THE INTERRELATION OF EU LAW WITH *INTER SE* INTERNATIONAL AGREEMENTS OF THE EU MEMBER STATES

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ABSTRACT

This thesis examines how EU law interrelates with international agreements concluded between EU Member States *inter se* when a conflict between their norms can be identified. Chapter One starts by distinguishing between the different types of international agreements that may co-exist with EU law and argues that conflicts between EU law and *inter se* agreements need to be approached as conflicts of treaty norms on the international plane, using the conflict avoidance techniques and conflict resolution rules of international law. Against this background, Chapter Two examines and discards the premise that EU law constitutes a 'new legal order', highlighting the nature of EU law as international law. Chapter Three then examines the position of EU law within international law, identifying EU law as an autonomous sub-system *within* public international law, in the sense of a broadly conceived 'self-contained regime'. Chapter Four moves on to define the notion of 'conflict' between EU law and *inter se* agreements and provides the conceptual framework, within which it is to be grasped. Chapter Five explores the available conflict avoidance techniques, identifying two interrelated, yet distinct interpretative methods applicable to the context of this thesis: first, the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT); and second, the principle of a consistent-with-EU-law interpretation of *inter se* agreements, as a special application of the principle of harmonious interpretation applied in international law. Finally, Chapter Six identifies the rules governing conflict resolution in the interrelation of EU law with *inter se* agreements: first, Article 59 VCLT on the implicit abrogation of an earlier agreement by the conclusion of a later one between the same contracting parties; second, Article 30 VCLT, to the extent that it codifies the *pacta tertiis* principle of public international law; and third, the principle of primacy of EU law, which operates as a *lex specialis*, carving out the *lex posterior* conflict rule enshrined in Articles 30(3) and 30(4)(a) VCLT.

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AG	Advocate General
Am J Int'l Law	American Journal of International Law
BIT	Bilateral Investment Treaty
Brit YB of Int'l Law	British Yearbook of International Law
CYELS	Cambridge Yearbook of European Legal Studies
CCP	Common Commercial Policy
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
CUP	Cambridge University Press
DSU	Dispute Settlement Undertaking
EC	European Communities
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EEA	European Economic Area
EJIL	European Journal of International Law
ELJ	European Law Journal
E L Rev	European Law Review
EMU	Economic and Monetary Union
ERTA	European Road Transport Agreement
ESM	European Stability Mechanism
EU	European Union

FCC	German Federal Constitutional Court
FDI	Foreign Direct Investment
Fordham Int'l L.J.	Fordham International Law Journal
GATT	General Agreement on Tariffs and Trade
GCEU	General Court of the European Union
Geo Wash Int'l L Rev	George Washington International Law Review
HLR	Harvard Law Review
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
Int'& Comp LQ	International & Comparative Law Quarterly
ISA	Investor-State Arbitration
Italian YB Int'l L	Italian Yearbook of International Law
ITLOS	International Tribunal for the Law of the Sea
Maastricht J Eur & Comp L	Maastricht Journal of European and Comparative Law
Mich L Rev	Michigan Law Review
MPEIL	Max Planck Encyclopaedia of International Law
NYIL	Netherlands Yearbook of International Law
NYU Int'l & Pol	New York Journal of International Law and Policy
OUP	Oxford University Press
PCA	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
SRF	Single Resolution Fund
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNSC	United Nations Security Council
U Pitt L Rev	University of Pittsburgh Law Review
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations
WTO	World Trade Organisation
Yale Hum Rts & Dev L J	Yale Human Rights and Development Law Journal
YEL	Yearbook of European Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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INTRODUCTION

Despite the establishment of the European Union (EU) as a means of pursuing further integration, the Member States have continued to resort to instruments of international law to regulate their relationship in several policy fields. *Inter se* agreements, namely international agreements concluded exclusively between EU Member States, have been a prominent means of intergovernmental cooperation in areas where regulation at EU level is impossible (e.g. due to the lack of EU competence), impracticable (e.g. due to time constraints or political considerations) or simply undesirable. Being concluded on the international plane, *inter se* agreements remain in principle outside the EU legal framework and operate in parallel with it.

Over the past few years, the increasing use of *inter se* agreements as a regulatory tool has raised a series of complex questions with respect to their interrelation with EU law, which may not always be seamless. In fact, conflicts between EU law and a specific subset of *inter se* agreements, namely Bilateral Investment Treaties between EU Member States (intra-EU BITs), was one of the most complex problems that scholarship and practice had to tackle when I embarked on this research project. At that point, the Court of Justice of the European Union (CJEU) had just rendered its ruling in *Achmea*, finding investor-state arbitration (ISA) clauses in international agreements between Member States, such as intra-EU BITs, incompatible with EU law.[1] However, while the CJEU had affirmed a conflict between EU law and intra-EU BITs, it had not ruled on *how* said conflict could be resolved. So, the question on everybody's lips was: when there is a conflict between EU law and an *inter se* agreement, such as an intra-EU BIT, which of the conflicting instruments should apply?

[1] Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158.

For the Commission, a conflict between EU law and an *inter se* agreement needed to be resolved in favour of EU law; EU law would take precedence over the conflicting provisions of the *inter se* agreement, which would automatically cease to apply. Under this perspective, the conflict between EU law and ISA clauses affirmed by the CJEU in *Achmea* meant that a Member State could not validly have consented to arbitration via an ISA clause. Therefore, no arbitration agreement could have been concluded between a Member State and an investor on that basis, and arbitral tribunals established under such an ISA clause would lack jurisdiction to entertain relevant claims. However, arbitral tribunals did not consider the precedence of EU law over *inter se* agreements to be self-evident. To them, any repercussions of the *Achmea* judgment would be limited to *within* the EU legal order. For as long as the Member States maintained intra-EU BIT ISA clauses in force, they would indeed be in violation of their obligations under EU law. Yet, the conflict between intra-EU BIT ISA clauses and EU law affirmed in *Achmea* did not necessarily mean that EU law would prevail or that these clauses would automatically become ineffective on the international plane. Since an arbitral tribunal derives its jurisdiction from an international agreement, it would need to determine priority between the conflicting instruments based on the rules of international law, which could generate a different outcome.

Against this background, my thesis aspires to answer a seemingly simple question: which of the above approaches is right, and – more importantly – why? My research objective is to explain how EU law interrelates with (other) *inter se* agreements when a conflict between their norms can be identified. To that end, I argue that conflicts between EU law and *inter se* agreements need to be approached as normative conflicts between different sub-systems within the broader system of public international law. The purpose of this thesis is not to focus on conflicts between EU law and *inter se* agreements in a particular policy field, such as cross-border investment protection, or to go more deeply into concrete cases of conflict

between EU law and *inter se* agreements. In this thesis, I rather aim to set out the conceptual framework, within which conflicts are to be grasped and dealt with in the interrelation of EU law with *inter se* agreements more generally and in a systematic manner. To that end, the term '*inter se* agreements' refers to both international agreements concluded exclusively between EU Member States, as well as to the potential *inter se* application of mixed agreements, namely international agreements to which (some or all) Member States participate, alongside the EU itself and third countries or international organisations.

Against this background, Chapter One introduces the problem of conflicts between EU law and *inter se* agreements. It starts with a general taxonomy of international agreements that may coexist with EU law. It then focuses on *inter se* agreements, arguing that a potential conflict with EU law needs to be dealt with as a conflict between treaty norms in public international law.

A pre-condition for approaching conflicts between EU law and *inter se* agreements as normative conflicts on the international plane is for EU law and *inter se* agreements to form part of the same legal system, that of international law. Accordingly, Chapter Two examines and discards the premise that EU law constitutes a 'new legal order'. Instead, it highlights the nature of EU law as international law. The sources of EU law constitute instruments of international law. Meanwhile, the particular features supporting the EU's claim of 'external autonomy' do not suffice to emancipate it from international law altogether.

Having established that the special characteristics of EU law do not alter its nature as international law, Chapter Three then examines the position of EU law within international law. It shows that EU law is an autonomous sub-system *within* public international law, in the sense of a broadly conceived 'self-contained regime' of international law. For the purposes of this thesis, this concept is defined as a strong form of *lex specialis* designed to

exclude in principle the application of general international law, which may nevertheless apply residually to fill regulatory gaps.

Chapter Four moves on to define the notion of 'conflict' between EU law and *inter se* agreements, and provides the conceptual framework within which it is to be analysed. It puts forward a broad definition of 'conflict', whereby EU law is understood to be in 'conflict' with an *inter se* agreement, when compliance with either of them: (i) leads or may lead to a violation of the other; (ii) frustrates or may frustrate its object and purpose, even in the absence of concrete incompatibility between specific provisions; or (iii) when the conclusion of the *inter se* agreement falls within the scope of exclusive EU competence. This delineation of 'conflict' rests on a broad construction of the concept's material scope based on two criteria: the deontic nature of the norms encapsulated by 'conflict'; and the requirement that EU law and the *inter se* agreement regulate the 'same subject-matter'.

Based on this definition of 'conflict', the thesis distinguishes between: *apparent* conflicts between EU law and *inter se* agreements, which may be avoided through interpretative, conflict avoidance techniques; and *genuine* conflicts, which need to be resolved using the conflict rules of international law.

Chapter Five explores the available conflict avoidance techniques. It identifies two interrelated, yet distinct interpretative methods that can be applied for the purposes of the thesis: first, the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT); and second, the principle of a consistent-with-EU-law interpretation of *inter se* agreements, as a special application of the principle of harmonious interpretation applied in international law. As a first step, the principle of systemic integration set out in Article 31(3)(c) VCLT ensures that EU law is 'taken into account' in the interpretation of *inter se* agreements. Then, the principle of a consistent-with-

EU-law interpretation, reflecting the operation of the principle of primacy of EU law in its relationship with *inter se* agreements, entails that *inter se* agreements are to be construed in a manner harmonious with EU law.

Finally, Chapter Six identifies the rules governing conflict resolution in the interrelation of EU law with *inter se* agreements. It starts by outlining the rules of international law that apply to genuine conflicts between international agreements and, in particular, those enshrined in the VCLT. It then goes on to examine whether these rules are also relevant to tackling conflicts between EU law and *inter se* agreements or if there are special conflict rules to that end. I argue that there are three applicable conflict rules in this context: first, Article 59 VCLT on the implicit abrogation of an earlier agreement by the conclusion of a later one between the same contracting parties. Second, there is Article 30 VCLT, to the extent that it codifies the *pacta tertiis* principle of public international law. Finally, the principle of primacy of EU law operates as a *lex specialis*, whereby the Member States carved out the *lex posterior* conflict rule enshrined in Articles 30(3) and 30(4)(a) VCLT in their relationship. Whereas Articles 59 VCLT and Article 30 VCLT or the principle of primacy of EU law are mutually exclusive, depending on the composition of the parties to the *inter se* agreement, Article 30 VCLT and the principle of primacy may operate cumulatively.

CHAPTER ONE

WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM? CONFLICTS IN THE INTERRELATION OF EU LAW WITH *INTER SE* AGREEMENTS

This Chapter introduces the problem of conflicts between EU law and *inter se* agreements. It starts with a general taxonomy of international agreements that may coexist with EU law. It then focuses on *inter se* agreements and argues that a potential conflict with EU law needs to be dealt with as a conflict of treaty norms in public international law.

INTRODUCTION: THE FRAGMENTATION OF INTERNATIONAL LAW WITHIN THE EU CONTEXT

Over the years, the functional differentiation of international law has led to a sharp increase in the volume of treaties concluded at international level. The decentralised nature of international law, namely the fact that international law-making takes place at the level of States and international organisations,[1] results in specialised treaty-making and institution-building with relative ignorance of legislative and institutional activities in adjoining fields.[2] This 'emergence of specialised and relatively autonomous spheres of social action and structure'[3] is commonly referred to as the 'fragmentation' of international law.

The multiplication and increasing diversification of international treaty regimes concluded between different parties, at different times and in different political configurations entails the risk of potential clashes between their norms.[4] It would be an

1 C Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) Brit YB of Int'l Law 401, 403; Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 93; Jan Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 231.

2 Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 11 (A/CN.4/L.682); Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 3.

3 Koskenniemi (n 2) 11.

4 W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 NYIL 3, 12; Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers 2003) 1; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 Am J Int'l

extremely difficult – if not impossible – exercise to keep track of all existing treaties regulating a particular field of international law and the obligations stemming from them to ensure their harmonious coexistence at the level of law-making. Even so, there could be no guarantee that such clashes would always be avoided, as different institutions tend to apply and interpret international legal rules in a different manner. In fact, the more specialised and autonomous the treaty regimes that coexist, the greater the risk of conflicts between them.

The fragmentation of international law can be exacerbated within the EU. Through a set of international treaties, the EU Treaties, the Member States established the EU as an international actor, which possesses and exercises rights and obligations on the international plane in fields that fall within its (conferred) powers.[5] At the same time, since membership of the EU does not deprive its members of their sovereignty,[6] the Member States themselves have continued to conclude international agreements outside the EU legal framework, be that with third countries, international organisations or between themselves. These parallel treaty regimes may coexist harmoniously with EU law. However, there are occasions when their interrelation with EU law does not evolve smoothly. The exercise of the EU's or the Member States' treaty-making powers may sometimes result in normative clashes.[7] In such a scenario, a Member State finds itself bound by diverging treaty norms. So, a follow-up

Law 291, 293; Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 192, 193.

5 Enzo Cannizzaro, 'Fragmented Sovereignty? The European Union and Its Member States in the International Arena' (2003) 13 Italian YB Int'l L 35.

6 Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999, paras 50, 56, 59; Bruno de Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union' in Grainne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 31, 32; Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 EJIL 463, 464.

7 Robert Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship' (2007) 9 CYELS 387, 388.

question arises: how are these normative clashes to be dealt with and to which obligations does a Member State adhere?

In this thesis, I focus on conflicts in the interrelation of EU law with and *inter se* agreements, as conflicts between treaties whose parties are all equally bound by EU law. Against this background, the following section starts with a taxonomy of international agreements that coexist with EU law, using the composition of their contracting parties as a classification criterion. Section 1.2 then illustrates the problem of conflicts between EU law and *inter se* agreements and the theoretical and practical concerns underlying it. To that end, it uses a recent practical example stemming from the relationship between EU law and intra-EU BITs. Finally, Section 1.3 outlines how I propose to address the problem; I argue that conflicts between EU law and *inter se* agreements need to be approached and resolved as normative conflicts between treaty regimes on the international plane, using the conflict avoidance and conflict resolution techniques of international law.

1.1 Defining the Scope: A Taxonomy of International Agreements in the EU

Several international agreements concluded by and between different international actors coexist with EU law. Based on the composition of their contracting parties, a preliminary distinction can be drawn between: (a) international agreements concluded by the EU itself (EU international agreements); (b) international agreements concluded by the Member States; and (c) mixed agreements, namely international agreements to which both the EU and the Member States are contracting parties, alongside third countries or international organisations.[8] The taxonomy of international agreements based on this criterion is crucial

[8] Allan Rosas, 'The European Union and Mixed Agreements' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell 2000) 203; Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 212-213; Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham Int'l L.J. 1304, 1306; Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013) xvii; Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020) 368.

since, depending on the composition of the contracting parties to the agreement that generates the conflict with EU law, different conflict rules apply.

1.1.1 EU International Agreements

The question regarding the EU's legal personality has been settled by the Lisbon Treaty.[9] Under Article 47 of the Treaty on European Union (TEU) 'the Union shall have legal personality'.[10] Despite the recent insertion of this provision and its terse wording, the CJEU had early on upheld the EU's capacity to establish contractual links with third countries in the exercise of its external relations.[11] The Union's international legal personality, namely its *capacity* to negotiate and conclude international agreements, is without prejudice to and must be distinguished from its *competence* actually to enter into such agreements. The latter remains delineated by the principle of conferral set out in Article 5(2) TEU, according to which

> the Union shall only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

Based on this principle, the conferral of power upon the EU is necessary for the Union to act in a specific area, internal or external. The Member States felt the need to state this explicitly in Declaration 24 annexed to the Final Act of the Intergovernmental Conference adopting the Lisbon Treaty, which reads:

> The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties.

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9 Nicholas Tsagourias, 'Conceptualizing the Autonomy of the European Union' in Richard Collins and Nigel de Witte (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 341.

10 Consolidated Version of the Treaty on European Union [2012] OJ C 326, Article 47.

11 Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECLI:EU:C:1971:32, para 14; Opinion 1/76 *Inland Waterways* [1977] ECLI:EU:C:1977:63, para 3; Trevor Hartley, *The Foundations of European Union Law* (8th edn, OUP 2014) 180-191; Christina Eckes and Ramses A Wessel, 'An International Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol 1, OUP 2018) 76.

The modalities relating to the exercise of the EU's international legal personality are elaborated in Article 216(1) of the Treaty on the Functioning of the European Union (TFEU), according to which

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

The above provision complements the EU's competence to take internal action for the regulation of a specific area with a parallel external competence also to conclude international agreements in that area.[12] However, Article 216(1) TFEU does not determine the nature of the competence as exclusive or shared. This would be a follow-up question, the answer to which depends on the EU law provisions governing the policy field at issue.[13]

EU international agreements are negotiated and concluded in accordance with the procedural requirements set out in Article 218 TFEU. Once entered into force or provisionally applied,[14] EU international agreements form an integral part of EU law and are binding on the EU institutions and the Member States.[15] According to the CJEU, this is premised on the fact that international agreements concluded by the EU constitute acts of

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12 Craig and de Búrca (n 8) 377; Friedrich Erlbacher, 'Article 216' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1643, 1647.

13 Erlbacher, 'Article 216 TFEU' (n 12) 1646.

14 Under Article 218(5), the EU may decide provisionally to apply an EU international agreement before it enters into force, Andrei Suse and Jan Wouters, 'Exploring the Boundaries of Provisional Application: The EU's Mixed Trade and Investment Agreements' (2019) 53 Journal of World Trade 395, 401.

15 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Article 216(2); Case C-87/75 *Bresciani v Amministrazione delle Finanze dello Stato* [1976] ECLI:EU:C:1976:18, para 18; Alan Dashwood, 'EU Acts and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 191; Marise Cremona, 'Member States Agreements as Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 291; Robert Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014) 50.

the EU institutions;[16] and that, in ensuring respect for such international agreements, the Member States fulfil an obligation towards the EU itself, the latter having assumed responsibility for the due performance of the agreement at issue.[17] This obligation is a special application of the Member States' duty of loyalty enshrined in Article 4(3) TEU, namely the duty to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties or resulting from acts of the EU institutions.[18]

As acts of the EU institutions and part of EU law, EU international agreements fall within the jurisdiction of the EU courts. An EU international agreement may come before the CJEU either before or after its conclusion, under Articles 218(11) and 263 and 267 TFEU respectively. Article 218(11) TFEU allows the Member States and the EU institutions to request an opinion from the CJEU as to whether an envisaged EU international agreement is compatible with the provisions of the EU Treaties.[19] An opinion under Article 218(11) TFEU operates *ex ante*, preventing the EU from committing to an international agreement to which it will later not be able to adhere because of its incompatibility with the EU Treaties.[20] When the opinion of the CJEU is adverse, the agreement may not enter into force unless it is first revised to eliminate the detected incompatibility or the EU Treaties are accordingly amended

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16 Case C-181/73 *R & V Haegeman v Belgium* [1974] ECLI:EU:C:1974:41, paras 4-5; Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECLI:EU:C:1989:646, para 8; Case C-162/96 *Racke v Hauptzollapt Mainz* [1998] ECLI:EU:C:1998:293, para 41; Case C-11/05 *Friesland Cobero Dairy Foods* [2006] ECLI:EU:C:2006:312, para 36; Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, para 39; Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para 45; Opinion 1/17 *Accord ECG UE – Canada* [2019] ECLI:EU:C2019:72, Opinion of AG Bot, para 60.

17 Case C-104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECLI:EU:C:1982:362, para 13; Mendez (n 8) 67.

18 Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 185; Eleftheria Neframi, 'The Duty of Loyalty: Rethinking Its Scope Through Its Application in the Field of EU External Relations' (2010) 47 CMLR 323, 349.

19 Eeckhout (n 8) 268.

20 Friedrich Erlbacher, 'Article 218' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1658, 1671.

instead. *Ex post*, the CJEU may come to deal with an EU international agreement under Article 263 TFEU, in direct annulment proceedings brought against acts of the EU institutions in the context of its conclusion. Moreover, national courts may refer preliminary questions to the CJEU on both the validity and interpretation of said EU acts pursuant to Articles 19(3)(b) and 267 TFEU.[21] In the above cases, the CJEU's jurisdiction only relates to the validity or interpretation of the EU acts issued in the context of the conclusion of the EU international agreement and does not extend to the validity or interpretation of the agreement itself.[22]

1.1.2 International Agreements Concluded by the EU Member States: Extra-EU and *Inter Se* Agreements

A second category of international agreements applicable together with EU law are those concluded by the EU Member States, being the by-product of their sovereignty.[23] Unlike EU international agreements and mixed agreements, international agreements of the Member States are concluded without EU participation. By contrast to EU international agreements, they remain in principle outside the EU legal framework.[24] The CJEU does not enjoy

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21 *Western Sahara Campaign* (n 16) para 48; Opinion 1/75 *Arrangement OCDE* [1975] ECLI:EU:C:1975:145, p 1361; Case C-314/85 *Foto-Frost* [1987] ECLI:EU:C:1987:452, para 17; Case C-6/99 *Greenpeace France at als* [2000] ECLI:EU:C:2000:148, para 54; Case C-344/04 *IATA and ELFAA* [2006] ECLI:EU:C:2006:10, para 27.

22 Joined Cases C-402/05 and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 288; Eeckhout (n 8) 289-290; Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9, 15-16.

23 Schütze, 'EC Law and International Agreements' (n 7) 418; Rosas 'The Status in EU Law of International Agreements' (n 8) 406; De Witte, 'Old-Fashioned Flexibility' (n 6) 32; Bruno de Witte, 'Using International Law for the European Union's Domestic Affairs' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 145.

24 Armin von Bogdandy and Maja Smrkolj, 'European Community and Union Law and International Law', MPEIL, available at < https://ezproxy-prd.bodleian.ox.ac.uk:2852/view/10.1093/law:epil/9780199231690/law-9780199231690-e620?rskey=YMQBEg&result=1&prd=MPIL> accessed 10 September 2021. An exception to this rule includes, first, cases where the EU authorises the Member States to conclude themselves (together or individually), acting on the EU's behalf and in its interests, an international agreement falling within a field of the EU's exclusive competence. This has been the case of the European Road Transport Agreement (ERTA). The CJEU held that, in concluding and negotiating the ERTA for the

jurisdiction to rule on the validity or to interpret an international agreement binding on the Member States outside of EU law.[25] This has been affirmed by the CJEU, which has consistently found that

> The Court [...] has already held that it lacks jurisdiction to rule on the interpretation of an international agreement concluded between Member States whose subject matter falls outside the areas of EU competence and on the obligations arising under it for them [...].[26]

According to the CJEU, this would even be true of cases where it is called upon to interpret EU law, yet the infringement of EU law provisions pleaded in support of the action is ancillary to the alleged failure to comply with obligations arising from such an international agreement.[27] Of course, this is without prejudice to the possibility of the CJEU to interpret EU law provisions in the context of a preliminary reference under Article 267 TFEU to establish whether there is a conflict between EU law and the agreement at issue. However, in such a scenario it will not be for the CJEU but for national courts to identify the obligations

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EU, the Member States were fulfilling their obligation under (what is now) Article 4(3) TEU, *Commission v Council* (n 11) para 90; second, cases where the Member States have concluded an international agreement in a field, over which the EU was subsequently conferred exclusive competence. This has been the case of the General Agreement on Tariffs and Trade (GATT), where the CJEU upheld that, insofar as the EU 'has assumed the powers previously the Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the [EU], see Joined Cases C-21-24/72 *International Fruit Company and Others* [1972] ECLI:EU:C:1972:115, para 18. Third, cases where the conclusion of an agreement falls within a field where the EU's competence is exclusive, yet it cannot itself become a party to the agreement, on the ground that only states can participate therein. For such cases, the CJEU's view is that the EU's 'external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the [EU's] interest', Opinion 2/91 *Convention No 170 of the ILO* [1993] ECLI:EU:C:1993:106, para 5; see also Cremona (n 15); finally, agreements concluded by the Member States may be integrated within the EU legal framework though express *renvoi*, see for example Regulation (EC) 392/2009 of 28 May 2009 on the Liability of Passengers by Sea in the Event of Accidents [2009] OJ L 131, which incorporated into the EU the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (preamble para 9).

25 See also Case C-130/73 *Vandeweghe E.A.* [1973] ECLI:EU:C:1973:131, para 2. An exception to this rule is provided under Article 273 TFEU, enabling the Member States to confer jurisdiction upon the CJEU in any dispute between them which relates to the subject matter of the Treaties, if the dispute is submitted to it under a special agreement.

26 Case C-132/09 *Commission v Belgium* [2010] ECLI:EU:C:2010:562, para 44; Case C-457/18 *Slovenia v Croatia* [2020] ECLI:EU:C:2020:65, para 91.

27 *Slovenia v Croatia* (n 26) para 92.

imposed on the Member State concerned by an international agreement and to ascertain their ambit to determine whether they constitute an obstacle to the application of EU law.[28]

Based again on the composition of their contracting parties, international agreements of the Member States can further be divided into those concluded with third countries or international organisations (extra-EU agreements), and agreements concluded exclusively between EU Member States (*inter se* agreements).

Extra-EU agreements may be concluded between a Member State and a third country or international organisation (bilateral extra-EU agreements); or include several parties in various combinations, ranging from agreements between one or several Member States with one or several third countries or international organisations (multilateral extra-EU agreements). Over the years, the Member States have become parties to several extra-EU agreements, many of which pre-dated their accession to the EU.[29] In certain instances, the possibility for the Member States to conclude extra-EU agreements is even explicitly recognised by the EU Treaties or secondary EU legislation.[30] Extra-EU agreements are most common in areas where the EU has (or had) no competence to act and itself conclude

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28 Case C-158/91 *Ministère Public and Direction du Travail and de l'Emploi v Levy* [1993] ECLI:EU:C:1993:332, para 21; See also Case C-324/93 *The Queen/ Secretary of State for the Home Department,* ex parte *Evans Medical and Macfarlan Smith* [1995] ECLI:EU:C:1995:84, para 29; Case C-264/09 *Commission v Slovak Republic* [2011] ECLI:EU:C:2011:580, para 40.

29 For example, this was the case with Bilateral Investment Treaties concluded between Member States before their accession to the EU and third countries.

30 See, for example, Article 34(1) TEU, which provides that 'Member States shall coordinate their action in international organisations and at international conferences'; Article 212(3) TFEU, according to which '[w]ithin their respective spheres of competence, the Union and the Member States shall cooperate with third countries and the competent international organisations'; and Article 351(1) TFEU, explicitly recognising the Member States' right to remain parties to any agreements that they had concluded with third countries prior to their EU membership, on condition that they ensure their compatibility with the EU Treaties. See also Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56, under Article 4(2) of which '[T]his Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned'.

international agreements at EU level[31] or where the agreement at issue is closed to participation for international organisations.[32]

A second type of Member States' international agreements are those they conclude exclusively between themselves, without the participation of the EU, third countries or international organisations. *Inter se* agreements have commonly been employed as a tool for furthering integration in fields that went beyond the EU's regulatory reach.[33]

As may also be the case with extra-EU agreements, the possibility for the Member States to conclude *inter se* agreements was – and in certain cases is still – recognised under EU law. Until recently, the only explicit reference to *inter se* agreements in the EU Treaties was Article 350 TFEU. According to that provision, which has existed since the Treaty of Rome and remains essentially unchanged,[34]

> [T]he provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of those regional unions are not attained by the application of the Treaties.

Following the outburst of the financial crisis in 2010, the EU Treaties also confirmed the possibility for intergovernmental cooperation outside the EU legal framework to safeguard financial stability in the Economic and Monetary Union (EMU).[35] In 2011, the European Council approved an amendment to Article 136 TFEU through the simplified revision procedure of Article 48(6) TEU to allow for the establishment of a permanent crisis

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31 Rosas 'The Status in EU Law of International Agreements' (n 8) 1306, 1311.

32 This is the case, *inter alia*, for the UN Charter and the ICSID Convention, which do not allow for international organisations to become contracting parties.

33 Several areas currently falling within the sphere of EU law started out as *inter se* international cooperation, including the area of freedom, security and justice, Angelos Dimopoulos, 'Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty' (2015) 34 YEL 286, 289.

34 Marcus Klamert, 'Article 350 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2063.

35 See also Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756, para 72.

mechanism that would safeguard the stability of the euro area.[36] The amendment added a third paragraph to Article 136 TFEU, which reads:

> The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

Following this insertion, the 17 euro-area Member States established the ESM through an *inter se* agreement, which entered into force on 27 September 2012.[37]

Before the entry into force of the Lisbon Treaty, Article 293 EC[38] explicitly encouraged international cooperation between the Member States in a wide array of subjects falling outside the EU's competence. It read:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:
> - the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals,
> - the abolition of double taxation within the Community,
> - the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,
> - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitral awards.

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36 European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU).

37 Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, full text available at <https://www.esm.europa.eu/sites/default/files/migration_files/20150203_-_esm_treaty_-_en.pdf> accessed 28 August 2021.

38 Consolidated version of the Treaty establishing the European Community [2002] OJ C 325.

Article 293 EC conferred discretion upon the Member States, which were invited, but not obliged to enter negotiations in the above fields. Albeit not bound to that end, the Member States concluded several *inter se* agreements, some of which were subsequently integrated into EU legislation, when the political circumstances for doing so were mature.[39] Given that the 'invitation' of Article 293 EC was addressed to the Member States collectively, it was argued that only *inter se* agreements between *all* Member States could be concluded on that basis.[40] Yet, in practice the legal framework of Article 293 EC had also been employed for the conclusion of bilateral *inter se* agreements, the most prominent being double taxation conventions.[41]

The explicit references in the EU Treaties to the possibility to enter *inter se* agreements in specific areas led some commentators further to distinguish between different types of *inter se* agreements based on a functional criterion. De Witte and Martinelli have suggested the categorisation of *inter se* agreements into those that: (i) form 'an integral part of the EU legal order', namely the EU Treaties; (ii) *inter se* agreements that can be considered as 'quasi-instruments of EU law'; and (iii) *inter se* agreements that remain completely extraneous to the EU legal framework.[42] Hartley has also employed a similar classification scheme, distinguishing between: (i) the EU's 'constitutive Treaties', namely 'the Treaties

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39 Among the most prominent examples, the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters [1972] OJ L 299, which, following the conferral of explicit competence upon the EU in this field by the Treaty of Amsterdam, was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction in Civil and Commercial Matters [2001] OJ L12. Similarly, the Rome Convention on the law applicable to contractual obligations [1989] OJ L 48/1, was subsequently also turned into a Regulation, see Regulation (EC) No 593/2008 of 17 June 2008 'on the Law Applicable to Contractual Obligations' (Rome I) [2008] OJ L 177.

40 Bruno De Witte and Thibault Martinelli, 'Treaties Between EU Member States as Quasi-Instruments of EU Law' in Marisa Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (OUP 2018) 160

41 See Manuel Kellerbauer and Markus Klamert, 'Article 351 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2071.

42 De Witte and Martinelli (n 40) 157-158.

which created the Union [...], together with the Treaties which amend or supplement them'; (ii) 'subsidiary conventions', namely *inter se* agreements that were part of EU law; and (iii) 'other decisions and agreements', which do not fall within any of the above categories.[43]

The content-based distinction proposed by de Witte, Martinelli and Hartley would require a prior classification of *inter se* agreements based on their subject-matter and on whether the latter has any connection with EU law. Yet, apart from the fact that there are no set classification criteria to ensure the objective pigeon-holing of international treaties based on their subject-matter, EU law's increasing expansion *rationae materiae* would make it almost impossible to identify *inter se* agreements that have no connection with it whatsoever. Moreover, under this classification scheme the authors imply that the EU Treaties are to be treated differently from other *inter se* agreements between the Member States, without explaining, however, *why* this should be the case.

Instead, for the purposes of this thesis, it is more appropriate to use a different taxonomy of *inter se* agreements, taking the number of Member States-parties to the agreement at issue as a relevant classification criterion.[44] I, therefore, distinguish between: (i) *inter se* agreements concluded between all 27 EU Member States (universal *inter se* agreements); and (ii) *inter se* agreements concluded between some EU Member States on a multilateral or bilateral basis (collectively referred to as 'partial *inter se* agreements'). The distinction between universal and partial *inter se* agreements corresponds to the dichotomy in international law between amendments (changes between all the parties)[45] and modifications

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43 Hartley (n 11) 87-95.

44 Schütze, 'EC Law and International Agreements' (n 7) 409-410.

45 Under Article 40 VCLT, the parties to a multilateral agreement are free to amend an agreement to which they are parties if they so unanimously agree, unless the agreement provides otherwise.

(changes between some of the parties)[46] to multilateral agreements. On that basis, each type of *inter se* agreements poses a different threat to the EU. Universal *inter se* agreements risk leading to 'cold revisions' of the EU Treaties, namely revisions through a subsequent agreement between the same contracting parties outside the specific framework set out in Article 48 TEU. On the other hand, partial *inter se* agreements risk causing *inter se* modifications to the EU Treaties, a possibility, however, which the EU Treaties implicitly rule out, as further analysed in Chapter Two. Against this background, the proposed taxonomy makes a significant difference when dealing with conflicts between *inter se* agreements and EU law. Even though, as analysed in Chapter Six, the primacy of EU law would be the default conflict rule in both cases, depending on classifying the type of *inter se* agreement as universal or partial different considerations would lie behind its operation.

1.1.3 The 'Three' Faces of Janus: Mixed Agreements

A final category of international agreements applicable within the EU comprises mixed agreements.[47] Mixity is most commonly used in cases where the subject matter of the envisaged agreement falls only partly within the EU's competence.[48] The conclusion of a mixed agreement is legally required where the EU has no competence to conclude the agreement in its entirety.[49] However, in cases where the EU's competence is shared, a mixed agreement is simply one of the available options.[50] In fact, the EU may always choose to

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46 Article 41 VCLT provides that some parties to a multilateral agreement may choose to modify its terms *inter se*, insofar as this possibility is provided for or not prohibited by the multilateral agreement.

47 Erlbacher, 'Article 216 TFEU' (n 12) 1650.

48 Hartley (n 11) 195-196; Eeckhout (n 8) 212-213; Rosas, 'The European Union and Mixed Agreements' (n 8) 203-204; Eleftheria Neframi, 'Mixed Agreements as a Source of European Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 325.

49 Case C-600/14 *Germany v Council* [2017] ECLI:EU:C:2017:296, Opinion of AG Szpunar, para 85; Friedrich Erlbacher, 'Article 217' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1655.

50 According to AG Wahl in Opinion 3/15, 'the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence [...] is

exercise a shared competence for the first time by entering into an international agreement, even if it had previously taken no action in the relevant field.[51] Originally, the CJEU's case law seemed to imply otherwise. Over the years, the Court took the existence of EU legislation in an area covered by a mixed agreement as the relevant criterion in distinguishing between the parts of the agreement falling within the EU's competence and those within the Member States' power.[52] In Opinion 2/15, the Court held that the envisaged free trade agreement with Singapore could not be concluded by the EU alone, insofar as it also related to the regulation of types of investment over which the EU enjoyed shared competence.[53] The same was true of the institutional provisions, to the extent that they related to those types of investment.[54] However, in *COTIF*[55] the CJEU affirmed the possibility of the EU to enter alone an international agreement in a field where it shares competence with the Member States. In an authentic interpretation of its Opinion 2/15, the CJEU clarified that it was only prompted to require Member State participation in the envisaged agreement with Singapore on the factual ground that the EU could not obtain the necessary majority in the Council to conclude the agreement alone.[56]

Due to the composition of their signatories, mixed agreements may present elements of all types of international agreements identified above. First, mixed agreements constitute EU international agreements, insofar as their subject matter falls within the scope of

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generally a matter for the discretion of the EU legislature', Opinion 3/15 *Marrakesh Treaty to Facilitate Access to Published Works* [2016] ECLI:EU:C:2016:657, Opinion of AG Wahl, para 119.

51 Erlbacher, 'Article 216 TFEU' (n 12) 1651.

52 Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECLI:EU:C:2000:688, paras 47-48; See also Koutrakos, *EU International Relations Law* (n 18) 207-208.

53 See Opinion 2/15 *Free Trade Agreement with Singapore* [2017] ECLI:EU:C:2017:376, paras 243-244.

54 ibid para 278.

55 Case C-600/14 *Germany v Council* [2017] ECLI:EU:C:2017:935.

56 ibid para 68.

competences conferred upon the EU (EU part of the mixed agreement). On the other hand, mixed agreements are agreements concluded by the Member States, insofar as they reflect the exercise of Member States' power that has not been conferred upon the EU. In that vein, a mixed agreement will partly constitute an extra-EU agreement, as regards the relationship between the Member States and third countries or international organisations (extra-EU part of the mixed agreement); meanwhile, it may also combine an *inter se* element, to the extent that it also applies to the relationship between the Member States (*inter se* part of the mixed agreement).[57] As with pure *inter se* agreements, depending on its composition, the *inter se* part of mixed agreements may equally be universal (when all Member States are contracting parties) or partial (when only some Member States participate in it).

Because of their potentially threefold nature, mixed agreements have been characterised as 'the apotheosis of complexity in external relations law'.[58] The biggest challenge underlying the phenomenon of mixity is breaking down the mixed agreement into its different parts. This distinction would be based on the distribution of competences between the EU and the Member States. Difficult as it may be, this clarification is essential since the consequences that a mixed agreement entails vary significantly depending on whether its provisions fall within the scope of the EU's or the Member States' power.

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57 For example, as regards the Energy Charter Treaty (ECT), which has been concluded as a mixed agreement, the European Commission has consistently argued before arbitral tribunals dealing with disputes arising thereunder that the ECT was never meant to have an *inter se* application, see, for example, the Commission's *amicus curiae* submissions in the enforcement proceedings before the United States District Court for the Southern District of New York regarding the arbitral award in *Foresight Luxembourg Solar 1 S.a.r.l and Others v the Kingdom of Spain*, SCC Case No 2015/150, Brief of the European Commission in Support of Spain of 3 May 2019, p 18. For a more detailed analysis on this issue, see Paschalis Paschalidis, 'International Investment Law and EU Law: Are There Systemic Conflicts and Incompatibilities?' in Hélène Ruiz-Fabri and Emmanuel Gaillard (eds), *EU Law and International Investment Arbitration* (Juris 2018) 45-51.

58 Markus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 185.

The EU part of the mixed agreement constitutes an EU international agreement.[59] As a result, it is negotiated and concluded under Article 218 TFEU, whereas it can apply provisionally before its entry into force pursuant to a Council decision under Article 218(5) TFEU.[60] The EU part of the mixed agreement forms an integral part of EU law, is binding on both the EU[61] and the Member States pursuant to Article 216(2) TFEU and does not need to be ratified by each Member State.[62] The CJEU enjoys jurisdiction to give opinions on the compatibility of that part with the EU Treaties under Article 218(11) TFEU, as well as rulings on the validity and interpretation of the EU acts pertaining to its conclusion under Articles 263 and 267 TFEU. In addition, the CJEU has held that it has jurisdiction to define the obligations that the EU has assumed under the mixed agreement and, for that purpose, also to interpret the agreement itself.[63] This has been affirmed in *Mox Plant*. In that case, the CJEU found that, because of the nature of the United Nations Convention on the Law of the Sea (UNCLOS) as a mixed agreement, it first had to establish if the provisions relied upon by Ireland fell within EU competence to assess its jurisdiction to deal with disputes relating to their interpretation and application and whether they had been respected.[64]

On the other hand, the part of the mixed agreement falling within the ambit of Member States' competence, be that extra-EU or *inter se*, is negotiated, concluded, provisionally

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59 Case C-13/00 *Commission v Ireland* [2002] ECLI:EU:C:2002:184, para 14; Case C-239/03 *Commission v France* [2004] ECLI:EU:C:2004:598, para 25; Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para 84 (Mox Plant).

60 Erlbacher, 'Article 218 TFEU' (n 20) 1667; Suse and Wouters (n 14) 403-404.

61 Hartley (n 11) 195.

62 Ivan Smyth, 'Mixity in Practice – A Member State Practitioner's Perspective' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 314-315.

63 Case C-431/05 *Merck Génericos Produtos Farmacêuticos* [2007] ECLI:EU:C:2007:496, para 33; *Dior* (n 52) para 33; also Jan Willem van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 73.

64 *Mox Plant* (n 59) paras 86, 121 and further case law cited there.

applied and ratified by each Member State in accordance with its own constitutional requirements[65] and, with the exceptions analysed above,[66] does not form part of the EU legal system[67] or bind the EU. Moreover, as is the case with extra-EU and *inter se* agreements, the CJEU does not have jurisdiction to give rulings on the extra-EU and *inter se* parts of the mixed agreement,[68] despite its jurisdiction to interpret the provisions of EU law to establish whether the extra-EU and *inter se* parts of the mixed agreement are compatible with them.

The division of competences between the EU and the Member States is crucial also as regards issues of State responsibility arising from the mixed agreement. Notably, the EU and the Member States will each be held internationally responsible for the fulfilment of obligations stemming from the parts to which they are contracting parties. In addition to their responsibility for meeting their obligations under the extra-EU and *inter se* parts, the Member States are also under an obligation to assist the EU in fulfilling its obligations under the EU part of the agreement. This obligation is a special application of the duty of loyalty of Article 4(3) TEU.[69]

More importantly for present purposes, the distinction between the different parts of a mixed agreement is pivotal when dealing with conflicts between the latter and EU law. Depending on the type of international agreement that gives rise to a conflict with EU law, different conflict rules apply. When a conflict between EU law and a mixed agreement can be identified, the applicable conflict rules vary based on which part of the agreement at issue

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65 See also Frank Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 256-260.

66 See above n 24.

67 Hartley (n 11) 196.

68 See to that effect Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECLI:EU:C:1987:400, para 9.

69 See *Kupferberg* (n 17) para 13; Erlbacher, 'Article 216 TFEU' (n 12) 1651.

(the EU, the extra-EU or the *inter se* part) generated the conflict. As this thesis focuses on conflicts between EU law and *inter se* agreements, mixed agreements are only examined as regards conflicts with EU law generated by their *inter se* part. The rules applying to the resolution of conflicts between EU law and the EU part or extra-EU part of mixed agreements fall outside the scope of this thesis.

1.2 AN ILLUSTRATION OF THE PROBLEM: THE INTRA-EU BITS SAGA

While intergovernmental cooperation between Member States outside the EU legal framework always remained possible, the number of *inter se* agreements has only recently risen significantly. First, the gradual accession of new Member States to the EU transformed originally extra-EU agreements into *inter se* ones, thus leading to a sharp increase in their number. This was particularly evident with intra-EU BITs, which rose from two in force prior to 2004[70] to over 190 in 2014.[71] Meanwhile, during the past two decades the Member States entered into *inter se* agreements in a wide array of legal fields, ranging from intellectual property, with the conclusion of the agreement establishing the Unified Patent Court;[72] to the furthering of the EMU, through the conclusion of the Treaty establishing the ESM,[73] the Treaty on Stability, Coordination and Governance (Fiscal Compact)[74] and the

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70 Those were the Germany-Greece BIT, signed on 27 March 1961 and entered into force on 15 July 1963, Treaty on the Promotion and Protection of Investments (Federal Republic of Germany – Hellenic Republic) (in German) (full text available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1329> accessed at 24 April 2020) and the Germany-Portugal BIT, signed on 16 September 1980 and entered into force on 23 April 1982, Treaty on the Promotion and Reciprocal Protection of Investments (full text available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1394> accessed 24 April 2020).

