interpreting body to consider 'any subsequent agreement

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[72] Spain argued that in this context 'international law' also includes EU law. *Green Power*, note 70 above, para 132.

[73] Ibid, para 143.

[74] Ibid, para 331.

[75] Ibid, para 332.

[76] Ibid.

[77] *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 4.117 (2012).

[78] *Green Power*, note 70 above, para 337.

[79] Ibid, para 339.

[80] Ibid, para 342.

[81] Ibid, para 348.

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between the parties regarding the interpretation of the treaty' and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[82] The tribunal considered some of the declarations made by the EU Member States to be 'subsequent practice' that is relevant for the interpretation of the treaty. In particular, it considered the 2019 declaration made by representatives of EU Member States following the *Achmea* judgment.[83] The tribunal found that the declaration would be relevant only 'to the 22 EU Member States which signed Declaration II and it would reflect their authentic interpretation of the meaning of certain legal relations *inter se*'.[84] The tribunal does not consider this declaration to be an *inter se* amendment of the ECT. Rather than *modifying* the terms of the ECT, the Declaration is evidence of the shared understanding of Spain, Denmark and twenty other EU Member States regarding the relevance of EU law to the issue of investment arbitration.[85] The tribunal stresses that the Declaration is only used for the purposes of interpretation, further showing how Spain and Denmark understood their relations under the ECT and EU law. The tribunal thus found a way to bring in EU law: via systemic integration and the application of Article 31(3)(c) VCLT.[86] This approach views EU law as belonging to a wider international legal system, rather than the either/or dichotomy of EU law and public international law.

Such an approach is an example of how dispute settlement bodies can seek to engage with the law of other legal orders. Rather than finding that EU law is not applicable to the decide jurisdiction, the tribunal takes the EU law arguments seriously. One problem with such an approach, however, is that the tribunal accepts that the ECT can be applied differently in disputes between different members, which would arguably undermine the consistent application and interpretation of the ECT. It should be noted that the declaration of 22 EU Member States does not show evidence of the intention of all ECT parties, but a fragment of them. The tribunal recognizes this, finding that 'this mismatch must be taken into account when considering the weight to be given to this means of interpretation'.[87] The tribunal thus found that EU law is valid for the interpretation of the ECT, but only insofar it applies to the mutual relations of the EU Member States. The tribunal attaches special importance to the fact that norms in the EU legal order have superior and overriding status: 'The Tribunal deems important to note that the primacy of EU

[82] Article 31 VCLT.

[83] Declaration of the Representatives of the Governments of Member States of 15 January 2013 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

[84] *Green Power*, note 70, para 370.

[85] Ibid, para 380.

[86] On systemic integration and EU law, see K S Ziegler, 'Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law' (2016) 35 *Yearbook of European Law* 667.

[87] *Green Power*, note 70 above, para 392.

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law in the relations between EU Member […] is not a matter of *lex specialis* or of *lex posterior*, but one of *lex superior*'.[88]

This approach allows the interpretation of the ECT to change depending on the party to a dispute. This goes against the finding in *Vattenfall* in which the tribunal found that Article 26 ECT includes EU Member States and non-EU Member States without distinction, finding that there was no *inter se* carve out for EU Member States. This finding was also based on the VCLT, the principle of good faith and the need for a single, coherent and unified interpretation of each treaty provision:

> When States enter into international legal obligations under a multilateral treaty, *pacta sunt servanda* and good faith require that the terms of that treaty have a single consistent meaning. States parties to a multilateral treaty are entitled to assume that the treaty means what it says, and that all States parties will be bound by the same terms. It cannot be the case that the same words in the same treaty provision have a different meaning depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute The need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT'.[89]

On the one hand, *Green Power* shows how legal arguments based on EU law can be presented in the language of public international law and the law of treaties. Rather than speaking in the language of primacy of EU law and autonomy, the tribunal discusses the law of treaties and the concept of *lex superior.* On the other hand, this approach has meant that the treaty is not given a single, coherent meaning and would establish different interpretations for different ECT parties. While the CJEU is concerned with the integrity and uniformity of EU law, the approach in *Green Power* gives rise to similar concerns about the consistent and uniform application of a multilateral agreement. Tribunals will continue to hear arguments against their jurisdiction based on *Achmea* and *Komstroy*, and will likely now refer to the *Green Power* decision. If they are to accept the legal reasoning adopted in *Green Power,* they should also address the real concerns raised in the 'Decision on the *Achmea*' quoted above.

V. CONCLUSION

The academic debate about the CJEU's relationship with other dispute settlement bodies shows a clear divide. Some are highly critical of the approach adopted towards external dispute settlement bodies and the application of the principle of autonomy in cases such as *Opinion 2/13* and *Achmea*. This academic debate mirrors a clear division in practice. The aim of this article was not to add to the commentary on these

[88] Ibid, para 469.

[89] *Vattenfall et al v Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, para 156.

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cases and the merits of the approach taken by the CJEU or arbitral tribunals. Rather, the article looked at how the CJEU has been able to live alongside other international courts, tribunals and dispute settlement bodies in other fields, and consider ways that might foster coexistence. A consideration of these other relationships shows that coexistence is usually brought about through the development of legal techniques to avoid direct conflict with other legal orders. The examples of the ICJ, WTO DSB, and ECtHR also show that these relationships can be managed without the introduction of new procedures and rules. The ability of the EU and its Court to deal with the possibility of diverging interpretations of EU law from other bodies demonstrates the robustness and maturity of the EU legal order. In the case of investment tribunals, however, the Court has not shown a similar level of trust. The CJEU has sought to insulate the EU legal order from these threats, primarily through the principle of autonomy. Yet arguments based on the autonomy and primacy of EU law have not been accepted fully by other dispute settlement bodies, which tend to view EU law as a separate source of law. Rather than view external dispute settlement bodies as a threat to the EU legal order, it argues in favour of an approach that would including compromise, comity and engagement. This does not mean abandoning the CJEU's jurisprudence on the autonomy of the EU legal order. Rather, it would mean applying this principle in a way that is mindful of the fact that the EU and its court live alongside and interact with other states, organizations and dispute settlement bodies.

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