71 Case C-284/16 *Achmea* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para 3; Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 Int'& Comp LQ 297, 298; Press Release of the European Commission IP-15-5198, 18 June 2015; UNCTAD, *Investor-State Dispute Settlement: Note on the United States and the European Union* (UNCTAD 2014) 2; Juliane Kokott and Christoph Sobotta, 'Investment Arbitration and EU Law' (2016) 18 CYELS 1, 5.

72 Agreement on a Unified Patent Court [2009] OJ C 175/01.

73 See above n 37.

74 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal republic of

Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (SRF).[75]

The increase in the number of *inter se* agreements soon made it clear that their 'cohabitation' with EU law would not always evolve smoothly. It was not before long that conflicts between EU law and *inter se* agreements started to appear. However, the practical extent of the problems that such conflicts could cause, as well as their intrinsic complexity, only recently generated academic and practical interest. The reason behind this was undoubtedly the ruling of the CJEU in *Achmea.*[76] In that case, the CJEU identified a conflict between EU law and a set of *inter se* agreements in the field of cross-border investment protection, concluding that an ISA clause in an *inter se* agreement, such as the one in the Dutch – Slovak Republic BIT,[77] was incompatible with Articles 267 and 344 TFEU. In the judgment's aftermath, there has been widespread discourse as to how – if at all – the identified conflict between intra-EU BIT ISA clauses and EU law can be addressed. The different perspectives of the European Commission and arbitral tribunals on the legal consequences of *Achmea* for intra-EU investor-state arbitration exemplify the possible

Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, full text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0302(01)&from=EN> accessed 28 August 2021.

75 Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, full text available at <https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf> accessed 28 August 2021.

76 Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158.

77 Agreement on the Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1994 and entered into force on 1 October 1992, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2080/download> accessed 1 October 2021.

repercussions of adopting either approach to tackle conflicts in the interrelation of EU law with *inter se* agreements more generally.

To understand how the saga on the compatibility of intra-EU BITs with EU law first arose and was subsequently escalated to the CJEU, one needs to draw a clear picture of the evolution of the EU's competence in the field of foreign investment. The EU was only conferred explicit competence to act in the field of Foreign Direct Investment (FDI) in 2009, when the Lisbon Treaty entered into force. The EU's competence over FDI was introduced under Article 207(1) TFEU, which inserted FDI into the broadened framework of the Common Commercial Policy (CCP), thus placing the regulation of foreign investment among the areas over which the Union's competence was exclusive.[78] Before that, the EU lacked the power to negotiate and conclude International Investment Agreements (IIAs) with third countries.[79] As the EU Treaties were silent on the Union's competence to engage in treaty action for the protection of foreign investment,[80] under the principle of conferral the IIA- and BIT-making power rested with the Member States, which were reluctant to concede it to the EU.[81]

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78 Koutrakos, *EU International Relations Law* (n 18) 46; Craig and de Búrca (n 8) 383; Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 94; August Reinisch, 'The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and other Investment Agreements' (2014) 12 Santa Clara Journal of International Law 111; Panos Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defence Policy' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 276; Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 EJIL 639, 641; Friedrich Erlbacher and Tim Maxian Rusche, 'Article 207' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1590.

79 Angelos Dimopoulos, 'Shifting the Emphasis from Investment Protection to Liberalisation and Development: The EU as a New Global Factor in the Field of Foreign Investment' (2010) 11 The Journal of World Investment & Trade 5; George Bermann, 'Reconciling European Union Law Demands with the Demands of International Arbitration' (2011) 34 Fordham Int'l L.J. 1192, 1211; Nikos Lavranos, 'Member States' BITs: Lost in Transition' available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935625> accessed 7 May 2020, 1.

80 Michael Hahn, 'EU Rules and Obligations Related to Investment' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch and Yun-I Kim (eds), *International Investment Law: A Handbook* (Hart 2015) 672.

81 Dimopoulos, *EU Foreign Investment Law* (n 78) 20.

Since the EU originally lacked the competence to regulate in the field of foreign investment, the Member States commonly negotiated and concluded investment treaties, both multilateral and bilateral, individually. As a result, they entered many BITs with third states, among which many central and eastern European countries. The dissolution of the Soviet Union, along with Czechoslovakia and Yugoslavia in the early '90s, led to the emergence of several newly-formed states. For these states, the conclusion of treaties on foreign investment protection was a prerequisite to accelerating transition from the previous system of central economic planning to a market-driven economy.[82] The creation of a stable and specific legal framework for foreign investment through the conclusion of international treaties was thought to incentivise the attraction of cross-border investment in their territory.[83] In fact, the EU institutions were supportive of this approach, considering the conclusion of BITs between the newly-emerged states and the Member States as a means of smoothing the accession process of the former to the EU.[84] With the EU's blessings, the vast majority of Member States signed investment treaties with these newly-emerged third states.[85]

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82 *Achmea B.V. v the Slovak Republic (former Eureko B.V.),* PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para 41; Jan Asmur Bischoff, 'Just a Little Bit of Mixity: The EU's Role in the Field of International Investment Protection Law' (2011) 48 CMLR 1527, 1532; Joel Dahlquist, Hannes Lenk and Love Rönnelid, 'The Infringement Proceedings over Intra-EU Investment Treaties – an Analysis of the Case against Sweden' (2016) 4 European Policy Analysis 1.

83 *Achmea v Slovakia* (n 82) para 44, quoting the Jurisdiction Memorial submitted in the context of the proceedings by Slovakia.

84 See, for example, Article 72(2) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, on the other part [1993] OJ L 347, whereby cooperation between the signatories in the field of investment promotion and protection would, *inter alia*, take the form of the conclusion of bilateral agreements between the Member States of the Union and Hungary in the abovementioned fields.

85 Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms provided for in *Inter-se* Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 Legal Issues of Economic Integration 179,181; Marc Bungenberg and Stephan Hobe, 'The Relationship of International Investment Law and European Union Law' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch and Yun-I Kim (eds), *International Investment Law: A Handbook* (Hart 2015) 1606; Marc Bungenberg and August Reinisch, 'Special

The gradual accession of 13 new Member States to the EU led to the transformation of what had originated as extra-EU BITs, namely bilateral investment treaties concluded between Member States and third countries, into BITs *between Member States*. The fact that these treaties were henceforth applicable exclusively within the EU, regulating investment protection in the territory of the Member States, caught the European Commission's attention. From that point onwards, the Commission started actively to get involved and continuously expressed its views on the incompatibility of intra-EU BITs, as a whole and of specific provisions thereof, substantive and procedural, with EU law. *Inter alia*, the Commission argued that: (i) intra-EU BITs became a parallel treaty system, whose provisions overlapped with the single market rules; (ii) they violated the principle of non-discrimination, insofar as they conferred rights only upon investors from the two Member States concerned;[86] and (iii) by setting up an alternative system of dispute resolution, intra-EU BITs took away from the national judiciary litigation concerning national measures and involving EU law, and entrusted it to private arbitrators, who could not properly apply EU law in the absence of the indispensable judicial dialogue with the CJEU.[87] On that basis, between 2011 and 2014 the Commission engaged in discussions with all Member States concerned to explore the possibility of agreeing on a coordinated approach to the (explicit)[88]

Issue: Legal Problems of Intra-EU BITs: An Introduction' (2016) 17 The Journal of World Investment & Trade 871.

86 In that respect, see also Ingolf Pernice, 'The Autonomy of the EU Legal Order – 50 Years after *Van Gend*' in Antonio Tizzano, Juliane Kokott and Sacha Prechal (eds), *50th Anniversary of the Judgment in Van Gen den Loos* (Luxembourg: Office des Publications de l'Union Européenne 2013) 75-79.

87 Communication from the Commission to the European Parliament and the Council of 19 July 2018 on Protection of Intra-EU Investment, COM(2018) 547 final, 2.

88 In the context of its interventions as an *amicus curiae* in arbitral proceedings under intra-EU BITs, the Commission has repeatedly argued that intra-EU BITs have been implicitly terminated under Article 59 VCLT as of the date of the last contracting party's accession to the EU. However, no arbitral tribunal has even upheld this argument so far. Even in his recent Statement of Dissent in *Adamakopoulos v Cyprus*, Marcelo Kohen concurred with the majority's view that Article 59 VCLT cannot form the basis for a decision to dismiss the tribunal's jurisdiction, see *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Statement of Dissent of Professor Marcelo Kohen of 3 February 2020, para 10.

termination of the circa 200 intra-EU BITs and launched infringement procedures against some Member States.[89]

The predicament that a (potential) conflict between EU law and an *inter se* agreement can create for the Member States is clearly reflected in the enforcement saga that followed an arbitral tribunal's award in *Micula v Romania*.[90] The bone of contention in that case was the revocation of a tax deduction incentive scheme that Romania had established before acceding to the EU for investments made in certain disadvantaged regions. The Micula brothers, who had invested heavily in the area in reliance on these deductions, brought arbitral proceedings under the Romania – Sweden BIT pursuant to the ICSID Convention, claiming damages. The applicants argued that the termination of the granted economic incentives amounted to a violation of Romania's obligation under the intra-EU BIT to treat investors fairly and in an equitable manner. Conversely, during the arbitral proceedings both Romania and the Commission (as an *amicus curiae*)[91] stressed that the revoked privileges, for which compensation was sought, constituted illegal State aid within the meaning of Article 107(1) TFEU. According to them, an arbitral award reinstating these privileges or compensating the investors for that loss would lead to the grant of new aid.[92] This would

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89 These Member States were Austria, the Netherlands, Romania, Slovakia, and Sweden, see the Commission's press release <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5162> accessed 8 May 2020.

90 *Ioan Micula, Viorei Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania,* ICSID Case No ARB/05/20, Final Award of 11 December 2013.

91 Tribunals characterise as *amicus curiae* a non-party to the dispute, a 'friend' offering 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', *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v the Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition by 5 Non-Governmental Organisations for Permission to Make an *Amicus Curiae* Submission of 19 May 2005, para 20; Jorge Viñualez, '*Amicus* Intervention in Investor-State Arbitration' (2006) 61 Dispute Resolution Journal 72, 76; Lucas Bastin, 'The *Amicus Curiae* in Investor-State Arbitration' (2012) 1 Cambridge Journal of International and Comparative Law 208, 217.

92 State Aid S.A. 38517 implemented by Romania of 11 December 2013 (Case 2014/C) (ex 2014/NN) Commission Decision 2015/1470 [2015] OJ L 232/43, recital 25; see also Pietro Ortolani, 'Intra-EU

render the award unenforceable, as the payment of the awarded sum would violate Romania's obligations under Article 107 TFEU.[93]

In December 2013, the tribunal upheld the violation of the intra-EU BIT and awarded damages to the investors. In the award, the tribunal considered EU law as completely autonomous from international law and declined to address the effect of the EU State aid rules on the award's enforceability, considering it undesirable 'to base its decisions […] on matters of EU law that may come to apply after the award has been rendered'.[94] The applicants had the award recognised and partially enforced before the Romanian courts. Romania also brought proceedings before the national courts to challenge this decision. During these proceedings, the Commission intervened and argued that the Romanian court was obliged to annul the previous decision or refer the issue to the CJEU under Article 267 TFEU. Meanwhile, the Commission initiated an infringement procedure against Romania for partially enforcing the national court's decision,[95] and issued a suspension injunction requiring Romania to abstain from its further execution. In March 2015, the Commission issued its final decision on the matter, upholding that the enforcement of the arbitral award would constitute illegal State aid and forbidding Romania to execute it.[96] The investors challenged the Commission's decision before the General Court of the European Union (GCEU), which ultimately annulled it in May 2019, as it found the Commission retroactively to have exercised its powers under Article 108 TFEU to a situation predating Romania's

Arbitral Awards *vis-à-vis* Article 107 TFEU: State Aid Law as a Limit to Compliance' (2015) 6 Journal of International Dispute Settlement 118.

93 *Micula v Romania* (n 90) para 335; Kokott and Sobotta (n 71) 14.

94 *Micula v Romania* (n 90) para 340.

95 Conor Quingley QC, *European State Aid Law and Policy* (3rd edn, Hart Publishing 2015) 603-604.

96 Commission Decision 2015/1470 [2015] OJ L 232/43, Article 1.

accession to the EU.[97] In August 2019, the Commission lodged an appeal against the GCEU's decision before the CJEU, which is pending to this date.[98]

Meanwhile, the applicants have brought enforcement proceedings in the United States (US), France, Belgium, Luxembourg, Sweden and the United Kingdom (UK), which are still ongoing. In January 2017, the English Commercial Court stayed the enforcement of the *Micula* tribunal's award, which the investors sought by virtue of the UK Arbitration (International Investment Disputes) Act 1966 transposing the provisions of the ICSID Convention[99] into UK law.[100] According to Blair J, the court could not, based on its obligations under EU law, proceed with the enforcement of an award that the Commission had prohibited Romania to enforce, at least for as long as the decision of the GCEU on the validity of the Commission's decision was still pending.[101] Furthermore, in June 2017, the London High Court rejected the claimants' request for a security order, on the ground that the provision of such a security would equally be considered as a payment made to the claimants pursuant to the award, the enforcement of which had been prohibited by the Commission's decision.[102]

It was not until recently that the CJEU crystallised the existence of a conflict between the provisions of intra-EU BITs and EU law in its ruling in *Achmea*.[103] Although the CJEU

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97 Joined Cases T-624, 694 and 704/15 *European Foods and Others v Commission* [2019] ECLI:EU:T:2019:423.

98 Case C-638/19 P *Commission v European Foods and Others* (pending).

99 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).

100 *Micula & Ors v. Rom*ania [2017] EWHC 31 (Comm).

101 Catriona E. Paterson, 'English Courts Stay Enforcement of ICSID Award' <http://www.latham.london/2017/02/english-courts-stay-enforcement-of-icsid-award/#_edn4> accessed 8 September 2021.

102 *Micula & Ors v. Romania* [2017] EWHC 1430 (Comm).

103 *Achmea* (CJEU) (n 76).

did not rule on the compatibility of the substantive provisions of intra-EU BITs with EU law, it gave a definitive answer to the question pertaining to the compatibility of intra-EU BIT ISA clauses with EU law. In March 2018, the CJEU ruled that ISA clauses in an *inter se* agreement were incompatible with EU law and, in particular, with Articles 267 and 344 TFEU.

The case arose in March 2016 during an action for the annulment of the final arbitral award in *Achmea v the Slovak Republic*[104] before the German Federal Court of Justice (*Bundesgerichtshof)*.[105] Achmea, an undertaking of a Dutch insurance group, brought arbitral proceedings against Slovakia based on the Dutch and Czech and Slovak Republic BIT, claiming damages. During the arbitral proceedings, Slovakia challenged the tribunal's jurisdiction to hear the dispute, on the ground that the ISA clause of the applicable intra-EU BIT was incompatible with EU law. The tribunal rejected the objection to its jurisdiction, adjudicated the dispute on the merits and awarded damages to Achmea, finding Slovakia to have had violated its obligations under the BIT. Following the award, Slovakia brought proceedings before the Higher Regional Court in Frankfurt am Main, where the tribunal was seated, claiming that the ISA clause of the applicable BIT was incompatible with Articles 18(1), 267 and 344 TFEU. The Commission intervened both in the proceedings before the tribunal and in the annulment proceedings before the German courts, supporting Slovakia's argument.[106] The request for annulment was dismissed at first instance and Slovakia lodged an appeal before the *Bundesgerichtshof*. In light of the Commission's position throughout

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104 *Achmea B.V. v the Slovak Republic (former Eureko B.V.),* Case No 2008-13, Final Award of 7 December 2012.

105 See Decision of the German Federal Court of Justice (*Bundesgerichtshof*) dated 3 March 2016, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74612&linked=bes&Blank=1&file=dokument.pdf> accessed 24 January 2019.

106 *Achmea* (AG Wathelet) (n 71) para 29.

the proceedings and in order for the CJEU to be heard on the compatibility of intra-EU BIT ISA clauses with EU law, the *Bundesgerichtshof* decided to refer the case to the CJEU under Article 267 TFEU.

In September 2017, Advocate General (AG) Wathelet delivered a comprehensive opinion on the case, suggesting that there was no conflict between intra-EU BIT ISA clauses and EU law.[107] However, the CJEU's approach to the matter was very different. In delivering its ruling, the Court premised its analysis on the special features of EU law and, in particular, on the principle of mutual trust and the EU's judicial system and preliminary reference procedure, highlighting them as essential in ensuring the consistency, uniformity, full effect and autonomy of EU law.[108]

The CJEU first examined whether an intra-EU BIT ISA clause was compatible with Article 344 TFEU.[109] In this regard, the Court sought to answer whether a tribunal established under the ISA clause in question could be called upon to rule on issues pertaining to the interpretation and application of EU law. According to the Court, Article 8(6) of the applicable Dutch-Slovak Republic BIT allowed for this, as it enabled the tribunal to consider EU law on a two-fold basis; as part of Slovakia's domestic law and as an international agreement to which the contracting parties to the applicable intra-EU BIT were both parties.[110]

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107 *Achmea* (AG Wathelet) (n 71).

108 *Achmea* (CJEU) (n 76) paras 33-37; see also Steffen Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgment in Achmea Put in Perspective' (2019) 44 E L Rev 1, 4.

109 Under Article 344 TFEU, 'Member States undertake not to submit a dispute concerning the interpretation or application of the [EU] Treaties to any method of settlement other than those provided for therein'.

110 *Achmea* (CJEU) (n 76) para 42.

Having established that the arbitral tribunal could, in fact, be called upon to interpret and apply EU law, the CJEU sought to ascertain whether it could form part of the EU judicial system and participate in the judicial dialogue with the Court through the preliminary reference procedure of Article 267 TFEU.[111] To the CJEU, an arbitral tribunal established under an intra-EU BIT ISA clause was not one of 'a Member State' in the sense of Article 267 TFEU, as it was not part of the intra-EU BIT signatories' judicial system and did not have any links with the latter whatsoever.[112] The Court held that 'it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.'[113]

Since an arbitral tribunal established under an intra-EU BIT ISA clause could not directly refer preliminary questions to the CJEU under Article 267 TFEU, the Court went on to ascertain whether intra-EU BIT disputes could still be subjected to its review indirectly. This would be the case if an award issued by such an arbitral tribunal could be subjected to the review of the Member States' domestic courts, which could then refer questions to the Court.[114] However, in investor-state arbitration it is the applicable BIT and arbitration rules, as well as the domestic law of the tribunal's seat, that determine whether and to what extent judicial review of the arbitral award is an option. As a result, there could be cases where an arbitral award would either completely escape judicial review by the Member States' domestic courts or such review would be limited, depending on the applicable national rules. The Court found a dispute resolution mechanism that prevented disputes relating to the

111 ibid para 43.

112 ibid paras 45-49.

113 ibid para 45.

114 ibid para 50.

interpretation and application of EU law from being referred to the CJEU to have an adverse effect on the autonomy of EU law.[115] Against this background, it concluded that an ISA clause in an *inter se* international agreement is incompatible with Articles 267 and 344 TFEU.

Following *Achmea*, Skouris, former President of the CJEU, wrote that

> [t]here is no doubt that the ECJ's reasoning in the *Achmea* Judgment put an end to the legal controversies surrounding the relationship between international arbitration and EU law.[116]

However, a closer look at the situation that followed the CJEU's decision shows that this has clearly not been the case. In *Achmea*, the CJEU may have ruled on the incompatibility of intra-EU BIT ISA clauses with EU law, yet it did not elaborate on what said incompatibility entailed and how it was to be tackled. In the decision's aftermath, there has been significant debate among EU law and international law scholars as well as among practitioners and arbitral tribunals regarding the legal consequences of the CJEU's ruling on intra-EU investment, in general, and on intra-EU investment arbitration, in particular.[117]

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115 ibid para 59.

116 Vassillios Skouris, 'Recourse to International Arbitration as a Means of Settlement of Disputes to Which EU Law May Be Applicable' in in Hélène Ruiz-Fabri and Emmanuel Gaillard (eds), *EU Law and International Investment Arbitration* (Juris 2018) 200.

117 See, *ex multis*, Anastasios Gourgourinis, 'After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation (2018) 3 European Investment Law and Arbitration Review 282; Ana Bilanova and Jaroslav Kudrna, 'Achmea: The End of Investment Arbitration as We Know It' (2018) 3 European Investment Law and Arbitration Review 261; Nicolas De Sadeleer, 'The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded Between Two Member States' (2018) 9 European Journal of Risk Regulation 355; Maria Fanou, 'Intra-European Union Investor-State Arbitration post-Achmea: RIP? An Assessment in the Aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of March 6 2018, EU:C:2018:158' (2019) 2 Maastricht Journal of European and Comparative Law 316; Cristina Contartese and Mads Andenas, 'Court of Justice: EU Autonomy and Investor-State Dispute Settlement under Inter Se Agreements between EU Member States*'* (2019) 56 CMLR 157.

Following *Achmea*, there has also been considerable and vivid academic discourse as to whether *Achmea*'s reasoning could extend to intra-EU disputes and arbitral awards under the ECT. The definitive answer to this question is well beyond the scope of this thesis. However, it is relevant to mention that, to the Commission, *Achmea*'s reasoning applies equally to the intra-EU application of the ECT, regardless of the fact that Achmea is silent on the ECT and the nature of the latter as a mixed agreement, see Communication on Protection of Intra-EU Investment (n 87) 3. On the other hand, several arbitral tribunals have so far rejected the *Achmea*-based objection to their jurisdiction to

What is interesting about the *Achmea* saga is that the argumentation is upside down. EU law scholars and the Commission may suggest that EU law takes precedence over intra-EU BIT ISA clauses conflicting with it. However, in doing so they endorse a treaty law perspective of EU law, essentially considering it part of the broader system of international law. To them, the conflict between intra-EU BIT ISA clauses and EU law affirmed by the CJEU in *Achmea* meant that the Member States could not have validly consented to arbitration via the respective ISA clause, which under the conflict rules of international law had become inapplicable since the BIT became intra-EU[118] and, therefore, no valid arbitration agreement could have been concluded on that basis. As a result, an arbitral tribunal established under an intra-EU BIT ISA clause would lack jurisdiction to entertain claims and investors would have no legal basis to bring intra-EU BIT disputes to arbitration. This lack of a legal basis for the award of damages would also transform its payment into illegal State aid. This would be so in any case, regardless of whether the award was meant to compensate for the withdrawal of a privilege classified itself as illegal State aid.[119] As a result, intra-EU BIT arbitral awards rendered pursuant to an ISA clause of an intra-EU BIT could not be enforced.

However, international law theorists, practitioners and arbitral tribunals have made a different reading of the legal consequences of *Achmea* on investor-state arbitration under intra-EU BITs. To them, the conflict between the intra-EU BIT ISA clause and EU law affirmed in *Achmea* means that, for as long as the Member States maintained intra-EU BIT

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entertain intra-EU ECT disputes as irrelevant, see, *ex multis*, *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No ARB/14/1, Award of 16 May 2018, para 679; *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue of 31 August 2018, para 164.

118 Joined Cases C-66, 127 and 128/79 *Amministrazione delle Finance dello Stato* v *Salumi* [1980] ECLI:EU:C:1980:101, para 9; Case C-262/12 *Vent de Colère* [2013] ECLI:EU:C:2013:851, para 39.

119 *Commission v European Foods* (n 98).

ISA clauses in force, they would be in violation of their obligations under EU law.[120] Yet, *Achmea* could not directly affect a tribunal's jurisdiction to entertain intra-EU BIT disputes, which derived from international law. The fact that the CJEU ruled on the incompatibility of intra-EU BIT ISA clauses with EU law did not mean that these clauses would automatically cease to apply on the international plane. Instead, they view *Achmea*'s consequences as limited to *within* EU law, considering it an autonomous legal order, cut off from and existing in parallel with international law. Based on this reading, arbitral tribunals continued to entertain disputes brought under intra-EU BIT ISA clauses in the post-*Achmea* era.[121] Meanwhile, investors continued to seek the enforcement of arbitral awards (rendered both before and after *Achmea*) before the national courts of EU Member States and third countries under the applicable international treaties on enforcement, such as the ICSID Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

The divergent approaches to the conflict between EU law and intra-EU BITs have ended up exacerbating the fragmentation of international law within the EU. Currently, a Member State, against which arbitral proceedings are initiated or enforcement of an arbitral award is sought, will be in violation of a set of international obligations regardless of how it chooses to act. In an enforcement scenario, the same would also be true of a Member State, before whose courts enforcement proceedings of an intra-EU BIT arbitral award are brought. The recent ruling of the UK Supreme Court (UKSC) in the *Micula* enforcement saga is clearly

120 Fanou (n 117) 334; Contartese and Andenas (n 117) 182-184.

121 *Ex multis*, in *United Utilities v Estonia*, a case brought under the Netherlands – Estonia BIT, an ICSID tribunal dismissed the *Achmea*-based objection, finding, *inter alia*, that '[w]hile EU law forms part of both Dutch and Estonian law and is relevant to public international law, the jurisdiction of the Tribunal arises from and is founded on the BIT and the ICSID Convention, as well as on the Parties' consent as required by these instruments. As a result, the question of jurisdiction is properly to be approached by analysing those agreements and the relevant facts from a public international law perspective', see *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award of the Tribunal of 21 June 2019, para 532.

reflecting this predicament. In February 2020, the UKSC reversed the previous judgments of the High Court and the Court of Appeal and lifted the stay on enforcement of the award. In its reasoning, the UKSC found that EU law, in particular the duty of loyalty in conjunction with the May 2014 suspension injunction and the October 2014 opening decision adopted by the Commission in the State aid procedure concerning this case, could not affect the UK's obligations under international law and, more specifically, Article 54 ICSID Convention, to recognise and enforce the award.[122]

As a result of the UKSC's judgment, Romania now has to deal with what can only be described as a 'lose-lose' situation; it can either opt to comply with the UKSC's decision and the tribunal's award in conformity with its obligations under international law, i.e. under the Romania – Sweden BIT and the ICSID Convention, thus violating its EU law obligations and having to face the consequences of such a breach; or choose to disregard the UKSC's decision and comply with EU law instead, thus being in violation of its obligations under the ICSID Convention and the intra-EU BIT.[123] Meanwhile, the UK may equally be considered in violation of its EU law obligations, read in conjunction with Articles 127 and 131 of the EU-UK Withdrawal Agreement, pursuant to which it was bound to apply and comply with EU law until the end of the transition period (31 December 2020).[124] In fact, the UKSC recognised that the CJEU may have to rule on the matter in a possible future infringement procedure brought by the Commission against the UK because of the UKSC's judgment but

122 *Micula and Others v Romania* [2020] UKSC 5.

123 George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arbitration International 397, 422.

124 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384 I/01.

considered that this would be 'entirely speculative' and 'would have no realistic prospect of success'.[125]

To resolve the controversy stemming from the different approaches to the conflict between EU law and intra-EU BITs once and for all, the Member States recently took political action. On 15 and 16 January 2019, all Member States issued declarations on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, whereby they made a political commitment to terminate all intra-EU BITs to which they were parties by means of a plurilateral treaty or bilaterally.[126] On 5 May 2020, 23 Member States signed an *inter se* agreement for the termination of intra-EU BITs (Termination Agreement).[127] *Inter alia*, the Termination Agreement provides for the termination of intra-EU BITs between the signatory-Member States, including their sunset clauses,[128] as well as for transitional measures regarding ongoing disputes.[129] These include enforcement proceedings relating to arbitral awards rendered on or before the date of the CJEU's *Achmea* judgment. The Termination Agreement seems to endorse the Commission's reading of conflict resolution between EU law and *inter se* agreements and, therefore, *Achmea*'s consequences for intra-EU BIT ISA clauses. Under

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125 *Micula v Romania* (n 122) [116].

126 Declarations of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the Legal Consequences/Enforcement 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, https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf, and http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf accessed 4 July 2020.

127 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] L 169/1. The full text of the treaty is available at <https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en> accessed 8 May 2020.

128 Termination Agreement, Article 2.

129 Termination Agreement, Articles 5-10.

Article 4(1) of the Termination Agreement, the Member States confirmed that, because of their incompatibility with EU law, intra-EU ISA clauses had become inapplicable and could not have served as a legal basis for arbitration proceedings from the moment when the incompatibility with EU law arose, namely when the last of the contracting parties to the BIT became an EU Member State.

Yet, despite the Member States' best efforts and intentions, it is not certain that the Termination Agreement will achieve the desired degree of legal certainty, particularly regarding the elimination of claims already pending before arbitral tribunals and enforcement proceedings of existing intra-EU BIT arbitral awards, which may continue.[130] This is exacerbated by the fact that the Termination Agreement does not offer a comprehensive solution covering all existing intra-EU BITs, given that Sweden, Finland, Austria, Ireland and the UK did not sign it. In fact, the Commission has already launched infringement procedures against Finland and the UK for failing to eliminate all legal effects of intra-EU BITs within their territories.[131] As a result, it remains plausible that arbitral tribunals may still be seised of intra-EU BIT disputes and national courts of Member States with relevant enforcement/annulment proceedings in the (near) future. In addition, given that the Termination Agreement is itself an *inter se* agreement, it is conceivable that *its* provisions may generate further conflicts with EU law. Under both the above scenarios, a conflict between EU law and an *inter se* agreement may be identified. As conflicts between EU law

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130 See also Laura Halonen, 'Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law' Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2020/05/13/termination-of-intra-eu-bits-commission-and-most-member-states-testing-the-principle-of-good-faith-under-international-law/> accessed 13 May 2020.

131 See the Commission's press release of 14 May 2020 <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859?fbclid=IwAR0WlSZNodW619rdK0s9XyaRTEYL2wbe3QEUTHvlFXyxi0Yh3Q1QcXvs29I> accessed 14 May 2020; also Michael de Boeck, 'Disagreement on Intra-EU BITs Continues: Infringement Actions over Intra-EU BITs' European Law Blog <https://europeanlawblog.eu/2020/06/15/disagreement-on-intra-eu-bits-continues-infringement-actions-over-intra-eu-bits/> accessed 17 June 2020.

and *inter se* agreements may end up being irreconcilable, thus being liable further to fragment international law, it is crucial to identify a solution ensuring that this phenomenon is effectively tackled.

1.3 Approaching Conflicts between EU law and *Inter se* Agreements from the Perspective of International Law

Having identified the problem, as well as its scale of complexity, what now remains to be considered is how it could be addressed. Although the policy areas where *inter se* agreements have been employed vary significantly, the possible tensions caused by their coexistence with EU law, and the research and practical challenges that follow, are to a great extent similar. The research question of this thesis is, therefore, more general, aiming at addressing the problem in a systematic manner: when there is a conflict between EU law and *inter se* agreements, which of the conflicting instruments should apply and why?

My thesis is that conflicts between EU law and *inter se* agreements should be approached and resolved as conflicts of treaty norms in public international law. This argument is based on a two-fold premise.

The first premise is that conflicts between EU law and *inter se* agreements are conflicts of treaty norms within the same legal system, that of international law. Conflicts may exist between norms situated in different legal orders, e.g. between national and international law or between the legal order and the moral order. However, normative conflicts can only be effectively dealt with when they occur between norms in the same legal system,[132] as different legal systems commonly provide their own tools to establish their internal

[132] Hans Kelsen, 'Derogation' in Ralph A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (The American Society of Legal History 1962) 363; Lando Kirchmair, 'Who Has the Final Say? The Relationship between International, EU and National Law' [2018] European Journal of Legal Studies – 10th Anniversary Conference Special Issue 47, 80.

coherence, thus potentially generating inconsistent outcomes.[133] Against this background, I argue that conflicts between EU law and *inter se* agreements should be approached as conflicts of norms situated in the broader system of international law. This premise rests on an ontological argument, namely that EU law remains an inextricable part of international law. I argue that EU law does not constitute a 'new legal order'; instead, it is a 'self-contained regime', in the sense of a strong form of *lex specialis* meant to regulate in a specialised manner the relationship between the Member States in several legal fields. That is not to say that EU law exists in a normative vacuum. Rather, EU law should be – and has been – approached as a special, regional treaty regime, operating within the broader system of international law and its principles and in close connection to it.[134] The nature of EU law as international law and its position within the international legal system are examined in detail in Chapters Two and Three respectively.

Since EU law is treaty law and remains part of the broader system of international law, normative conflicts in its interrelation with (other) *inter se* agreements form the subject matter of the law of treaties.[135] The second premise of my thesis, therefore, is that conflicts between EU law and *inter se* agreements are to be addressed pursuant to the rules of international law applicable to treaty conflicts.[136] Against this background, I distinguish between: 'apparent' conflicts, which may be avoided through methods of interpretation (conflict avoidance); and 'genuine' conflicts, which cannot be reconciled through methods of interpretation and need to be resolved using the conflict rules of international law instead

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133 Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 11.

134 Koskenniemi (n 2) 68, 112-114.

135 Ahmad Ali Ghouri, 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options' (2010) 16 ELJ 806, 811.

136 Derrick Wyatt, 'New Legal Order or Old?' (1982) 7 E L Rev 147, 148.

(conflict resolution). The rules of international law for conflict avoidance and conflict resolution between international agreements and any special rules applicable to the interrelation of EU law with *inter se* agreements are analysed in Chapters Five and Six respectively.

Before suggesting ways of tackling apparent and genuine conflicts between EU law and *inter se* agreements, a preliminary matter is to define what is meant by 'conflict'. In Chapter Four I argue that EU law is in 'conflict' with an *inter se* agreement when compliance with either of them: (i) leads or may lead to a violation of the other; (ii) frustrates or may frustrate its object and purpose, even in the absence of a concrete incompatibility between specific provisions; or (iii) when the conclusion of the *inter se* agreement falls within the scope of exclusive EU competence. This definition rests on a broad construction of the material scope of 'conflict' based on two criteria: the deontic nature of the norms encapsulated by the notion; and the requirement that EU law and the *inter se* agreement regulate the 'same subject-matter'.

Importantly, the argument that conflicts between EU law and *inter se* agreements are conflicts of treaty norms in public international law limits the scope of this thesis as follows.

First, the thesis only deals with conflicts of norms 'in public international law'. As a result, conflicts between international law and domestic legislation or conflicts between treaty norms as transposed into domestic legislation are not examined.

Second, the thesis focuses on conflicts between 'treaty norms'. The subject of this thesis is limited to conflicts emanating from international treaties and the rights and obligations stemming from them. This means that conflicts between treaty norms and other sources of

international law, be they normative (e.g. customary international law) or pre-normative (e.g. the preparatory works of a treaty etc.) remain outside the thesis's scope.

Third, the thesis is limited to conflicts between treaty norms situated on the same level (horizontal conflicts). The latter occur in cases of relative normative priority, established explicitly, through priority clauses, or implicitly, through the conclusion of new, conflicting treaties *inter se*. Horizontal conflicts are juxtaposed with vertical conflicts, namely conflicts between treaty norms placed in a hierarchical relationship. Although there is no inherent hierarchy of norms in the international legal order,[137] which is based on the sovereign equality of States as law-makers, normative hierarchy remains conceivable in international law. When it comes to treaty norms, these would be cases of conflicts between 'lower' treaty norms and 'higher' treaty norms, namely treaties incorporating peremptory norms (*ius cogens*). *Ius cogens* is defined as a rule or principle in international law that is so fundamental that it binds all states and does not allow for any exceptions.[138] According to the VCLT,

> [...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[139]

The superior status of peremptory norms in the otherwise horizontal system of international law can be inferred from Article 64 VCLT,[140] according to which a peremptory norm may only be modified by a subsequent peremptory norm. More importantly for present purposes, the hierarchical superiority of *ius cogens* is also evidenced from the conflict rule enshrined

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137 *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 Responsibility and on the Principles of Quantum of 30 November 2018, para 212.

138 'Jus Cogens' in John Grant and Craig Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009).

139 See Article 53 VCLT.

140 Article 64 VCLT reads: '[I]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

in Article 53 VCLT,[141] proclaiming that treaty norms conflicting with *ius cogens* are invalid. International *fora*,[142] including the CJEU,[143] also commonly recognise *ius cogens* as ranking higher compared to other norms in the international legal order.[144] In light of the different considerations underlying vertical conflicts, the methods and rules relating to their avoidance and resolution respectively are outside the scope of this thesis.

Finally, the thesis focuses on horizontal conflicts between EU law and a specific subset of international agreements that coexist with EU law, namely *inter se* agreements (including the *inter se* part of mixed agreements). The interrelation of EU law with the other types of international agreements examined earlier in this Chapter (EU international agreements, extra-EU agreements, and the EU and extra-EU parts of mixed agreements) is not examined, as it is based on different premises and the applicable conflict avoidance and resolution rules are, therefore, different.

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141 Article 53 VCLT provides that '[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.'

142 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, Order of 13 September 1993 (Separate Opinion of Judge Lauterpacht) [1993] ICJ Rep 325, para 100; *Prosecutor v Duško Tadić, International Tribunal for the Former Yugoslavia*, Case IT-94-1-A (1999) ILM vol 38, No 6 para 296; *Prosecutor v Anto Furundzija*, Case IT-95-17/1 (1998) Trial Chamber II, 260, para 153.

143 Regardless of whether it rightly asserted its own jurisdiction to review action of the UN Security Council (UNSC) for compliance with *ius cogens* norms, in *Kadi I* and in *Yusuf and Al Barakaat* the CFI recognised *ius cogens* as a limit to the binding effect of UNSC resolutions. The Court of First Instance (CFI) confirmed that failure to comply with *ius cogens* could lead to the invalidity of the UNSC resolutions, although it ultimately failed to identify any such violation in the cases at issue, see Case T-315/01 *Kadi v Council and Commission* [2005] ECLI:EU:T:2005:332, paras 226-230, 252, 276, 292 (*Kadi I*); Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECLILEU:T:2005:331, paras 277-281, 303, 331, 347; see also Grainne de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in Grainne de Búrca and Joseph H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 115-116.

144 Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 344; Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law* (OUP 2012) 29; Kirsten Schmalenbach, 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 990; Koskenniemi (n 2) 184.

CHAPTER TWO

THE NATURE OF EU LAW: A 'NEW LEGAL ORDER' OR INTERNATIONAL LAW?

This Chapter examines and discards the premise that EU law constitutes a 'new legal order'. Instead, it highlights the nature of EU law as international law. The sources of EU law constitute instruments of international law. Meanwhile, the particular features supporting the EU's claim of 'external autonomy' do not suffice to emancipate it from international law altogether.

INTRODUCTION

A condition to approaching conflicts between EU law and *inter se* agreements as normative conflicts on the international plane is for EU law to form part of international law. There can be no doubt that the EU is a highly complex legal structure. However, what there has been – and still is – doubt about is its nature. Even though its foundations are traced in international law, based on which the Member States negotiated, signed and ratified the treaties that brought the EU into life,[1] the particular features of EU law are said to differentiate the EU from ordinary international organisations and take it one step closer to – but still not quite – a constitutional legal order.[2] Among the most significant of these features are the legal doctrines of primacy and direct effect of EU law, as well as the provision of an institutional framework with legislative and adjudicatory powers.[3] By

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1 Joseph H H Weiler and Ulrich Haltern, 'The Autonomy of the Community Legal Order: Through the Looking Glass' (1996) 37 Harvard International Law Journal 411, 417; Jan Klabbers, 'Straddling the Fence: The EU and International Law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 53.

2 Bruno de Witte, 'Rules of Change in International Law: How Special is the European Community?' (1994) 25 NYIL 299, 300; Andrew Moravcsik, 'The European Constitutional Settlement' in Sophie Meunier and Kathleen McNamara (eds), *Making History. European Integration and Institutional Change at Fifty* (OUP 2007) 23; Timothy Moorhead, 'European Union Law as International Law' (2012) 5 European Journal of Legal Studies 125, 128; Weiler and Haltern (n 1) 420; see also Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLR 595; Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 106.

3 Moorhead (n 2) 128; Weiler and Haltern (n 1) 420; Joseph H H Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403, 2413 *seq*.

reference to these characteristics and despite the fact that they were concluded in the form of an international agreement, it has been supported that the EU Treaties constitute an 'autonomous, self-sufficient and coherent' system of norms.[4] The CJEU itself has written of the 'constitutional charter of a community based on the rule of law'.[5] Yet, the question remains: is EU law truly emancipated from its international law origins?

2.1 THE 'FORGOTTEN' NATURE OF EU LAW AS INTERNATIONAL LAW

EU law is founded on the EU Treaties, which are themselves part of and governed by international law.[6] Throughout the life span of the EU, its members have loyally followed a 'treaty path' for the regulation of their relationship. Starting from the conclusion of the Treaty of Rome in 1957, the Member States have opted for international agreements as the main means of putting together the foundational document of their union[7] and of pursuing amendments to its terms.[8] This is true even of the Treaty establishing a Constitution for Europe, which was similarly negotiated by an intergovernmental conference and concluded by the Member States in the form of an international agreement, before being rejected by the electorates of France and the Netherlands in referendums.[9] Currently, the EU Treaties comprise the TEU and the TFEU.

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4 Lenaerts and Gutiérrez-Fons (n 2) 104.

5 Case C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166, para 23; Opinion 1/91 *Draft Agreement Relating to the Creation of the European Economic Area* [1991] ECLI:EU:C:1991:490, para 21.

6 Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) 49.

7 Article 1(1) TEU provides that '[b]y this Treaty [TEU], the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION [...], on which the Member States confer competences to attain objectives they have in common'.

8 Bruno de Witte, 'Using International Law for the European Union's Domestic Affairs' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 135.

9 Bruno De Witte, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources' in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 780.

From any legal perspective, it is commonly accepted that the TEU and the TFEU are based on treaties of international law, the text of which they consolidate into two separate documents.[10] The EU Treaties are 'international conventions' in the sense of Article 38 of the Statute of the International Court of Justice (ICJ).[11] That Article constitutes an authoritative statement of the sources of international law,[12] the function of the ICJ being to decide disputes submitted to it 'in accordance with international law'. It provides that any legal instrument, 'whether general or particular, establishing rules expressly recognised by the contesting states' is to be considered a 'convention'.[13] Through the EU Treaties, the Member States have contracted with one another in a legally binding manner on the international plane, given that the contractual activity of sovereign states *inter se* takes places 'automatically and necessarily within the system of international law'.[14] In that sense, the EU Treaties are 'international conventions' and, therefore, form part of international law.

The EU Treaties also fall within the scope of the notion of 'treaty', as defined in Article 2(1)(a) VCLT. According to the latter, any

> [...] international agreement in written form concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation

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10 De Witte, 'Using International Law for the European Union's Domestic Affairs' (n 8) 142; Anne Peters, The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9, 36; Trevor C Hartley, 'International Law and the Law of the European Union – A Reassessment' (2001) 72 Brit YB of Int'l Law 1, 3; Bruno de Witte, 'The European Union as an International Legal Experiment' in Grainne de Búrca and Joseph H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 28 *seq*.

11 Ramses A Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) 35 YEL 533, 558.

12 W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 NYIL 3, 5.

13 Alain Pellet and Daniel Müller, 'Competence of the Court, Article 38' in Andreas Zimmermann, Christian J Tams, Karin Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 890; Malgosia Fitzmaurice, 'Treaties', OUP MPEPIL available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1481> accessed 1 October 2019.

14 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 37.

constitutes a treaty. Article 5 VCLT explicitly includes the constituent treaties of international organisations within the scope of the convention, should they fall within the above definition.[15]

The definition of Article 2(1)(a) VCLT is narrower than that of Article 38 ICJ Statute, in that it requires the agreement at issue to have been concluded in 'written form'. Even though its function was meant to distinguish between the instruments of international law relevant to the application of the VCLT, the ICJ has accepted that the definition of 'treaty' included therein reflects a rule of customary international law.[16] Against this background, the concept of 'treaty' set out in the VCLT also encompasses the EU Treaties, even though some Member States are not contracting parties to the VCLT.[17]

The nature of the EU Treaties as international legal instruments is further affirmed by their structure and the language used therein. The EU Treaties replicate a series of elements common to international agreements, including: a preamble; a provision on ratification, entry into force and the appointment of a depositary;[18] provisions on duration[19] and authentic languages;[20] as well as references to their signatories as 'High Contracting Parties'.[21]

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15 Kirsten Schmalenbach, 'Article 5' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 99; Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 527.

16 *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening*) (Judgment) [2002] ICJ Rep 303, para 263; see also Kirsten Schmalenbach, 'Article 2' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 32.

17 According to the UN Depository, France and Romania are not parties to the VCLT, see <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en#3> accessed 1 October 2019; AG Campos Sánchez-Bordona used similar reasoning in *Wightman*, see Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, paras 78-79.

18 Articles 54 TEU and 357 TFEU.

19 Articles 51 TEU and 356 TFEU.

20 Articles 55 TEU and 358 TFEU.

21 See, *ex multis*, Articles 1(1) TEU, 54 TEU and 357 TFEU.

At the same time, the processes regarding amendment, accession to and withdrawal from the EU Treaties are also founded on international law.[22] First, Article 48 TEU provides the possibility of amendments to the EU Treaties by means of a unanimous decision of the Member States, embodied in a revision 'treaty'[23] concluded and ratified by all Member States in accordance with their constitutional requirements. So far, all amendments to the EU Treaties[24] have taken place within the framework prescribed by Article 48 TEU,[25] including the Treaty establishing a Constitution for Europe, which was meant to repeal the earlier Treaties as a whole.[26] In a similar vein, Article 49 TEU sets out the conditions for the accession of any 'European State' to the EU by means of an international agreement between that State and the Member States that will 'be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements'.[27] Furthermore, under Article 50 TEU, it remains possible for any Member State to withdraw from the EU at any time in accordance with its own constitutional requirements.[28] To that end, the Union shall

22 *Wightman* (AG Campos Sánchez-Bordona) (n 17) para 84.

23 Article 48(5) TEU explicitly states that the amendment of the EU Treaties takes place by means of a 'treaty'.

24 Including the one based on the simplified revision procedure under Article 48(6) TEU of an Article 136(3) relating to the establishment of a stability mechanism.

25 These were, by chronological order, the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997), the Treaty of Nice (2001) and the Lisbon Treaty (2007).

26 See, to that effect, Article IV-437 of the Treaty establishing a Constitution for Europe.

27 The most recent accession to the EU was that of Croatia in 2013 through the 'Treaty between the Member States of the EU and the Republic of Croatia Concerning the Accession of the Republic of Croatia to the European Union' [2013] OJ L 112/10 of 24 April 2012. The Treaty entered into force on 1 July 2013; see also Theodor Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 Harvard International Law Journal 389, 390. For further analysis on the conditions for accession set out under Article 49 TEU see Friedrich Erlbacher, 'Article 49 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 314-315.

28 On the specifics of the withdrawal process, see also Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 127; also Friedrich Erlbacher, 'Article 50 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 319.

negotiate and conclude an international agreement with that State setting out the arrangements of its withdrawal. The CJEU interpreted the process of Article 50 TEU relying explicitly on the VCLT in *Wightman,* even if only partly so at the end of the judgment.[29] Given that it is the Union itself rather than the Member States individually that concluded the withdrawal agreement in this instance, the agreement is an integral part of EU law under Article 216(2) TFEU.[30]

EU law also comprises a series of other elements equally premised on the EU Treaties and, as a result, recognised as instruments of international law. The EU Treaties are the constituent treaties of the EU, through which the Member States have clothed their union with a separate legal personality.[31] The EU is, thus, authorised to adopt binding legal instruments in a number of fields, subject to the principle of conferral and, depending on the nature of the competence as exclusive or shared, the principles of subsidiarity and proportionality.[32] Under Article 288 TFEU, these instruments take the form of secondary law: regulations, directives and decisions adopted by the EU institutions. The EU Treaties delineate the competences conferred upon the EU and exercised through the EU institutions. For the adoption of secondary legislation at EU level, the EU Treaties need to provide for a specific legal basis, which will typically identify the organs authorised to act, the objectives pursued, the type of act to be adopted and the specific process for its adoption.[33] Unless such a legal basis can be identified, the legislative act at issue will be quashed by the CJEU under

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29 Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999, para 70; *Wightman* (AG Sánchez-Bordona) (n 17) in particular paras 77-85.

30 Friedrich Erlbacher, 'Article 216 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1643, 1647-1648; see also Case C-104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECLI:EU:C:1982:362, para 13.

31 Article 47 TEU.

32 Article 5 TEU.

33 Marcus Klamert, 'Article 5 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 66-67.

Article 263 TFEU on the ground of lack of competence.[34] Since secondary EU legislation is based on instruments of international law, namely the EU Treaties, secondary EU rules also have an international legal character.[35]

The same is true of the rulings of the CJEU. The constituent instruments of international organisations commonly vest an appropriate *forum* with jurisdiction to entertain disputes regarding their interpretation and with the authority to bind their contracting parties on issues of international law that affect them. The case law of such a *forum* may also be regarded as a form of practice of said organisation and, as such, it may generate relevant rules of the organisation in the sense of Article 5 VCLT.[36] Also in the EU context, the Member States have agreed through the EU Treaties to set up a specialised *forum*, authorised to rule on questions of EU law in a binding manner.[37] The CJEU is entrusted with the exclusive power authoritatively to interpret EU law and the rights and obligations stemming from it. The CJEU's interpretative monopoly concerning the meaning of EU law is grounded on the combination of Articles 19(1) TEU, 267 and 344 TFEU. Under Article 19(1) TEU

> The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

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34 See, for example, Case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544, paras 81-83 in particular; Case C-380/03 *Germany v Parliament and Council* [2006] ECLI:EU:C:2006:772; Case C-482/17 *Czech Republic v Parliament and Council* [2019] ECLI:EU:C:2019:1035.

35 *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para 4.122-4.123.

36 Paolo Palchetti, 'Halfway between Fragmentation and Convergence: The Role of the Rules of the Organization in the Interpretation of Constituent Treaties' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 493.

37 John McMahon, The Court of the European Communities: Judicial Interpretation and International Organisation (1961) 37 Brit YB of Int'l Law 320.

Article 344 TFEU confers exclusive jurisdiction upon the CJEU over the interpretation and application of EU law.[38] It stipulates that

> 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.

The exclusive jurisdiction of the CJEU authoritatively to interpret and apply EU law is complemented by Article 267 TFEU. This Article embodies the preliminary reference procedure, through which the Member States can refer questions concerning the interpretation of EU law to the CJEU, thus engaging in a judicial dialogue with it. According to Article 267 TFEU,

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give the judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [...].

Being established under an instrument of international law, namely the EU Treaties, the CJEU is an international court. Therefore, its case law equally forms part of international law. Against this background, the CJEU's interpretation of EU law is binding not only on the courts and tribunals of the Member States, as part of the EU legal *acquis*,[39] but also on other international *fora* that need to interpret or apply EU law, as rulings of the court

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38 Marcus Klamert, 'Article 344 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2045.

39 Joined Cases C-28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:6; Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECLI:EU:C:2004:17; Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020), 549.

entrusted with the authoritative interpretation of EU law.[40] To the extent that an international *forum* is bound to consider or apply EU law, it is equally bound to give effect to the exclusive competence of the CJEU authoritatively to apply and interpret the provisions of EU law; if a dispute involves questions of EU law that have already been dealt with by the CJEU, the international *forum* entertaining such a claim must adhere to the CJEU's interpretation and decide on the dispute before it accordingly. The CJEU's rulings do not create new law, but merely clarify and define the meaning and scope of an EU rule as it must be, or ought to have been, understood and applied from the time of its coming into force.[41] Therefore, the CJEU's reasoning is applicable *ex tunc*,[42] since the rule under interpretation entered into force.

Over the years, the CJEU's case law has contributed to the development of an additional source of unwritten EU law, in the form of general principles applicable within the EU.[43] In performing its task under Article 19(1) TEU to 'ensure that in the interpretation and application of the Treaties the law is observed', the CJEU has identified a series of general principles going beyond written EU law. The CJEU draws inspiration as to the existence of such general principles from the EU Treaties and the constitutional traditions common to the

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40 *Vattenfall AB and Others* v *Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea issue of 31 August 2018, paras 148 and 150. For more on the role of the CJEU as the authoritative source of interpretation of EU law, see the UNCLOS tribunal in *Mox Plant*, ITLOS Order No. 3, 24 June 2003, at paras 27 and 28; and *Award in the Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, Chapter III, in particular at para 103.

41 Case C-262/12 *Vent de Colère* [2013] ECLI:EU:C:2013:851, para. 39.

42 Joined Cases C-66, 127 and 128/79 *Amministrazione delle Finance dello Stato v Salumi* [1980] ECLI:EU:C:1980:101, para 9; Case C-61/79 *Amministrazione delle Finance dello Stato v Denkavit Italiana* [1980] ECLI:EU:C:1980:100, para 16; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté Française* [2010] ECLI:EU:C:2010:181, para 90.

43 De Witte, 'The European Union's Semi-Autonomous System of Sources' (n 9) 775; Samantha Besson, 'General Principles and Customary Law in the EU Legal Order' in Stephan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 125.

Member States. Especially in the field of fundamental rights, Article 6(3) TEU also includes within the general principles of EU law fundamental rights guaranteed under the European Convention for the Protection of Human Rights (ECHR). The function of general principles is to fill in gaps and ensure the coherence of EU law.[44] Being enunciated by an international *forum* and complementing the interpretation and application of the EU Treaties, general principles of EU law also form part of international law. In a similar vein, they may also be considered rules of customary international law at regional (EU) level, to the extent that the State practice and *opinio juris* required for the establishment of such a rule may be identified through recourse to the common constitutional traditions of the EU Member States.[45]

The nature of EU law and its sources as international law has consistently been upheld by the national courts of the Member States.[46] Most notably, the German Federal Constitutional Court (FCC) has on many occasions recognised the EU as a 'treaty-based association' and, therefore, EU law obligations as emanating from international law.[47] In the FCC's words,

> Article 23.1 of the Basic Law like Article 24.1 of the Basic Law underlines that the Federal Republic of Germany takes part in the development of a European Union designed as an association of sovereign states (Staatenverbund) to which sovereign

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44 Besson (n 43) 114; Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 17; Koen Lenaerts and José A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLR 1629.

45 The notion of international custom is defined in Article 38(1) ICJ Statute, according to which a custom is 'a general practice accepted as law'. For a rule of customary international law to be established, there needs to be evidence of a consistent practice (*usus*), which States accept as law (*opinio juris*) and which is binding on them, see ILC, Draft Conclusions on Identification of Customary International Law with Commentaries (2018) UN Doc A/73/10, 122, 124; Pellet and Müller (n 13) 904-905; Theodore Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35 YEL 513, 516.

46 See *R (Gina Miller) v the Secretary of State for Exiting the EU* [2017] UKSC 5, para 90; Conseil Constitutionnel, *Decision no 2004-505 dc of 19 November 2004*, available in English at <https://www.conseil-constitutionnel.fr/en/decision/2004/2004505DC.htm> accessed 15 May 2021, para 9, relating in particular to the Treaty establishing a Constitution for Europe; also Eleftheriadis (n 6) 96-97; Claudina Richards, 'The Supremacy of Community Law before the French Constitutional Court' (2006) 31 E L Rev 498, 502, 510; Bruno de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3nd edn, OUP 2021) 218.

47 BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, paras 228, 231, 337-338 (*Lisbon Treaty Judgment*); BVerfG, Order of the Second Senate of 6 July 2010 - 2 BvR 2661/06 -, paras 64, 66, 97 (Honeywell);

> powers are transferred. The concept of Verbund covers a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States, remain the subjects of democratic legitimation.[48]

The nature of the sources of EU law as instruments of international law has further been affirmed by the practice of international *fora*. In the context of investment treaty arbitration, arbitral tribunals established under BITs or mixed agreements, such as the Energy Charter Treaty (ECT), consistently posit EU law on the international plane.[49] In *Electrabel*, an arbitral tribunal established under the ECT pursuant to the ICSID Convention recognised that EU law as a whole had to be classified as international law, being rooted in the EU Treaties, which were international treaties.[50] In the same vein, the tribunals in *Vattenfall* and *EURAM* also placed the EU Treaties in the arena of international law, considering that they fell within the scope of 'international convention' and 'treaty' in the sense of Articles 38(1) ICJ Statute and 2(1)(a) VCLT respectively.[51] In *BayWa,* the tribunal upheld both that the EU Treaties constituted international treaties and that the CJEU was an international court, whose judgments were binding on the Member States *inter se*.[52] Similarly, in *Adamakopoulos,* the tribunal accepted that it could consider EU law and the case law of the CJEU in ruling on its jurisdiction to entertain a dispute under an intra-EU BIT, finding that:

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48 *Lisbon Treaty Judgment* (n 47) para 229.

49 See *ex multis* in this regard *RREEF Infrastructure (GP) 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, para 73; *Landesbank Baden-Württemberg and Others v Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the Intra-EU Jurisdictional Objection of 25 February 2019, para 158; *Eskosol S.P.A. in Liquidazione v Italian Republic,* ICSID Case No ARB15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on the Inapplicability of the Energy Charter Treaty to Intra-EU Disputes of 7 May 2019, para 117.

50 *Electrabel* (n 35) paras 4.119-4.123.

51 *Vattenfall* (n 40) paras 140-146; *European American Investment Bank AG (Austria) v Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para 74.

52 *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para 280.

> [...] EU law, in particular the rules set out in the relevant EU Treaties as interpreted by the relevant EU organs, is international law binding on EU member states. Thus, those rules of law, like any other rules of international law, can be invoked in this dispute. And any decision of the CJEU as the interpreter of those rules, on the scope, interpretation and application of those rules is equally relevant.[53]

Against this background, it is clear that all EU legal rules, both primary and secondary, including general principles of EU law and the rulings of the CJEU, have an international legal character, being included in or deriving from international treaties.[54]

2.2 THE PARTICULAR CHARACTERISTICS OF EU LAW AS A DISTINGUISHING FEATURE?

Based on the analysis above, there is no disagreement with the statement that the sources of EU law are instruments of public international law, being rooted in international treaties, whereby their contracting parties established *inter se* a European union in the pursuit of common objectives.

However, the CJEU has held that the EU has differentiated itself from a common international organisation and has rather been transformed into an 'autonomous legal order'. This legal order has claimed autonomy both from the domestic legal order of the Member

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53 *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Decision on Jurisdiction of 7 February 2020, para 160. This was also accepted by Professor Marcelo Cohen in his dissenting opinion in the case, see *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Statement of Dissent of Professor Marcelo Cohen of 3 February 2020, para 6.

54 Case C-352/09 P *Thyssenkrupp Nirosta v Commission* [2011] ECLI:EU:C:2011:191, para 45. In *Van Duyn*, the CJEU held that 'it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence', Case C-41/74 *Van Duyn v Home Office* [1974] ECLI:EU:C:1974:133, para 22; see also AG Wathelet's opinion in *Achmea*, where he accepts that the EU Treaties would have to be accounted for by the arbitral tribunal established under the applicable intra-EU Bilateral Investment Treaty under Article 31(3)(a) and (c) VCLT, as subsequent agreements between the parties to the intra-EU BIT at issue and as relevant rules of international law applicable in their relations respectively, Case C-284/16 *Achmea* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para 172. In the same vein, in *United Kingdom v Council*, AG Trstenjak noted that declarations adopted by an inter-governmental conference, albeit not a part of the founding Treaties, may be relevant in interpreting such Treaties under Article 31(2)(b) VCLT, Case C-77/05 *United Kingdom v Council* [2007] ECLI:EU:C:2007:419, Opinion of AG Trstenjak, para 18.

States (internal autonomy) as well as from the international one (external autonomy).[55] As this thesis examines the interrelation of *inter se* agreements with EU law on the international plane, only the latter form of autonomy is relevant to its purposes and is, therefore, examined.

Based on the CJEU's consistent line of reasoning, the prevailing view among EU law scholars and practitioners has been that EU law is of *sui generis* nature,[56] going beyond an ordinary inter-state agreement that 'merely creates mutual obligations between contracting states'.[57] Without denying the EU's original formation as an international organisation, their view is that the EU Treaties have rather transformed into an 'autonomous, self-sufficient and coherent' system of norms, laying down an autonomous, if not 'constitutional' legal order.[58] Schütze has gone so far as to classify the EU as a 'Federation of States', seeing the EU Treaties as having elevated to a constitutional status.[59]

Against this background, the most common misconception has been that EU law may be distinguished from public international law altogether. In support of this view, theorists cite

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55 Case C-26/62 *NV Allgemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-001, 12; Opinion 2/13 *on the Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, para 170; Opinion 1/17 *Accord ECG UE – Canada* [2019] ECLI:EU:C:2019:341, para 109; Marcus Klamert, 'Article 1 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 14; Marcus Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) 42 E L Rev 815, 816; Nicholas Tsagourias, 'Conceptualizing the Autonomy of the European Union' in Richard Collins and Nigel de Witte (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 349.

56 *Ex multis* Ingolf Pernice, 'The Autonomy of the EU Legal Order – 50 Years after *Van Gend*' in Antonio Tizzano, Juliane Kokott and Sacha Prechal (eds), *50th Anniversary of the Judgment in Van Gen den Loos* (Luxembourg: Office des Publications de l'Union Européenne 2013) 56; Jan Willem van Rossem, 'The Autonomy of EU Law: More or Less?' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 17.

57 *Van Gend en Loos* (n 55) p 12.

58 Lenaerts and Gutiérrez-Fons (n 2) 104; see also Ernst Ulrich Petersmann, 'Constitutional Principles Governing the EEC's Commercial Policy' in Marc Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff 1993) 21; Weiler, 'The Transformation of Europe' (n 3) 2407.

59 Robert Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014) 46; Robert Schütze, *European Constitutional Law* (2nd edn, OUP 2016) 56 *seq*.

the special characteristics of EU law, as developed gradually by the CJEU's case law. To them, these features constitute the crucial element leading to EU law's complete emancipation from the international legal order and transformation into a self-sufficient legal edifice.[60] So, a follow-up question arises: do the particular features of EU law suffice to support the claim of external autonomy, thus conclusively distinguishing it from its international law origins?

The CJEU first raised the autonomy argument in its seminal judgment in *Van Gend en Loos,*[61] where it characterised the Community as:

> […] a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[62]

One of the fundamental elements of this 'new legal order' was, in the CJEU's view, its direct effect, in the sense that the provisions of EU law applied 'independently of the legislation of Member States', thus 'creating individual rights which the national court must protect'.[63] Insofar as a binding provision of EU law was sufficiently clear and unconditional, individuals could invoke it directly before national courts, regardless of whether it had been transposed into national legislation.[64]

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60 *Ex multis*, see Karl Matthias Meessen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 CMLR 485; Daniel Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework' in Martii Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 181; Bruno de Witte, 'EU Law: Is It International Law?' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 185; see also Lenaerts and Gutiérrez-Fons (n 2) 104; Weiler and Haltern (n 1).

61 Jan Willem van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 60.

62 *Van Gend en Loos* (n 55).

63 ibid p 12 and 13 respectively.

64 Craig and de Búrca (n 39) 225.

In a similar vein, in *Costa v E.N.E.L.* the CJEU further equipped EU law with yet another characteristic, which is deemed to clothe it with 'quasi-constitutional status within domestic legal orders.'[65] With the aim of having the full impact of the doctrine of direct effect realised,[66] the CJEU enunciated the principle of primacy of EU law,[67] stating that:

> the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[68]

Consequently, in any case where a unilateral act of a Member State was held to be incompatible with the provisions of EU law, the latter would prevail, as Member States were not allowed to 'accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity'.[69] Under the doctrines of direct effect and primacy, national courts are required to give direct effect to the provisions of EU law as well as to set aside conflicting national law, whenever its provisions are incompatible with them.[70] The CJEU's case law has explicitly intertwined the *rationale* of direct effect and primacy, considering that the purpose of the right of individuals to rely on directly effective provisions of the EU Treaties before national courts is precisely to ensure the primacy of EU law.[71] EU

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65 Bruno de Witte, 'The Framework of the Revision Debate: International Agreement or European Constitution' in Jan A Winter and Others (eds), *Reforming the Treaty on European Union: the Legal Debate* (Kluwer Law International 1996) 12; see also Ole Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10(4) EJIL 763, 771.

66 Monica Claes, 'The Primacy of EU Law in European and National Law' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 183

67 Julie Dickson, 'Towards a Theory of European Union Legal Systems' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 33; Anthony Arnull, 'Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law' (2007) 31(5) Fordham Int'l L.J 1174, 1178.

68 Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECLI:EU:C:1964:66.

69 ibid 593-594.

70 Craig and de Búrca (n 39) 314.

71 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland/The Queen/ Secretary of State for Transport,* ex parte *Factortame Ltd and Others* ECLI:EU:C:1996:79, para 20.

law is, therefore, an integral part of the legal systems of the EU Member States, taking precedence over ordinary, domestic law.[72]

Going beyond primacy and direct effect, over the years the CJEU enriched its original conception of the EU as a legal order autonomous from international law with a series of additional features. Following *Costa*, the CJEU's case law connected the concept of external autonomy with its own exclusive jurisdiction under Articles 19(1) TEU and 267 and 344 TFEU authoritatively to interpret and apply EU law, in the attempt to ensure the uniform application and the unity of EU law.[73] Starting with Opinion 1/91 on the EEA agreement,[74] the CJEU has consistently held that the juridical order laid down by the EU Treaties, with its own judicial monopoly under Article 267 TFEU as its keystone, forms part of the EU's 'constitutional' core.[75] Moreover, in *Kadi* the CJEU found that the autonomy of the EU legal order also encompasses the protection of fundamental rights under the Charter of Fundamental Rights of the EU (Charter), as well as their interpretation within the framework of the structure and the specific objectives of the EU as part of the constitutional principles of the EU Treaties.[76]

Then, in Opinion 2/13, the Court summarised the special features, which in its view support the EU's claim of external autonomy, engaging in probably 'the most detailed and

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72 *Costa v E.N.E.L* (n 68) 593; Weiler, 'The Transformation of Europe' (n 3) 2415.

73 Opinion 1/09 *on the Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123, para 83; Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158, para 37; Van Rossem, The Autonomy of EU Law: More or Less?' (n 55) 19.

74 *Opinion 1/91* (n 5).

75 ibid para 35; Opinion 1/00 *on the Proposed Agreement between the European Community and Non-member States on the Establishment of a European Common Aviation Area* [2002] ECLI:EU:C:2002:231, paras 11-12; Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para 123 (*Mox Plant*); Joined Cases C-402/05 and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, para 282; *Opinion 1/09* (n 73) para 67; *Opinion 2/13* (n 55) para 174; *Wightman* (CJEU) (n 29) para 45; *Achmea* (CJEU) (n 73) paras 35-37; *Opinion 1/17* (n 55) paras 109-111.

76 *Kadi* (n 75) para 285.

comprehensive analysis of the autonomy of EU law'.[77] These features included the principles relating to the 'constitutional structure of the EU' and the 'very nature of EU law', namely: the principle of conferral and the institutional framework of the EU, as well as the principles of primacy and direct effect respectively;[78] the principles of mutual trust and sincere cooperation between the Member States;[79] the system for the protection of fundamental rights under the Charter;[80] the pursuit of the EU's fundamental objectives through a series of substantive provisions, such as the fundamental freedoms;[81] and the provision of a judicial system entrusted with the task of ensuring consistency and uniformity in the interpretation of EU law.[82] This reasoning was similarly followed in *Wightman*[83] and Opinion 1/17.[84]

The special aspects of EU law comprising the autonomy of the EU legal order are commonly referred to in support of what has been characterised as the 'popular side of the story',[85] namely that EU law is something distinct, *aliud* from international law. Although EU law may have originally been established by means of an international legal instrument, it is said quickly to have cast off any relations it may had with international law because of its particular features.[86]

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77 Lenaerts and Gutiérrez-Fons (n 2) 106; see also Benedict Pirker and Stefan Reitemeyer, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 CYELS 168.

78 *Opinion 2/13* (n 55) paras 165 and 166 respectively.

79 ibid paras 168 and 173 respectively.

80 ibid para 169.

81 ibid para 172.

82 ibid para 174.

83 *Wightman* (n 29) para 45.

84 *Opinion 1/17* (n 55) paras 109-111.

85 Spiermann, 'The Other Side of the Story' (n 65) 764.

86 Lenaerts and Gutiérrez-Fons (n 2) 106; Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU law' (2006) 31 E L Rev 287, 292; Peters (n 10) 10-11.

Nevertheless, this is not the end of the story. To paint the full picture of the nature of EU law, reference needs to also be made to the 'unpopular side of the story'. Proponents of this 'side' support that the effect of EU law's special characteristics is not to alter its international law nature;[87] rather, apart from the fact that these concepts are not alien to international law to begin with, it is precisely *based* on international law that these features were established in the first place and are still relevant to date.

With respect to the doctrine of direct effect, it is true that the CJEU in *Van Gend en Loos* reversed a fundamental presumption of international law, namely that international legal obligations are addressed to States, which are empowered to determine how – if at all – they would comply with them.[88] Under international law, individuals are typically not themselves subjects of the international legal order and cannot invoke the international obligations of a State before its national courts, unless there is a remedy under national law allowing them to make such a claim. This is true even when an international agreement is meant to confer rights upon individuals, yet the States concerned failed to bestow them.[89] The CJEU in *Van Gend en Loos* characterised the EU as a 'new legal order' based on this characteristic as, in its view, international law was unfamiliar with direct effect.[90] However, it would be flawed to support the EU's external autonomy on the doctrine of direct effect, and that for several reasons.

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87 De Witte, 'The European Union as an International Legal Experiment' (n 10) 20-21; Marcus Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Arbitration 181, 191; Julie Dickson and Pavlos Eleftheriadis, 'Introduction: The Puzzles of European Union Law' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) 9; Bethlehem (n 60) 178-179.

88 Weiler, 'The Transformation of Europe' (n 3) 2413.

89 ibid 2413.

90 Spiermann, 'The Other Side of the Story' (n 65) 766; Christina Eckes and Ramses A Wessel, 'An International Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol 1, OUP 2018) 93.

First, international law is not at all unfamiliar with the doctrine of direct effect. There are multiple occasions when international law recognises private individuals directly as its subjects.[91] Examples to this end may be drawn from the fields of refugee law, human rights law and international investment law, where a number of international treaties directly empower individuals to have access to international courts and tribunals and claim breaches of the treaties conferring rights upon them.[92] Direct effect is also omnipresent in the field of international criminal law. In that context, it is individuals rather than States who are the culprits of crimes against international law and against whom the obligations stemming from international treaties are to be enforced.[93]

More importantly, the intrusive nature of EU law within the jurisdictions of the Member States does not of itself mean that its international law character is altered merely on these grounds.[94] The EU was established on the basis of an international treaty, whereby the contracting States evidenced their willingness and consented to obligate themselves to the pursuit of common social and economic policies under international law.[95] In fact, in international law there is no inherent limitation as to either the scope or the subject matter of an international agreement that would prevent contracting States from including therein any features they consider necessary or useful in regulating their relationship.[96]

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91 Joseph Starke, 'Monism and Dualism in the Theory of International Law' in Stanley Paulson and Bonnie Kitschewski Paulson (eds), *Normativity and Norms* (OUP 2007) 542; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 258-259.

92 Relevant examples include the ECHR and intra-EU BITs; Lenaerts and Corthaut (n 86) 288.

93 *U.S., France, U.K. and U.S.S.R. v Göring and Others*, 1 Trial of the Major War Criminals 171, 223; Spiermann, 'The Other Side of the Story' (n 65) 767; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 436.

94 Moorhead (n 2) 131.

95 ibid

96 ibid

Against this background, one of the core elements of the EU Treaties was the setting up of a composite institution, the CJEU, vested with the exclusive power authoritatively to interpret and apply EU law,[97] thus binding the Member States as to the interpretation of their obligations under the EU legal framework. In the context of the competence conferred upon it by the EU Treaties, the CJEU developed a series of principles of 'quasi federal' texture,[98] including the doctrine of direct effect, which form an integral part of EU law.[99] The CJEU's rulings are binding on the Member States and may be altered only through a subsequent opposite decision of the CJEU itself; or an amendment to the EU Treaties.[100] Conversely, once the CJEU concludes that a measure is in conformity with EU law, that measure may only be deemed incompatible with it through a subsequent opposite decision or through treaty revision.

The dynamic character of EU law resulting from the CJEU's interpretation does not escape from the control of the Member States, which may correct unwanted developments on the occasion of a future amendment of the EU Treaties.[101] De Witte considers the dynamic evolution of EU law partly to escape the control of the Member States based on a pragmatic argument; to him, it seems highly unlikely that the Member States would reach the consensus required for treaty revision under Article 48 TEU. Yet, the difficulty in achieving unanimous consent does not alter the fact that, once such consent is actually established, the Member

97 Article 19(1) TEU.

98 Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation and Instability' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 408.

99 Marise Cremona, 'External Relations and External Competence of the European Union' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3nd edn, OUP 2021) 446.

100 On this point, see also Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 570.

101 Grainne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 450; see also De Witte 'The European Union as an International Legal Experiment' (n 87) 36; also Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 227.

States are free to enact or abolish any provision of the EU Treaties they please. Despite the rigidity of Article 48 TEU on the amendment of the EU Treaties, the Member States remain the Masters of their Treaties, retaining full control of the amendment process under a principle of unanimity.[102] Schütze disagrees. To him, the Member States may be the Masters of the Treaties as a collective entity, but on individual level they are no longer themselves competent to determine unilaterally the limits of their competences.[103] Yet Schütze's argument is flawed in two respects: first, the fact that the Member States may not unilaterally alter any obligations they have agreed on under the EU Treaties is not a particularity of EU law capable of supporting its claim of external autonomy; it is rather an aspect of *pacta sunt servanda* and holds true of any inter-state agreement concluded on the international plane. Second, any Member State that wishes to escape its obligations under the EU Treaties is always free to withdraw from the Union. In fact, treaties setting up international organisations commonly comprise special rules pertaining to their amendment, which may, on occasion, not require the common accord of all the parties thereto. In case a party to the organisation disagrees with a particular amendment to or interpretation of its constituent document(s), it is presented with a choice either to accept it or leave the organisation altogether.[104]

In fact, the unanimous consent of the Member States is both necessary and sufficient in amending Treaty provisions. It is necessary, given that the EU Treaties impose integral obligations on the Member States, which may only be altered with their common accord

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102 Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (OUP 1999) 117.

103 Schütze, *European Constitutional Law* (n 59) 58.

104 Max Sørensen, 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order' (1983) 32 Int'& Comp LQ 559, 564.

under Article 48 TEU. It is sufficient, as, once the required unanimous consent is established, the Member States cannot be restricted in amending any provision of EU law they please.[105]

As explained in Chapter One, international law distinguishes between amendments and modifications to multilateral agreements. While Article 48 TEU provides a specific amendment process of the EU Treaties, the latter remain silent on the possibility of *inter se* modifications. Given this silence of the EU Treaties, the permissibility of *inter se* modifications to is to be assessed under Article 41 VCLT. The latter reads:

> Article 41
>
> Agreements to modify multilateral treaties between certain of the parties only
>
> Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

According to 41(1)(b) VCLT unless explicitly prohibited, an *inter se* modification of a multilateral agreement is permissible under two cumulative conditions: when it does not affect the enjoyment of the other parties' rights or the performance of their obligations under the agreement; and when it does not relate to a provision, derogation from which would be incompatible with 'the effective execution of the object and purpose of the treaty as a whole'. These conditions largely reflect the classification of multilateral treaty obligations into:

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105 De Witte, 'Rules of Change' (n 2) 303.

reciprocal (bilateral), in the sense that they are owed to each contracting party individually; and *erga omnes partes* (integral), whose binding effect is collective towards all States-parties to the treaty and cannot be reduced to a compilation of bilateral treaty relations.[106] As can further be supported by reference to the VCLT's preparatory works,[107] integral obligations are not amenable to *inter se* modifications, as they are owed to all contracting parties to the multilateral agreement collectively. When the multilateral treaty does not provide otherwise, an *inter se* modification to integral obligations would not meet the conditions of Article 41(1)(b) VCLT. Albeit valid, such an *inter se* modification would violate the multilateral agreement, thus raising the question of State responsibility.[108]

Over the years, the Permanent Court of International Justice (PCIJ) and later the ICJ have engaged in a teleological interpretation to classify multilateral treaty obligations as bilateral or integral. In his separate opinion in the *Customs Regime between Germany and Austria* case, Judge Anzilotti questioned the possibility of *inter se* modifications to the Treaty of Saint-Germain, given that its provisions '[...] form an essential part of the peace settlement and were adopted not in the interests of any given State, but in the higher interest of the European political system and with a view to the maintenance of peace'.[109] Judge Van Eysinga employed a similar reasoning in the *Oscar Chinn* case. In his separate opinion, he found the 1919 Convention of Saint-Germain to be an impermissible *inter se* modification

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106 Pauwelyn, *Conflict of Norms in Public International Law* (n 14) 52-53; Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 908.

107 See to that effect Sir Gerald Fitzmaurice, 'Third Report to the ILC on the Law of Treaties' (1958) 2 Yearbook of the International Law Commission 20, 27-28 (A/CN.4/115); also ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 Yearbook of the International Law Commission 187, 217 (A/CN 4/191); Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 161 (A/CN.4/L.682).

108 Czaplinski and Danilenko (n 12) 24 and further references there.

109 *Customs Regime between Germany and Austria* (Individual Opinion by M Anzilotti), [1931] PCIJ, Series A/B No 41, 64.

to the earlier General Act of Berlin of 1885 based on the latter's objective, which was to guarantee 'the interests of peace, those of "all nations" as well as those of the natives'.[110] In the *Reservations to the Genocide Convention* case, the ICJ also affirmed this approach as regards the possibility of contracting States to make reservations to a multilateral treaty. In that case, it found the purely humanitarian and civilising purpose of the Genocide Convention to limit both the freedom of its contracting parties to make reservations and that of objecting to them.[111]

A teleological interpretation of the EU Treaties shows that they impose integral obligations on the Member States. Since the *telos* of the EU is to warrant and further European integration, the creation of parallel treaty systems, whereby some Member States carve out specific EU law obligations in their interrelation, could fragment the uniformity and threaten the efficiency of EU law. The integral nature of the Member States' obligations under the EU Treaties implicitly prohibits *inter se* modifications, since they would be liable to frustrate the object and purpose of the EU legal experiment altogether. Therefore, changes to the EU Treaties are only possible with the common accord of all Member States, which needs to be established within the specific framework of Article 48 TEU.

Over the years, there has also been vivid scholarly debate as to whether there are any substantive constraints upon the Member States' power to proceed with treaty amendment, even when the conditions of Article 48 TEU were met. Some scholars have argued that there may be an 'unchangeable core' of the EU Treaties inferred from the spirit thereof.[112] Lavranos suggests that the notion of 'the very foundations of the Community legal order'

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110 *Oscar Chinn* (Separate Opinion of Jonkheer van Eysinga) [1934] PCIJ, Series A/B No 63, 133.

111 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 23.

112 See De Witte 'The European Union as an International Legal Experiment' (n 87) 35-36; De Witte 'Rules of Change' (n 2) 319-320 and further references.

developed by the CJEU's case law implied the existence of an 'untouchable core of fundamental European constitutional law values and principles', which even the Member States, as Master of the Treaties, could not abrogate or amend.[113] His view is that the Court's choice in Opinion 1/91 to refer both to the EU Treaties and, more generally, to the 'very foundations of the Community' in rejecting the compliance of the Agreement on the European Economic Area (EEA Agreement) with EU law indicated that there was something 'more fundamental than primary EC Law'; unless that were the case, a simple reference to the EEA Agreement's conflict with EU primary law would have been sufficient grounds for the Court to reject its conclusion. He further supports this argument by reference to the CJEU's rationale in *Kadi*. By contrast to Opinion 1/91, the UN Charter at issue in *Kadi* was an international agreement to which the EU was not a party, and which predated the Member States' membership of the Union. This would normally trigger the operation of Article 351 TFEU, which, in case of conflict, allows for derogations from the EU Treaties in favour of pre-existing international agreements of the Member States with third countries.[114] However, and contrary to the position of the then CFI (now GCEU) in that case,[115] the CJEU emphasised that Article 351 TFEU could not authorise any derogations from the 'principles that form part of the very foundations of the Community legal order'.[116] As such, the CJEU identified 'the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU'.[117] On that basis, Lavranos sees the 'very

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113 Nikolaos Lavranos, 'Protecting EU Law from International Law' (2010) 15 European Foreign Affairs Review 265, 269.

114 *Kadi* (CJEU) (n 75) para 301; Case C-324/93 *The Queen/ Secretary of State for the Home Department,* ex parte *Evans Medical and Macfarlan Smith* [1995] ECLI:EU:C:1995:84, para 27; Case C-124/95 *The Queen,* ex parte *Centro-Com v HM Treasury and Bank of England* [1997] ECLI:EU:C:1997:8, para 56.

115 Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECLI:EU:T:2005:331; Case T-315/01 *Kadi v Council and Commission* [2005] ECLI:EU:T:2005:332, para 139 (*Kadi I*).

116 *Kadi* (CJEU) (n 75) para 304.

117 ibid para 303.

foundations' of EU law, also comprising the autonomy of the EU legal system,[118] as the unchangeable constitutional core of the EU Treaties confirming the constitutional nature of the EU legal order.[119]

Whether an unchangeable constitutional core of the EU Treaties in fact exists is a complex question, which cannot be addressed in more detail here. Nevertheless, the Treaties do not include any provision limiting the Member States' amending powers on its substance. This hints that the Member States never accepted any such substantive limitations.[120] In the absence of explicit constraints to that end, the Member States remain free to amend or abolish any provision of the EU Treaties they please. Insofar as the amendment of the fundamental rules of an international organisation is no longer within the discretion and under the full control of its members, it may be claimed that the 71rganization has left the field of international law and has transformed into something different;[121] however, this is not the case with the EU.[122]

The same is true regarding the possibility to amend the very provision on amendment. Although Article 48 TEU provides for a specific amendment process, the latter cannot be deemed to escape the common accord rule either. Since the Member States are always able to amend the EU Treaties, if they unanimously agree on the content of the amendment and act within the procedure set out in Article 48 TEU, there is no reason why they should be deprived of the same possibility regarding a potential revision of the specific treaty provision

118 Lavranos (n 113) 271.

119 ibid 274.

120 De Witte 'The EU as an International Legal Experiment' (n 87) 35-36.

121 De Witte 'Rules of Change' (n 2) 301-302.

122 Van Rossem, The Autonomy of EU Law: More or Less?' (n 56) 25; Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 516.

on amendment. In fact, Article 48 TEU was recently amended by the Lisbon Treaty, which introduced changes to what is now the 'ordinary revision procedure' and also provided for the novel 'simplified revision procedures'.[123] The possibility to amend the provision on amendment of the EU Treaties finds further support in the *a maiore ad minus* argument that the Treaties may be terminated as a whole, if all contracting parties so wish.[124] The procedural constraints of Article 48 TEU can, therefore, also be amended, insofar as all Member States agree on their revision using the special procedure on treaty amendment set out in Article 48 TEU.

Based on the above, even though the doctrine of direct effect originally emerged from the CJEU's case law, it is, in any event, covered by the common accord rule. Although the Member States were free to agree otherwise by means of a unanimous decision to this end in a subsequent treaty revision, they opted not to. The fact that, in establishing their union, the Member States went one step further and enabled it to enact legislation directly applicable within their national legal orders does not alter another fact, namely that their power to do so derived from international law. In that, it would be counter-intuitive to support that the automatic effect of EU legislation is the feature that alters the EU's nature as international law.

This is also the case regarding the general principle of primacy. Based on *Costa v E.N.E.L.*, many commentators argued in favour of the federalisation of the EU, given that, albeit not commonplace in international organisations, the doctrine of primacy was a common aspect of the legal orders of federal states.[125] In fact, Schütze argues that 'the

123 Steve Peers, 'Amending the EU Treaties' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Volume 1, OUP 2018) 423.

124 ibid 313.

125 Amedeo Arena, 'The Twin Doctrines of Supremacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 307; Spiermann, 'The

supremacy doctrine' 'forms no part' of classic international law.[126] However, as is the case with direct effect, international law is not unfamiliar with primacy clauses affording normative priority to one international agreement over another either. Most notably, the UN Charter includes a primacy clause in the form of Article 103, which reads:

> in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Similarly to the principle of primacy of EU law, Article 103 UN Charter affords priority to (primary and secondary)[127] obligations stemming from the UN Charter over all regional, bilateral or multilateral arrangements that the contracting parties have made, both earlier and successive to the UN Charter[128] (with the exception of international agreements incorporating *ius cogens*).[129] On that basis, the UN Charter has also been characterised as the constitution of the international community.[130] Yet, this claim rests on a rather circular reasoning. As eloquently put by Suy, the UN Charter includes a primacy clause because it is

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Other Side of the Story' (n 65) 772; Hartley (n 10) 3. See also Eric Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case' (1965) Mich L Rev 491, 513; David Edward, 'The Community's Constitution – Rigid or Flexible' in Henry Schermers, Deirde Curtin and Ton Heukels (eds), *Essays in Honour of Henry G Schermens: Institutional Dynamics of European Integration* (Vol 2, Martinus Nijhoff Publishers 1994) 57.

126 Robert Schütze, *From Dual to Cooperative Federalism: the Changing Structure of European Law* (OUP 2009) 49.

127 Jan Klabbers, *Treaty Conflict and the European Union* (OUP 2009) 152.

128 Johann Ruben Leiæ and Andreas Paulus, 'Miscellaneous Provisions, Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Vol II, 3rd edn OUP) 2120.

129 Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law* (OUP 2012) 48; Erika de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 635.

130 Eric Suy, 'The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms' in Ulrich Beyerlin, Michael Bothe, Rainer Jofmann and Ernst-Ulrich Petersmann (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht – Festschrift für Rudolf Bernhardt* (Springer 2003) 267; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Brill 2009) 104; see also Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 573; Michael Doyle, 'Dialectics of a Global Constitution: The Struggle over the UN Charter' (2011) 18 European Journal of International Relations 601; *contra* Erica de Wet, 'The International Constitutional Order' (2006) 55 Int'& Comp LQ 51, 54; Tzanakopoulos (n 129) 63.

a constitution; in turn, the UN Charter is accepted as a constitution because it includes a rule establishing its primacy over any conflicting obligation.[131] The same is true of the primacy of EU law as the foundation of the EU's claim of external autonomy.

In any event, what the CJEU actually did in *Costa* was to reaffirm the – omnipresent in international law – principle of *pacta sunt servanda*.[132] According to Article 26 VCLT, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. The principle of *pacta sunt servanda* is premised on good faith, the latter being 'one of the basic principles governing the creation and performance of legal obligations, whatever their source'.[133] The principle of good faith is further developed in Article 27 VCLT, which provides that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The function of Article 27 VCLT is to rule out the possibility of a State using its deviant legal situation as grounds for failing to comply with its international obligations.[134] A contracting party to an international agreement must adhere to the obligations it has agreed to thereunder and may not proceed to a unilateral alteration of that agreement. This is also the objective of the principle of primacy of EU law. In the Court's own words:

> the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity.[135]

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131 Suy (n 130) 267.

132 De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' (n 46) 226.

133 *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, para 49; Kirsten Schmalenbach, 'Article 26' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 473.

134 Kirsten Schmalenbach, 'Article 27' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 493; see also Eleftheriadis (n 6) 86.

135 *Costa v E.N.E.L* (n 68) 593.

According to the CJEU's reasoning, in entering into the treaties establishing the EU and in achieving the required degree of integration for the EU to fulfil its objectives, the Member States decided that EU law would take precedence over conflicting national legislation. Their intention has been explicitly verified, as the principle of primacy of EU law is now enshrined in Declaration 17, annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty. According to Declaration 17,

> 17. Declaration concerning primacy
>
> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
>
> The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):
>
> "Opinion of the Council Legal Service
>
> of 22 June 2007
>
> It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.
>
> [1] "It follows (…) that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.""

By contrast to Protocols annexed to the EU Treaties, which explicitly form part of primary law pursuant to Article 51 TEU, the legal status of Declarations is not entirely clear.[136] However, it cannot be denied that Declaration 17 is a unanimous expression of the will of

[136] Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of *Kompetenz-Kompetenz*: A Conflict between Right and Right in Which There is No *Praetor*' (2011) 17 ELJ 470, 472.

the Member States,[137] whereby they restated and codified the CJEU's relevant long-standing case law on the primacy of EU law. The principle of primacy is, therefore, undeniably covered by the common accord rule. In that, it can only be amended within the framework of Article 48 TEU, through a unanimous decision of the Member States. Insofar as it is possible for the Member States to agree on, amend or completely abolish the principle of primacy by means of an international treaty under the procedure of Article 48 TEU, the former can hardly be the feature proving the EU's claim of external autonomy. Primacy may indeed be conceived as an 'all-encompassing, absolute, unconditional, hierarchical and inherent facet of integration',[138] yet this is only so because the Member States have so agreed and will only remain so for as long as they do not unanimously decide otherwise.

The EU's quest for external autonomy cannot be supported by reference to the principle of sincere cooperation either. Under the latter, as enshrined in Article 4(3) TEU, 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. This principle has been held to entail both positive and negative obligations for the Member States; positive, in that each Member State is under a duty to fulfil its own and assist other Member States as well as the EU itself in fulfilling their obligations under EU law;[139] negative, in that the Member States must refrain from any action that may jeopardise the EU's interests.[140]

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137 See also Oliver Dörr, 'Declaration' Max Planck Encyclopaedia of International Law (MPEIL) available at < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1397?print=pdf> accessed 27 May 2021.

138 Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17 ELJ 744, 746.

139 *Opinion 1/09* (n 73) para 68; *Opinion 2/13* (n 55) para 178; *Achmea* (CJEU) (n 73) para 34.

140 Lenaerts and Gutiérrez-Fons (n 2) 119; Vlad Constantinesco, 'L' Article CEE de la Bonne Foi à la Loyauté Communautaire' in Francesco Capotorti and Pierre Pescatore (eds), *Du Droit International au Droit de l' Intégration: Liber Amicorum Pierre Pescatore* (Nomos 1987) 109; Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 46; Marcus Klamert, 'Article 4 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 56-57.

Nonetheless, the principle of sincere cooperation is not a novelty of EU law; it rather constitutes a special application of the principle of *pacta sunt servanda*'.[141] The latter equally imposes a duty on the contracting parties to an international treaty both to perform obligations thereunder *in bona fide* and not to defeat the treaty's object and purpose.[142] The principle of good faith is inherent in the principle of sincere cooperation under Article 4(3) TEU.[143] Meanwhile, it also constitutes an obligation incumbent on the Member States as a result of their EU membership.[144] In addition, it is widely accepted that the principle of *pacta sunt servanda* and the principle of good faith encompassed therein embody customary international law.[145] To the extent that the principle of sincere cooperation reflects rules of customary international law, it is binding on both the EU and its Member States.[146] This would be the case even if the EU Treaties did not include a *lex specialis* in the form of the principle of sincere cooperation of Article 4(3) TEU. Therefore, the principle of sincere cooperation can hardly be treated as a feature able conclusively to distinguish EU law from international law.

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141 Klamert, *The Principle of Loyalty* (n 140) 46; Anthony Aust, 'Pacta Sunt Servanda', MPEIL, available at <https://ezproxy-prd.bodleian.ox.ac.uk:10053/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449?rskey=Ye6pjX&result=1&prd=MPIL> accessed 4 November 2019.

142 Schmalenbach, 'Article 26' (n 133) 483-484.

143 Case C-217/88 *Commission v Germany* [1990] ECLI:EU:C:1990:290, para 33.

144 Case C-203/07 P *Greece v Commission* [2008] ECLI:EU:C:2008:270, Opinion of AG Mazák, para 83; also Klamert, 'Article 4 TEU' (n 140) 46; Klamert, 'The Autonomy of the EU' (n 55) 821.

145 Case T-115/94 *Opel Austria v Council* [1997] ECLI:EU:T:1997:3, para 90; Case C-308/06 *Intertanko and others* [2008] ECLI:EU:C:2008:312, para 52; Schmalenbach, 'Article 26' (n 133) 475 and further references there.

146 Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECLI:EU:C:1992:453, para 10; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, para 45; Case C-386/08 *Brita* [2010] ECLI:EU:C:2010:91, para 42; Case C-410/11 *Espada Sánchez and Others* [2012] ECLI:EU:C:2012:747, para 21; Case C-285/12 *Diakite* [2014] ECLI:EU:C:2014:39, Opinion of AG Mengozzi, para 23; Case C-574/15 *Scialdone* [2017] ECLI:EU:C:2017:553, Opinion of AG Bobek, note 12; Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para 58; Case C-15/17 *Bosphorus Queen Shipping* [2018] ECLI:EU:C:2018:557, para 67.

It is true that the CJEU has expanded the scope of the principle of sincere cooperation beyond the remit of what would normally be expected by the contracting parties to an international agreement under the customary international law principle of *pacta sunt servanda*.[147] In EU law, the principle of sincere cooperation operates as a type of 'catch-all clause', commonly invoked to impose obligations on the Member States in the absence of more concrete EU law provisions.[148] Over the years, the principle of sincere cooperation has performed a gap-filling function in EU law, being used either as an independent source of obligations[149] or as a means of extending the scope of other Treaty provisions.[150] Nevertheless, the CJEU's case law on this point does not prove that there is in fact a qualitative difference between the international law principle of *pacta sunt servanda* and the EU law principle of sincere cooperation due to the EU's external autonomy. Their difference is rather quantitative; given the much broader teleology of EU law compared to other international agreements, the scope of its members' obligation not to defeat its object and purpose is equally broadened to an unparalleled level. This feature alone, therefore, is not sufficient to support EU law's emancipation from the international legal order.

The above reasons equally apply regarding the principle of mutual trust. According to the CJEU's consistent line of reasoning,

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147 Klamert, 'The Autonomy of the EU' (n 55) 821.

148 See, for example, Joined Cases C-231/06 – 233/06 *Jonkman* [2007] ECLI:EU:C:2007:373, para 37, where the CJEU found that the Member States are required under the principle of sincere cooperation to nullify the unlawful consequences of a breach of EU law.

149 See, *ex multis*, Case C-272/86 *Commission v Greece* [1988] ECLI:EU:C:1988:433, paras 30-32; *Mox Plant* (n 75) para 182.

150 This has been the case, for example, in the field of competition law, where the CJEU has extended the scope of Article 101 TFEU, normally concerned with the conduct of undertakings. Read in conjunction with Article 4(3) TEU, the CJEU found an infringement of Article 101 TFEU, 'where a Member State requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforces their effects [...]', see Joined Cases C-427-428/16 *CHEZ Elektro Bulgaria* [2017] ECLI:EU:C:2017:890, para 42 and further case law cited; also Case C-13/77 *INNO v ATAB* [1977] ECLI:EU:C:1977:185, paras 30-31; Joined Cases C-209 to 213/84 *Ministère Public v Asjes* [1986] ECLI:EU:C:1986:188, paras 71, 77; Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254, para 35; Klamert, 'Article 4 TEU' (n 140) 49-50.

> the EU is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[151]

Albeit fundamental in EU law, the principle of mutual trust is, nonetheless, yet another application of the principle of *pacta sunt servanda*. The EU may, in fact, be founded on the common values set out in Article 2 TEU. Yet, as the CJEU itself recently ruled in *Wightman*, this is only the case because the Member States opted 'freely and voluntarily' to commit themselves to those values and, consequently, to the principle of mutual trust stemming from them.[152]

The EU's claim for external autonomy cannot be justified based on its 'constitutional structure' and institutional set-up, or on any substantive provision of EU law either. International organisations are commonly established by means of international treaties, whereby their members set out their fundamental objectives, vest them with particular decision-making, executive and adjudicative powers and create specialised organs entrusted to exercise them.[153] This includes the establishment *ab initio* or the conferral upon existing international *fora* of jurisdiction authoritatively to decide on the interpretation of the organisation's founding instruments and on any disputes stemming from them.[154] As a matter

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151 *Opinion 2/13* (n 55) para 168; *Achmea* (CJEU) (n 73) para 34.

152 *Wightman* (CJEU) (n 29) para 63; Case C-619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531, para 42.

153 Sørensen (n 104) 562; Van Rossem, The Autonomy of EU Law: More or Less?' (n 55) 24. On that basis, the UN Charter has been characterised by several theorists as the 'constitution' of the international community, see, *ex multis*, Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 Leiden Journal of International Law 593; Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 130); Nigel D White, 'Lawmaking' in Jacob Catz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organisations* (OUP 2016) 563.

154 Among the most prominent examples lies the multilateral dispute settlement system associated with the World Trade Organisation (WTO), set up to address claims between WTO members regarding non-compliance with their obligations. The WTO dispute settlement regime is regulated by the

of international law, contracting states are free to agree on and equip an international organisation with any features they consider necessary to achieve their common objectives, and in any combination.[155] It is, of course, undeniable that, by virtue of their agreement reflected in the EU Treaties, the EU Member States expanded both the substantive mandate as well as the institutional framework of their union to an unparalleled level compared to other international organisations.[156] Nevertheless, it is also uncontested that their power to do so derived from international law at the outset. To assume that a group of sovereign States can use an international treaty to create a legal edifice with special features that qualify it as a 'new legal order' necessarily implies that other sovereign States have the power to repeat this legal experiment. In that, there is no reason why they could not opt to set up an international organisation bearing the same – if not more – special features, as those, whereby the EU's external autonomy claim has been supported, or even develop more far-reaching arrangements.

Against this background, the argument of EU law having left international law behind because of its particular features or the combination thereof is based on a rather circumlocutory chain of reasoning. The fact that the Member States equipped EU law with some special characteristics by virtue of an international agreement cannot of itself alter the EU's nature as a project of international law,[157] unless such characteristics could not be subsequently revoked or amended through the same methods of public international law. In

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Dispute Settlement Undertaking (DSU), annexed to the Agreement Establishing the World Trade Organisation. In addition, the dispute settlement regime set up under the UNCLOS builds upon existing institutions and authorises a new one, the International Tribunal for the Law of the Sea (ITLOS), see John R Crook, 'Dispute Settlement' in Jacob Catz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organisations* (OUP 2016) 657-658.

155 Moorhead (n 2) 131; See also Sørensen (n 104).

156 De Witte 'The European Union as an International Legal Experiment' (n 87) 20; Moravscik (n 2) 23.

157 Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms provided for in *Inter-se* Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39 Legal Issues of Economic Integration 179, 186.

EU law, the amendment of any of these features remains possible once the common accord of all Member States is established under the procedure set out in Article 48 TEU. The fact that the Member States decided not to touch upon any of those characteristics during the multiple revisions of the EU Treaties does not mean that they have been deprived of this possibility for the future if they unanimously so agree.

CHAPTER THREE

THE RELATIONSHIP BETWEEN EU LAW AND INTERNATIONAL LAW: EU LAW AS A SELF-CONTAINED REGIME

Having established that the particular features of EU law do not suffice to alter its nature as international law, this Chapter examines the position of EU law within international law. It shows that EU law is an autonomous sub-system *within* public international law, in the sense of a broadly conceived 'self-contained regime'. For the purposes of this thesis, this concept is defined as a strong form of *lex specialis* designed to exclude in principle the application of general international law, which may nevertheless apply residually in its interpretation or to fill regulatory gaps.

INTRODUCTION

Based on the analysis of the previous Chapter, the special features of EU law cannot support the conclusion that it has cut the 'umbilical cord with the international legal order'.[1] Rather, the opposite; it is precisely based on international law that the Member States have agreed on and currently maintain those features in force.

What now remains to be explored is the position of EU law within international law. This Chapter starts by setting out how the EU's claim of external autonomy can further fragment international law and proposes an alternative reading of it. I argue that EU law is not a legal order autonomous from international law. I argue, instead, that EU law constitutes an autonomous sub-system *within* international law, in the form of a broadly conceived 'self-contained regime'. This is a familiar arrangement within public international law. For the purposes of this thesis, the concept of a 'self-contained regime' is defined as a strong form of *lex specialis*, designed to exclude the application of general international law, comprising customary international law and general principles of law recognised by civilised nations.[2]

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1 Robert Schütze, *European Constitutional Law* (2nd edn, OUP 2016) 62.

2 Article 38(1) ICJ Statute; Karl Matthias Meessen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 CMLR 485, 487; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 Am J Int'l L 535, 536; Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the

Albeit self-contained, EU law is not a 'closed legal circuit'; it is not impervious to international law. Falling back on the rules of general international law remains possible. General international law may still apply residually in the interpretation of the self-contained regime, as well as to fill regulatory gaps. In its interrelation with other international agreements, EU law needs to be addressed as a special, regional sub-system[3] operating within the broader system of international law and its principles.[4] This has been affirmed by the practice of the CJEU and the GCEU (collectively referred to as the EU Courts), whose case law has repeatedly resorted to general international law within the 'self-contained regime' of EU law.

3.1 The EU's Claim of External Autonomy as a Cause of (Further) Fragmentation of International Law

The debate on the EU's claim of external autonomy was enriched with another seminal judgment, characterised as the 'direct, if late, offspring of the van Gen den Loos and Costa/Enel jurisprudence'.[5] In *Kadi I*,[6] the CJEU emphasised once again its conception of the EU as a 'new legal order'; however, this time the Grand Chamber dropped the accompanying phrase 'of international law'[7] for good and placed the Member States' obligations under the UN Charter and EU law into separate legal orders, autonomous from

Fragmentation of International Law' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 32.

3 *European American Investment Bank AG (EURAM) v the Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para 71.

4 Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 68, 112-114 (A/CN.4/L.682).

5 Andrea Gattini, 'Joined Cases C-402/05 P & 415/05 P, *Yassin Abdullah Kadi, Al Bakaraat International Foundation v. Council and Commission*, Judgment of the Grand Chamber of 3 September 2008, nyr' (2009) 46 CMLR 213, 224.

6 Joined Cases C-402/05 and 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.

7 Originally used in *van Gend en Loos*, see Case C-26/62 *NV Allgemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-001, 12.

one another.[8] This reading of EU law in clinical isolation from international law gave rise to a conflict between the Member States' obligations under EU law and the UN Charter and further fed the power struggle between these treaty regimes.

The case concerned an action for annulment against a Regulation[9] adopted with the aim to transpose into the EU a number of UNSC Resolutions[10] related to the fight against terrorism.[11] In 2001, the Sanctions Committee of the Security Council published a list of persons, entities and bodies affected by those resolutions, which was annexed into the Regulation. Mr Kadi, who had been designated by the Sanctions Committee as a person suspected of supporting terrorists and was, therefore, included in the Regulation's Annex,[12] proceeded against it before the then CFI. *Inter alia*, he argued that there was no system of redress available at UN level to allow him to plead his case and seek to have his name removed from the list and his assets unfrozen; consequently, that the Regulation at issue transposing the UNSC resolutions in the EU had violated his fundamental rights, including the right to a fair trial, the right to property and the right to an effective remedy, which formed an integral part of EU law.[13] To the applicant, the fact that the contested Regulation

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8 Nicholas Tsagourias, 'Conceptualizing the Autonomy of the European Union' in Richard Collins and Nigel de Witte (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 339, 348.

9 Council Regulation (EC) No 461/2001 of 6 March 2001 'prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000' [2001] OJ L 67/1.

10 UNSC Resolutions 1267 of 1999, 1333 of 2000 and 1390 of 2002.

11 The facts I am discussing here relate to the *Kadi I* case. However, the legal analysis that follows also applies to the *Yusuf and Al Barakaat* case, which was subsequently joined with the *Kadi I* case on appeal.

12 Pursuant to its Article 10(1), Council Regulation 461/2001 was amended to that effect by Commission Regulation (EC) 2062/2001 of 19 October 2001 'amending, for the third time Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000' [2001] OJ L 277/25.

13 Case T-315/01 *Kadi v Council and Commission* [2005] ECLI:EU:T:2005:332, para 139 (*Kadi I*).

constituted the direct transposition of UNSC resolutions, for the implementation of which the EU Member States did not enjoy discretion and from which they could not abstain, was irrelevant. Instead, the EU needed and had failed to justify its actions by reference to its own powers and duties *vis-à-vis* individuals within the EU legal order, the latter seen as completely independent from the UN and governed by its own rules of law.[14]

The CFI rejected the action at first instance. By contrast to the applicant's submissions, the CFI did not approach the EU as a legal order secluded from international law. Instead, it accepted that the EU Treaties constitute 'international treaty law'; as a result, potential conflicts between EU law and the UN Charter had to be approached as conflicts of norms situated within the same legal order, that of international law. Based on this reading, the CFI subjected the Member States' obligations under EU law to those under the UN Charter, including those arising under binding decisions of the UNSC.[15]According to the CFI,

> from the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including [...] for those that are also members of the Community, their obligations under the EC Treaty.[16]

This reasoning was premised on a treaty law analysis, using as a reference both the primacy clause laid down in Article 103 UN Charter[17] as well as the conflict rule of what is now Article 351(1) TFEU. The latter reads:

> the rights and obligations arising from agreements concluded before 1 January 1958, or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third countries, on the other, shall not be affected by the provisions of the Treaties.

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14 ibid para 140.

15 ibid para 184.

16 ibid para 181.

17 For the wording of Article 103 UN Charter see Chapter Two.

Citing the priority principle enshrined in Article 30(1) VCLT[18] as well as relevant case law of the ICJ,[19] the CFI ruled that Article 103 UN Charter conferred primacy upon the obligations stemming from the UN Charter over all regional, bilateral or multilateral arrangements that the contracting parties have made, both earlier and successive to the UN Charter.[20] These arrangements necessarily included the EU Treaties, as 'international treaty law'. Moreover, since the obligations of all Member States under the UN Charter pre-dated the entry into force of the EU Treaties or their accession to the EU (depending on the case), they would remain unaffected by virtue of Article 351(1) TFEU.[21] To the CFI, Article 351(1) TFEU prevented the Member States from applying any provision of EU law that would raise an impediment to the proper performance of their obligations under the Charter.[22] This obligation applied equally to the EU, albeit not directly bound by the UN Charter.[23] The CFI found that the EU was required to comply with the obligations stemming from the UNSC

18 Article 30(1) VCLT provides that 'subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs', Kirstin von der Decken, 'Article 30' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 545; see also Alexander Orakhelashvili, 'Article 30, Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 764.

19 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment on Jurisdiction of the Court and Admissibility of Application) [1984] ICJ Rep 392, para 107; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 3, para 39.

20 *Kadi I* (n 13) paras 183-184; see also Johann Ruben Leiæ and Andreas Paulus, 'Miscellaneous Provisions, Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Vol II, 3rd edn OUP) 2128 *seq*.

21 *Kadi I* (n 13) para 187.

22 ibid para 190.

23 This position was first enunciated in *Bosphorus*, where the CJEU took the view that the relevant UNSC Resolutions were not part of the EU legal framework, the EU not being directly bound by the UN Charter, but were to be used in the interpretation of the EU act transposing them into the EU, Case C-84/95 *Bosphorus v Minister for Transport, Energy, Communications and others* [1996] ECLI:EU:C:1996:312, paras 13-14.

resolutions in the same way as its Member States, since it was acting under strictly circumscribed powers and enjoyed no discretion in their implementation.[24]

Following that reasoning, the CFI accepted a limitation to its jurisdiction to review the legality of the contested Regulation. Since the EU had no (autonomous) discretion in adopting the UNSC resolutions or altering their content, to exercise jurisdiction and annul the Regulation based on alleged breaches of EU-protected fundamental rights would practically result in the CFI directly impeaching the legality of the transposed UNSC resolutions in light of EU law. Yet, to the CFI such an outcome could not be supported from a treaty law perspective, either under the UN Charter and the VCLT or the EU Treaties. The CFI ended up rejecting its jurisdiction to review, even indirectly, the legality of the contested UNSC resolutions by reference to EU law,[25] concluding that

> reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community.[26]

Mr Kadi appealed to the CJEU, whose approach was fundamentally different. Drawing inspiration from the Opinion of AG Maduro,[27] the CJEU stressed its conception of EU law being autonomous from international law.[28] As an institution set up by the EU Treaties, the

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24 *Kadi I* (n 13) paras 195-197.

25 ibid para 225.

26 *Kadi I* (n 13) para 224. The CFI did not stop there. Faithful to its conception of the legal hierarchy between different instruments of international law, the CFI upheld that it was competent to check the legality of the UNSC resolutions against *ius cogens* norms. As such, the CFI characterised 'a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'. The CFI considered the mandatory provisions concerning the universal protection of human rights, including the breaches complained about by the applicant, to fall within the scope of *ius cogens* norms. Regardless of whether it rightly asserted its own jurisdiction to review UNSC action for compliance with *ius cogens* norms, the CFI concluded that there had been no relevant violation and, therefore, dismissed the applicant's action.

27 Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:11, Opinion of AG Maduro.

28 Grainne de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in Grainne de Búrca and Joseph H H Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 127.

CJEU would accord priority to the EU's own 'constitutional' rules and principles over obligations imposed by an international agreement.[29] To the CJEU, it would always be possible internally to review an act of the EU institutions for compliance with the 'basic constitutional charter' of the EU legal order, namely the EU Treaties and the fundamental principles stemming from them.[30] In the CJEU's words,

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[31]

The fact that, in the case at issue, the contested EU act was meant to transpose UNSC resolutions into the EU could not alter this outcome. The CJEU's review would not entail a challenge to the lawfulness or the primacy of such a resolution on the international plane.[32] Instead, its jurisdiction would be limited to the EU act intended to give effect to the UNSC Resolution at issue.[33]

To complement this reasoning, the CJEU also drew argumentation from Article 351 TFEU. Even though the case law had consistently interpreted Article 351 TFEU as allowing for derogations from EU primary law, in *Kadi I* the Court placed a limit to its application. According to the Court, Article 351 TFEU did not – in fact, could not – allow for any derogations from or authorise any challenge against what it understood to form the 'very foundations of the Community legal order'.[34] As such, it characterised 'the principles of

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29 ibid 119.

30 *Kadi I* (CJEU) (n 6) para 281

31 ibid para 285.

32 ibid para 288.

33 See also Ramses A Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 17.

34 *Kadi I* (CJEU) (n 6) para 304.

liberty, democracy and respect for human rights and fundamental freedoms', enshrined in Article 6(1) TEU,[35] as well as the review of consistency of measures adopted by the EU institutions with those principles conducted by the EU judicature. The CJEU held that no international agreement could prejudice its power to review the validity of any EU measure in light of fundamental rights, which constituted an expression of 'a constitutional guarantee stemming from the EC Treaty as an autonomous legal system'.[36] This statement further solidified the CJEU's conception of the EU as a 'closed legal circuit'. To the CJEU, this outcome would remain unaffected even under the assumption that the obligations stemming from the UN Charter were to be classified within the EU legal order. Referring to what are now Articles 216(2) and 218(11) TFEU and relevant case law, the Court ranked EU primary law over international agreements concluded by the EU, thus forming part of the EU legal order through the implementing act of the EU institutions.[37] The CJEU held that it would still enjoy jurisdiction to review the contested Regulation by virtue of the EU Treaties under such a scenario, with its power of review only covering the act whereby the UN Charter would be integrated into the EU, not the UN Charter *per se*.[38] Against this background, the CJEU concluded that

> [T]he question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights,[39]

and annulled the contested Regulation, finding the CFI to have erred in law.

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35 ibid para 303.

36 ibid para 316.

37 ibid paras 305-309.

38 ibid para 288.

39 ibid para 317.

To provide the EU institutions with sufficient time to remedy the attested violations, the CJEU allowed the Regulation to maintain its effects for a period of three months following the judgment. However, as the EU institutions did not enjoy discretion in altering the content of the UNSC Resolutions at will, to have adopted secondary legislation different on substance while the UNSC resolutions remained intact would not have effectively addressed the problem. At that point, the conflict between the Member States' obligations under EU law and their obligations under the UN Charter could only be resolved at political level if the UNSC agreed to rectify the alleged deficiency in the system's due process. In that vein, starting from 2008 the UNSC gradually adopted a series of measures aiming at improving the due process deficiencies in the system of sanctions. These measures ranged from the introduction of a narrative summary of the grounds for being included in the list of those affected by the UNSC resolutions; to the creation of an independent Ombudsperson, with the power initially to process delisting petitions to be subsequently decided by the UNSC and then to decide on such petitions itself under certain conditions. Even though in the *Kadi II* case the GCEU did not consider the system of narrative summary to meet the EU standard for fundamental rights protection,[40] a judgment subsequently upheld on appeal by the CJEU,[41] it is arguable that the current system of judicial protection at UN level could meet the *Kadi I* threshold and satisfy (some of) the CJEU's concerns.[42]

The *Kadi I* saga is exemplary in identifying how the different readings of the EU's claim of external autonomy in the interrelation of EU law with other international agreements may further fragment international law. In *Kadi I*, the CFI rejected the argument that EU law

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40 Case T-85/09 *Kadi v Commission* [2010] ECLI:EU:T:2010:418 (*Kadi II*).

41 Joined Cases C-584/10, C-593/10 and C-595/10 P *Commission and Others v Kadi* [2013] ECLI:EU:C:2013:518.

42 Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 EJIL 1015, 1020-1021.

should be viewed as autonomous from international law and existing in parallel to it.[43] Instead, it employed a treaty law perspective, analysing the alleged conflict as one between the norms of two simultaneously applicable treaty regimes on the international plane. Against this background, the CFI accepted that a conflict between the UN Charter and the EU Treaties could not have affected the validity of the transposed UNSC resolutions. On this point, its reasoning also appeared pragmatic; to have annulled the contested Regulation based on an alleged breach of EU law would have resulted in the Member States having to face two irreconcilable legal obligations; compliance with their obligations under EU law would translate into a violation of the Member States' obligations under the UN Charter and *vice versa*.

On the other hand and despite the fact that the specific conflict was subsequently dealt with at political level, the CJEU's approach in *Kadi I* has made clashes between EU law and international agreements, such as the UN Charter, likelier in the future.[44] The CJEU seems to have employed a *Solange I* rationale,[45] concluding that, as it stood, the system set up by the UNSC Resolutions did not provide for protection equivalent to that offered by the 'internal legal order of the Community'.[46] By insisting on the divide between the EU and the international legal order, the CJEU clarified that the warranties provided by the UN sanctions system were not consistent with the standards of fundamental rights protection in the EU, thus urging the Member States and the UNSC to take action to improve them.[47] However,

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43 *Kadi I* (n 13) para 208.

44 Ramses A Wessel, 'The *Kadi* Case: Towards a More Substantive Hierarchy in International Law?' (2008) 5 International Organizations Law Review 323, 326-327; Trevor C Hartley, *The Foundations of European Union Law* (8th edn, OUP 2014) 106.

45 Kokott and Sobotta (n 42) 1018-1019; Matej Avdelj, 'The Case of Mr. Kadi and the Modern Concept of Law' in Matej Abelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Rouledge 2014) 55.

46 *Kadi I* (CJEU) (n 6) paras 321-322.

47 Jean d'Aspremont and Frédéric Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) International Organizations Law Review 371, 377.

by asserting that EU law was a 'closed legal circuit', proclaiming its utter autonomy from international law and even its inward constitutionality,[48] the CJEU enhanced the fragmentation of international law[49] and led its interrelation with EU law into uncharted waters.[50]

3.2 The Concept of a 'Self-Contained Regime' and its Application to EU Law

To determine whether EU law may in fact be characterised as a 'self-contained regime', a preliminary issue is to delineate what this concept encompasses and in what sense it has been used.

The notion of a 'self-contained regime' was first deployed by the PCIJ in the *Wimbledon* case.[51] There, the PCIJ was called to answer whether the special provisions of the Treaty of Versailles relating to the regulation of the Kiel Canal could be supplemented by the general provisions on the regulation of inland navigable waterways of Germany. To the PCIJ, this question had to be answered in the negative, considering the special Treaty provisions on the Kiel Canal to constitute a 'self-contained regime'; they could not be supplemented or interpreted by reference to the general provisions relating to other German waterways, as their purpose was precisely to carve out those provisions.[52]

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48 See also Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 107.

49 Katja Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 Human Rights Law Review 288, 298.

50 De Búrca (n 28) 106; Grainne de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 Harvard International Law Journal 1, 44.

51 PCIJ Series A, No 1 (1923).

52 ibid 24.

In *Tehran Hostages*,[53] the ICJ also referred to the notion of 'self-contained regimes', this time in the context of the secondary rules on State responsibility (mostly of a customary nature). In that case, the ICJ characterised the remedies regime established under the Vienna Convention on Diplomatic Relations[54] as 'self-contained' *vis-à-vis* the customary international law on State responsibility.[55] In the event of a relevant violation, recourse could not be had to the remedies available under general international law, given that 'diplomatic law provides itself the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions'.[56] Against this background, the ICJ concluded that:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such breach.[57]

The ICJ made a similar finding in the *Nicaragua* case regarding State responsibility in the field of human rights law, this time without explicitly referring to a 'self-contained regime'.[58] The ICJ held that recourse to a remedy of customary international law was not the appropriate method to ensure respect for human rights, given that

> where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided in the conventions themselves.[59]

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53 *Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

54 Vienna Convention on Diplomatic Relations of 18 April 1961 and entered into force on 24 April 1964 (vol 500, United Nations Treaty Series) 95.

55 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 491.

56 *Tehran Hostages* (n 53) para 83; Simma and Pulkowski (n 55) 491.

57 ibid para 86.

58 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14.

59 ibid para 267.

Emphasising the nature of treaty rules as *lex specialis* compared to general international law, the ICJ concluded that 'it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim'.[60]

This approach of self-contained regimes as a form of *lex specialis* has also been adopted by the International Law Commission (ILC) in its report on the draft articles on the responsibility of States for internationally wrongful acts.[61] Under Article 55 (*lex specialis*) of the ILC draft articles,

> these 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 a State are governed by special rules of international law.

Citing the case law of the PCIJ and the ICJ analysed above, the Commentary to Article 55 distinguishes between, on the one hand, 'weaker forms of *lex specialis*, such as specific treaty provisions on a single point'; and 'strong forms of *lex specialis*, including what are often referred to as "self-contained regimes"', on the other.[62] The Commentary does not explain on what basis this distinction is made. However, it appears that the relevant criterion is the completeness of the special regime compared to the general international law framework and whether it encompasses a full and exhaustive set of rules pertaining to its creation, administration, modification and termination.[63]

As the above analysis indicates, the notion of 'self-contained regimes' has been given both a narrow and a broad reading. In a narrow sense, the term has been used in the context

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60 ibid para 274.

61 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the International Law Commission on the Work of its Fifty-third Session' (2001) 2 Yearbook of the International Law Commission 31 (A/56/10) 37.

62 ibid 140.

63 Koskenniemi (n 4) 81.

of State responsibility to refer to special secondary rules that claim primacy over the general rules of international law prescribing the consequences of and the remedies for a relevant violation.[64] In a broader sense, it has been employed to denote a set of special primary and secondary rules of international law, which tend to resolve within their own context the legal regime of a considerable number of relationships among the participating States and for the interpretation of which it is not necessary to resort to rules of general international law, the latter seen as an external source.[65]

The common denominator in both instances is that self-contained regimes have been treated as specialised regimes, designed to exclude the application of general international law in the cases falling within their scope; a treaty may create a 'self-contained regime', in the sense that its provisions may not be overruled by the application of general international law. Their difference is one relating to completeness and to the degree of specialisation. The notion of a 'self-contained regime' may be used to describe a wide range of specialised rules of international law, spanning from a very limited set of secondary rules to whole fields of functional specialisation, such as 'human rights law' or 'environmental law', comprising special rules as well as special interpretation techniques.[66] In this latter form, a 'self-contained regime' can be seen as a strong form of *lex specialis*, denoting a complete set of rules designed to exclude the application of general international law.

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64 ibid 68.

65 Gaetano Arangio-Ruiz, 'Third Report to the ILC on State Responsibility' (1991) 2 Yearbook of the International Law Commission 1, 45 (A/CN.4/440); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 37.

66 Koskenniemi (n 4) 68.

EU law may be characterised as a 'self-contained regime' in the broader sense.[67] First, EU law comprises a complete and exhaustive set of primary and secondary rules of international law. These rules cover the whole range of the EU's competences and functions, providing special legal consequences and remedies to deal with relevant violations,[68] to the exclusion of those available under general international law.[69] Second, to the extent feasible, questions of interpretation are answered within the 'self-contained regime' of EU law. In the exercise of its exclusive power authoritatively to interpret EU law, the CJEU commonly applies the methods of systemic and teleological interpretation.[70] However, the Court does not take the general system of international law as a point of reference, but rather the narrower 'self-contained regime' of EU law. This is evidenced by settled case law of the CJEU, under which the interpretation of an EU law provision requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law taken as a whole, including their origins.[71] Finally, possible regulatory gaps are, first and foremost, covered within the EU legal framework, without the need to resort to rules of general international law. In that respect, the CJEU's case law has used EU law to perform a gap-filling function in various fields, such as the EU's competences in external relations, using a teleological purposive interpretation of the EU Treaties to identify implied

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67 *AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic*, PCA Case No 2017-15, Final Award of 11 May 2020, para 372.

68 For example, in cases where an EU Member State violates its obligations under EU law, under Articles 258 and 259 TFEU another Member State or the European Commission may bring that Member State before the CJEU.

69 Bruno Simma, 'Self-Contained Regimes' (1985) 16 NYIL 111, 125;

70 Gunnar Beck, 'The Court of Justice of the EU and the Vienna Convention on the Law of Treaties' (2016) 35 YEL 484, 492.

71 Case C-283/81 *Cilfit and Others* [1981] ECLI:EU:C:1981:335, para 20; Case C-292/82 *Merck Hauptzollamt Hamburg-Jonas* [1983] ECLI:EU:C:1983:335, para 12; Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para 50; Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756, para 133; Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999, para 47; Beck (n 70) 493.

powers of the EU;[72] in the EU's institutional framework and balance, by acknowledging the legal value of practices emanating from the EU institutions or the EU Member States as combining the elements necessary to make up a rule of EU customary law,[73] albeit sometimes not explicitly;[74] and in the field of fundamental rights protection, through the identification of general principles of EU law.[75] To that end, the CJEU draws inspiration from the ECHR and the constitutional traditions common to the Member States, as per Article 6(3) TEU.[76]

3.3 THE EU'S CLAIM OF EXTERNAL AUTONOMY REVISITED: AN AUTONOMOUS LEGAL ORDER?

It has already been established that EU law constitutes a 'self-contained regime', in the sense of a strong form of *lex specialis* comprising a full set of international law rules designed to exclude recourse to general international law.

However, the fact that the existence of a self-contained regime excludes the application of the rules of general international law in certain circumstances does not suffice to remove that self-contained regime from the realm of international law altogether. The contractual activity of States *inter se* falls automatically and necessarily within the area of international

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72 Leigh Hancher, 'Constitutionalism, the Community Court and International Law' (1994) 25 NYIL 259, 265.

73 Case C-133/06 *Parliament v Council* [2007] ECLI:EU:C:2007:551, Opinion of AG Poiares Maduro, para 27; Samantha Besson, 'General Principles and Customary Law in the EU Legal Order' in Stephan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 116.

74 Case C-25/70 *Köster* [1970] ECLI:EU:C:1970:115, para 6, where the CJEU explicitly referred to the 'consistent practice of the Community institutions' and 'the legal concepts recognized in all the Member States'.

75 Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECLI:EU:C:1970:114, para 4; Case C-4/73 *Nold KG v Commission* [1974] ECLI:EU:C:1974:51, para 13; Besson (n 73) 126; Koen Lenaerts and Kathleen Gutman, 'The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (OUP 2015) 158; Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020) 435-436.

76 Tobias Lock, 'Article 17 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2151.

law.[77] With the exception of *ius cogens*, in their agreements States may choose to disapply explicitly or by way of implication some or all the rules of general international law regulating the subject matter of their relationship. Nevertheless, no rule of international law applies in a normative *vacuum*, however special its subject matter or limited the number of States concerned by it.[78] States cannot simply contract out of the field of international law as a whole.[79] Regardless of how complete and exhaustive the rules of the self-contained regime may be, general international law will always apply to a certain extent, at least at the level of interpretation.[80] Pauwelyn saw this limitation as a rule of *ius cogens* itself, considering it to be directly linked to the principle of *pacta sunt servanda*.[81] Citing the definitions of 'system' and 'sub-system' enunciated by Special Rapporteur Riphagen,[82] Pauwelyn identifies international law as the broader system, within which multiple specialised regimes (sub-systems) coexist and which prohibits the creation of sub-systems completely dissociated from international rules agreed upon elsewhere. To him, this is crucial to avoiding a situation, where States resort to a special branch of international law to

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77 Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 37.

78 Koskenniemi (n 4) 64; Simma and Pulkowski (n 55) 492; in the field of human rights law, see also the decisions of the European Court of Human Rights in *McElhinney v Ireland,* App No 31253/96 (ECtHR, 21 November 2001), para 36; *Al-Adsani v United Kingdom*, App No 35763/97 (ECtHR, 21 November 2001), para 55; *Bancovic v Belgium and Others* App No 52207/99 (ECtHR, 12 December 2001), para 57; *Marguš v Croatia* App No 4455/10 (ECtHR, 27 May 2014), para 129; see also *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment (Separate Opinion of Judge Cançado Trindade) [2014] ICJ Rep 226, para 25.

79 Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 37; Simma and Pulkowski (n 55) 492; Georges Abi-Saab, 'Fragmentation of Unification: Some Concluding Remarks' (1999) 31 NYU Int'L & Pol 919, 926; Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 17.

80 Simma and Pulkowski (n 55) 492.

81 Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 37; Koskenniemi (n 4) 83.

82 Special Rapporteur Riphagen viewed international law as a universal legal order, the 'system' in the context of which many 'autonomous' sub-systems co-exist. As a 'system', he defined 'an ordered set of conduct rules, procedural rules and status provisions which formed a closed legal circuit for a particular field of factual relationships'. To him, a 'system' differed from a sub-system, in that the latter retained an interrelation with other sub-systems in the same system, see Willem Riphagen, 'Third Report to the ILC on the Content, Forms and Degrees of State Responsibility' (1981) 2 Yearbook of the International Law Commission 1, 7 (A/CN.4/354/Add.1); Willem Riphagen, 'Fourth Report to the ILC on State Responsibility' (1983) 2 Yearbook of the International Law Commission 202 (A/CN.4/366).

escape other treaty obligations.[83] Koskenniemi adopted a similar approach in the report of the Study Group of the ILC on the fragmentation of international law, considering general international law to remain an inextricable part of any special branch of international law.[84]

Against this background, while a 'self-contained regime' has priority in the sphere of its application, it should not be perceived as a 'closed legal circuit';[85] it cannot be construed as completely impervious to general international law. None of the treaty regimes that currently exists can be characterised as 'self-contained', in the sense that it is impenetrable by general international law.[86] Whereas the plethora of general international law provisions constitute *ius dispositivum*, this cannot hold true for international law as a system. Recourse to general international law remains possible at the level of interpretation and to cover gaps or deal with regulatory failures of the self-contained regime. It is true that self-contained regimes in the sense identified above aim precisely at regulating certain aspects of State behaviour in an exhaustive manner; the more exhaustive the specialised regime, the less likely the need to resort to general international law.[87] However, this is not to exclude that general international law may still apply residually, insofar as no special derogation is provided for or could be inferred from the constituent instruments of the self-contained regime at issue.[88] The presumption may be in favour of exhaustive regulation within the self-contained regime.[89] Yet, a fall-back on general international law is possible and its extent will depend

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83 Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 38.

84 Koskenniemi (n 4) 64.

85 Riphagen (n 82).

86 Koskenniemi (n 4) 91; in that vein, see also the analysis of Pauwelyn about the law of the WTO, Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 35-40.

87 Dirk Pulkowski, 'Book Review: Pauwelyn, Joost. Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law' (2005) 16 EJIL 153, 156.

88 Koskenniemi (n 4) 94; Simma and Pulkowski (n 55) 492; Pauwelyn, The Role of Public International Law in the WTO' (n 2) 537.

89 See also Patrick Ostendorf, 'The Withdrawal Cannot Be Withdrawn: The Irrevocability of a Withdrawal Notification under Art.50(2) TEU' (2017) 42 E L Rev 767, 773; Jake Rylatt, 'The

on the degree to which the parties to the specialised regime have contracted out of its application.[90]

This position has been affirmed on multiple occasions by the case law of international *fora*. In *Georges Pinson*, the Permanent Court of Arbitration (PCA) held that every international convention must be deemed tacitly to refer to general principles of international law for all the questions which it does not itself resolve in express terms and in a different manner.[91] Moreover, according to the Iran-US Claims Tribunal:

> As a lex specialis, in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant [...]. On the contrary, the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.[92]

Conversely, general international law applies, unless its operation has been excluded by the self-contained regime expressly or by way of implication, that is by virtue of the regime's object and scope.[93] In that vein, the ICJ has found itself

> [...] unable to accept that an important principle of customary international law could be held to have been tacitly dispensed with, in the absence of any words making clear the intention to do so.[94]

Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke' UK Constitutional Law Blog <https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/> accessed 5 May 2021.

90 Pauwelyn, *Conflict of Norms in Public International Law* (n 65) 38.

91 *Georges Pinson (France) v United Mexican States*, Award of 19 October 1928 UNRIAA V, p. 422.

92 *Amoco International Finance Corporation v Iran*, Iran-US Claims Tribunal, Partial Award (Award No 310-56-3) of 14 July 1987, para 112.

93 Koskenniemi (n 4) 95.

94 *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 50; similarly, Pauwelyn argued that a treaty must exclude the application of the rules of general international law that the parties do not want to apply to their relationship, not the reverse, Pauwelyn, 'The Role of Public International Law in the WTO' (n 2) 537.

The above are equally true of EU law. EU law may, in fact, be conceived as a 'self-contained regime', but not in the sense that is completely cut off from international law.[95] EU law forms part of the broader system of international law, being a special branch of it. As with all such branches, EU law has developed rules that deviate from general international law, adapting the latter's rules and principles to the particularities of the Member States' specific relationship.[96] However, the nature of EU law as a 'self-contained regime' cannot take it so far as to transform it into an autonomous legal order, completely emancipated from international law.[97] In his leading article of 1985, Simma argued that, even though the exhaustive nature of its rules made EU law an ideal fit to be characterised as a 'self-contained regime' in the strong sense, recourse to general international law could not be and, in fact, was not completely ruled out.[98] A fall-back on general international law will be possible, unless it can be established that the Member States meant to exclude its application in the case at issue explicitly or by way of implication. This argument finds further support on Article 5 VCLT, which provides for the residual application of general international law, as codified in the VCLT, to the constituent instruments of international organisations.[99]

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95 Gaetano Arangio-Ruiz, 'Fourth Report to the ILC on State Responsibility' (1992) 2 Yearbook of the International Law Commission 1, 35-36 (A/CN.4/444, Add 1, Corr 1 and Add 2-3); Hancher (n 72) 259.

96 Olufemi Elias, 'General International Law in the European Court of Justice: From Hypothesis to Reality' (2000) 31 NYIL 3, 5; see also Kuijper's relevant analysis on the law of the GATT, Pieter Jan Kuijper, 'The Law of the GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained Regime?' (1994) 25 NYIL 227.

97 Simma and Pulkowski (n 55) 516; see also *Electrabel,* where the tribunal found that all EU legal rules were part of a regional system of international law and, therefore, have an international legal character; to accept otherwise would mean that 'an international rule would remain free-floating, as a mere theoretical aspiration', *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para 4.123.

98 Simma (n 69) 127-129; Simma and Pulkowski (n 55) 519; Gerard Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 EJIL 679, 682.

99 Case C-508/08 *Commission v Malta* [2010] ECLI:EU:C:2010:392, Opinion of AG Sharpston, para 4; Katja Ziegler, 'Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law' (2016) 35 YEL 667, 692; Kirsten Schmalenbach,

The case law of the EU Courts supports this reading of EU law, providing evidence that, albeit a self-contained regime, EU law is not to be treated in 'clinical isolation' to international law.[100] As eloquently put by AG Maduro in *Kadi*, '[...] international law can permeate [the EU] legal order only under the conditions set by the constitutional principles of the Community'.[101] However, this is not a novelty of EU law nor the outcome of its external autonomy. Rather, the possibility to fall back on international law always depends on the extent to which the special regime (exhaustively) regulates the relationship between the contracting parties. The *fora* entrusted with the application and interpretation of a self-contained regime normally deal with issues arising thereunder by taking the regime itself as a starting point; yet, to the extent that a matter is left unresolved by the specialised regime, they have recourse to the residual rules of general international law.[102] The practice of the CJEU and the GCEU also seems to reflect this approach. Over the years, the EU Courts have repeatedly resorted to the rules of general international law.[103] This penetration of general international law through the case law of the EU Courts has taken place both directly and indirectly.

First, general international law has infiltrated the autonomous sub-system of EU law indirectly, through the application of Article 52(3) of the Charter.[104] Under the latter, insofar

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'Article 5' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 99; Simma (n 69) 123.

100 This was the wording used by the Appellate Body of the WTO in the very first case that it rendered, referring to the relationship between the GATT and general international law, see *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R, p 17; also Koskenniemi (n 4) 30.

101 *Kadi* (AG Maduro) (n 27) para 24.

102 Simma and and Pulkowski (n 55) 488.

103 See also Marcus Klamert, 'Article 1 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 7, 15.

104 Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham Int'l L.J. 1304, 1336; also Ziegler, 'Beyond Pluralism and Autonomy' (n 99) 676.

as the Charter contains rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Article 52(3) aims at ensuring consistency between the Member States' obligations under the Charter and the ECHR. According to the explanations to Article 52, the meaning and scope of ECHR rights are determined not only by their text, but also by reference to the case law of the European Court of Human Rights (ECtHR).[105] The ECtHR constitutes an international *forum*, established by an international treaty, the ECHR, and entrusted with its application and authoritative interpretation. On that basis, the ECtHR has been very explicit as to the application of VCLT provisions in the interpretation of the ECHR.[106] Article 52(3) of the Charter does not have the effect of making the case law of the ECtHR binding on the EU Courts. However, the rulings of the ECtHR remain a highly influential source of inspiration in the interpretation of Charter rights.[107] Insofar as the EU Courts consistently take the rulings of the ECtHR into account when dealing with Charter rights, the case law indirectly transposes into EU law general international law, as may be relied upon by the ECtHR in the interpretation of ECHR rights.

More importantly, the case law of the EU Courts has also resorted to general international law directly. Given the CJEU's narrative on the EU's (external) autonomy, it comes as no surprise that the EU Courts are very reluctant directly to apply general international law for

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105 Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C-303/17); also Tobias Lock, 'Article 52 CFR' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2255-2256.

106 Hermann Mosler, 'Problems of Interpretation in the Case-Law of the European Court of Human Rights' in Frits Kalshoven, Pieter Van Kuijper and Johan G Lammers (eds), *Essays on the Development of the International Legal Order: in memory of Haro F Van Panhuys* (TMC Asser Institut 1980) 149 *seq*; Max Sørensen, 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order' (1983) 32 Int'& Comp LQ 559, 574; see also, *ex multis*, *Golder v the United Kingdom* App No 4451/70 (ECtHR, 21 February 1975), para 30; *Saadi v the United Kingdom* App No 13229/03 (ECtHR, 29 January 2008), para 61; *Hassan v the United Kingdom* App No 29750/09 (ECtHR, 16 September 2014), para 100; *Magyar Helsinki Bizottság v Hungary* App No 18030/11 (ECtHR, 8 November 2016), para 118.

107 Lock, 'Article 52 CFR' (n 105) 2256.

matters pertaining to the interpretation or application of EU law. This is so even where the applicability of such rules is invoked by the parties to the case before them.[108] By contrast to the practice of AGs, who often have recourse to general international law in their opinions, the EU Courts normally abstain from directly referring to such rules, be they customary international law or general principles of international law.[109] Instead, the EU Courts commonly attempt to provide solutions within the self-contained regime of EU law. This practice is loyally followed, even where this means essentially 'transposing' rules of general international law into the EU through recourse to existing statutory provisions and general principles of EU law.[110] For example, in *Commission v Council*, the CJEU referred to the practice of the EU institutions, as evidenced from several non-binding policy documents, for the interpretation of the EU Treaties, thus essentially replicating the provision of Article 31(3)(b) VCLT on the interpretation of treaties by reference to subsequent practices of the contracting parties.[111] There have also been cases where the CJEU echoed the substance of a general international law rule, yet without invoking it explicitly. For example, in *Opel Austria,* the GCEU found the rule of Article 18 VCLT prohibiting the frustration through State behaviour of the object and purpose of a treaty prior to its entry into force to reflect the general principle of legitimate expectations applicable in the EU context.[112] In a similar vein,

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108 See in this respect Case C-125/79 *Denilauler v Couchet* [1980] ECLI:EU:C:1980:130, p 1558-1559; Case C-812/79 *Attorney General v Burgoa* [1980] ECLI:EU:C:1980:231; Case C-500/99 P *Conserve Italia v Commission* [2002] ECLI:EU:C:2002:45.

109 Pieter Jan Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 257.

110 See Case C-285/12 *Diakite* [2014] ECLI:EU:C:2014:39, para 27, where, by interpreting the term 'internal armed conflict' used in Directive 2004/83 (EU Qualifications Directive) by reference to its usual meaning, context and the system of rules to which it belongs, the CJEU replicates, albeit implicitly, the interpretative rule of Article 31 VCLT; on this point, see also Case C-549/07 *Wallentin-Hermann* [2008] ECLI:EU:C:2008:771, para 17; also Koen Lenaerts and José A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLR 1629.

111 Case C-91/05 *Commission v Council* [2008] ECLI:EU:C:2008:288.

112 Case T-115/94 *Opel Austria v Council*, [1997] ECLI:EU:T:1997:3, paras 90-91, 93; also Robert Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014) 56-57.

in *Inter-Environnement Wallonie*, the CJEU referred to the combination of the principle of sincere cooperation and the binding nature of Directives as to the result to be achieved, under what are now Articles 4(3) TEU and 288 TFEU respectively, to support the Member States' obligation to refrain from any measure that would be liable to hinder the prescribed outcome during the transposition period. Yet, this objective could have been equally achieved through the direct application of Article 18 VCLT.[113]

However, despite this reluctance, the EU Courts have consistently accepted that general international law, including the rules of customary international law, is applicable within the EU, binding on both the Member States and the EU itself.[114] In fact, the EU Courts have on various occasions resorted to general international law as an *ultimum refugium*, where the self-contained regime of EU law did not seem to offer a solution. *Inter alia*, the EU Courts have used general international law: for the interpretation of international agreements, to which the EU is a contracting party; for guidance as to the interpretation of EU law, including the EU Treaties; as a reference for assessing the legality of secondary EU law; and as a gap-filler, in the absence of EU-specific rules on matters where the EU Courts needed guidance to reach a decision.[115]

A first category of cases where the EU Courts have referred to the rules of general international law is the interpretation of EU international agreements. As the EU has a separate legal personality under Article 47 TEU, it has the capacity to establish contractual

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113 Case C-129/96 *Inter-Environnement Wallonie v Région wallonne* [1997] ECLI:EU:C:1997:228, para 45; also Case C-319/97 *Kortas* [1999] ECLI:EU:C:1999:37, Opinion of AG Saggio, para 12.

114 *Opel Austria* (n 112) para 90; Case C-308/06 *Intertanko and others* [2008] ECLI:EU:C:2008:312, para 52; Kirsten Schmalenbach, 'Article 26' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 475 and further references there.

115 See Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, para 83; Theodore Konstadinides, 'Customary international Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35 YEL 513, 518.

links with third countries or other international organisations in the exercise of its external relations, subject to the principle of conferral. Once concluded, EU international agreements form an integral part of EU law and are binding on the EU institutions and the Member States.[116] Meanwhile, they remain an inextricable part of the international plane and are, therefore, subject to interpretation under the customary rules of the law of treaties, as codified by the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO)[117] and the VCLT. Although the VCLTIO is not yet in force and the EU is not a contracting party to it, the EU Courts have consistently affirmed that the EU is bound by its rules, insofar as they codify customary international law.[118] Based on the same reasoning, the EU Courts have also upheld the application of the VCLT's rules within the EU, even though some EU Member States are not parties to it and treaties concluded between States and international organisations are explicitly excluded from its scope under Article 3 VCLT.[119] For example, in *Brita*, the CJEU held that

> [...] the fact that the VCLT does not apply to treaties concluded between States and other subjects of international law does not affect the application to them of any rules set forth in that convention to which they would be subject under international law independently of that convention. It follows that the rules laid down in the Vienna Convention apply to an agreement concluded between a State and an international organization, such as the EC-Israel Association Agreement, insofar as the rules are an expression of general customary law [...].[120]

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116 Article 216(2) TFEU; Case C-87/75 *Bresciani v Amministrazione delle Finanze dello Stato* [1976] ECLI:EU:C:1976:18, para 18; Marise Cremona, 'Member States Agreements as Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 291.

117 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986 (not yet in force).

118 Case C-404/12 *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* [2014] ECLI:EU:C:2014:309, Opinion of AG Jääskinen, para 17; Case C-28/12 *Commission v Council* [2015] ECLI:EU:C:2015:282, Opinion of AG Mengozzi, para 65.

119 Case T-512/12 *Front Polisario v Council* [2015] ECLI:EU:T:2015:953, para 93; see also Article 1 VCLTIO, according to which agreements between States and international organisations, such as the EU, fall within its remit.

120 Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91, paras 40-41; Kuijper (n 109) 258.

The EU Courts commonly resort to general international law to interpret EU international agreements.[121] In this regard, the most frequently cited rules include: the principle of *pacta sunt servanda* reflected in Articles 26 VCLT and VCLTIO, which the EU Courts have explicitly connected with the principle of good faith;[122] the conflict rules of Articles 59(1) and 30(3) VCLT and VCLTIO on the termination/ suspension in operation of an earlier treaty implied by the conclusion of a later treaty between the same parties on the same subject matter[123] and the application of successive treaties between the same parties on the same subject matter respectively;[124] and the principles on treaty interpretation laid down in Articles 31-33 VCLT[125] and VCLTIO. The EU Courts have consistently relied on Articles 31 VCLT and VCLTIO to answer questions going beyond the textual interpretation of an EU international agreement, considering as a corollary its context, object and purpose,[126] as

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121 Konstadinides (n 115) 518; Kuijper (n 109) 260; Jan Wouters and Dries Van Eeckhoutte, 'Giving Effect to Customary International Law through European Community Law' [Institute for International Law] available at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf> accessed 9 April 2020, 14.

122 Case C-104/81 *Hauptzollamt Mainz v Kupferberg & Cie* [1982] ECLI:EU:C:1982:362, para 18; Case C-142/88 *Hoesch and Others v Bergrohr* [1989] ECLI:EU:C:1989:393, para 30, where the CJEU mirrors the principle of *pacta sunt servanda*, without explicitly referring to it or to the VCLT and the VCLTIO; Case C-61/94 *Commission v Germany* [1996] ECLI:EU:C:1996:313, para 30; Case C-149/96 *Portugal v Council* [1999] ECLI:EU:C:1999:574, para 35; Case T-546/13 *Šumelj and Others v Commission* [2016] ECLI:EU:T:2016:107, para 57.

123 Case T-2/99 *T Port v Council* [2001] ECLI:EU:T:2001:186, para 81; Case C-158/91 *Ministère Public and Direction du Travail and de l'Emploi v Levy* [1993] ECLI:EU:C:1993:332, para 19; Joined Cases C-364/95 and 365/95 *T Port v Haumptzollamt Hamburg-Jonas* [1998] ECLI:EU:C:1998:312, Opinion of AG Elmer, para 16.

124 Case C-464/14 *SECIL* [2016] ECLI:EU:C:2016:52, Opinion of AG Wathelet, paras 53-56.

125 Case C-156/98 *Germany v Commission* [2000] ECLI:EU:C:2000:467, para 50; Case C-306/05 *SGAE* [2006] ECLI:EU:C:2006:764, para 34; Case C-70/09 *Hengartner and Ga*sser [2010] ECLI:EU:C:2010:430, para 36; Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 311-312.

126 See, *ex multis*, Opinion 1/91 *Draft Agreement Relating to the Creation of the European Economic Area* [1991] ECLI:EU:C:1991:490, para 14; Case C-312/91 *Metalsa* [1993] ECLI:EU:C:1993:279, para 12; Case C-416/96 *Eddline El-Yassini* [1999] ECLI:EU:C:1999:107, para 47; Case C-268/99 *Jany and Others* [2001] ECLI:EU:C:2001:616, para 35; Case C-63/09 *Walz* [2010] ECLI:EU:C:2010:251, para 23; Case C-429/14 *Air Baltic Corporation* [2016] ECLI:EU:C:2016:88, para 24; Case C-258/16 *Finnair* [2018] ECLI:EU:C:2018:252, para 21; Case C-532/18 *Niki Luftfahrt* [2019] ECLI:EU:C:2019:1127, para 31; see also Kuijper (n 109) 260; Wouters and Eeckhoutte (n 121) 13.

well as any other relevant rules of international law[127] or subsequent practice of the contracting parties relating to its application.[128]

Apart from taking the rules of general international law as a reference to the interpretation of EU international agreements, the EU Courts have also employed them in the interpretation of EU law itself, both primary and secondary. The case law has confirmed on many occasions that the EU Treaties constitute international treaties, thus being covered by general international law.[129] As with any international treaty, the EU Courts have interpreted the EU Treaties based on the rules of customary international law codified in Articles 31-33 VCLT.[130] In addition, the case law has resorted to customary international law to determine, *inter alia*: the territorial and temporal scope of the EU Treaties;[131] the notion of an

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127 Case C-104/16 P *Council v Front Polisario* [2016] ECLI:EU:C:2016:973, para 86.

128 Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food,* ex parte *Anastasiou* [1994] ECLI:EU:C:1994:277, para 50.

129 Case C-352/09 P *Thyssenkrupp Nirosta v Commission* [2011] ECLI:EU:C:2011:191, para 45. In *Van Duyn*, the CJEU held that 'it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence', Case C-41/74 *Van Duyn v Home Office* [1974] ECLI:EU:C:1974:133, para 22; see also AG Wathelet's opinion in *Achmea*, where he accepts that the EU Treaties would have to be accounted for by the arbitral tribunal established under the applicable intra-EU BIT under Article 31(3)(a) and (c) VCLT, as subsequent agreements between the parties to the intra-EU BIT at issue and as relevant rules of international law applicable in their relations respectively, Case C-284/16 *Achmea* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para 172. In the same vein, in *United Kingdom v Council*, AG Trstenjak noted that declarations adopted by an inter-governmental conference, albeit not a part of the founding Treaties, may be relevant in interpreting such Treaties under Article 31(2)(b) VCLT, Case C-77/05 *United Kingdom v Council* [2007] ECLI:EU:C:2007:419, Opinion of AG Trstenjak, para 18.

130 *Pringle* (n 71) para 135, where the CJEU referred to the preparatory work of the Treaty of Maastricht, as per Article 32 VCLT, to determine the objective of Article 125 TFEU; also in *Wightman,* where AG Campos Sánchez-Bordona referred to the preparatory works of the European Convention, which formed the basis for the wording of Article 50 TEU, to determine that the latter was inspired by Articles 65 to 68 VCLT, *Wightman (*AG Campos Sánchez-Bordona) (n 115) para 85, note 63; also *Wightman* (CJEU) (n 71) para 47; *Inuit Tapiriit Kanatami* (n 71) para 50; Case C-64/05 P *Sweden v Commission* [2007] ECLI:EU:C:2007:433, Opinion of AG Poiares Maduro, para 34; Beck (n 70) 505.

131 In particular, the EU Courts have referred to Articles 29, 54 and 70 VCLT respectively, see Case C-591/15 *The Gibraltar Betting and Gaming Association Limited and the Queen* [2017] ECLI:EU:C:2017:32, Opinion of AG Szpunar, para 24; Case C-293/02 *Jersey Produce Marketing Organisation* [2005] ECLI:EU:C:2005:269, Opinion of AG Léger, para 31, note 22; Case T-91/10 *Lucchini v Commission* [2014] ECLI:EU:T:2014:1033, para 114; Case T-472/09 *SP v Commission* [2014] ECLI:EU:T:2014:1040, para 113; Case T-25/04 *González y Díez v Commission* [2007] ECLI:EU:T:2007:257, para 37; Joined Cases C-89, 104, 114, 116, 117 and 125/85 *Ahlström*

'agreement' in the sense of Article 216(1) TFEU and what it encompasses;[132] the purpose and scope of the conflict clause of Article 351(1) TFEU;[133] and the effects of accession treaties concluded under Article 49 TEU.[134]

In a similar vein, the EU Courts have also had recourse to general international law for the interpretation of secondary EU legislation. This possibility was first enunciated explicitly in *Poulsen*, where the CJEU observed that the EU 'must respect international law in the exercise of its powers' and that, consequently, the provisions of the secondary EU legislation at issue in that case had to be interpreted and their scope limited in light of the relevant rules of customary international law.[135] This statement now reflects settled case law of the EU Courts, which have consistently taken general international law as a reference to interpret secondary EU law since then.[136]

Osakeyhtiö and Others v Commission of the European Communities [1988] ECLI:EU:C:1988:447, para 18 (*Wood Pulp (No 1)*).

132 In this respect, the case law has had recourse to the definitions of a 'treaty' under Articles 2 VCLT and VCLTIO, which have been recognised as reflecting customary international law, see Case C-327/91 *France v Commission* [1994] ECLI:EU:C:1994:305, para 25; Case C-103/12 *Parliament v Council* [2014] ECLI:EU:C:2014:334, Opinion of AG Sharpston paras 79-80, 96; Opinion 1/13 *Accession of Third States to the Hague Convention* [2014] ECLI:EU:C:2014:2303, para 37; Case C-660/13 *Council v Commission* [2015] ECLI:EU:C:2015:787, Opinion of AG Sharpston, note 26; Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECLI:EU:C:1993:158, Opinion of AG Van Gerven, para 23, note 47.

133 Case C-158/91 *Ministère Public and Direction du Travail and de l'Emploi v Levy* [1992] ECLI:EU:C:1992:411, Opinion of AG Tesauro, para 4; Case C-324/93 *The Queen/ Secretary of State for the Home Department,* ex parte *Evans Medical and Macfarlan Smith* [1994] ECLI:EU:C:1994:357, Opinion of AG Lenz, para 30; Case C-84/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:359, para 53; Case C-62/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:358, para 44; Case C-205/06 *Commission v Austria* [2009] ECLI:EU:C:2009:118, para 33; Case C-249/06 *Commission v Sweden* [2009] ECLI:EU:C:2009:119, para 34; Case C-264/09 *Commission v Slovak Republic* [2011] ECLI:EU:C:2011:580, para 41.

134 *Commission v Malta* (Opinion of AG Sharpston) (n 99) para 4; Joined Cases C-39, 43, 85 and 88/81 *Halyvourgiki v Commission* [1982] ECLI:EU:C:1982:1, Opinion of AG Verloren Van Themaat, p 622; Case C-273/04 *Poland v Council* [2007] ECLI:EU:C:2007:361, Opinion of AG Poiares Maduro, para 52.

135 Case C-286/90 *Anklagemindigheden v Poulsen and Diva Navigation* [1992] ECLI:EU:C:1992:453, para 9; Wouters and Eeckhoutte (n 121) 9.

136 See, *ex multis*, Case C-162/96 *Racke v Hauptzollamt Mainz* [1997] ECLI:EU:C:1997:582, Opinion of AG Jacobs, paras 73-75; Case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* [2018] ECLI:EU:C:2018:972, Opinion of AG Kokott, para 54.

Even though general international law has been employed to interpret primary and secondary EU law, this is not to say that the EU Courts will go so far as to disapply EU law based on general international law in any scenario. First, the EU Courts have rejected the possibility of invoking general international law to dismiss the application of the EU Treaties. Given that the objective of a self-contained regime is precisely to regulate the legal relationship between the States-parties to it in a different, more specialised manner, a fall-back on general international law will only be possible to supplement, not to displace the provisions of the self-contained regime.[137] With regard to EU primary law, this argument draws further support from Article 48 TEU, which only allows for the explicit amendment of the Member States' obligations under the EU Treaties through the special process provided for thereunder.[138]

In the same vein, the EU Courts may have accepted their jurisdiction to ensure that secondary EU law complies with general international law, yet this alone does not render the latter invokable as grounds for legality review in any case. The case law seems, in fact, to imply that general international law may be relied upon in a more general way than solely to interpret and apply secondary EU law in conformity with it.[139] Under Article 3(5) TEU, the EU is to contribute to the strict observance and the development of international law. Taking Article 3(5) TEU as a legal basis, the CJEU has accepted that, when adopting an act, the EU is bound to respect international law in its entirety, including customary international

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137 *Parliament v Council* (AG Maduro) (n 73) para 29; also in that respect Case C-146/89 *Commission v United Kingdom* [1991] ECLI:EU:C:1991:294, paras 24-25; Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] ECLI:EU:C:1992:295, paras 10-11.

138 In *Defrenne*, the CJEU accepted that the EU Treaties may only be amended within the framework of what is now Article 48 TEU, thus rejecting the possibility of an informal amendment through recourse to general international law or to subsequent practices of the Member States, Case C-43/75 *Defrenne v SABENA* [1976] ECLI:EU:C:1976:56, para 58; Bruno De Witte, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources' in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 776. See further analysis in Chapter Six.

139 Wouters and Eeckhoutte (n 121) 16.

law, which is binding upon the EU institutions.[140] Against this background, it is possible in principle to invoke general international law as grounds for contesting the validity of secondary EU legislation. However, in upholding its jurisdiction to review the validity of a measure of secondary EU law on those grounds, the CJEU has enunciated two conditions; first, that such a rule must be binding upon the EU; and, second, that the rule at issue must be capable of conferring rights upon individuals, which they can invoke before the courts.[141] For the latter condition to be met: the rule of general international law at issue needs to be capable of calling into question the competence of the EU to adopt the act in question;[142] and for that act to be liable to affect rights, which the individual derives from EU law, or to create obligations under EU law in this regard.[143] This already restrictive test has been supplemented with an additional requirement, which further qualifies the cases where general international law could be successfully invoked to support the illegality of an act of the EU institutions. According to the case law, an act will only be found incompatible with general international law in cases where, by adopting that act, the EU institutions made a manifest error of assessment regarding the conditions for applying the rules of general international law.[144]

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140 Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECLI:EU:C:1998:293, paras 45-46; Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 101; *Poulsen* (n 135) para 9; see also *Wood Pulp (No 1)*, where the CJEU implicitly affirmed the possibility to invoke general international law as grounds for conducting legality review of EU secondary legislation, *Wood Pulp (No 1)* (n 131) para 23; also Alessandra Giannelli, 'Customary International Law in the European Union' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 105.

141 Joined Cases C-21-24/72 *International Fruit Company and Others* [1972] ECLI:EU:C:1972:115, paras 7-8.

142 *Wood Pulp (No 1)* (n 131) paras 15-18; *Air Transport Association of America* (n 140) para 107.

143 *Air Transport Association of America* (n 140) para 107.

144 *Racke* (CJEU) (n 140) para 52; *Air Transport Association of America* (n 140) para 110; see also Wouters and Eeckhoutte (n 121) 22; Konstadinides (n 115) 520.

A final function of general international law within the EU has been that of a 'gap-filler', providing the EU Courts with guidance in cases where EU law displays gaps on a certain issue that cannot be resolved within the self-contained regime.[145] In the absence of EU-specific rules, the EU Courts have occasionally resorted to the rules of customary international law to answer questions relating to various areas of EU law. Relevant examples can be drawn from the field of EU fisheries law, where the CJEU has consistently recognised the possibility of the Member States to fall back on the rules of general international law to determine the conditions for the registration of vessels to their registries and the right to fly their flag.[146] Similarly, the CJEU has had recourse to the rules of customary international law for the delineation of the conditions regarding the acquisition or loss of a Member State's nationality.[147]

Most recently, in *Wightman*, AG Campos Sánchez-Bordona took customary international law as a reference to determine whether a Member State, after notifying its intention to withdraw from the EU in accordance with Article 50 TEU, could (unilaterally) revoke that notification. First, the AG acknowledged the nature of the EU Treaties as international treaties forming the constituent instruments of the EU as an international organisation.[148] As such, he found the EU Treaties to be subject to interpretation under the rules of the VCLT, insofar as the latter embodied rules of customary international law.[149] The AG considered Article 50 TEU on the possibility to withdraw from the EU to constitute *lex specialis*

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145 Wouters and Eeckhoutte (n 121) 14; Konstadinides (n 115) 520.

146 Case C-221/89 *The Queen v Secretary of State for Transport,* ex parte *Factortame* [1991] ECLI:EU:C:1991:320, para 17; Case C-246/89 *Commission v United Kingdom* [1991] ECLI:EU:C:1991:375, para 15.

147 *Micheletti* (n 137) para 10; Case C-192/99 *Kaur* [2001] ECLI:EU:C:2001:106, para 19, where the CJEU further confirmed the nature of this rule as one of customary international law; Case C-135/08 *Rottmann* [2010] ECLI:EU:C:2010:104, para 53.

148 *Wightman (*AG Campos Sánchez-Bordona) (n 115) para 78.

149 ibid paras 78-79.

compared to the provisions of general international law on withdrawal from treaties reflected in the VCLT, thus claiming priority over them. However, to the AG a fall-back on the provisions of general international law remained possible to provide interpretative guidelines about issues that were not expressly dealt with by Article 50 TEU, as in the case at issue regarding the possibility to revoke withdrawal notifications.[150] In that vein, he concluded that

> Article 50 TEU [...] is [...] lex specialis in respect of the general rules of international law on withdrawal from treaties, but not a self-contained provision which exhaustively governs each and every detail of that withdrawal process. Thus, in order to fill the lacunae in Article 50 TEU, there is nothing to preclude recourse being had to Article 68 of the VCLT [...].[151]

Even though the CJEU did not fully replicate the AG's reasoning on this point, it also resorted to the provisions of the VCLT in that case. In its assessment, the CJEU referred to Articles 65-68 VCLT as an alternative legal basis to support its conclusion on the possibility unilaterally to withdraw the notification of withdrawal under Article 50 TEU, considering them in light of the preparatory works of the EU Treaties.[152]

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150 ibid para 82.

151 ibid para 85.

152 In particular, as part of the preparatory works of the failed Treaty establishing a Constitution for Europe, which first set out the provision on withdrawal as later included in the TEU, *Wightman* (CJEU) (n 71) paras 68, 70-71.

CHAPTER FOUR

THE CONCEPT OF CONFLICT IN THE INTERRELATION OF EU LAW WITH *INTER SE* AGREEMENTS

This Chapter provides the conceptual framework, within which the notion of conflict between EU Law and *inter se* agreements is to be grasped. It puts forward a broad definition of 'conflict', whereby EU law is understood in 'conflict' with an *inter se* agreement, when compliance with either of them: (i) leads or may lead to a violation of the other; (ii) frustrates or may frustrate its object and purpose, even in the absence of concrete incompatibility between specific provisions; or (iii) when the conclusion of the *inter se* agreement falls within the scope of exclusive EU competence. This delineation of 'conflict' rests on a broad construction of the concept's material scope based on two criteria: the deontic nature of the norms encapsulated by 'conflict'; and the requirement that EU law and the *inter se* agreement regulate the 'same subject-matter'.

INTRODUCTION

Before I enter into the discussion of the rules to avoid or deal with conflicts in the interrelation of EU law with *inter se* agreements, a preliminary matter is to define the very notion of conflict; only a 'conflict' between EU law and an *inter se* agreement can trigger the conflict avoidance and conflict resolution methods that may apply.

So, when does a 'conflict' between EU law and an *inter se* agreement arise? In the absence of a generally accepted, analytical definition[1] of the concept of conflict in EU law or international law, for present purposes EU law is considered in 'conflict' with an *inter se* agreement when compliance with the norms of either of them: (i) leads or may lead to a violation of those of the other; (ii) frustrates or may frustrate its object and purpose, even in the absence of concrete incompatibility between specific provisions; or (iii) when the *inter se* agreement falls within the scope of exclusive EU competence. The proposed approach rests on a broad construction of the concept's material scope based on two criteria: first, the

[1] Vranes defines an 'analytical definition' as one deduced from legal texts, which would, therefore, be binding, see Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 EJIL 395, 410.

deontic nature of the norms that may give rise to a 'conflict'; and, second, whether a finding of 'conflict' requires that EU law and the *inter se* agreement have the same subject matter. Throughout this Chapter, the terms 'conflict' and 'incompatibility' are used interchangeably.

4.1 The Lack of A General Definition of 'Conflict' between International Agreements

'Normative conflict is endemic to international law'.[2] The nature of public international law as a fragmented legal order,[3] combined with its increasing diversification and specialisation, has made conflicts among treaty norms a common phenomenon.[4] Yet the notion of conflict between international agreements currently remains one of the most complex and obscure concepts in international law. At the moment, there is no universally accepted definition of 'conflict' in international law.[5] No international legal instrument concretely defines what constitutes a 'conflict' nor is there a generally accepted definition in customary international law.

On the international plane, the VCLT deals with conflicts between international agreements. However, it does not elaborate on what the concept of 'conflict' actually entails. Article 59 VCLT provides that:

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2 Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 246 (A/CN.4/L.682).

3 Kirstin von der Decken, 'Article 30' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 540.

4 Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69; François Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the *Case of the Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*)' (2012) 25 Leiden Journal of International Law 1003.

5 Nele Matz-Lück, 'Treaties, Conflicts between', OUP Max Planck Encyclopaedia of International Law, available at https://ezproxy-prd.bodleian.ox.ac.uk:3405/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?rskey=aXx4yP&result=12&prd=MPIL accessed 10 January 2021; Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 Geo Wash Int'l L Rev 573, 575.

Article 59

Termination or Suspension of the Operation of a Treaty Implied by the Conclusion of a Later Treaty

A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. [...].

Moreover, Article 30 VCLT reads:

Article 30

Application of Successive Treaties Relating to the Same Subject-Matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

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

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States parties to both treaties the same rule applies as in paragraph 3.

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension in operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Articles 59 and 30 VCLT regulate the relationship between successive treaties found in a relationship of conflict. However, the application of Articles 59 and 30 VCLT presupposes

that a conflict between two international agreements has already been identified and do not provide any indication as to what constitutes a 'conflict' for their purposes.

The situation under EU law is similar. Article 351 TFEU is the only explicit reference in the EU Treaties on the status under EU law of international agreements concluded by the Member States.[6] It reads:

> The rights and obligations arising from agreements concluded before 1 January 1958, or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more third countries, on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Article 351 TFEU answers how 'incompatibilities' between a specific subset of extra-EU agreements and EU law are to be resolved. It confers priority upon extra-EU international agreements pre-dating their Member State counterpart's membership to the EU (prior extra-EU agreements) in case their provisions are incompatible with those of EU law and imposes an obligation on the Member State concerned to take all necessary measures to eliminate such incompatibilities.[7] However, it does not clarify what an 'incompatibility' that may trigger its application is.

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6 Jan Klabbers, *Treaty Conflict and the European Union* (OUP 2009) 10.

7 Joined Cases C-402/05 and 415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, paras 301-302; Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham Int'l L.J. 1304, 1321; Manuel Kellerbauer and Marcus Klamert, 'Article 351 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2066.

4.2 THE MATERIAL SCOPE OF 'CONFLICT' BETWEEN EU LAW AND *INTER SE* AGREEMENTS

As explained, there is no general definition of conflict between international agreements, including between EU law and other international agreements. Meanwhile, international *fora*, including the CJEU, have been reluctant to offer a clear-cut definition of 'conflict' between international agreements and have not yet fully clarified the conditions under which such a conflict can be perceived to exist.[8] In the same vein, despite the increasing interest of academic scholarship in the topic, only a few theorists have tackled treaty conflict by attempting to enunciate a general definition of the concept.[9]

Over the years, scholars have commonly argued that a 'conflict' could only arise between international agreements that overlap *rationae personae, rationae temporis* and *rationae materiae.*[10] The requirement of a *rationae personae* and *rationae temporis* overlap for a finding of 'conflict' between international agreements has been rather uncontroversial. *Rationae temporis,* for a 'conflict' to be identified, two international agreements need to have existed or interacted with one another at a certain point in time.[11] *Rationae personae*, a finding of conflict between two international agreements presupposes that at least one State

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8 W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 NYIL 3, 13; Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill 2018) 82.

9 For example, Klabbers delves deeply into the topic of conflict of treaty norms, but he focuses more on the causes of such normative conflicts and the methods for their resolution, rather than on the notion of conflict itself, Klabbers, *Treaty Conflict* (n 6).

10 Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 165; Ferguson (n 8) 60; see also the definition of 'conflict' in the Encyclopedia of Public International Law, *Encyclopedia of Public International Law – Volume 7: History of International Law, Foundations of International Law, Sources of International Law and the Law of Treaties* (North Holland Publishing Company 1984) 468.

11 Pauwelyn (n 10) 165; Klabbers, *Treaty Conflict* (n 6) 22; Hans Kelsen, 'Derogation' in Ralph A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (The American Society of Legal History 1962) 340.

is bound by both the allegedly conflicting agreements.[12] However, the delineation of the concept's material scope has been more problematic. In fact, academic scholarship and international *fora* have construed the material scope of 'conflict' in narrower or broader terms, depending on their approach of two interrelated, yet distinct criteria: the deontic nature of the norms that may give rise to a conflict; and the requirement for the international agreements at issue to have the same subject matter. Whether one opts for a narrower or broader construction of these two criteria is crucial, as the narrower the material scope of 'conflict', the more limited the number of cases that would qualify under the concept and, consequently, trigger any applicable conflict avoidance and conflict resolution methods.[13]

Before delving more deeply into what the notion of 'conflict' in the interrelation of EU law with *inter se* agreements entails and the specific conflict scenarios that may be identified, it is, therefore, necessary to delineate the concept's material scope. How broadly is the notion of a 'conflict' between EU law and an *inter se* agreement to be construed? To answer this question, the following section examines the different approaches enunciated about the material scope of 'conflict' between international agreements based on the above criteria, going on to transpose the discourse to the specific relationship between EU law and *inter se* agreements by reference to each of these criteria in turn.

4.2.1 The Deontic Nature of 'Conflicting' Norms

A first point of reference that has a direct bearing on how broadly the material scope of a 'conflict' between EU law and *inter se* agreements is to be understood is the deontic nature of the norms that may give rise to such a 'conflict'.

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12 Hans Kelsen, 'Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements – An Analysis of Article 103 of the Charter' (1948) 10 U Pitt L Rev 284, 285.

13 Pauwelyn (n 10) 172-173; Vranes (n 1) 398.

Based on their deontic logic, two types of norms may be distinguished; first, 'mandatory' norms, which impose an obligation on their addressee to do (obligatory norms) or not to do something (prohibitive norms); and, 'permissive' norms, which equip their addressee with the freedom to do or not to do something[14] and which may take the form of a permission or an exception to an obligation. Against the background of this typology, a 'conflict' may arise in the following scenarios:

(a) Between two obligatory norms concerning an action and its opposite (one norm requires A, while another requires -A);

(b) Between an obligatory and a prohibitive norm about the same action (one norm requires A and another prohibits A);

(c) Between a prohibitive and a permissive norm over the same action (one norm prohibits A and another allows for A); and

(d) Between an obligatory and a permissive norm over the same action (one norm requires A and another permits A).[15]

By reference to the adopted approach as regards the deontic nature of the 'conflicting' norms, academic scholarship has delineated the concept of conflict between international agreements in both narrower and broader terms. Strictly, a 'conflict' between international agreements would be identified only in cases of *obligations* that cannot be complied with at the same time. The term 'obligation' is used here to reflect the concept of mandatory norms altogether, including both obligatory and prohibitive norms. In that context, Jenks employed the notion of conflict strictly, only to cover mutually exclusive *obligations*. According to him:

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14 Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers 2003) 5; Pavlos Eleftheriadis, *Legal Rights* (OUP 2008) 86; see also George Henrik Von Wright, *Norm and Action. A Logical Enquiry* (Routledge 1963).

15 Ferguson (n 8) 78; Pauwelyn (n 10) 179; Vranes (n 1) 409.

> A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its *obligations* under both treaties.[16]

Kelsen also considered a conflict of norms to exist only

> when that which one of them decrees to be obligatory is incompatible with that which the other decrees to be obligatory, so that the observance or application of one norm necessarily or possibly involves the violation of the other.[17]

Koskenniemi further defined 'conflict' in the sense of mutually exclusive *obligations*. To him, the notion of conflict would presuppose the previous identification of two (sets of) obligations, one owed under each international agreement. Once this exercise has been completed, a 'conflict' would then be identified when these obligations could not be complied with at the same time.[18]

Conversely, in the broader sense the concept of conflict would encapsulate clashes between any type of opposite norms, be they mandatory or permissive. In that vein, Czaplinski and Danilenko delineate 'conflict' between international agreements broadly, as arising

> at the stage of application of the agreements when the later treaty in a particular situation violates the rights of any other party to the earlier treaty, or when the provision of the later treaty seriously infringes provisions of the earlier treaty which are indispensable for the effective implementation of the object or aim of that treaty.[19]

Von Wright enunciated a broad definition of incompatibility as well, covering both mandatory and permissive norms:

> [...] [A] set of commands and permissions is consistent (the norms compatible) if, and only if, it is logically possible, under any given condition of application, to obey all

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16 C Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) Brit YB of Int'l Law 401, 426 (Emphasis added).

17 Hans Kelsen, *General Theory of Norms* (OUP 1991) 123.

18 Koskenniemi (n 2) 129; see also *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, ICSID Case No ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis of 12 June 2020, para 208.

19 Czaplinski and Danilenko (n 8) 13.

> the commands collectively and avail oneself of each one of the permissions individually which apply on that occasion.[20]

Vranes also offered a broader definition of the concept of conflict by reference to this point. According to him, '[t]here is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated.'[21] Vranes characterises as legally inappropriate the 'narrow definition' of conflict, which defines the concept so as only to cover 'mutually exclusive obligations'.[22] To him, an adequate definition of the notion should also include cases, where one of the seemingly contradictory norms does not entail an obligation on the State, but provides it with a right instead. This right could take the form of a permission or an exception to the original obligation.[23] Schmalenbach also supports a broadly defined concept of conflict, rejecting Jenks's definition as 'too restrictive'.[24] To her, there is a normative conflict 'if the operation of one rule impeded the operation of another rule', irrespective of whether these rules are mandatory or permissive.[25] To support her view, she makes a compelling argument referring to conflicts with *ius cogens*. Inasmuch as peremptory rules may be either mandatory or permissive, 'a normative conflict arises if a treaty provision either allows conduct proscribed by *ius cogens* or prohibits conduct prescribed by *ius cogens*';[26] to accept otherwise would effectively mean to carve out a number of cases from the concept of conflict, which would otherwise be resolved in favour *ius cogens*. In a similar vein, Pauwelyn, whose work examined conflicts between the law of the WTO and other rules of public international law,

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20 Von Wright (n 14) 144.

21 Vranes (n 1) 415.

22 ibid 418.

23 ibid 412.

24 Kirsten Schmalenbach, 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 990.

25 ibid

26 ibid

defines normative conflict in what he considers to constitute 'the most open and non-dogmatic way'.[27] His view is that 'two norms are in a relationship of conflict if one constitutes, has led to or may lead to a breach of the other'.[28] Pauwelyn also rejects a narrow definition of conflict based on the deontic nature of the 'conflicting' norms.[29] According to him, the concept of conflict should also encapsulate permissive norms. The fact that most cases where the alleged 'conflict' relates to a divergence between an obligation and a right would be resolved in favour of the strictest norm does not mean that no 'conflict' could be identified at the outset. By carving out and refusing to recognise as normative conflicts these situations altogether, 'one essentially solves part of the problem by ignoring it'.[30] Pauwelyn considers that a narrow construction of 'conflict' ends up confusing the concept as such with the tools and techniques available to resolve it. To him, these conflict resolution techniques should only come into play at a later stage, when a 'conflict' has actually been identified. In his words, 'in those situations, the alleged conflict is not then solved by a rule on *how to solve* conflict but by *the very definition* of conflict.'[31] On the need to include permissive norms within the concept of conflict, Pauwelyn's definition has further been adopted by Milanović,[32] Boudreault[33] and Leiæ and Paulus.[34] On the other hand, Karl[35] and Sadat-

27 Pauwelyn (n 10) 169.

28 ibid 176.

29 ibid 170.

30 ibid 171.

31 ibid

32 Milanović (n 4) 72.

33 Boudreault (n 4) 1010.

34 Johann Ruben Leiæ and Andreas Paulus, 'Miscellaneous Provisions, Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Vol II, 3rd edn OUP) 2110, 2123.

35 Wolfram Karl, 'Conflicts between Treaties' in Rudolph Bernhardt (ed), *Encyclopaedia of Public International Law* (Vol VII, North Holland 1992) 468.

Akhavi[36] may not refer explicitly to permissive norms, but consider 'conflict' to cover, more generally, all cases where two treaty norms cannot be complied with simultaneously.

Meanwhile, the case law of international *fora* has also adopted different approaches to the deontic nature of the norms falling within the scope of 'conflict'. In the application of the conflict clauses of the WTO agreements, panels and the Appellate Body of the WTO have defined 'conflict' both narrowly and broadly. In the *EC – Bananas III* case, the panel examined the notion of conflict in the context of the General Interpretative Note to Annex 1A to the WTO Agreement.[37] In that case, the panel defined the concept broadly, as covering both mandatory and permissive norms. To the panel, 'conflict' comprised

> (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[38]

The panel explained in a footnote why it opted for the broad construction of the deontic modality of the norms falling within the material scope of 'conflict':

> For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, *such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements*

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36 Sadat-Akhavi (n 14) 1.

37 According to the General Interpretative Note, '[I]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization [...], the provision of the other agreement shall prevail to the extent of the conflict'.

38 *EC – Regime for the Importation, Sale and Distribution of Bananas – Complaint by Ecuador – Report of the Panel* (22 May 1997) WT/DS27/R/ECU, para 7.159.

> *listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994.* [...].[39]

By contrast, other WTO panels approached the notion of conflict narrowly. In *Turkey – Textiles*, the panel adopted Jenks's narrow conception of conflict, concluding that

> [t]here is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another.[40]

The panel in *Indonesia – Automobiles* followed a similar reasoning. The complainants claimed, *inter alia*, that Indonesia had violated Article III:2 of the GATT, according to which an imported product should not be subject to an internal tax more than that applied to a similar domestic product. As a defence, Indonesia invoked its rights under Article 27(3) of the WTO Agreement on Subsidies and Countervailing Measures, which explicitly allowed developing countries to maintain subsidies contingent on the use of domestic over imported goods for a specific period. The panel rejected Indonesia's defence and upheld a violation of the GATT. Even though the conflict clause of the General Interpretative Note[41] would confer priority upon the Subsidies Agreement over the GATT in case of a conflict between their provisions, the panel found that 'conflict' for the purposes of the Note could only arise in cases of 'mutually exclusive obligations'.[42] Consequently, a divergence between a mandatory and a permissive norm could not trigger the application of the conflict clause of the General Interpretative Note, as it did not qualify as a 'conflict' in the first place.[43]

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39 ibid fn 403 in the Report of the Panel (emphasis added).

40 *Turkey – Restrictions on Imports of Textile and Clothing Products – Report of the Panel* (31 May 1999) WT/DS34/R, para 9.92.

41 See n 37 above.

42 *Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel* (2 July 1997) WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, para 14.99.

43 Pauwelyn (n 10) 193; Vranes (n 1) 400.

On the other hand, the ICJ seems to endorse a broader construction of the material scope of conflict based on the deontic modality of the 'conflicting' norms. In *Lockerbie*, the ICJ confirmed, albeit by way of implication, that a 'conflict' may in fact arise between a mandatory and a permissive norm.[44] In its application to the ICJ for provisional measures against the UK and the US in that case, Libya had invoked a right it enjoyed under Article 7 of the Montreal Convention,[45] allowing it not to extradite the two Libyan suspects accused of the Lockerbie bombing but to try them in Libya.[46] Meanwhile, the UK and the US invoked a UNSC Resolution[47] imposing an obligation on Libya to surrender the two suspects for trial to the UK and the US. In its order, the ICJ rejected Libya's application, finding, at least *prima facie*, a 'conflict' to exist between Libya's obligations under Article 25 UN Charter[48] and UNSC Resolution 748 and the rights it enjoyed under the Montreal Convention, which could activate the conflict (primacy) clause of Article 103 UN Charter.[49]

In the EU context, the CJEU also construes the material scope of 'conflict' broadly, as comprising divergences both between mandatory norms and mandatory and permissive norms.

First, according to the CJEU's case law in the context of Article 351(2) TFEU, an 'incompatibility' between EU law and a prior extra-EU agreement would be identified when

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44 Pauwelyn (n 10) 186.

45 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971.

46 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3 (*Lockerbie UK*); *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States)* (Provisional Measures) [1992] ICJ Rep 114 (*Lockerbie US).*

47 UN Security Council Resolution 748 of 31 March 1992.

48 Article 25 UN Charter provides that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

49 *Lockerbie UK* (n 46) para 39; *Lockerbie US* (n 46) para 42.

the agreement at issue requires 'a particular course of action which Community law prohibits or prohibit[s] a course of action which Community law requires to be taken'.[50] In other words, 'conflict' would be perceived to arise when there is a divergence between an obligation prescribed under EU law and one under a prior extra-EU agreement, which precludes their cumulative application. To ascertain whether there is such an incompatibility, it is necessary to examine the content of the extra-EU agreement in question, on the one hand, and that of EU law, on the other. Against this background, the concept of incompatibility between EU law and a prior extra-EU agreement would be logically composed of two elements: a mandatory norm under EU law; and a mandatory norm under the international agreement.[51] The Court has consistently affirmed that the application of the conflict clause of Article 351 TFEU presupposes that the extra-EU agreement in question imposes an obligation on the Member State concerned, whose performance may still be required by its third country-counterpart.[52] On the other hand, with respect to the identification of an EU law obligation, the reasoning for a finding of 'incompatibility' is the same as for determining an infringement of EU law for the purposes of Article 258 TFEU.[53]

At the same time, the CJEU has affirmed that the concept of incompatibility in the sense of Article 351(2) TFEU also encapsulates cases of conflict between the Member States'

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50 Case C-324/93 *The Queen/ Secretary of State for the Home Department,* ex parte *Evans Medical and Macfarlan Smith* [1994] ECLI:EU:C:1994:357, Opinion of AG Lenz, para 34.

51 Case C-205/06 *Commission v Austria* [2008] ECLI:EU:C:2008:391, Opinion of AG Poiares Maduro, para 18.

52 Case C-158/91 *Ministère Public and Direction du Travail et de l'Emploi v Levy* [1993] ECLI:EU:C:1993:332, para 13; Case C-324/93 *The Queen/ Secretary of State for the Home Department,* ex parte *Evans Medical and Macfarlan Smith* [1995] ECLI:EU:C:1995:84, para 28; Case C-124/95 *The Queen,* ex parte *Centro-Com v HM Treasury and Bank of England* [1997] ECLI:EU:C:1997:8, para 57; Joined Cases C-364/95 and 365/95 *T-Port v Hauptzollamt Hamburg-Jonas* [1998] ECLI:EU:C:1998:95, para 60; Case C-216/01 *Budėjovickÿ Budvar* [2003] ECLI:EU:C:2003:618, para 146; Case C-264/09 *Commission v Slovak Republic* [2011] ECLI:EU:C:2011:580, para 42.

53 *Commission v Austria* (AG Poiares Maduro) (n 51) fn 5 in the Opinion.

rights under EU law and their obligations under the extra-EU agreement. According to the Court, there is an incompatibility each time an extra-EU agreement does not allow the Member State concerned to exercise 'its rights and fulfil its obligations as a member of the Community'.[54] However, the Court has clarified that the opposite scenario is not covered under Article 351 TFEU. The CJEU has consistently found that 'incompatibility' does not comprise divergences among the Member States' obligations under EU law and their rights stemming from the extra-EU agreement.[55] In other words, a Member State may not invoke its rights under a prior extra-EU agreement to carve out its EU law obligations towards other Member States. As the *ratio* behind Article 351 TFEU is to ensure respect for the Member States' pre-existing contractual obligations towards third states,[56] the rights protected under that Article are only those of the third states involved. Therefore, clashes between the Member States' obligations under EU law and their rights under the extra-EU agreement would not fall within the notion of incompatibility. Based on the CJEU's case law, the typology of norms covered under 'incompatibility' in the sense of Article 351(2) TFEU would, therefore, comprise the following:

(a) divergences between a mandatory norm under EU law and another mandatory norm under an extra-EU agreement;

(b) divergences between a permissive norm under EU law and a mandatory norm under an extra-EU agreement;

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54 Case C-205/06 *Commission v Austria* [2009] ECLI:EU:C:2009:118, para 38; Case C-249/06 *Commission v Sweden* [2009] ECLI:EU:C:2009:119, para 38; Case C-118/07 *Commission v Finland* [2009] ECLI:EU:C:2009:525, Opinion of AG Sharpston, para 21.

55 Case C-473/93 *Commission v Luxembourg* [1996] ECLI:EU:C:1996:263, para 40; Case C-147/03 *Commission v Austria* [2005] ECLI:EU:C:2005:263, para 73; Case C-203/03 *Commission v Austria* [2005] ECLI:EU:C:2005:76, paras 57-59; *Levy* (n 52) para 12.

56 Case C-10/61 *Commission v Italy* [1962] ECLI:EU:C:1962:2.

(c) divergences between a mandatory norm under EU law and a permissive norm under an extra-EU agreement, on condition that the permissive norm operates in favour of the third country-counterpart and not the Member State.

In light of the above analysis, in this thesis I also approach the deontic nature of the norms to be encapsulated under 'conflict' in a broader sense. For present purposes, a 'conflict' between EU law and an *inter se* agreement should cover divergences both between mandatory norms, as well as between mandatory and permissive norms. A broad construction of 'conflict' on this point would allow for a clearer distinction between the conceptual definition of 'conflict' (when a conflict exists) and the applicable conflict rule(s) (how, once identified, such a conflict is to be tackled or avoided altogether). Under this approach, any normative divergence between EU law and an *inter se* agreement would (at least *prima facie*) qualify as a 'conflict'.[57] The follow-up question of how such 'conflict' would be dealt with would then be tackled under the applicable conflict avoidance and conflict resolution methods.

4.2.2 The Sameness of Subject Matter: An Additional Requirement for Finding a 'Conflict'?

The second criterion for delineating the material scope of 'conflict' in the interrelation of EU law with *inter se* agreements is the (additional) requirement that they relate to the same subject matter. Depending on how one approaches this point, the notional spectrum of 'conflict' between EU law and *inter se* agreements may be construed in a stricter or looser manner. Strictly, a *rationae materiae* overlap would operate as a filter to a finding of 'conflict'; EU law and an *inter se* agreement would be in a relationship of conflict only if they cover the same subject matter. In any other case, identified divergences would fall

[57] See also Vranes (n 1) 396; Pauwelyn (n 10) 171.

outside the scope of 'conflict' and, therefore, that of the applicable conflict avoidance and conflict resolution methods. On the other hand, in a broader sense the sameness of subject matter would not be a precondition for a 'conflict' to be identified; instead, it would be perceived itself as a (broader) form of conflict between EU law and the *inter se* agreement in question, capable of triggering the applicable conflict rules.[58]

Over the years, international *fora* as well as several scholars[59] have consistently employed the 'same subject-matter' criterion as a filter to a finding of 'conflict' between international agreements. The ICJ seems to have also endorsed a narrower approach of 'conflict' on this point. In its judgment in *Jurisdictional Immunities of the State*,[60] Germany claimed that Italy had violated its obligations under international law by denying it sovereign immunity in proceedings before Italian courts regarding civil claims for violations of international humanitarian law committed by the German Reich in the period between 1943-1945.[61] Italy argued, *inter alia*, that, because of the gravity of Germany's violations, to have granted it immunity under the circumstances would have violated peremptory norms of international humanitarian law. However, the ICJ rejected Italy's argument, as it saw no normative conflict in that case. To the ICJ, there could be no conflict when 'the two sets of rules address

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58 See also Konstantina Georgaki and Thomas-Nektarios Papanastasiou, 'The Impact of *Achmea* on Investor-State Arbitration under Intra-EU BITs: A Treaty Law Perspective' (2019) XXXIX Polish Yearbook of International Law 209, 219.

59 See, *ex multis*, Hans Aufricht, 'Supersession of Treaties in International Law' (1952) 37 Cornell Law Quarterly 655, 665-666; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 Journal of World Trade 1081, 1084; Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' (2009) 58 Int'l & Comp L.Q. 297, 304; Ahmad Ali Ghouri, 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU member States with the EC Treaty: Individual and Collective Options' (2010) 16 ELJ 806, 813; August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations' (2012) 2 Legal Issues of Economic Integration 39, 165; Christina Binder, 'A Treaty Law Perspective on Intra-EU BITs' (2016) 17 Journal of World Investment & Trade 964, 970; Pauwelyn (n 10) 165; Borgen (n 5) 580.

60 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 99.

61 Also Boudreault (n 4) 1004.

different matters',[62] as would be the case where one norm is procedural and another substantive in character. In the court's words

> [...] recognizing the immunity of a foreign State in accordance with customary international law [a procedural norm] does not amount to recognizing as lawful a situation created by a breach of a jus cogens rule [a substantive norm], or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[63]

The sameness of subject matter criterion has more commonly been treated as a filter to establishing 'conflict' in the application of the conflict rules of Articles 59 and 30 VCLT.[64] Even though the VCLT does not define 'conflict', these Articles appear to presuppose that the international agreements in question relate to the 'same subject-matter'.[65] Article 59(1) VCLT provides that '[a] treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter [...]', whereas Article 30(1) VCLT also refers to '[...] the right and obligations of States parties to successive treaties relating to the same subject-matter [...]'. This wording has largely influenced the scholarly view that a

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62 *Jurisdictional Immunities of the State* (n 60) para 93.

63 ibid. Under Article 41 of the ILC's articles on state responsibility, '[N]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [namely a serious breach arising out of a peremptory norm], nor render aid or assistance in maintaining that situation'.

64 See, *ex multis*, *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, para 74; *Achmea B.V. v the Slovak Republic (former Eureko B.V.),* PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, paras 239, 258; *European American Investment Bank AG (Austria) v Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para 169 (*EURAM*); *Anglia Auto Accessories Ltd v Czech Republic*, SCC Case No V2014/181, Final Award of 10 March 2017, paras 114-116; *Ivan Peter Busta and James Peter Busta v Czech Republic*, SCC Case No V2015/014, Final Award of 10 March 2017, paras 114-116; *Marfin Investment Group Holdings SA and Others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award of 26 July 2018, para 585; *Eskosol S.p.a. in Liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on the Inapplicability of the Energy Charter Treaty to Intra-EU Disputes of 7 May 2019, para 136; *Magyar Farming Company Ltd, Kintyre Kft and Inizia Zrt v Hungary*, ICSID Case No ARB/17/27, Award of 13 November 2019, para 236; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para 273; *Addiko Bank* (n 18) para 210.

65 Von der Decken (n 3) 544-545; Alexander Orakhelashvili, 'Article 30, Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 764; Thomas Giegerich, 'Article 59' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 1084.

finding of 'conflict' between international agreements requires that they also overlap *rationae materiae*. For example, Pauwelyn takes it for granted that two international agreements need to relate to the same subject matter for a conflict to arise that will trigger the application of Articles 59 and 30 VCLT, without attempting to justify his reasoning on this point.[66]

However, a closer look at Articles 59 and 30 VCLT proves why this is not the case. Rather, the treatment of the sameness of subject matter as a filter to a finding of 'conflict' between international agreements is based on a misinterpretation of the relevant conflict rules.[67]

First, examined against the background of the VCLT's *travaux préparatoires*, it is clear that the sameness of subject-matter was never meant to narrow down the scope of 'conflict', thus limiting the cases falling within the scope of Articles 59 and 30 VCLT. It was instead conceived as a (broader) form of conflict between international agreements that could trigger itself the application of these conflict rules. Based on the commentary on the final ILC draft, Article 59 VCLT (then Draft Article 56) was meant to codify the principles developed by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia and Bulgaria* case.[68] That case concerned the possibility to consider an earlier agreement implicitly terminated because of a later agreement between the same contracting parties. According to Judge Anzilotti

> [...] it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous

66 Pauwelyn (n 10) 284.

67 See also Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 194.

68 [1939] PCIJ Series A/B no 77. See ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session, 4 May – 19 July 1966' (1966) 1 Yearbook of the International Law Commission 1, 253 (A/6309/Rev 1); also Pauwelyn (n 10) 283.

> provisions, *or* that the whole matter which formed the subject of these latter is henceforth governed by the new provisions.[69]

As the above passage indicates, Judge Anzilotti envisaged two forms of conflict that could trigger the tacit termination of an earlier international agreement, a stricter and a broader one. To him, a previous international agreement would be considered implicitly terminated under one (or both) of the following scenarios: strictly, if the provisions of the later agreement were incompatible with those of the previous one; or, more broadly, where the whole matter forming the subject of the previous agreement would henceforth be governed by the new provisions, even in the absence of concrete incompatibility between specific norms. Although the case in question fell within the first category (concerning 'two conventions between the Belgian Government and the Bulgarian Government which lay down different rules for the same thing'),[70] it is clear that Judge Anzilotti did not use the wording 'relating to the same subject-matter' as a filter to the application of the *lex posterior*. Instead, he employed it as a (broader) form of conflict, sufficient to cause itself the tacit termination of the earlier agreement. This was further recognised by the commentary to what was then Article 56, which mentions that

> the *two tests* put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the majority of the Commission to contain the essence of the matter.[71]

This is also the case as regards Article 30 VCLT. The ILC Draft of 1964 of what was then Article 63 used the following wording:

> […] the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

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69 *Electricity Company of Sofia and Bulgaria* (n 68) 92 (emphasis added).

70 ibid 89.

71 ILC (n 68) 253 (emphasis added).

At that point in time, the sole criterion for the application of Article 30 VCLT was 'incompatibility', namely conflict. Only in the ILC Final Draft, were the words 'the provisions of which are incompatible' replaced by 'relating to the same subject-matter'. The accompanying commentary explains the reason behind that change:

> On re-examining the article at the present session the Commission felt that, although the rules may have particular importance in cases of incompatibility, they should be stated more generally in terms of the application of successive treaties to the same subject matter. […] Consequently, while the substance of the article remains the same as in the 1964 text, its wording has been revised in the manner indicated.[72]

In a similar vein, it is the wording of Articles 59 and 30 VCLT that introduces the notion of incompatibility. Article 59(1)(b) VCLT refers to the provisions of a later treaty that are 'so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time'. Article 30(3) VCLT provides that '[...] the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. The same is true also of the conflict rule of Article 30(4) VCLT, which triggers the application of Article 30(3) VCLT by way of *renvoi*. The provisions of a later international agreement may be incompatible with those of an earlier one even if they do not regulate the same subject matter.[73] Conversely, the fact that two successive treaties overlap *rationae materiae* does not of itself preclude their harmonious coexistence, unless their simultaneous application in a given case can be excluded.[74]

In any event, the sameness of subject matter is not an appropriate filter to a finding of 'conflict' between international agreements even outside the context of the *lex posterior*

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72 Ralf Günther Wetzel and Dietrich Rauschning, *The Vienna Convention on the Law of the Treaties Travaux Préparatoires* (Metzner 1978) 227-236.

73 See also Benedetto Conforti, 'Consistency among Treaty Obligations' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 187, 188.

74 Also Koskenniemi (n 2) 18; Egbert Willem Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1989) 59 Brit YB of Int'l Law 75, 100.

conflict rules. First, it is entirely fictitious. In practice, it is quite common for international agreements to address multiple – and at times even entirely irrelevant – matters at the same time. This is the case, for example, with Treaties of Amity and Friendship, Commerce and Navigation Treaties, which regulated trade, investment, consular/diplomatic relations, use of force, marine insurance, law of the sea, etc. in a single document.[75] Second, it is doctrinally unsound, given that its application would require a contrived and potentially arbitrary prior classification of treaties into strictly delineated categories.[76] In fact, it could be claimed that the subject matter to which an international agreement relates lies 'in the eyes of the beholder'. Criticism on this point was expressed by Boudreault, who considered that if 'conflict' were only to exist between norms dealing with the same subject matter, the concept would essentially depend on the way such subject matter is described in each case.[77] Similarly, in the ILC Report on Fragmentation Koskenniemi rejected the sameness of subject matter criterion, pointing to the risk of States being able to deviate from their international law obligations 'simply by qualifying a novel treaty in terms of a novel "subject"'.[78] Finally, strict adherence to the sameness of subject matter criterion for a finding of 'conflict' may inevitably lead to inequitable outcomes. On that basis, Judge Cançado Trindade strongly criticised the requirement of a *rationae materiae* overlap for a finding of 'conflict'. In his dissenting opinion in the *Jurisdictional Immunities of the State* case, he considered that normative conflict should not be rejected solely on sameness of subject matter grounds, as

75 See Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013) 24-25.

76 Koskenniemi (n 2) 18.

77 Boudreault (n 4) 1007-1008.

78 ibid 130.

to do so could potentially lead to 'a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences'.[79]

Against this background, Koskenniemi proposed an alternative, functional test for the assessment of 'conflict':

> [T]he test of whether two treaties deal with the "same subject matter" is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way.[80]

This test has been employed in practice by international *fora* dealing with conflicts of treaty norms, albeit in a limited number of cases.[81]

The CJEU also endorses the functional approach of 'conflict' on this point. First, the Court has clarified that the notion of incompatibility in the sense of Article 351(2) TFEU does not require for the extra-EU agreement in question and EU law to overlap *rationae materiae*.[82] For the purposes of that Article, 'incompatibility' has a general scope; it is the consistent case law of the CJEU that the conflict clause set out in Article 351 TFEU applies to any international agreement that is capable of affecting the application of the EU Treaties, irrespective of its subject matter.[83] In fact, the CJEU has affirmed a 'conflict' between EU

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79 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Dissenting Opinion of Judge Cançado Trindade) [2012] ICJ Rep 99, paras 129, 296.

80 ibid 129.

81 See *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Decision on Jurisdiction of 7 February 2020, paras 169-170; also *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Statement of Dissent of Professor Marcelo Cohen of 3 February 2020, para 23.

82 Panos Koutrakos, 'Case C-205/06, *Commission v. Austria*, Judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported; Case C-249/06, *Commission v. Sweden*, Judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported' (2009) 46 CMLR 2059, 2060.

83 Case C-812/79 *Attorney General v Burgoa* [1980] ECLI:EU:C:1980:231, para 6; *Levy* (n 55) para 11; Panos Koutrakos, *EU International Relations Law* (2nd edn, Blooomsbury 2015) 302; Kellerbauer and Klamert (n 7) 2066.

law and international agreements pertaining to various legal fields, ranging from fisheries[84] to cross-border investment protection.[85]

The CJEU has also consistently affirmed that the sameness of subject matter is not a prerequisite to a finding of 'conflict' between EU law and international agreements of the Member States when delineating the EU's external competence, namely its capacity to conclude international agreements with third countries or international organisations.[86] Article 216(1) TFEU provides that

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is [...] likely to affect common rules or alter their scope.

Moreover, Article 3(2) TFEU uses a similar wording and reads:

> [T]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

An international agreement concluded by the Member States may 'affect common rules or alter their scope', thus conflicting with Articles 3(2) and 216(1) TFEU as falling under the EU's exclusive or shared external competence respectively,[87] even if the areas covered by

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84 See *Burgoa* (n 83), which concerned the compatibility of the London Fisheries Convention of 9 March 1964 with Council Regulation No 1376/78 extending certain interim measures for the conservation and management of fishery resources applicable to vessels flying the flag of Spain to 31 July 1978 [1978] OJ L 167, 9-10.

85 *Commission v Austria* (n 54), *Commission v Sweden* (n 54), and Case C-118/07 *Commission v Finland* [2009] ECLI:EU:C:2009:715, which concerned the compatibility of extra-EU BITs concluded by Austria, Sweden and Finland with the provisions of the EU Treaties on the free movement of capital.

86 Case C-600/14 *Germany v Council* [2017] ECLI:EU:C:2017:296, Opinion of AG Szpunar, para 65 (*COTIF*).

87 The CJEU explicitly distinguishes between Articles 216(1) and 3(2) TFEU as regulating the EU's shared and exclusive external EU competence respectively. Despite their nearly identical wording, to the Court the scope of Article 3(2) TFEU is narrower; the situations in which the Union has an external competence pursuant to Article 216(1) TFEU are not limited to the scenarios set out in Article 3(2) TFEU, where the Union's external competence is exclusive, Case C-600/14 *Germany v Council* [2017] ECLI:EU:C:2017:935, paras 47 and 50 (*COTIF*). To accept otherwise would mean to deprive Article 216(1) TFEU of any meaningful content, as then the two provisions would essentially coincide, see Friedrich Erlbacher, 'Article 216' in Manuel Kellerbauer, Marcus Klamert and Jonathan

the international agreement and the EU rules do not fully coincide. To the Court, the scope of common EU rules may equally be affected or altered when the international commitments of the Member States fall within an area largely covered by EU law instead.[88] In applying this test, the Court's assessment rests not only on the subject matter of the EU rules at issue, but also on their nature and content.[89]

Considering the above, it is preferable to adopt a broader, functional approach to the material scope of 'conflict' based on this point. For present purposes, the definition of 'conflict' does not prescribe a sameness of subject matter requirement; a 'conflict' between EU law and an *inter se* agreement should not be precluded if their regulatory scope is not identical. What matters is not the stringent criterion of a *rationae materiae* overlap between EU law and the *inter se* agreement at issue. Instead, as will be explained immediately below, the critical question should be whether compliance with the norms of EU law or the *inter se* agreement: (i) leads or may lead to a violation of those of the *inter se* agreement or EU law respectively; (ii) frustrates or may frustrate its object and purpose; or (iii) if the *inter se* agreement falls within the scope of an exclusive EU competence, irrespective of whether the areas covered by EU law and the agreement at issue fully coincide.[90]

Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1643, 1647.

88 Opinion 2/91 *Convention No 170 of the ILO* [1993] ECLI:EU:C:1993:106, para 25; Case C-114/12 *Commission v Council* [2014] ECLI:EU:C:2014:2151, paras 69 and 70; Opinion 1/13 *Accession of Third States to the Hague Convention* [2014] ECLI:EU:C:2014:2303, paras 72 and 73; Opinion 3/15 *Marrakesh Treaty on Access to Published Works* [2017] ECLI:EU:C:2017:114, paras 106 and 107; Opinion 2/15 *Free Trade Agreement with Singapore* [2017] ECLI:EU:C:2017:376, para 181.

89 Opinion 1/03 *New Lugano Convention* [2006] ECLI:EU:C:2006:81, para 126; also Nikolaos Lavranos, 'Protecting EU Law from International Law' (2010) 15 European Foreign Affairs Review 265, 276.

90 See also *Opinion 1/03* (n 89) para 126.

4.3 DEFINING 'CONFLICT' BETWEEN EU LAW AND *INTER SE* AGREEMENTS

Having delineated the material scope of the concept, this section examines when a 'conflict' between EU law and *inter se* agreements would actually arise. Pursuant to Article 31(4) VCLT, 'a special meaning shall be given to a [treaty] term if it is established that the parties so intended'. However, there is no reference in the EU Treaties to indicate that the Member States meant to give such a special meaning to the concept of 'conflict' in the interrelation of EU law with *inter se* or any other type of international agreements for that matter. Since no special language can be found in primary or secondary EU legislation, this Chapter adopts a broad, albeit stipulative, definition of 'conflict' between EU law and *inter se* agreements, drawing inspiration from the scholarly contributions to the notion of conflict under international law and the relevant case law of international *fora*, including the ICJ and the CJEU. For the purposes of this thesis, EU law is perceived to be in 'conflict' with an *inter se* agreement under three different scenarios: first, when compliance with the norms of either of them leads or may lead to a violation of those of the other (direct conflicts); second, when compliance with the norms of either of them frustrates or may frustrate the object and purpose of the other, even if there is no concrete incompatibility between specific provisions (indirect conflicts and together with direct conflicts collectively referred to as substantive conflicts); finally, there is a 'conflict' between EU law and an *inter se* agreement when the latter falls within the scope of exclusive EU competence (*per se* conflicts). A broad construction of the scenarios, under which a conflict with EU law arises, would increase the number of clashes that qualify as a 'conflict' to be subsequently dealt with pursuant to the applicable conflict avoidance and resolution methods of international law.

4.3.1 Substantive Conflicts

An *inter se* agreement is in conflict with EU law when either of them imposes certain obligations or grants certain rights that, once complied with or exercised, will constitute a

violation of (the norms of) the other ('substantive' conflicts). Substantive conflicts do not arise *in abstracto*; they are only identified *in concreto*, when the simultaneous application of both EU law and an *inter se* agreement to the same set of facts would necessarily lead to irreconcilable outcomes.[91]

Depending on how broadly substantive conflicts between EU law and *inter se* agreements are to be understood, a two-fold distinction can be made: first, a substantive conflict can be perceived to arise when compliance with one norm under EU law would necessarily entail a violation of another norm under an *inter se* agreement or *vice versa* (direct conflicts). Second, substantive conflicts may also comprise cases where there is no outright conflict between EU law and the *inter se* agreement, in the sense of a direct incompatibility between specific norms, but compliance with norms of EU law or the *inter se* agreement would nevertheless frustrate the object and purpose of the *inter se* agreement or EU law respectively (indirect conflicts).[92]

Over the years, international scholarship and case law have approached 'conflict' between international agreements both narrowly and broadly on this point. In the narrow sense, 'conflict' would only comprise direct conflict, namely cases where the norms of one international agreement strictly prevent compliance with the norms of another agreement. This narrow construction of conflict was indirectly endorsed by the ICJ in *Jurisdictional Immunities of the State*, where the ICJ ruled that

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91 Pauwelyn (n 10) 176.

92 Schütze makes a similar distinction in the context of conflicts between EU law and national legislation. He distinguishes between cases where 'an actual or potential conflict between Member State law and Community legislation' can be identified ('rule pre-emption') and cases '*where there is no outright conflict between federal (or Community) and state law* but where a state measure is alleged to be incompatible with the general policy objectives which federal (or Community) law seeks to achieve', see Robert Schütze, 'Supremacy without Pre-Emption: The Very Slowly Emergent Doctrine of Community Pre-Emption' (2006) 43 CMLR 1023, 1036-1037. this distinction is further adopted by Arena, see Amedeo Arena, 'The Twin Doctrines of Supremacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 324.

> To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.[93]

Moreover, this approach has been adopted by a number of arbitral tribunals entertaining disputes under intra-EU BITs, according to which a conflict occurs when compliance with one treaty necessarily causes a breach of the other.[94] In that vein, Jenks also distinguished between broadly defined divergences and 'conflicts' in the strict sense, characterising as such only cases of direct conflict between the obligations of the parties under two international agreements. Jenks acknowledged that

> [T]he possibility of a conflict arises whenever instruments which are in force for different groups of parties deal with related questions or have repercussions upon one another in any other way [...][95]

However, he did not identify such a divergence between international agreements as a 'conflict', even though he accepted that it could nevertheless defeat the purpose of either or both international agreements in question and result in the loss of their practical importance.[96] Jenks's strict approach of 'conflict' is further supported by Marceau. According to her,

> since the main objective of interpretation rules is to identify the intention of the parties, "conflicts" should be interpreted narrowly, in order to keep as much as possible of the agreement of the parties.[97]

By contrast, to other scholars, like Koskenniemi, the concept of conflict between international agreements should comprise both direct and indirect conflicts. A 'conflict' would always exist when the act of complying with one (set of) norm(s) under an

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93 *Jurisdictional Immunities of the State* (n 60) para 95.

94 *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v Republic of Croatia*, ICSID Case No ARB/17/34, Decision on Respondent's Jurisdictional Objections of 30 September 2020, para 134; *EURAM* (n 64) paras 216-217.

95 Jenks (n 16) 404.

96 ibid 426.

97 Marceau (n 59) 1086.

international agreement necessarily brings a State into non-compliance with another one under a different agreement. However, two international agreements would equally be incompatible when compliance with the norms of one of them may, more generally, frustrate the object and purpose of the other.[98] This reading would also require a finding that the international agreements under examination cannot be cumulatively applied to the same set of facts. Yet this would not necessarily mean that the agreements at issue provide for flatly inconsistent norms; they could also provide for complementary norms or impose parallel or additional obligations instead. Bartels also advocates in favour of a wider notion of conflict by reference to this point. Drawing arguments from the wording of Articles 18 and 41 VCLT,[99] he considers that '[a] treaty which defeated the object and purpose of the earlier treaty should be seen as conflicting with this earlier treaty'.[100] Similarly, Lauterpacht's interpretation of the term 'inconsistency' used in Article 20 of the Covenant of the League of Nations[101] covered not only cases of 'patent inconsistency appearing on the face of the treaty', but also of 'potential or latent inconsistency'.[102] As such, he characterised cases where 'the continued validity or operation [of a treaty] is incompatible with the negative or positive obligations of the Covenant', even without there being a conflict between specific provisions.

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98 Koskenniemi (n 2) 19.

99 Under Article 18 VCLT, a State that has signed but not ratified a treaty is obliged to refrain from acts that would defeat its object and purpose. At the same time, Article 41 VCLT prohibits parties to a multilateral treaty from concluding any treaty *inter se* that is incompatible with the effective execution of the object and purpose of the main treaty as a whole.

100 Lorand Bartels, 'The Relationship between Treaties', [2001] Paper for CIEL.

101 According to Article 20, '[T]he Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.'

102 Hersch Lauterpacht, 'The Covenant as the "Higher Law"' (1936) 17 Brit YB of Int'l Law 54, 58.

As a self-contained regime, EU law adheres to a broad definition of conflict, comprising cases of both direct and indirect conflicts. First, a 'conflict' between EU law and an international agreement can be established when there is an incompatibility between specific norms (be they mandatory or permissive). A recent example of such a direct conflict was identified by the CJEU in *Achmea*, where the Court found ISA clauses in *inter se* agreements in the field of cross-border investment protection to be incompatible with Articles 267 and 344 TFEU.[103]

At the same time, the notion of conflict also encapsulates indirect conflicts; a 'conflict' between EU law and an international agreement may equally be identified when compliance with the norms of the agreement would be liable to affect, alter or hinder the scope or the practical effectiveness of EU legislation. Such a broad construction of 'conflict' finds support in both the textual interpretation of the EU Treaties and the CJEU's case law.

First, in the context of the EU's external competence under Articles 216(1) and 3(2) TFEU, the Member States may be impeded from exercising their treaty-making power when the conclusion of an international agreement may jeopardise common rules or alter their scope, irrespective of whether a direct conflict between EU law and specific provisions of the (envisaged) agreement can be identified.[104] Further guidance on this point can be drawn from the CJEU's well-established case law in the field of external EU competence, which the above Articles codify.[105] In *ERTA*, the CJEU examined to what extent the Member States

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103 Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158; see also the analysis in Chapter One.

104 Case C-467/98 *Commission v Denmark* [2002] ECLI:EU:C:2002:625, para 82; *Opinion 2/91* (n 88) paras 25 and 26.

105 *Commission v Council* (n 88) paras 66-67; Marcus Klamert, 'Article 3 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 366.

were able to conclude an international agreement (the ERTA) that could have repercussions for the EU's competence in the field of road transport. The Court ruled that

> [...] to the extent to which the Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.[106]
>
> [...] These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions *would be incompatible with the unity of the Common Market and the uniform application of community law*.[107]

The *ERTA* doctrine has been consistently upheld since then.[108] According to the CJEU, for the EU's external competence to be established, it is not necessary to prove that there is or would be a direct conflict between common (EU) rules and the international commitments in question.[109] Instead, what is decisive is 'whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish', to preserve the full effectiveness of EU law.[110]

This broad construction of 'conflict' is also in line with the CJEU's case law in the context of Article 351(2) TFEU. The Court has consistently found the concept of incompatibility in the sense of Article 351(2) TFEU to cover concrete clashes between the provisions of EU law and those of an extra-EU international agreement. To the CJEU, even the risk of conflict between EU law and an extra-EU agreement suffices to trigger the application of Article 351(2) TFEU.[111] Meanwhile, an extra-EU agreement would also be found incompatible with

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106 Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECLI:EU:C:1971:32, para 22.

107 ibid para 31 (Emphasis added).

108 See, *ex multis*, *Opinion 3/15* (n 88) para 105; *Opinion 2/15* (n 88) para 180; *Opinion 1/13* (n 88) para 71; Case C-66/13 *Green Network* [2014] ECLI:EU:C:2014:2399, para 29; *Commission v Council* (n 88) para 68.

109 *Opinion 2/91* (n 88) para 25.

110 *Opinion 1/13* (n 88) para 74; *Opinion 1/03* (n 89) para 128.

111 *Commission v Austria* (n 54) para 42.

EU law for the purposes of Article 351(2) TFEU, when it is liable to jeopardise the effectiveness of EU legislation, existing or even potential.

The Court's reasoning on this last point is clearly reflected in its *extra-EU BITs* rulings.[112] In those cases, the Commission had brought infringement proceedings against Austria, Sweden and Finland for their failure to comply with their duty under Article 351(2) TFEU to eliminate the alleged incompatibility of transfer clauses[113] contained in a number of extra-EU BITs with the EU law provisions on the free movement of capital. Albeit protective of the free movement of capital to and from third countries in accordance with Article 63 TFEU, the Commission argued that: transfer clauses could hinder the effectiveness of (possible) restrictive measures pursuant to what are now Articles 64(2), 66 and 75 TFEU;[114] and the absence of any reference in the BITs to the Member States' right to apply restrictive

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112 See n 54; also *Commission v Finland* (n 85).

113 'Transfer clauses' are commonly included in BITs and guarantee to the investors of each contracting party the free transfer, in freely convertible currency, of payments relating to an investment, see for example Article 7 of the Finland-Belarus BIT (2006), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/298/download> accessed 12 September 2020.

114 *Commission v Austria* (n 54) para 4; *Commission v Finland* (n 85) para 6; *Commission v Sweden* (n 54) para 4.

Under Article 64(2) TFEU, '[W]hilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets'.

Under Article 66 TFEU, '[W]here, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary'.

Under Article 75 TFEU, '[W]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. [...]'.

measures to movements of funds connected with investments, as may unilaterally be adopted by the Council, could make it more difficult, or even impossible, for the Member States to comply with their obligations under EU law.[115]

In establishing the application of Article 351 TFEU in these cases, the Grand Chamber enunciated a wider notion of incompatibility. While there was no direct conflict between the provisions of the BITs and those of EU law at that point in time, the Court held that the lack of a mechanism in the BITs ensuring the immediate application of any possible future measures under Articles 64(2), 66 and 75 TFEU was liable to hinder their practical effectiveness.[116] In the Court's words,

> [I]n order to ensure the effectiveness of [Articles 64(2), 66 and 75 TFEU], measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States which have signed one of the agreements at issue with the Republic of Austria.
>
> Accordingly, those powers of the Council, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the Community and, second, there is also no international-law mechanism which makes that possible.[117]

On that basis, the Court affirmed that there was indeed (indirect) conflict between EU law and the extra-EU BITs. By failing to take all appropriate steps to eliminate said conflict between EU law and the BITs, Austria, Sweden and Finland had, therefore, violated their obligations under Article 351(2) TFEU.

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115 *Commission v Austria* (n 54) para 16; *Commission v Finland* (n 85) para 15; *Commission v Sweden* (n 54) para 15.

116 *Commission v Austria* (n 54) paras 39-40; *Commission v Sweden* (n 54) paras 40-41; see also Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law' (2010) 9 Law and Practice of International Courts and Tribunals 409, 421.

117 *Commission v Austria* (n 54) paras 36-37.

The inclusion of indirect conflict within the scope of 'conflict' has also been affirmed in the interrelation of EU law with *inter se* agreements. In *Pringle*, the CJEU held that the establishment of the ESM in the form of an *inter se* agreement was not in conflict with EU law, as, *inter alia*, it did not 'affect the power of the Union to grant, on the basis of Article 122(2) TFEU, ad hoc financial assistance' or 'jeopardise in any way the objective pursued by Article 122(2) TFEU'.[118]

Against the background of the above analysis, this thesis puts forward a broad definition of substantive conflicts. For present purposes, EU law is in a relationship of 'conflict' with an *inter se* agreement when compliance with the norms of either of them leads or may lead to a violation of those of the other; or where compliance with the norms of the *inter se* agreement (may) frustrate the object and purpose of EU law or *vice versa*.

The proposed definition is based on two premises: first, that the existence of substantive conflicts should be considered from the side of either EU law or the *inter se* agreement; and, second, that the concept of conflict covers both direct and indirect conflicts. In this broader sense, the notion of conflict would ensure maximum coverage of divergences between EU law and *inter se* agreements qualifying as 'conflicts', which would trigger the applicable conflict avoidance and resolution methods. Under this definition, substantive conflicts would also cover cases where EU law and the *inter se* agreement are in a relationship of complementarity. A finding of 'conflict' would still require that EU law and the *inter se* agreement cannot be cumulatively respected. However, they would not need to be flatly inconsistent; instead, their norms could be parallel, providing the Member States with additional obligations or rights, which, however, cannot be simultaneously complied with without frustrating the object and purpose of the *inter se* agreement or EU law.

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[118] Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:756, paras 104 and 106 respectively.

Moreover, the proposed definition implies the existence of a wider form of 'conflict', more generally with the Member States' obligations under the principle of *pacta sunt servanda*.[119] The latter imposes on the contracting parties to an international agreement a two-fold duty: positive, in that they must perform obligations thereunder *in bona fide*; negative, in that they must not act in a manner that may defeat the object and purpose of the international agreement, as a whole[120] or that of specific provisions, if identified to serve a specific object and purpose.[121] A special application of the principle of *pacta sunt servanda* in the EU context is enshrined in Article 4(3) TEU in the form of the duty of loyalty. This principle has equally been held to entail both positive and negative obligations for the Member States: positive, in that each Member State is under a duty to fulfil its own and assist other Member States as well as the EU itself in fulfilling their obligations under EU law;[122] negative, in that the Member States must refrain from any action that may jeopardise the EU's interests.[123] Both the ICJ and the CJEU have consistently upheld that the principle of *pacta sunt servanda* and the duty of loyalty, as its special application, constitute fully-fledged obligations that can be violated without the need for a direct breach of another

119 See also *Commission v Austria* (AG Poiares Maduro) (n 51) paras 33-46.

120 Kirsten Schmalenbach, 'Article 26' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 483-484.

121 Oliver Dörr, 'Article 18' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 256.

122 Opinion 1/09 *on the Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123, para 68; Opinion 2/13 *on the Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, para 178; *Achmea* (n 103) para 34.

123 Vlad Constantinesco, 'L' Article CEE de la Bonne Foi à la Loyauté Communautaire' in Francesco Capotorti and Pierre Pescatore (eds), *Du Droit International au Droit de l' Intégration: Liber Amicorum Pierre Pescatore* (Nomos 1987) 109; Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 46; Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 119; Marcus Klamert, 'Article 4 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 35, 56-57.

treaty[124] or EU law provision respectively.[125] Under this construction of 'conflict', when the application of EU law provisions (be they mandatory or permissive) would frustrate the object and purpose of an *inter se* agreement, a 'conflict' may be identified between said EU law provisions, on the one hand, and the Member States' negative obligations under the principle of *pacta sunt servanda* as regards the i*nter se* agreement, on the other. Conversely, when the application of norms of an *inter se* agreement would frustrate the object and purpose of EU law (as a whole or of specific provisions thereof), there would be a clash between the former and the negative aspect of the Member States' duty of loyalty under Article 4(3) TEU.

4.3.2 *Per Se* Conflicts

An *inter se* agreement would not always generate a conflict with EU law in its actual operation. Such an agreement may in fact be incompatible with EU law *per se*, by its mere existence, without the need to establish a substantive conflict in its application, direct or indirect.[126] This would be the case when the conclusion of the *inter se* agreement falls within the scope of exclusive EU competence, *ab initio* or supervening.[127]

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124 See, *ex multis*, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits), [1986] ICJ Rep 14, where the ICJ found the US in breach of their duty not to deprive the treaty of friendship of its object and purpose because of certain hostile activities that were liable to undermine the effective implementation of friendship in the fields provided for by their bilateral agreement with Nicaragua.

125 Most notably as regards the transposition of directives, the CJEU has consistently upheld that, under the duty of loyal cooperation, during the period prescribed for the implementation of a directive the Member States are obliged to refrain from taking 'any measures liable seriously to compromise the result prescribed [by the directive]', see Case C-129/96 *Inter-Environnement Wallonie v Région wallonne* [1997] ECLI:EU:C:1997:228, para 45.

126 Pauwelyn calls this type of conflicts between international law and the law of the WTO 'inherent', Pauwelyn (n 10)176.

127 Bruno De Witte and Thibault Martinelli, 'Treaties Between EU Member States as Quasi-Instruments of EU Law' in Marise Cremona and Claire Kilpatrick (ed), *EU Legal Acts: Challenges and Transformations* (OUP 2018) 177. This is what Weiler, Schütze and Arena identify as 'field pre-emption' in the interrelation of EU law with national measures of the Member States, see Joseph Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 YEL 267, 277; Schütze (n 92) 1035; Arena (n 92) 324; see also Robert Schütze, 'Lisbon and the Federal Order of Competences' (2008) 33 E L Rev 709, 711.

As a preliminary matter, it is important to distinguish from the outset between the EU's exclusive internal and external competence. Whereas the EU's internal competence relates to the possibility of the EU to legislate and adopt legally binding acts at EU level, the EU's external competence refers to its capacity to conclude international agreements with third countries and international organisations.[128] In the areas where the EU has exclusive external competence (under Articles 3(1) and 3(2) TFEU), the Member States are prohibited from concluding extra-EU agreements.[129] However, the question here is not whether the EU can conclude itself an agreement on the international plane with third countries or international organisations, but rather whether it has competence to adopt legislative measures to regulate at EU level the field, to which an *inter se* agreement pertains. This is also the case as regards mixed agreements. Even though the possibility of the EU to conclude a mixed agreement would depend on its external competence in the relevant area, the conclusion of the *inter se* part of the mixed agreement by the Member States, with which this thesis is dealing, is governed by the same considerations as the conclusion of any other *inter se* agreement. As a result, the EU's external (exclusive) competence is not relevant here and is not tackled further.

Under Article 2(1) TFEU

> [W]hen the Treaties confer on the Union exclusive competence in a specific area, only the EU may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

128 *COTIF* (AG Szpunar) (n 86) para 65.

129 Case C-370/12 *Pringle* [2012] ECLI:EU:C:2012:675, Opinion of AG Kokott, para 98.

The EU's competence may be exclusive from the outset or become exclusive subsequently. The EU's competence is exclusive by default, if it relates to an area listed in Article 3(1) TFEU (*ab initio* exclusive competence).[130] The latter reads as follows:

> The Union shall have exclusive competence in the following areas:
> (a) customs union;
> (b) the establishing of the competition rules necessary for the functioning of the internal market;
> (c) monetary policy for the Member States whose currency is the euro;
> (d) the conservation of marine biological resources under the common fisheries policy;
> (e) common commercial policy.

Yet exclusivity may also be supervening, occurring in an area where the EU originally shared competence with the Member States, but which has been pre-empted through harmonisation.[131] Under Article 2(2) TFEU,

> [W]hen the EU Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Pursuant to Article 2(2) TFEU, once the EU exercises its competence in an area of shared competence, it pre-empts Member State action in that area, thus acquiring supervening exclusive competence. However, by contrast to *ab initio* exclusive competence, which is unconditional, EU action in an area of shared competence does not always have pre-emptive effect that would lead to supervening exclusive competence. In fact, the pre-emptive effect

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130 *Ex multis*, Case C-804/79 *Commission v United Kingdom* [1981] ECLI:EU:C:1981:93, para 20; also Marcus Klamert, 'Article 2 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 353, 354; Mauro Cappelletti, Monica Seccombe and Joseph Weiler, 'Integration through law: Europe and the American Federal Experience – A General Introduction' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (Vol 1, de Gruyter 1986) 32.

131 Shared competence constitutes the default type of competence under the EU Treaties. Article 4 TFEU provides that '[T]he Union shall share competence with the Member States where the Treaties confer upon it a competence which does not relate to the areas referred to in Articles 3 and 6' and indicates a number of 'principal areas' falling in this category.

of EU action is qualified in several ways. First, the EU Treaties explicitly exclude certain fields from such pre-emptive effect. Albeit shared, the exercise of EU competence in certain areas does not have the effect of preventing the Member States from exercising their own competence in the field. Prominent examples include: the area of research, technological development, and space, under Articles 4(3) and 179-190 TFEU; the area of development cooperation and humanitarian aid, under Articles 4(4), 208-211 and 214 TFEU; and Union measures taken under Article 19 TFEU (implementation of the principle of non-discrimination), Article 79(4) TFEU (integration of third-country nationals) and Article 84 TFEU (crime prevention). Second, pre-emption occurs only to the extent that the EU has actually exercised the competence it shares with the Member States. When the EU has acted in an area of shared competence, the Member States are not prevented from intervening in the whole area, but only from exercising their competence in respect of those elements governed by the EU action in question. This is also clearly illustrated in Protocol No 25 annexed to the Lisbon Treaty. Similarly, pre-emption will equally be excluded to the extent that the EU has only engaged in minimum harmonisation of the area at issue.[132] The Member States may in fact be allowed to take more stringent measures in an area under the conditions set out in Article 114 TFEU. Explicit provision to this effect is made under: Article 153(4) TFEU regarding the EU's competence to regulate on social matters; Article 169(4) TFEU, as regards the EU's competence to take measures which support, supplement and monitor the policy pursued by the Member States in the field of consumer protection; and Article 193 TFEU, as regards the adoption of environmental protection measures at EU level.[133]

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132 See also Opinion 1/94 *Agreements Annexed to the WTO Agreement* [1994] ECLI:EU:C:1994:384, para 127.

133 Stephen Weatherill, *The Internal Market as a Legal Concept* (OUP 2017) 209. However, despite the absence of supervening exclusive EU competence, the Member States may still be impeded from exercising their own competence in the relevant area, if by doing so they would be violating their duty of loyalty under Article 4(3) TEU. This was the case, for example, in *Commission v Sweden*, where the CJEU found that, by making a unilateral proposal in the context of the Stockholm Convention on Persistent Organic Pollutants (a mixed agreement) to add a chemical to the list covered by the

Finally, supervening exclusive competence is transitory. The Member States do not lose their competence to regulate the area, but only the right to exercise it; they may again exercise their competence to the extent that the EU has ceased exercising its own.[134] This is further elaborated upon in Declaration 18 annexed to the Final Act of the Intergovernmental Conference that adopted the Lisbon Treaty, setting out a number of ways in which this could happen.[135]

An exhaustive analysis of the EU's exclusive competence would exceed the limited scope of this section. What is necessary for present purposes is to emphasise the consequences of exclusivity for the possibility of the Member States to conclude *inter se* agreements. As a rule, when the EU enjoys exclusive competence (*ab initio* or supervening) in a particular field, the Member States must refrain from regulating said field themselves, unless specifically authorised to do so. Even though EU law does not prohibit intergovernmental cooperation between Member States outside the EU legal framework,[136] in areas where the EU enjoys exclusive competence under Articles 3(1) TFEU or 2(2) TFEU the Member States are barred and must refrain from concluding *inter se* agreements.[137] That is not to deny the Member States' sovereignty to conclude an agreement in the area concerned on the

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Convention despite the existence of a 'Community strategy' to abstain from making such a proposal at that time, Sweden was in violation of its obligation under what is now Article 4(3) TEU, Case C-246/07 *Commission v Sweden* [2010] ECLI:EU:C:2010:203. The Court also found Luxembourg and Germany to have committed a violation of their duty of loyalty by concluding international agreements, albeit in an area of shared competence, where an EU negotiating mandate had already been agreed, see Case C-266/03 *Commission v Luxembourg* [2005] ECLI:EU:C:2005:341 and Case C-433/03 *Commission v Germany* [2005] ECLI:EU:C:2005:462.

134 *COTIF* (n 86) (AG Szpunar) para 77.

135 Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020) 118.

136 Angelos Dimopoulos, 'Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty' (2015) 34 YEL 286, 290.

137 *Pringle* (n 118) para 101; Case C-181/91 *Parliament v Council and Commission* [1993] ECLI:EU:C:1993:271, para 16; *Adamakopoulos* (Statement of Dissent) (n 80) para 67; see also Case C-41/76 *Donckerwolke and Others v Procureur de la République and Others* [1976] ECLI:EU:C:1976:182, para 32; Case C-174/84 *Bulk Oil v Sun International* [1986] ECLI:EU:C:1986:60, para 31; Case C-83/94 *Leifer and Others* [1995] ECLI:EU:C:1995:329, para 12.

international plane;[138] despite EU membership, the Member States remain sovereign and may continue to conclude agreements *inter se* at international level. However, unless the EU authorised its conclusion, an *inter se* agreement in an area where the EU's competence is exclusive (*ab initio* or supervening) would be *per se* incompatible with EU law and, in particular, with Articles 3(1) or 2(2) TFEU (depending on whether the EU enjoys *ab initio* or supervening exclusive competence respectively), read together with Article 2(1) TFEU. Under such a scenario, a *per se* conflict would arise, even if no substantive conflict(s) between EU law and specific provisions of the *inter se* agreement could be identified in the context of its application.[139] In most cases, such an *inter se* agreement would be *per se* incompatible with EU law since its conclusion. Yet, a *per se* conflict with EU law could also arise subsequently, if, after the conclusion of the *inter se* agreement, the EU acquired (*ab initio* or supervening) exclusive competence through the pre-emption of the field, to which the agreement relates or an amendment to the EU Treaties.[140]

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138 Marise Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3nd edn, OUP 2021) 453.

139 *Green Network* (n 108) para 32; *Opinion 1/13* (n 88) para 96; *Commission v Council* (n 88) para 71; *Commission v Denmark* (n 104) para 82; *Opinion 2/91* (n 88) paras 25-26.

140 A relevant recent example of *per se* incompatibility falling in the latter category, this time, however, relating to the possibility of the Member States to conclude extra-EU agreements, was the case of extra-EU BITs. In 2009, the Lisbon Treaty explicitly included FDI into the broadened framework of the CCP under Article 207(1) TFEU, with respect to which the EU's competence is exclusive under Article 3(1)(e) TFEU. Before the EU's competence on FDI became exclusive the Member States had concluded international investment agreements with third states on a bilateral basis. As a result, after the Lisbon Treaty entered into force, the Member States were bound by a significant number of extra-EU BITs. These BITs remained in force on the international plane even though the competence over FDI was in the meantime transferred to the EU. Yet, at that point in time existing extra-EU BITs became *per se* incompatible with EU law, given that their subject matter fell henceforth within the EU's exclusive competence, see Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011) 94; August Reinisch, 'The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and Other Investment Agreements' (2014) 12 Santa Clara Journal of International Law 111; Panos Koutrakos, 'External Action: Common Commercial Policy, Common Foreign and Security Policy, Common Security and Defence Policy' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 276; Koutrakos, *EU International Relations Law* (n 83) 46; Craig and de Búrca (n 135) 383; Catherine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) 26 EJIL 639, 641. In the attempt to manage the interrelation of EU law with extra-EU BITs in the post-Lisbon era, the EU authorised the Member States to maintain existing extra-EU BITs under the conditions set out in Regulation 1219/2012, see Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment

Agreements between Member States and Third Countries [2012] OJ L 351/40. The Regulation addresses the status of extra-EU BITs concluded by the Member States before the entry into force of the Lisbon Treaty (1 December 2009) and lays down the conditions under which the Member States are entitled to conclude or maintain in force BITs concluded with third states between 1 December 2009 and the Regulation's entry into force (9 January 2013).

CHAPTER FIVE

CONFLICT AVOIDANCE IN THE INTERRELATION OF EU LAW WITH *INTER SE* AGREEMENTS

This Chapter explores the available conflict avoidance techniques in the interrelation of EU law with *inter se* agreements. It starts by distinguishing between genuine and apparent conflicts, going on to examine how the latter could be dealt with. To that end, it identifies two interrelated, yet distinct interpretative methods that can be applied for the purposes of this thesis and which are tackled here in turn: first, the principle of systemic integration, enshrined in Article 31(3)(c) VCLT; and, second, the principle of a consistent-with-EU-law-interpretation of *inter se* agreements, as a special application of the principle of harmonious interpretation applied in international law. As a first step, the principle of systemic integration ensures that EU law is 'taken into account' in the interpretation of *inter se* agreements. Then, the principle of a consistent-with-EU-law-interpretation entails that *inter se* agreements are to be construed in a manner harmonious with EU law, reflecting the operation of the principle of primacy of EU law in its relationship with *inter se* agreements.

INTRODUCTION

As explained in the previous Chapter, for the purposes of this thesis, EU law is perceived to be in 'conflict' with an *inter se* agreement, irrespective of whether the areas covered by EU law and the agreement at issue (fully) coincide, when compliance with the norms of EU law or the *inter se* agreement (be they mandatory or permissive): (i) leads or may lead to a violation of the norms of the *inter se* agreement or EU law respectively; (ii) frustrates or may frustrate its object and purpose; or (iii) if the *inter se* agreement falls within the scope of exclusive EU competence, *ab initio* or supervening.

The notion of conflict implies an 'either or'; the application of one treaty norm necessarily entails the non-application of another. However, not every divergence between treaty provisions always qualifies as a 'conflict'.[1] Even though the vagueness and ambiguity of treaty norms often gives the impression of a 'conflict', their interpretation may prove that

[1] C Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) Brit YB of Int'l Law 401, 425.

this is not really the case.[2] Sometimes a conflict can be avoided through interpretative techniques, which enable the harmonious reading of different norms.[3] This is what international case law and academic scholarship call an 'apparent' or 'false' conflict.[4] By contrast, when there are differences between treaty norms that cannot be reconciled through methods of interpretation, a 'genuine' conflict would be identified,[5] which will then need to be dealt with through the rules applicable to conflict resolution.

Before discussing how genuine conflicts are to be resolved in the interrelation of EU law with *inter se* agreements, a preliminary matter would be to assess whether it were possible to avoid such conflicts altogether – and if so how. To that end, there are two interrelated conflict avoidance techniques, which can be applied to the relationship between EU law and *inter se* agreements: first, the principle of systemic integration, enshrined in Article 31(3)(c) VCLT; and, second, the principle of a consistent-with-EU-law-interpretation of *inter se*

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2 Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers 2003) 25.

3 Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 Am J Int'l L 535, 571; Christina Binder, 'A Treaty Law Perspective on Intra-EU BITs' (2016) 17 Journal of World Investment & Trade 964, 974. This was also reflected in the draft proposal included in Special Rapporteur Waldock's second report to the ILC on the law of treaties. In particular, para 1(b) of Article 14 entitled 'Conflict with a Prior Treaty' provided that '[I]n any such case [namely where the parties to the two treaties are the same or where the parties to a later treaty include all the parties to an earlier treaty] the conflict between the two treaties shall be resolved on the basis of the general principles governing the interpretation and application of treaties', Sir Humphrey Waldock, 'Second Report to the ILC on the Law of Treaties' (1963) 2 Yearbook of the International Law Commission 35, 53 (A/CN.4/156).

4 *Electricity Company of Sofia and Bulgaria*, Judgment (Separate Opinion of Judge Anzilotti) [1939] PCIJ Series A/B no 77, 90; Case C-464/14 *SECIL* [2016] ECLI:EU:C:2016:52, Opinion of AG Wathelet, para 43; Sadat-Akhavi (n 2) 25; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 Journal of World Trade 1081, 1089; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 272; Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 73; Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law* (OUP 2012) 50-51; Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill 2018) 62.

5 Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 193.

agreements, as a special application of the principle of harmonious interpretation that exists in international law. Albeit distinct, these interpretative principles operate cumulatively and consecutively, as can further be evidenced by the practice of international *fora*.[6] The principle of systemic integration set out in Article 31(3)(c) VCLT ensures that international *fora* can 'take' EU law 'into account' in the interpretation of *inter se* agreements. Once EU law is allowed to penetrate the interpretative process, the principle of a consistent interpretation entails that the *inter se* agreement is to be construed in a manner harmonious with EU law. In that, it ensures that apparent conflicts between EU law and *inter se* agreements are resolved in favour of EU law, as is also the case with genuine conflicts (at least when the earlier agreement is not implicitly terminated pursuant to Article 59 VCLT).

5.1. The Principle of Systemic Integration in the Interrelation of EU Law with *Inter Se* Agreements

The starting point to identifying an apparent 'conflict' between EU law and *inter se* agreements is the principle of systemic integration reflected in Article 31(3)(c) VCLT. Section 5.1.1 analyses Article 31(3)(c) VCLT and the conditions for its application. Section 5.1.2 then examines how Article 31(3)(c) VCLT could be applied to apparent conflicts between EU law and *inter se* agreements.

5.1.1 The Principle of Systemic Integration of Article 31(3)(c) VCLT

The principle of systemic integration finds expression in Article 31(3)(c) VCLT, which forms part of the 'general rule on interpretation' of Article 31 VCLT. It reads:

> Article 31
> General rule of interpretation
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[6] *Nada v Switzerland*, App No 10593/08 (ECtHR, 12 September 2012), paras 169-170.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) *any relevant rules of international law applicable in the relations between the parties.*

4. A special meaning shall be given to a term if it is established that the parties so intended.[7]

The principle of systemic integration recognises that all international agreements are 'a creation of the international legal system'.[8] Assuming that international law does not constitute a random patchwork of norms but a cogent legal system instead,[9] it extends the contextual reading of international agreements beyond the specific sub-system of international law that is being interpreted[10] and places their interpretation into the broader system of international law.[11] The principle of systemic integration is a prominent interpretative technique and is itself a reflection of other fundamental principles of treaty

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7 Emphasis added.

8 Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 180 (A/CN.4/L.682).

9 *Golder v the United Kingdom*, App No 4451/70 (ECtHR, 21 February 1975), para 30.

10 Katja Ziegler, 'Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law' (2016) 35 YEL 667, 689; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 603; Marceau (n 4) 1089.

11 See *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Separate Opinion of Judge Cançado Trindade) [2014] ICJ Rep 226, paras 25-26; *Banković and Others v Belgium and Others*, App No 52207/99 (ECtHR, 12 December 2001), para 57; Vassilis P Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology – Between Evolution and Systemic Integration' (2010) 31 Michigan Journal of International Law 621, 624.

interpretation, including the principle of good faith.[12] Given that it aims precisely at ensuring a reasonable degree of coherence and unity in international law,[13] the principle of systemic integration has been characterised as 'an "antidote" to fragmentation'.[14]

Article 31(3)(c) VCLT codifies customary international law.[15] Therefore, the principle of systemic integration enshrined therein is always applicable and relevant to the interpretation of international agreements unless it has been set aside by other interpretative principles, specific to the treaty regime under examination.[16] In the absence of such special rules, the interpreter of any international agreement is required to perform her interpretative task pursuant to Article 31(3)(c) VCLT.[17] This duty applies to any international court, including

12 Jenks (n 1) 428.

13 Hersch Lauterpacht, 'Second Report to the ILC on the Law of Treaties' (1954) II Yearbook of the International Law Commission 123, 137–8 (A/CN.4/87); Philippe Sands, 'Sustainable Development: Treaty, Custom and the Cross-Fertilization of International Law' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP 1999) 49; Robert Kolb, *The Law of Treaties* (Edward Elgar 2016) 183.

14 Ziegler (n 10) 687.

15 See, *ex multis, Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [1991] ICJ Rep 53, 70; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Judgment) [1994] ICJ Rep 6, 21; *LaGrande (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 501; Mark E Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 1985) 334-343; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 Int'& Comp LQ 279, 290; Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 304.

16 See Koskenniemi (n 8) 92.

17 Koskenniemi (n 8) 212-213.

the CJEU, which is equally bound to apply general international law,[18] being a *forum* created by the Member States *inter se* on the international plane.[19]

But what is the content of the obligation imposed on the interpreter of an international agreement under Article 31(3)(c) VCLT? Albeit undefined in international law,[20] the ordinary meaning of the phrase 'shall be taken into account' only requires that extraneous rules of international law are brought into the interpretative process. Once the conditions discussed below are met, international *fora* need to consider all international legal rules in the interpretation of an international agreement, including those external to the specific sub-system of international law that is subject to interpretation.[21] Under Article 31(3)(c) VCLT, international *fora* must, therefore, interpret an international agreement in its normative environment and include 'any relevant rules of international law applicable in the relations between the parties' among the factors to be considered in the interpretative exercise.[22] This obligation applies irrespective of whether the relevant *forum* has only been entrusted with the interpretation and application of a specific international agreement; or whether the international agreement in question falls outside the scope of the VCLT altogether, e.g. if it was concluded before its entry into force or if the parties to it are not contacting parties to

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18 *Ex multis*, see Case C-149/96 *Portugal v Council* [1999] ECLI:EU:C:1999:574, para 35; Case C-386/08 *Brita* [2010] ECLI:EU:C:2010:91, paras 40-41; Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, para 83; Theodore Konstadinides, 'Customary international Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35 YEL 513, 518; Jan Wouters and Dries Van Eeckhoutte, 'Giving Effect to Customary International Law through European Community Law' [Institute for International Law] available at <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP25e.pdf> accessed 9 April 2020, 14; see also Marcus Klamert, 'Article 1 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 7, 15. See also further case law cited in Chapter three.

19 See analysis in Chapter two.

20 Sands (n 13) 58; Philippe Sands, 'Treaty, Custom and Cross-Fertilisation of International Law' (1998) 1 Yale Hum Rts & Dev L J 85, 103.

21 Ziegler (n 10) 688.

22 ibid; also Tzevelekos (n 11) 667.

the VCLT.[23] Nevertheless, Article 31(3)(c) VCLT does not go so far as to require the interpreter to change the applicable law, displacing the rule(s) of the agreement under interpretation[24] and replacing them with the external rules.[25]

The operation of the principle of systemic integration in the interpretation of an international agreement is not unconditional. First, it is subject to intrinsic limitations. The principle of systemic integration only applies where linguistically feasible. Since interpretation is the process of establishing the true meaning of a treaty,[26] the latter needs to include terms that are broad and ambiguous enough to allow for input by other rules.[27] Furthermore, as an interpretative exercise, the principle of systemic integration is necessarily limited by the pre-determined conceptual radius of the term to which it relates.[28] Article 31(1) VCLT provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. Only if these criteria do not enable the meaning of an international agreement to be established with certainty will there be any scope for the principle of systemic integration to come into play.[29]

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23 Dörr (n 10) 563-564.

24 Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Hart 2012) 149; Sands, 'Treaty, Custom and Cross-Fertilisation' (n 20) 103.

25 D' Aspremont (n 24) 149.

26 Dörr (n 10) 560.

27 Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 245.

28 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 607.

29 Case C-61/94 *Commission v Germany* [1996] ECLI:EU:C:1996:313, para 52; Case C-216/01 *Budejovicky Budvar* [2003] ECLI:EU:C:2003:302, Opinion of AG Tizzano, para 152; Joined Cases C-720/18 and C-721/18 *Ferrari* [2020] ECLI:EU:C:2020:854, para 68.

More importantly, the principle of systemic integration set out in Article 31(3)(c) VCLT is subject to three conditions, which need to be cumulatively met for its application to be triggered. First, the external rules to be brought into the interpretation of an international agreement must themselves belong to the system of international law. The formulation of Article 31(3)(c) VCLT refers to 'rules of international law' in general. In the absence of any restriction as to its scope, this wording must be read broadly to encapsulate all recognised sources of international law set out in Article 38 ICJ Statute.[30] These include international agreements.[31]

Furthermore, the operation of Article 31(3)(c) VCLT requires that the 'rules of international law' must further be 'applicable in the relations between the parties'. Over the years, there has been significant academic discourse on whether an international agreement to be used in the interpretation of another agreement under Article 31(3)(c) VCLT needs to be binding on all the parties to the agreement under interpretation or just on the parties to the particular dispute.[32] The textual interpretation of the VCLT on this point, which defines a 'party' under Article 2(1)(g) as 'a State which has consented to be bound by the treaty and for which the treaty is in force', seems to support the former approach.[33] This perspective

30 *Golder v the United Kingdom* (n 9) para 35; Dörr (n 10) 605; Koskenniemi (n 8) 215; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 255; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 19.

31 Merkouris (n 30) 19; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 119.

32 Dörr (n 10) 610; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 257-263; Merkouris (n 30) 22-24; Sumith Suresh Bhat, 'A Study of the Issue of 'Relevant Rules' of International Law for the Purposes of Interpretation of Treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2019) 21 International Community Law Review 190, 215-216.

33 Koskenniemi (n 8) 227; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 257; Dörr (n 10) 610; Merkouris (n 30) 22.

has also been endorsed by the practice of international *fora*, including panels and the Appellate Body of the WTO.[34] As the latter held in the *EC – Computer Equipment* case,

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty.[35]

However, this approach would significantly limit the pertinence of Article 31(3)(c) VCLT to the interpretation of multilateral agreements, as it is highly unlikely for the parties to different multilateral agreements ever fully to coincide. According to Koskenniemi, a requirement of total party congruence for multilateral agreements to be 'taken into account' under Article 31(3)(c) VCLT 'would have the ironic effect that the more the membership of a multilateral treaty [...] expanded, the more those treaties would be cut off from the rest of international law'.[36] Against this background, some scholars have suggested a 'corrective' approach on this point. To them, the application of Article 31(3)(c) VCLT should not depend on the composition of the parties to the international agreements involved. Instead, it should be based on the nature of the obligations owed under the agreement to be interpreted as bilateral or integral.[37] In the former case, an international agreement could be considered 'applicable in the relations between the parties' in the sense of Article 31(3)(c) VCLT, even

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34 *EC – Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel* (7 February 2006) WT/DS291-293, paras 7.68-7.70; see also *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia – Report of the Panel* (15 June 2001) WT/DS58/RW, para 5.57.

35 *EC – Customs Classification of Certain Computer Equipment – Report of the Appellate Body* (5 June 1998) WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para 84 (emphasis in the original).

36 Koskenniemi (n 8) 237.

37 Dörr (n 10) 611; Koskenniemi (n 8) 238-239; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 52-53; Marceau (n 4) 1087; David Palmeter and Petros Mavroidis, *Dispute Settlement in the WTO: Practice and Procedure* (Kluwer 1999) 57; see also Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907.

if binding only on the parties to the specific dispute and not on all the parties to the agreement under interpretation.[38]

A final requirement for Article 31(3)(c) VCLT to be triggered is that the 'rules of international law applicable in the relations between the parties' are also 'relevant'. The vagueness of the wording of Article 31(3)(c) VCLT leaves much room for interpretation as to which material could be considered pertinent to that end. This exercise normally takes place on a case-by-case basis. However, an important caveat to this criterion is that the external means of interpretation must be of equal rank to the interpretative object. It would not be possible for the external rules to be brought into the interpretative process if the international agreement under interpretation is *lex superior*, as would be the case if it transposed *ius cogens*; or if the interpretative object has (relative) priority over the extrinsic international agreement in case of a conflict due to the operation of a priority rule.[39] In these scenarios, the extrinsic international agreement would not be 'relevant' in the sense of Article 31(3)(c) VCLT and would, therefore, not be brought into the interpretative process.

5.1.2 The Application of the Principle of Systemic Integration to the Interrelation of EU Law with *Inter Se* Agreements

For EU law to penetrate the interpretation of an *inter se* agreement under Article 31(3)(c) VCLT or *vice versa*, it needs to meet all three criteria examined above.

First, both EU law and *inter se* agreements qualify as 'rules of international law' in the sense of Article 31(3)(c) VCLT. Since EU law constitutes a self-contained regime within

38 Dörr (n 10) 611; McLachlan (n 15) 315.

39 *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Report of the Panel* (3 May 2002) WT/DS207/R, paras 7.83-7.84; Dörr (n 10) 610.

international law,[40] the terms of an *inter se* agreement (including the *inter se* part of a mixed agreement) could, in principle, be read in light of those of EU law and *vice versa*.[41]

The second requirement of Article 31(3)(c) VCLT that the extraneous rules are 'applicable in the relations between the parties' is also partly met. As the parties to an *inter se* agreement (universal or partial) are bound by EU law by definition, EU law would always be considered 'rules of international law applicable in the relations between the parties' for its interpretation. Meanwhile, albeit not binding on all contracting parties to mixed agreements, EU law should nevertheless be taken into account in the interpretation of their *inter se* part (be that universal or partial), at least when the obligations under the mixed agreement are bilateral in nature; or when the mixed agreement generates integral obligations, but there is a relevant disconnection clause, its purpose being to recognise the priority of the provisions of EU law over those of the mixed agreement as between Member States in a conflict scenario.[42] On this point, I concur with the perspective supporting that Article 31(3)(c) VCLT does not refer to the parties to the treaty, but rather to the parties to the particular dispute, at least where the obligations under the multilateral agreement subject

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40 See the analysis in Chapter three.

41 *Ex multis Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para 4.122-4.123; *Vattenfall AB and Others* v *Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue of 31 August 2018, para 152; *Belenergia S.A. v Italian Republic*, ICSID Case No ARB/15/40, Award of 28 August 2019, paras 292, 340; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para 280.

42 Marise Cremona, 'Disconnection Clauses in EU Law and Practice' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 160. A recent version of a disconnection clause reads as follows: 'Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties', Council of Europe Convention on the Prevention of Terrorism 2005, Article 26(3). Depending on its wording, the inclusion of a disconnection clause in a mixed agreement may either be read as only precluding the *inter se* application of the mixed agreement in case of a conflict with EU law; or, as precluding its *inter se* application altogether, in which case there will be no *inter se* part in the agreement and the above will not be relevant.

to interpretation can be reduced to a compilation of bilateral state-to-state relations; or an exception to the integral nature of the obligations under the mixed agreement has been accepted by all contracting parties in the form of a disconnection clause. In the same vein, since the EU Treaties generate integral obligations, only a universal *inter se* agreement or the universal *inter se* part of a mixed agreement could meet the requirement of 'applicability in the relations between the parties' to be considered in the interpretation of EU law under Article 31(3)(c) VCLT.[43]

However, the proposed approach has not always been endorsed in practice. In fact, a number of arbitral tribunals established under the ECT have found that EU law cannot be considered in the interpretation of its *inter se* part under Article 31(3)(c) VCLT because the ECT is a 'multilateral convention, to which sovereign States other than the EU Member States are also parties'.[44] To them, a potential interpretative penetration of EU law in the *inter se* part of the ECT would result in different interpretations of the same provision depending on the origin of the disputing parties in a particular case.[45] On that basis, tribunals skipped conflict avoidance techniques completely and proceeded directly to conflict resolution. Yet, this interpretation of Article 31(3)(c) VCLT is too narrow. To require total party congruence between the extrinsic international agreement and the one under interpretation would mean always to exclude EU law from the interpretation of mixed

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43 See the analysis in Chapter two.

44 *Sun Reserve Luxco Holdings Srl v Italy*, SCC Case No 132/2016, Award of 25 March 2020, para 389; see also *InfraRed Environmental Infrastructure GP Limited and Others v Kingdom of Spain*, ICSID Case No ARB/14/12, Award of 2 August 2019, para 267.

45 *Landesbank Baden-Württemberg and Others v Kingdom of Spain*, ICCID Case No ARB/15/45, Decision on the Intra-EU Jurisdictional Objection of 25 February 2019, para 163; *Eskosol S.P.A. in Liquidazione v Italian Republic,* ICSID Case No ARB15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on the Inapplicability of the Energy Charter Treaty to Intra-EU Disputes of 7 May 2019, para 126; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019, para 345; *Vattenfall* (n 41) paras 155-156.

agreements under Article 31(3)(c) VCLT, given that their contracting parties differ by default. Unless Article 31(3)(c) VCLT applies, conflicts between EU law and the *inter se* part of mixed agreements in such a scenario would always be genuine. Such conflicts could then only be dealt with by setting aside, disapplying or simply not complying with one of the conflicting norms, thus causing further fragmentation in international law.[46] Instead, the proposed approach effectively protects the systemic coherence of international law. Meanwhile, it also upholds the principle of *pacta sunt servanda* by ensuring that both diverging norms remain applicable, at least when they can harmoniously co-exist through interpretation and within the intrinsic limitations of Article 31 VCLT.

Finally, the assessment of whether EU law would be 'relevant' to the interpretation of an *inter se* agreement in the sense of Article 31(3)(c) VCLT is only possible on a case-by-case basis. Although EU law is likely to meet this requirement in most cases, given the breadth of topics it covers, this may not always be accepted in practice. For example, the tribunal in *Vattenfall* considered EU law not to be 'relevant' to the interpretation of the ECT under Article 31 VCLT, *inter alia* because it found there to be no clarity on either the applicable rule of EU law that needed to be taken into account in that context or its scope of application.[47] The arbitral tribunal in *Watkins Holdings* reached the same conclusion on this point.[48]

On the other hand, *inter se* agreements cannot be 'relevant' to the interpretation of EU law in any event. As examined in the next Chapter, unless either treaty is terminated pursuant to Article 59 VCLT, genuine conflicts between *inter se* agreements and EU law are to be

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46 *Electricity Company of Sofia and Bulgaria* (Judge Anzilotti) (n 4) 90; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 276; Tzanakopoulos (n 4) 44-45.

47 *Vattenfall* (n 41) paras 161, 164-165.

48 *Watkins Holdings S.à.r.l. and Others v Kingdom of Spain*, ICSID Case No ARB/15/44, Award of 21 January 2020, para 214.

resolved in favour of EU law due to the operation of the principle of primacy as a special conflict rule. Since EU law has normative priority over *inter se* agreements in case of a conflict, the latter cannot be 'relevant' to its interpretation in the sense of Article 31(3)(c) VCLT. The same is true of the *inter se* part of mixed agreements, insofar as they impose bilateral obligations on their contracting parties, or where there is a disconnection clause.[49] Unless these conditions are met, the operation of primacy in favour of EU law and its precedence over the *inter se* part of the mixed agreement already at the level of conflict avoidance could render the Member States liable towards their third country counterparts for a violation of the mixed agreement.[50] In such a case, the Member States will be faced with irreconcilable international obligations.

To sum up, the principle of systemic integration enshrined in Article 31(3)(c) VCLT translates into an obligation for EU law to be taken into account in the interpretation of *inter se* agreements. The same is true of the *inter se* part of mixed agreements, insofar as the mixed agreement imposes bilateral obligations on its contracting parties or where there is a disconnection clause. Once the conditions of Article 31(3)(c) VCLT are met, international *fora* must interpret an *inter se* agreement in its normative environment and include EU law among the factors to be considered in the interpretative exercise. Conversely, an *inter se* agreement could not be brought into the interpretation of EU law pursuant to Article 31(3)(c) VCLT in any circumstances. Given that the Member States have agreed on the normative priority of EU law over *inter se* agreements in a conflict scenario, the latter do not meet the 'relevance' requirement of Article 31(3)(c) VCLT.

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49 Cremona, 'Disconnection Clauses' (n 42) 160.

50 Pauwelyn, 'A Typology of Mixed Agreements' (n 37) 916; also Paz Andrés Sáenz de Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30 EJIL 721, 744.

5.2 THE PRINCIPLE OF A CONSISTENT-WITH-EU-LAW-INTERPRETATION OF *INTER SE* AGREEMENTS

The principle of systemic integration set out in Article 31(3)(c) VCLT ensures that EU law is considered in the interpretation of any *inter se* agreement, as well as of the *inter se* part of mixed agreements, insofar as they impose bilateral obligations on their contracting parties or include a disconnection clause. Yet systemic integration does not go so far as to prejudice the outcome of the interpretative process, predetermining the way the *inter se* agreement is to be interpreted in its interrelation with EU law.[51] This is when the principle of a consistent-with-EU-law-interpretation enters the process. The latter entails that an *inter se* agreement is to be construed in light of EU law; under the different possible interpretations of an *inter se* agreement, preference is to be given to the one that is more in line with EU law.[52]

The principle of a consistent-with-EU-law-interpretation of *inter se* agreements is based on the principle of harmonious interpretation applied in international law. The principle of harmonious interpretation involves a selection of the meaning amongst a spectrum of possible meanings that allows diverging norms harmoniously to co-exist.[53] When several treaties bear on a single issue, they should, to the extent feasible, be interpreted in a manner that makes them compatible.[54] The principle of harmonious interpretation is an undeniable expression of good faith, as well as of party consent;[55] any reasonable construction of seemingly conflicting treaties that allows for their harmonious coexistence is likelier to be

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51 *Landesbank v Spain* (n 45) para 164; Tzevelekos (n 11) 667.

52 Cf Gerrit Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' (2002) 22 Oxford Journal of Legal Studies 397.

53 *Al-Adsani v the United Kingdom*, App No 35763/97 (ECtHR, 21 November 2001), para 55; Nele Matz-Lück, 'Treaties, Conflicts between', OUP Max Planck Encyclopaedia of International Law, available at https://ezproxy-prd.bodleian.ox.ac.uk:3405/view/10.1093/law:epil/9780199231690/law-9780199231690-e1485?rskey=aXx4yP&result=12&prd=MPIL accessed 10 January 2021.

54 D'Aspremont (n 24) 148; W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 NYIL 3, 13.

55 See Koskenniemi (n 8) 215.

in line with the intention of their contracting parties.[56] In that, it amounts to a (rebuttable) presumption against normative conflict;[57] when States subscribe to successive international agreements, without explicitly terminating or amending any of them, they are presumed not to have intended to create a normative contradiction,[58] with the burden of proof that a conflict exists falling on the party making that claim.[59] This presumption against normative conflict is stronger where the contracting parties to the international agreements at issue coincide, as, failing any indication to the contrary, it can more safely be presumed that their agreements were meant to be consistent among themselves.[60] Against this background, the principle of harmonious interpretation in international law performs a function similar to that performed by the principle of legality in domestic law; a new international agreement is presumed to be consistent with existing agreements, just as any State conduct is presumed to comply with existing law.[61]

Under the principle of harmonious interpretation, the two international agreements are equally applicable and are to be interpreted in such a way as not to contradict each other.[62]

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56 Jenks (n 1) 428; Peter Benson Maxwell, *The Interpretation of Statutes* (9th edn, Sweet and Maxwell 2010) 144.

57 Kolb (n 13) 183.

58 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award of 13 November 2019, para 240; *Nada v Switzerland* (n 6) para 170; *Indonesia – Certain Measures Affecting the Automobile Industry – Report of the Panel* (2 July 1997) WT/DS54/R, WT/DS55/R, WT/DS59/R and WT/DS64/R, para 14.28; Koskenniemi (n 8) 26; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (vol 1, 9th edn, OUP 2008) 1275; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 433; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 207; Ferguson (n 4) 63.

59 *EC – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU – Decision by the Arbitrators* (12 July 1999) WT/DS26/ARB, para 9.

60 *Indonesia – Automobiles* (n 58) para 14.28, ft 649.

61 *Case Concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142; also Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 241 and further references there.

62 *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, para 76.

However, in the interrelation of EU law with *inter se* agreements, the principle of harmonious interpretation of international law finds a special application, in the form of the principle of a consistent-with-EU-law-interpretation of the *inter se* agreement. While the principle of harmonious interpretation is neutral to the outcome of the interpretative process, the principle of a consistent-with-EU-law-interpretation operates in favour of EU law. When dealing with apparent conflicts between EU law and *inter se* agreements, it is the *inter se* agreement that needs to be interpreted by reference to EU law and not the other way around.[63]

It is true that the principle of consistent interpretation is commonly a corollary of hierarchical normative relationships. The need to interpret the norms of one legal instrument in a manner consistent with those of another is inherent in any normative hierarchy,[64] in that it is the first – and easiest – step to ensure that no inconsistent subordinate norm is applied over the hierarchically superior one.[65] Against this background, one might argue that the principle of a consistent interpretation is better suited for normative relationships in domestic legal systems, which are inherently hierarchical,[66] and should not be applied to the international legal order, which is rather based on the sovereign equality of States as law-makers.[67]

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63 *RREEF* (Jurisdiction) (n 62) para 76; *Electrabel* (n 41) para 4.130.

64 Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 ELR 287, 294.

65 Cf Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 116; Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 CMLR 931, 946; Lenaerts and Corthaut (n 64) 293.

66 Erika de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter within the Sources of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 626.

67 See Kirsten Schmalenbach, 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 965, 985.

However, the principle of consistent interpretation could also be transposed to apparent normative conflicts on the international plane. This would be the case when international norms are in a hierarchical (vertical) relationship or in a (horizontal) relationship of relative normative priority.

Albeit more common in domestic law,[68] normative hierarchy is equally conceivable in international law. In treaty law, this would be the case of treaty norms codifying *ius cogens* and other, subordinate treaty norms. In this context, academic scholarship has suggested that, when dealing with apparent conflicts, the principle of harmonious interpretation and the presumption against normative conflict stemming from it should be applied in favour of peremptory norms.[69] Treaty norms should, therefore, be construed in light of *ius cogens*, the presumption being that States did not intend to hamper the operation of the *lex superior*.

The principle of consistent interpretation is equally relevant in cases of apparent conflicts between international agreements in a relationship of relative normative priority. This was originally also reflected in Special Rapporteur Waldock's second draft proposal to the ILC on the Law of Treaties, which suggested the insertion of a new paragraph to what was then Article 65 on 'Priority of Conflicting Treaty Provisions' explicitly making this point:

> 2. Whenever it appears from the terms of a treaty, the circumstances of its conclusion or the statements of the parties that their intention was that its provisions should be

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68 Merkouris (n 30) 178; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 20-21; Tzanakopoulos (n 4) 45-46; Mark E Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd edn, Kluwer Law International 1997) para 84; Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011) 112-113; Koskenniemi (n 8) 47. As explained in Chapter one, the interrelation of EU law with *inter se* agreements is approached from the perspective of international law, with both EU law and *inter se* agreements being examined as part of the international legal order.

69 Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 460; Antonio Cassese, *International Law* (2nd edn, OUP 2005) 106; see also Hans-Peter Gasser, 'Collective Economic Sanctions and International Humanitarian Law: An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?' (1996) 56 ZaöRV 871, 883.

> subject to their obligations under another treaty, the first mentioned treaty shall be applied so far as possible in a manner compatible with the provisions of the other treaty. In the event of a conflict, the other treaty shall prevail.[70]

Nevertheless, the ILC finally did not adopt this proposal. Although it concurred on substance with Special Rapporteur Waldock, it considered it desirable to simplify the drafting of Article 65 and use 'the simplest and easiest possible wording' on this point.[71]

In international law, the most notable example of a rule establishing normative priority between international agreements is Article 103 of the UN Charter. According to the latter,

> in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Over the years, there has been significant scholarly debate on whether Article 103 UN Charter 'constitutes *lex superior*', in the sense of positing the UN Charter on a higher rank among other sources of international law;[72] or merely *lex specialis*, a special rule only affording the Charter relative normative priority over conflicting obligations stemming from other international agreements.[73] Given that in case of conflict, the effect of Article 103 UN Charter is not to invalidate conflicting treaty norms, but only to set them aside,[74] it would be more appropriate to classify it as a simple rule of (relative) precedence and not as a hierarchy

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70 Sir Humphrey Waldock, 'Third Report to the ILC on the Law of Treaties' (1964) 2 Yearbook of the International Law Commission 5, 34-35 (A/CN.4/167).

71 ILC, 'Summary Record of the 743rd Meeting' (1964) 1 Yearbook of the International Law Commission 126, 131 (A/CN.4/SR.743).

72 Johann Ruben Leiæ and Andreas Paulus, 'Miscellaneous Provisions, Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Vol II, 3rd edn, OUP 2012) 2112; Kirstin von der Decken, 'Article 30' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 539, 545; De Wet (n 66) 635; Klabbers, 'Beyond the Vienna Convention (n 5) 196; Villiger, *Commentary on the 1969 Vienna Convention* (n 58) 399-400; Jenks (n 1) 438. There are also some commentators that classify Article 103 UN Charter as *ius cogens*, see Benedetto Conforti, 'Consistency among Treaty Obligations' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 189.

73 Tzanakopoulos (n 4) 63 *seq*; Koskenniemi (n 8) 170 and further references there; Jan Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 216.

74 Sir Gerald Fitzmaurice, 'Third Report to the ILC on the Law of Treaties' (1958) 2 Yearbook of the International Law Commission 20, 43 (A/CN.4/115); Waldock, 'Third Report to the ILC' (n 70) 36.

rule.[75] Against this background, before a genuine conflict between the UN Charter and other international agreements is ascertained, scholars have suggested that the priority clause of Article 103 further generates an obligation for the international agreement at issue first to be interpreted in light of the Charter.[76] With the exception of treaties incorporating *ius cogens*,[77] the presumption would be that an international agreement is intended to be compatible with the UN Charter, and must, therefore, be interpreted consistently with it.[78] This principle of a consistent-with-the-UN-Charter interpretation of international agreements would cover obligations under both primary and secondary UN Charter law (such as UNSC resolutions).[79] It is true that, in certain cases involving potential clashes of UNSC Resolutions with human rights, the principle of consistent interpretation has instead been applied in favour of human rights. In that vein, the ECtHR has found that, in interpreting UNSC Resolutions,

> there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.[80]

However, the *rationale* behind this practice was not to suggest the application of the principle of consistent interpretation in favour of the ECHR. Instead, the ECtHR seems to make an *ultra vires* argument, basing its reasoning on the systematic interpretation of the UN Charter. To the Court, when assessing UNSC Resolutions, regard must also be had to the purposes for which the UN was created, *inter alia* to maintain international peace and

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75 Tzanakopoulos (n 4) 64; Koskenniemi (n 8) 170; Czaplinski and Danilenko (n 54) 16-17.

76 Leiæ and Paulus (n 72) 2120.

77 Tzanakopoulos (n 4) 48.

78 Leiæ and Paulus (n 72) 2120.

79 ibid; De Wet (n 66) 635; Jan Klabbers, *Treaty Conflict and the European Union* (OUP 2009) 152; cf *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 3, para 39.

80 *Al-Jedda v The United Kingdom*, App No 27021/08 (ECtHR, 7 July 2011), paras 101-102; *Nada v Switzerland* (n 6) para 171.

security and to 'achieve international cooperation in [...] promoting and encouraging respect for human rights and fundamental freedoms' pursuant to Article 1 UN Charter. Article 24 UN Charter requires the UNSC to discharge its duties 'in accordance with the Purposes and Principles of the United Nations'. So, unless the ECtHR presumed that the UNSC Resolution was consistent with human rights, the former would have been invalid as *ultra vires*.[81] What the ECtHR did in these cases was to assume that the measures fell within the *vires* of the UNSC; it did not mean to reverse the priority of UNSC Resolutions over conflicting treaty obligations and, therefore, the application of the principle of consistent interpretation in favour of the Charter stemming from it.

In the same vein, the EU Member States have also agreed on the (relative) normative priority of EU law in its interrelation with *inter se* agreements, by affording primacy to primary and secondary EU law over *inter se* agreements in cases of conflict.[82] As with Article 103 UN Charter, given that the operation of the principle of primacy equally results in the disapplication, not the invalidity of conflicting norms of *inter se* agreements, it is more appropriate to classify it as a rule establishing the priority, not the hierarchical superiority of EU law. Against this background, the principle of consistent interpretation can equally be transposed to apparent conflicts between EU law and *inter se* agreements; since the Member States have agreed to resolve genuine conflicts between EU law and *inter se* agreements in favour of EU law, this would necessarily extend to apparent conflicts. When different interpretations of an *inter se* agreement are possible, preference should be given to the one that is most in line with the normative requirements of EU law.[83] The principle of a

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81 See also Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 288.

82 On the consequences of primacy's application in the interrelation of EU law with *inter se* agreements, see analysis in Chapter six and further references there.

83 Cf Case C-168/95 *Arcaro* [1996] ECLI:EU:C:1996:107, Opinion of AG Elmer, para 40; cf Tzanakopoulos (n 4) 47.

consistent-with-EU-law-interpretation of *inter se* agreements also applies to the *inter se* part of mixed agreements, insofar as they impose bilateral obligations on their contracting parties or where there is a disconnection clause.[84]

The Member States have explicitly confirmed the operation of the principle of a consistent-with-EU-law-interpretation to apparent conflicts between EU law and *inter se* agreements through the insertion of relevant clauses in recent *inter se* agreements.[85] Article 2(1) of the Fiscal Compact reads:

> This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.[86]

A similar provision was also inserted in the Agreement on the SRF, Article 2(1) of which reads:

> This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded and with European Union law, in particular Article 4(3) of the Treaty on European Union and Union legislation concerning the resolution of institutions.[87]

Moreover, the practice of arbitral tribunals has affirmed the operation of the principle of consistent interpretation in the interrelation of EU law with *inter se* agreements in cases

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84 Cremona, 'Disconnection Clauses' (n 42) 160.

85 Bruno De Witte and Thibault Martinelli, 'Treaties Between EU Member States as Quasi-Instruments of EU Law' in Marise Cremona and Claire Kilpatrick (ed), *EU Legal Acts: Challenges and Transformations* (OUP 2018) 176.

86 Article 2(1) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary,, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, full text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0302(01)&from=EN> accessed 27 May 2021.

87 Article 2(1) of the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, full text available at <https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf> accessed 27 May 2021.

brought under the ECT. In particular, the tribunal in *Electrabel* held that 'the ECT's historical genesis and its text are such that the ECT should be interpreted, if possible, in harmony with EU law', especially in light of the EU's and the Member States' close involvement in the ECT.[88] In that vein, the tribunal concluded that

> [...] the ECT's conclusion by the European Union and its Member States at that time (including Belgium) should be presumed, in the absence of clear language or cogent evidence otherwise, to have been made in conformity with EU law.[89]

The tribunal in *Isolux* reached the same conclusion.[90] Similarly, the arbitral tribunal in *RREEF* held that an interpretation harmonising the ECT with EU law 'is all the more compelling in the present case when [...] the EU played a predominant role in promoting and negotiating the ECT.'[91] The tribunal concurred with the *Electrabel* tribunal that 'it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law'. In support of this position, it also drew an argument from EU law and, more specifically, from Article 207(3) TFEU, 'which requires the Council and the Commission to ensure that "*the agreements negotiated are compatible with internal Union policies and rules*"'.[92]

On the other hand, the CJEU has not (yet) employed the principle of consistent interpretation to deal with apparent conflicts between EU law and *inter se* agreements. Nevertheless, the CJEU has on many occasions affirmed the need to respect relationships of relative normative priority by engaging in a harmonious interpretation with norms that enjoy such priority. In fact, the CJEU has employed the principle of consistent interpretation in

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88 *Electrabel* (n 41) paras 4.130-4.132.

89 ibid para 4.134.

90 *Isolux Netherlands, BV v Kingdom of Spain*, SCC Case V2013/153, Final Award of 17 July 2016, para 645.

91 *RREEF* (Jurisdiction) (n 62) para 76.

92 ibid (emphasis in the original).

three different settings: first, in the interrelation of EU law with national law; second, within the self-contained regime of EU law, in the relationship between secondary EU law and EU international agreements; and, finally, in the interrelation of EU law with prior extra-EU agreements in the application of Article 351 TFEU.

The need to perform a consistent interpretation has more commonly been recognised in the relationship between EU law and the national law of the Member States. Although it was originally developed to deal with transposition deficiencies of Directives as an alternative to direct effect,[93] the CJEU has now recognised the principle of a consistent-with-EU-law-interpretation as a conflict avoidance technique with a broader scope of application, covering conflicts between national law and EU law more generally.[94] The CJEU has consistently found that all Member States' authorities are under a duty to construe national law in a manner harmonious with EU law,[95] irrespective of whether the national provisions at issue preceded or succeeded those of EU law.[96] This duty to perform a consistent-with-EU-law-interpretation has been explicitly based on the operation of the principle of primacy in the interrelation of EU law with national law.[97] Meanwhile, in the specific relationship between

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93 See Case C-14/83 *Von Colson and Kamann v Land Nordhein-Westfalen* [1984] ECLI:EU:C:1984:153; Case C-79/83 *Harz v Deutsce Tradax* [1984] ECLI:EU:C:1984:155, para 26; Michal Bobek, 'The Effects of EU Law in the National Legal Systems' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020) 170.

94 Case C-157/86 *Murphy* [1988] ECLI:EU:C:1988:62; Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1989] ECLI:EU:C:1989:424, Opinion of AG Darmon, paras 10-11; Case C-357/06 *Frigerio Luigi & C.* [2007] ECLI:EU:C:2007:818, para 28; Case C-555/07 *Kücükdeveci* [2010] ECLI:EU:C:2010:21, para 48; Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECLI:EU:C:2010:329, para 74; Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33, para 22; Joined Cases C-621/10 and C-129/11 *Balkan and Sea Properties and Provadinvest* [2012] ECLI:EU:C:2012:248, para 54; Case C-142/12 *Marinov* [2013] ECLI:EU:C:2013:292, para 39; Lenaerts and Corthaut (n 64) 293-294; Betlem (n 52) 399; Claes (n 65) 115; Sara Drake, 'Twenty Years after Von Colson: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' (2005) 30 E L Rev 329, 336.

95 Case C-218/01 *Henkel* [2004] ECLI:EU:C:2004:88, para 60.

96 Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* [1990] ECLI:EU:C:1990:395, para 8; Case C-177/88 *Dekker* (AG Darmon) (n 94) para 11; Takis Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited' (2001) 21 YEL 327, 347.

97 Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* [1990] ECLI:EU:C:1990:310, Opinion of AG Van Gerven, para 9; Case C-573/17 *Poplawski* [2019] ECLI:EU:C:2019:530, para 57;

national law and Directives, the duty to construe national law in light of EU law has further been found to derive from the combination of Article 288 TFEU with the duty of sincere cooperation under Article 4(3) TEU;[98] as well as from a general principle of EU law 'inherent in the system of the Treaty', since it allows national courts to ensure the full effectiveness of EU law when deciding the cases before them.[99]

The CJEU has further applied the principle of consistent interpretation within the self-contained regime of EU law, in the relationship between secondary EU law and EU international agreements. As explained in Chapter One, EU international agreements (including the EU part of mixed agreements)[100] form an integral part of EU law and are binding on the EU institutions and the Member States.[101] It is settled case law of the CJEU that EU international agreements have primacy over secondary EU law;[102] since EU

Lenaerts and Corthaut (n 64) 293-294; Amedeo Arena, 'The Twin Doctrines of Supremacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 306; Malcolm Ross, 'Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?' (2006) 31 E L Rev 476, 491.

98 *Von Colson* (n 93) para 26; Case C-160/01 *Mau* [2003] ECLI:EU:C:2003:280, para 35; Case C-131/97 *Carbonari and Others* [1999] ECLI:EU:C:1999:98, para 48.

99 *Dominguez* (n 94) para 24; Joined Cases C-397-403/01 *Pfeiffer and Others* [2004] ECLI:EU:C:2004:584, para 114; Case C-212/04 *Adeneler and Others* [2006] ECLILEU:C:2006:443, para 109; Joined Cases C-378/07 to 380/07 *Angelidaki and Others* [2009] ECLI:EU:C:2009:250, paras 197-198; see also Federico Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 401; Stephen Weatherill, *Law and Values in the European Union* (OUP 2016) 198; Marcus Klamert and Paul-John Loewenthal, 'Article 288 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 1906-1907.

100 See Case C-13/00 *Commission v Ireland* [2002] ECLI:EU:C:2002:184, para 14; Case C-459/03 *Commission v Ireland* [2006] ECLI:EU:C:2006:345, para 84; Case C-239/03 *Commission v France* [2004] ECLI:EU:C:2004:598, para 25.

101 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Article 216(2); Case C-87/75 *Bresciani v Amministrazione delle Finanze dello Stato* [1976] ECLI:EU:C:1976:18, para 18; Marise Cremona, 'Member States Agreements as Union Law' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 291.

102 Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECLI:EU:C:2006:23, para 25; Case C-344/04 *IATA and ELFAA* [2006] ECLI:EU:C:2006:10, para 35; Case C-308/06 *Intertanko and Others* [2008] ECLI:EU:C:2008:312, para 42; Case C-366/10 *Air Transport Association of America and Others* [2011] ECLI:EU:C:2011:864, para 50; *SECIL* (AG Wathelet) (n 4) para 41; *Commission v Germany* (n 29) para 52.

international agreements are binding on the EU institutions, they constitute part of the framework delineating their power to legislate.[103] On that basis,[104] the CJEU has consistently affirmed that, prior to establishing a genuine conflict between them, secondary EU law needs to be interpreted as far as possible in a manner consistent with the EU international agreement.[105] This is so, irrespective of whether the agreement at issue has direct effect.[106]

Finally, the CJEU has affirmed the operation of the principle of consistent interpretation in the relationship between EU law and extra-EU agreements in the application of Article 351 TFEU.[107] This provision exceptionally allows the Member States to confer priority over EU law upon prior extra-EU agreements. In case of a genuine conflict between such an agreement and (primary or secondary) EU law,[108] the latter may be deprived of its effect and be disapplied within the legal order of the Member State-party to the agreement. In that,

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103 Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9, 41.

104 *Commission v Germany* (n 29) para 52; Case C-308/06 *Intertanko and Others* [2007] ECLI:EU:C:2007:689, Opinion of AG Kokott, para 78; Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013) 196-197.

105 Case C-341/95 *Bettati v Safety Hi-Tech* [1998] ECLI:EU:C:1998:353, para 20; Case C-228/06 *Soysal and Savatli* [2009] ECLI:EU:C:2009:101, para 59; Case C-289/09 *Pace* [2009] ECLI:EU:C:2009:572, para 83; Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet* [2012] ECLI:EU:C:2012:745, para 39; Case C-363/12 *Z.* [2014] ECLI:EU:C:2014:159, para 72; Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd* [2020] ECLI:EU:C:2020:677, para 62; Robert Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014) 54. This has been the case, for example, with the WTO agreements, with the CJEU affirming the need to ensure that secondary EU legislation is interpreted in a manner consistent therewith, *Commission v Germany* (n 29) para 52; Case C-92/71 *Interfood GmbH v Hauptzollamt Hamburg Ericus* [1972] ECLI:EU:C:1972:30, para 6; Case C-53/96 *Hermès International v FHT Marketing Choice* [1998] ECLI:EU:C:1998:292, para 28; Case C-286/02 *Bellio F.lli* [2004] ECLI:EU:C:2004:212, para 33; Case C-49/02 *Heidelberger Bauchemie* [2004] ECLI:EU:C:2004:384, para 20; see also Giacomo Gattinara, 'Consistent Interpretation of WTO Rulings in the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 269.

106 Peters (n 103) 71.

107 For the text of this provision see Chapter four.

108 Joined Cases C-402/05 and 415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461, paras 301-302; Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham Int'l L.J. 1304, 1321.

Article 351 TFEU introduces an explicit, albeit limited[109] exception to the primacy of EU law.[110] Before establishing a genuine conflict between EU law and a prior extra-EU agreement, the CJEU has consistently found that the latter needs to be interpreted in a manner consistent with EU law.[111] Although Article 351 TFEU exceptionally accords priority to prior extra-EU agreements over EU law, the principle of a consistent interpretation still operates in favour of EU law here. This is because exceptions from the principle of primacy of EU law are to be construed narrowly, as further affirmed by the CJEU's practice in applying Article 351 TFEU to genuine conflicts.[112] The resolution of apparent conflicts in favour of EU law in this context aims at ensuring that the required derogations from the principle of primacy of EU law in case of a genuine conflict are, to the extent feasible, limited. Against this background, the principle of a consistent-with-EU-law-interpretation warrants the full effectiveness and the widest possible application of EU law.[113]

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109 Once a genuine conflict between EU law and a prior extra-EU agreement is ascertained, Article 351(2) TFEU imposes an obligation on the Member State concerned to take all appropriate measures to eliminate it, see Case C-62/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:358, paras 42, 49; Case C-84/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:359, paras 51, 58; Case C-147/03 *Commission v Austria* [2005] ECLI:EU:C:2005:263, para 72; Case C-203/03 *Commission v Austria* [2005] ECLI:EU:C:2005:76, para 59; Opinion 2/15 *Free Trade Agreement with Singapore* [2016] ECLI:EU:C:2016:992, Opinion of AG Sharpston, para 385; Pietro Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law' (2001) 12 EJIL 781, 788.

110 Jan Willem van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2011) 75; Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020) 327; Klamert, 'Article 1 TEU' (n 18) 20; see also Klabbers, *Treaty Conflict and the European Union* (n 79) 116 *seq*.

111 *Ferrari* (n 29) para 68; *Budejovicky Budvar* (AG Tizzano) (n 29) para 153; Case C-216/01 *Budejovicky Budvar* [2003] ECLI;EU:C:2003:618, para 169; Manuel Kellerbauer and Marcus Klamert, 'Article 351 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 2065, 2069; Panos Koutrakos, 'Case C-205/06, *Commission v. Austria*, Judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported; Case C-249/06, *Commission v. Sweden*, Judgment of the Court (Grand Chamber) of 3 March 2009, not yet reported' (2009) 46 CMLR 2059, 2071; Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2006) 310.

112 Christina Eckes, 'International Law as Law of the EU: The Role of the European Court of Justice' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 362; Conforti (n 72) 191.

113 Cf *Pfeiffer* (n 99) para 114; *Mau* (n 98) para 34; see also Dorota Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in

In light of the above, when creating international obligations *inter se*, the Member States must be presumed not to intend to derogate from their commitments under EU law towards each other, as well as towards third Member States.[114] The operation of the principle of primacy of EU law as a special conflict rule and the (relative) priority it accords to EU law over *inter se* agreements suggests that, as first step, the norms of an *inter se* agreement are interpreted in a manner consistent of EU law. When the interpreter is faced with multiple possible constructions of the norms of an *inter se* agreement, she should, therefore, opt for the meaning that allows for better harmonisation with the requirements of EU law.[115] The principle of a consistent-with-EU-law-interpretation applies with respect to both *inter se* agreements and the *inter se* part of mixed agreements, on condition that the obligations imposed on their contracting parties are bilateral in nature, or, in any case, if the mixed agreement includes a disconnection clause.

Nevertheless, the principle of a consistent-with-EU-law-interpretation of *inter se* agreements is subject to limitations. First, it cannot be used against the clearly expressed contradictory intention of the parties to the *inter se* agreement.[116] Meanwhile, its harmonising effect only applies 'as far as possible'.[117] The principle of consistent interpretation cannot reconcile genuinely conflicting norms; it cannot go so far as to form the basis of a *contra legem* interpretation of the *inter se* agreement[118] by creating new rules,

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Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 214.

114 In that vein see *Nada v Switzerland* (n 6) para 170.

115 Matz-Lück (n 53).

116 Leiæ and Paulus (n 72) 2119.

117 *Marleasing* (CJEU) (n 96) para 8; Case C-432/05 *Unibet* [2006] ECLILEU:C:2006:755, Opinion of AG Sharpston, para 55.

118 Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECLI:EU:C:1990:34, Opinion of AG Van Gerven, para 50; Case C-268/06 *Impact* [2008] ECLI:EU:C:2008:223, para 100; Case C-105/03 *Pupino* [2005] ECLILEU:C:2005:386, para 47; Case C-441/14 *DI* [2016] ECLI:EU:C:2016:278, para 32 and further references there; Case C-605/15 *Aviva* [2017]

modifying the content of the norms or attributing to them a meaning that is clearly opposite to their letter or to the intention of the parties to the agreement under interpretation.[119] Dougan argues that the *contra legem* exception to the application of the principle of a consistent-with-EU-law-interpretation is evidence that the latter cannot be justified based on the principle of primacy. To him, had the duty of a consistent-with-EU-law-interpretation really been a corollary of 'supremacy', domestic courts would then 'be able simply to disapply inconsistent national legislation'.[120] Yet, on this point Dougan seems to confuse conflict avoidance with conflict resolution. The principle of a consistent-with-EU-law-interpretation is an interpretative technique. In that, it presupposes that there is in fact room for interpretation.[121] If the wording of the norms at issue is not ambiguous enough to allow for a consistent-with-EU-law-interpretation to be performed, then the conflict between EU law and the *inter se* agreement is not apparent, but genuine.[122] As with apparent conflicts, genuine conflicts between EU law and *inter se* agreements are resolved in favour of EU law. Yet, in such a scenario the principle of primacy does not operate as an interpretive, conflict avoidance technique, but as a special conflict rule instead. It is only in that latter capacity that the application of the principle of primacy of EU law could lead to the disapplication of the conflicting norms of the *inter se* agreement in favour of EU law.

ECLI:EU:C:2017:718, para 37; Case C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257, para 71; *Arcaro* (AG Elmer) (n 83) para 42; Klamert and Loewenthal (n 99) 1909; Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020); Tridimas (n 96) 347.

119 *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v Republic of Poland*, ICSID Case No ADHOC/15/1, Partial Award of 4 March 2020, para 8.125; *RWE* (n 45) para 345; *Vattenfall* (n 41) para 154; Sadat-Akhavi (n 2) 28; Pauwelyn, *Conflict of Norms in Public International Law* (n 4) 254, 273; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens & Sons 1962) xiv-xv; Salo Engel, 'De-facto Revision of the Charter of the United Nations' (1952) 14 Journal of Polities 132; see also Arnold Duncan McNair, *The Law of Treaties* (OUP 1961) 383-392, 424-431, 534-535.

120 Dougan (n 65) 947.

121 Koutrakos, *EU International Relations Law* (n 111) 312.

122 Matz-Lück (n 53).

CHAPTER SIX

CONFLICT RESOLUTION IN THE INTERRELATION OF EU LAW WITH *INTER SE* AGREEMENTS

This Chapter identifies the rules governing conflict resolution in the interrelation of EU law with *inter se* agreements. It starts by outlining the rules of international law that apply to genuine treaty conflicts and, in particular, those enshrined in the VCLT. It then goes on to examine whether these rules also apply to tackle conflicts between EU law and *inter se* agreements or whether there are special conflict rules to that end. I argue that there are three applicable conflict rules: first, Article 59 VCLT on the implicit abrogation of an earlier agreement by the conclusion of a later one between identical parties. Second, there is Article 30 VCLT, which operates in the interrelation of EU law with *inter se* agreements to the extent that it codifies the *pacta tertiis* principle of international law. Finally, the principle of primacy of EU law operates as a *lex specialis*, whereby the Member States carved out the *lex posterior* conflict rule enshrined in Articles 30(3) and 30(4)(a) VCLT in their relationship. Whereas Article 59 VCLT and Article 30 VCLT or the principle of primacy of EU law are mutually exclusive, depending on the composition of the parties to the *inter se* agreement, Article 30 VCLT and the principle of primacy may operate cumulatively.

CONFLICT RESOLUTION BETWEEN EU LAW AND *INTER SE* AGREEMENTS: AN INTRODUCTION

While conflict avoidance techniques can effectively deal with apparent conflicts in the interrelation of EU law with *inter se* agreements, they do not suffice to eliminate the problem of conflict altogether.[1] The use of interpretative methods has limitations. There are cases where there is no margin to allow for EU law to be considered in the interpretative process of an *inter se* agreement under the principle of systemic integration of Article 31(3)(c) VCLT;[2] or where a consistent-with-EU-law interpretation of the *inter se* agreement is impossible or impracticable.[3] At that point, a genuine 'conflict' between EU law and the

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1 C Wilfried Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 Brit YB of Int'l Law 401, 429.

2 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 607; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens & Sons 1962) xiv-xv; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 245.

3 Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* [1990] ECLI:EU:C:1990:395, para 8; Case C-61/94 *Commission v Germany* [1996] ECLI:EU:C:1996:313, para 52; Case C-216/01 *Budejovicky Budvar* [2003] ECLI:EU:C:2003:302, Opinion of AG Tizzano, para 152; Case C-432/05 *Unibet* [2006] ECLILEU:C:2006:755, Opinion of AG Sharpston, para 55; Case C-605/15 *Aviva* [2017] ECLI:EU:C:2017:718, para 37; Joined Cases C-720/18 and C-721/18 *Ferrari* [2020] ECLI:EU:C:2020:854, para 68; Johann Ruben Leiæ and Andreas Paulus, 'Miscellaneous Provisions,

inter se agreement is identified.[4] The next step is then to determine how – if at all – such a conflict could be resolved.[5]

Once there is a genuine conflict between treaty norms, one of the conflicting instruments must be disapplied in favour of the other. If two conflicting norms are simultaneously valid and applicable, the contracting States will necessarily have to choose which one to adhere to and, by way of implication, which one to break. This choice is political and will normally depend on the consequences stemming from violation, as States are likelier to comply with the treaty regime, whose breach would entail more serious repercussions at political and economic level. Against this background, two types of conflicts can be distinguished: first, reconcilable conflicts, which can be effectively dealt with via conflict rules, that is rules of international law[6] that determine *a priori* which norm will apply and which one will give way if they cannot harmoniously coexist.[7] Second, irreconcilable conflicts,[8] when the States

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Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary* (Vol II, 3rd edn, OUP 2012) 2119.

4 Case C-216/01 *Budejovicky Budvar* [2003] ECLI:EU:C:2003:618, para 170; *Electricity Company of Sofia and Bulgaria* (Separate Opinion of Judge Anzilotti) [1939] PCIJ Series A/B no 77, 90; see also Case C-122/17 *Smith* [2018] ECLI:EU:C:2018:631, para 41 and further case law cited there; Cf Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33, para 23; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 Journal of World Trade 1081,1089.

5 Cf *Budejovicky Budvar* (AG Tizzano) (n 3) para 170; *Ferrari* (n 3) para 69; *Unibet* (AG Sharpston) (n 3) para 55; Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECLI:EU:C:1993:945, para 22; Case C-91/92 *Faccini Dori v Recreb* [1994] ECLI:EU:C:1994:292, para 27; Case C-462/99 *Connect Austria* [2003] ECLI:EU:C:2003:297, point 1 of the operative part; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 Am J Int'l L 535, 571.

6 Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 243.

7 Jan Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 210.

8 *Electricity Company of Sofia and Bulgaria* (n 4) 90; Marceau (n 4) 1084; Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 276; Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law* (OUP 2012) 44-45; Rhonda Ferguson, *The Right to Food and the World Trade Organization's Rules on Agriculture: Conflicting, Compatible, or Complementary?* (Brill 2018) 93; Benedetto Conforti, 'Consistency among Treaty Obligations' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 188; Mus (n 7) 231; Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69, 73.

concerned will be in violation of one of the conflicting instruments no matter how they act. Irreconcilable conflicts more commonly appear between norms situated in different legal orders; since different legal systems normally provide their own conflict resolution tools, they may often generate irreconcilable outcomes. Nevertheless, irreconcilable conflicts are equally conceivable within the same legal system. These would be cases where there is no conflict rule whatsoever or where the applicable conflict rule fails to provide a satisfactory solution. This could be the case, for example, with Article 30(4)(b) VCLT, at least where the earlier agreement imposes integral obligations on the contracting parties, thus making any *inter se* modifications through a later treaty impermissible under Article 41 VCLT.[9] As irreconcilable conflicts can only be resolved via political means, they fall outside the scope of this thesis and are not touched upon further.

So, how are genuine (reconcilable) conflicts between EU law and *inter se* agreements to be addressed? This is the question this Chapter seeks to tackle. Since it has been established that both EU law and *inter se* agreements form part of the same legal system, that of international law,[10] it is international law that governs their relationship.[11] As conflicts of treaty norms on the international plane, conflicts between EU law and *inter se* agreements fall to be assessed under the conflict rules of international law.[12]

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9 Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff Publishers 2003) 72.

10 *Ex multis* see *Electrabel S.A. v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para 4.122-4.123; *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Decision on Jurisdiction of 7 February 2020, para 159; Pavlos Eleftheriadis, *A Union of Peoples* (OUP 2020) 49; see also analysis in Chapter two and further references there.

11 *Electrabel* (n 10) para 4.120; Ahmad Ali Ghouri, 'Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options' (2010) 16 ELJ 806, 811.

12 See also Anne Peters, The Position of International Law within the European Community Legal Order' (1997) 40 German Yearbook of International Law 9, 11; Derrick Wyatt, 'New Legal Order or Old?' (1982) 7 E L Rev 147, 148.

On the international plane, conflict rules may stem from customary international law. The latter traditionally distinguishes four principles aimed at the resolution of genuine conflicts between international agreements.[13] These are, first, the *lex posterior* principle, which confers priority upon a later treaty over earlier treaties between the same parties.[14] Second, the *lex prior* principle, which accords precedence to an earlier agreement over a later one and is mostly relevant in cases of successive treaties concluded between different parties.[15] Third, the *lex specialis* principle, which provides that, in a conflict scenario, special provisions prevail over more general ones.[16] Finally, the *lex superior* principle, which applies to vertical treaty conflicts and according to which an international agreement of higher rank prevails over another of lower rank. It is conceivable that a conflict between EU law and an *inter se* agreement is vertical, thus triggering the application of the *lex superior*. These would be conflicts between EU law and an *inter se* agreement codifying peremptory norms, as arguably EU law does not incorporate *ius cogens*. However, as this thesis focuses on horizontal conflicts between EU law and *inter se* agreements, vertical conflicts fall outside its scope. Therefore, the *lex superior* conflict rule is not examined further.

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13 Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 399-400; Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 96.

14 Report of the Study Group of the International Law Commission finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006) 125 *seq*. (A/CN.4/L.682); Mus (n 7) 219; Hans Aufricht, 'Supersession of Treaties in International Law' (1952) 37 Cornell Law Quarterly 665, 657; W Czaplinski and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 NYIL 3, 19.

15 Ferguson (n 8) 93; Koskenniemi (n 14) 122; Jenks (n 1) 442; Villiger (n 13) 400.

16 Lelae and Paulus (n 3) 2120; Koskenniemi (n 14) 116-117; see also Article 55 of the ILC Draft Articles on on Responsibility of States for Internationally Wrongful Acts, which explicitly refers to the *lex specialis*, providing that '[t]hese articles [i.e. the ILC 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 a State are governed by special rules of international law', ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Report of the International Law Commission on the Work of its Fifty-third Session' (2001) 2 Yearbook of the International Law Commission 31, 140 (A/56/10).

Apart from the *lex specialis*,[17] the VCLT codifies all rules of customary international law applicable to the resolution of conflicts between international agreements.[18] The VCLT contains two provisions that could – at least *prima facie* – apply to horizontal conflicts between EU law and *inter se* agreements. These are Article 59 VCLT on the implicit abrogation of an earlier agreement by the conclusion of a later one between the same parties; and Article 30 VCLT, governing conflicts between successive international agreements whose parties fully (Article 30(3) VCLT) or partially (Article 30(4) VCLT) coincide.[19] Since they reflect customary international law, the conflict rules set out in the VCLT are also binding on Member States that are not contracting parties to it.[20]

However, the conflict rules laid down by Articles 59 and 30 VCLT are residual; they only apply insofar as the States-parties to the conflicting agreements have not agreed on special rules regulating priority in their relationship.[21] Albeit not explicit in the text, the residual nature of these provisions is evident from the VCLT's preparatory works.[22] It further constitutes itself a reflection of the *lex specialis* principle, which equally determines priority

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17 Kirstin von der Decken, 'Article 30' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 539, 540; Ferguson (n 8) 96; Sinclair (n 13) 96.

18 Ferguson (n 8) 89.

19 Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 192, 193-194.

20 See Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, paras 78-79.

21 *Vattenfall AB and Others* v *Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea issue of 31 August 2018, para 217; *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, ICSID Case No ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis of 12 June 2020, para 210; *Raiffeisen Bank International AG and Raiffeissenbank Austria d.d. v Republic of Croatia*, ICSID Case No ARB/17/34, Decision on Respondent's Jurisdictional Objections of 30 September 2020, para 132; Von der Decken, 'Article 30' (n 17) 546; Pietro Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law' (2001) 12 EJIL 781, 782; Koskenniemi (n 14) 128; Sinclair (n 13) 97.

22 See, to that effect, ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 Yearbook of the International Law Commission 187, 214 (A/CN 4/191).

between different conflict rules; a general conflict rule would not apply where and to the extent there is a special rule governing the relationship between the conflicting instruments.[23]

Special conflict rules establish (relative) normative priority between otherwise equal-ranking international agreements.[24] They may take different forms, ranging from those conceding priority to another international treaty,[25] to those claiming the priority of a treaty over other treaties, existing and/or future.[26] Special conflict rules may derive from regional customary international law, that is from a general practice of a limited group of States and its acceptance as law (*opinio juris*).[27] Alternatively, they may be included in a treaty, taking the form of conflict clauses. As such, the ILC defines:

> a clause intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals. Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future.[28]

Conflict clauses may be enshrined in either or both the conflicting agreements or in a third agreement in which the States-parties to the conflicting instruments also participate.[29]

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23 Villiger (n 13) 403.

24 Tzanakopoulos (n 8) 45.

25 See, for example, Article 73 of the Vienna Convention on Consular Relations of 1963, which provides that 'the provisions of the present Convention shall not affect other international agreements in force as between States Parties to them'. For examples of relevant clauses in the interrelation of EU law with *inter se* agreements, see Section 6.3 below.

26 ILC, 'Draft Articles on the Law of Treaties' (n 22) 214; Sadat-Akhavi (n 9) 87 *seq*. See, to that effect, Article 103 UN Charter.

27 *Military and Paramilitary Activities in and against Nicaragua* (Judgment) [1986] ICJ Rep 14, para 199; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 13, para 34; ILC, 'Draft Conclusions on Identification of Customary International Law with Commentaries' [2018] 2 Yearbook of the International Law Commission 122, 155-156 (A/73/10).

28 ILC, 'Draft Articles on the Law of Treaties' (n 22) 214; also Nele Matz-Lück, 'Treaties, Conflict Clauses', Max Planck Encyclopaedia of International Law (MPEIL) available at <https://ezproxy-prd.bodleian.ox.ac.uk:3405/view/10.1093/law:epil/9780199231690/law-9780199231690-e1466?rskey=L1m8JW&result=9&prd=MPIL> accessed 27 June 2020.

29 Matz-Lück (n 28).

Against this background, a follow-up question arises: are conflicts in the interrelation of EU law with *inter se* agreements to be approached under the conflict rules set out in the VCLT or have the Member States agreed on special rules on conflict resolution in this context?

Except for Article 351 TFEU, which deals with conflicts between EU law and prior extra-EU agreements, the EU Treaties do not include any conflict clauses regulating the relationship between EU law and (other) international treaties.[30] Given the silence of the EU Treaties, I argue that Articles 59 and 30(4)(b) VCLT continue to operate in the interrelation of EU law with *inter se* agreements when their conditions are met. However, the Member States have set aside the *lex posterior* conflict rule reflected in Articles 30(3) and 30(4)(a) VCLT in their relationship by agreeing on a special conflict rule. That rule is the principle of primacy of EU law. While the operation of Article 59 VCLT and Article 30 VCLT or the principle of primacy of EU law is mutually exclusive, depending on the composition of the parties to the *inter se* agreement, Article 30 VCLT and the principle of primacy may operate cumulatively.

The following sections examine Articles 59 and 30 VCLT and the principle of primacy of EU law as a *lex specialis* in turn. Unless indicated otherwise, references to *inter se* agreements throughout this Chapter also encapsulate the *inter se* part of mixed agreements.

6.1 ARTICLE 59 VCLT

The starting point to approaching genuine conflicts between EU law and *inter se* agreements is Article 59 VCLT. It reads:

[30] *Electrabel* (n 10) para 4.179; Jan Klabbers, *Treaty Conflict and the European Union* (OUP 2009) 10.

Article 59

Termination or Suspension of the Operation of a Treaty Implied by the Conclusion of a Later Treaty

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

Article 59 VCLT provides for the implicit substitution of a later international agreement for an earlier one between the same parties.[31] Once its conditions are met, the earlier treaty ceases to exist or is suspended in operation.[32] Article 59 VCLT is silent on whether the earlier treaty may only be terminated/suspended in operation as a whole. Yet, as is clear from its negotiating history, the possibility of partial termination/suspension in operation was intentionally excluded from the text of Article 59 VCLT and was meant to be dealt with under Article 30(3) VCLT.[33] Given its effects, Article 59 VCLT takes logical priority over Article 30(3) VCLT, which – where relevant – would only result in the disapplication of the conflicting norms of the earlier agreement; and over the principle of primacy of EU law as

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31 ILC, 'Draft Articles on the Law of Treaties' (n 22) 216, 253; see also *Adamakopoulos v Cyprus* (Decision on Jurisdiction) (n 10) para 183; Sinclair (n 13) 185; E W Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYIL 75, 91; Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 Geo Wash Int'l L Rev 573, 602; Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration' (2012) 39(2) Legal Issues of Economic Integration 179, 186; Thomas Giegerich, 'Article 59' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 1083.

32 *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award of the Tribunal of 21 June 2019, para 550; ILC, 'Draft Articles on the Law of Treaties' (n 22) 252-253.

33 Sir Humphrey Waldock, 'Fifth Report to the ILC on the Law of Treaties' (1966) 2 Yearbook of the International Law Commission 1, 32 (A/CN.4/183).

a special conflict rule in the interrelation of EU law with *inter se* agreements, which would result in the disapplication of an *inter se* agreement's conflicting provisions in favour of EU law.[34]

The applicability of Article 59 VCLT to genuine conflicts between EU law and *inter se* agreements has been affirmed on many occasions by both academic scholarship[35] and international *fora*, including the CJEU. For example, in the *Spanish Fishermen* cases, the CJEU found EU law measures on fishing applicable to vessels flying the flag of Spain (pending the conclusion of a relevant international agreement between the EU and Spain) implicitly to have substituted for international agreements between France and Spain relating to fishing in the high seas.[36] At that point in time the international agreements at issue were extra-EU and not *inter se*, as Spain had not yet acceded to the EU. Nevertheless, the CJEU's

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34 Support for this argument can also be drawn from the case law of the CJEU, which has found that the application of the conflict clause of Article 351 TFEU would be precluded if the prior extra-EU agreement in question had been implicitly terminated pursuant to Article 59 VCLT, see Case C-158/91 *Ministère Public and Direction du Travail and de l'Emploi v Levy* [1993] ECLI:EU:C:1993:332, para 20.

35 See, *ex multis*, Hindelang (n 31) 185 *seq*; Thomas Eilmansberger, 'Investment Arbitration: Bilateral Investment Treaties and EU Law' in Gerold Zeiler, Irene Welser and others (eds), *Austrian Arbitration Yearbook 2009* (Manz'sche Verlags und Universitätbuchhandlung 2009) 518; Marek Wierzbowski and Aleksander Gubrynowicz, 'Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions' in Cristina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (OUP 2009) 553; Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law' (2011) 48 CMLR 63, 73; August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39 Legal Issues of Economic Integration 157; Juliane Kokott and Christoph Sobotta, 'Investment Arbitration and EU Law' (2016) 18 CYELS 1, 4; Christina Binder, 'A Treaty Law Perspective on Intra-EU BITs' (2016) 17 The Journal of World Investment & Trade 964, 968.

36 And, in particular, for the London Fisheries Convention of 9 March 1964 (UN Treaty Series Vol 581, No 8432) and the Geneva Convention of 29 April 1958 on Fishing and Conservation of the Living Resources of the High Seas (UN Treaty Series Vol 559, No 8164), Joined Cases C-180/80 and C-266/80 *Crujeiras Tome* [1981] ECLI:EU:C:1981:294, para 19; Case C-181/80 *Arbelaiz-Emazabel* [1981] ECLI:EU:C:1981:295, para 30; Joined Cases C-138/81 and C-139/81 *Affaires Maritimes du Littoral du Sud-Ouest and Others v Marticorena-Otazo and Others* [1982] ECLI:EU:C:1982:373, paras 8-9; Joined Cases C-137/81 and 140/81 *Affaires Maritimes du Littoral du Sud-Ouest and Others v Campandeguy Sagarzazu and Others* [1982] ECLI:EU:C:1982:372, paras 8-9; see also R R Churchill and N G Foster, 'European Community Law and Prior Treaty Obligations of Member States: The Spanish Fishermen's Cases' (1987) 36 Int'l & Comp L Q 504, 510.

rationale on the (implicit) abrogation of an earlier treaty by the 'progressive creation of new reciprocal relations between the Community and Spain in the field of sea-fishing'[37] could equally be applied to conflicts between EU law and *inter se* agreements. Meanwhile, arbitral tribunals have commonly employed Article 59 VCLT as a first step to approaching conflicts between intra-EU BITs and EU law. Nevertheless, the implicit termination of an intra-EU BIT on that basis has never been upheld to this date. In fact, the operation of Article 59 VCLT in that context has been rejected on multiple grounds, including on the ground that intra-EU BITs and EU law do not cover the same subject matter.[38] This has also been the case with the *inter se* part of mixed agreements, most notably the ECT.[39]

The next two subsections examine the conditions and consequences of applying Article 59 VCLT to conflicts between EU law and *inter se* agreements, as well as the possible conflict scenarios that can be dealt with pursuant to it.

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37 *Crujeiras Tome* (n 36) paras 19-20;

38 See, *ex multis*, *Achmea BV v The Slovak Republic, UNCITRAL, PCA Case No 2008-13, (former Eureko BV)*, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para 239; *Anglia Auto Accessories Ltd v Czech Republic*, SCC Case No V 2014/181, Final Award of 10 March 2017, para 115; *Ivan Peter Busta and James Peter Busta v Czech Republic*, SCC Case No 2015/014, Final Award of 10 March 2017, para 115. In his separate opinion in *Adamakopoulos v Cyprus*, Marcelo Kohen was the first to find intra-EU BITs and EU law to cover the same subject-matter. In that, he severely critisises other arbitral tribunals for adopting 'an extremely narrow interpretation of "the same subject matter" that would create incommensurable treaty chaos in international relations (as it is actually being created at the European level) if it were generally accepted in other fields', simply to 'achieve the goal of attributing themselves jurisdiction', see *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Statement of Dissent of Professor Marcelo Cohen of 3 February 2020, para 76. However, he ended up rejecting the application of Article 59 VCLT in that case, on the ground that there was no indication that the Member States had meant for the intra-EU BIT to be (implicitly) terminated following Cyprus's accession to the EU, see *Adamakopoulos v Cyprus* (Statement of Dissent) para 10.

39 *RWE Innogy GmbH and RWE Innogy AERSA S.A.U. v Kingdom of Spain*, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum of 30 December 2019, para 343; *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and Infraclass Energie 5 GmbH & Co KG v Italian Republic*, ICSID Case No ARB/16/5, Award of 14 September 2020, para 314.

6.1.1 Conditions and Consequences of Application

The application of any conflict rule presupposes the identification of a conflict. As explained in Chapter Four, a conflict may only arise between international agreements that existed or interacted with one another at a certain point in time.[40] Therefore, the first condition for Article 59 VCLT to be triggered in the interrelation of EU law with *inter se* agreements is for both EU law and the *inter se* agreement to have entered into force for the Member States concerned.[41]

Once a temporal overlap has been identified, the next step would be to determine whether it is EU law or the *inter se* agreement that qualifies as the 'later' treaty in the case at hand. According to Article 59 VCLT, the termination or suspension in operation of an earlier treaty is implied by the 'conclusion' of a later one. The term 'conclusion' is not defined in the VCLT. Although the question relating to the point in time when the later treaty is 'concluded' in the sense of Article 59 VCLT was not discussed during its adoption, it was heavily debated under the *lex posterior* conflict rule of Article 30 VCLT. In that context, it was decided that the crucial date for determining the 'conclusion' of the later treaty would be that of the adoption of its text – and not, for example, the date of its ratification or entry into force.[42] According to the ILC, at that point a new contractual intention is expressed with the later treaty, 'which should therefore be taken as intended to prevail over the intention expressed in the earlier instrument'.[43] Against this background, the exercise of finding the later treaty

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40 Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 165; Klabbers, *Treaty Conflict and the European Union* (n 30) 22.

41 ILC, 'Draft Articles on the Law of Treaties' (n 22) 216; Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 284; Vierdag (n 31) 92.

42 United Nations, *Official Records from the United Nations Conference on the Law of Treaties, Second Session (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole)* (A/CONF.39/C.1/SR.91) 253; also Sadat-Akhavi (n 9) 78; Vierdag (n 31) 93.

43 United Nations, *Official Records from the United Nations Conference on the Law of Treaties* (n 42) 253.

in the relationship between EU law and *inter se* agreements necessarily takes place on a case-by-case basis, depending on the date when the EU Treaties (or the relevant accession agreement in case of new Member States) and the *inter se* agreement in question were adopted by the Member States concerned. Amendments to an *inter se* agreement, as well as amendments to the EU Treaties pursuant to Article 48 TEU are also relevant to determining the most recent intention of the parties[44] and would, therefore, equally qualify as 'conclusion' of a later treaty in the sense of Article 59 VCLT. The crucial date remains that of the adoption of the EU Treaties (including any amendments thereof), regardless of whether the conflict with the *inter se* agreement is generated by secondary EU legislation, since it is the EU Treaties that impose compliance with the latter under Article 288 TFEU.[45]

Once the 'later' treaty is identified, a number of additional conditions need to be met for Article 59 VCLT to apply. First, its operation appears to require that the conflicting treaties relate to 'the same subject matter'.[46] Nevertheless, as already explained in Chapter Four, the

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44 Kokott and Sobotta (n 35) 5; Bruno de Witte, 'Rules of Change in International Law: How Special is the European Community?' (1994) 25 NYIL 299, 302-303.

45 See to that effect the statement of Sir Andrew Hardie on behalf of the UK before the ICJ in *Lockerbie,* who argued that obligations generated by UNSC decisions prevail over obligations under any other international agreement pursuant to Article 103 UN Charter. According to him, '[T]he syllogism is simple: Member States are under a legal obligation to "accept and carry out" the binding decisions of the Security Council; that obligation is an "obligation under the Charter"; therefore that obligation prevails over Member States obligations under any other international agreement', *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Verbatim Record 1997/17 of 14 October 1997, para 5.39.

46 See, *ex multis* in that vein, *Achmea v Slovak Republic* (Jurisdiction) (n 38) paras 239, 258; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, para 74; *European American Investment Bank AG (Austria) v Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para 169 (*EURAM*); *Anglia Auto v Czech Republic* (n 38) paras 114-116; *Ivan Peter Busta v Czech Republic* (n 38) paras 114-116; *Marfin Investment Group Holdings SA and Others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award of 26 July 2018, para 585; *Eskosol S.p.a. in Liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on the Inapplicability of the Energy Charter Treaty to Intra-EU Disputes of 7 May 2019, para 136; *Magyar Farming Company Ltd, Kintyre Kft and Inizia Zrt v Hungary*, ICSID Case No ARB/17/27, Award of 13 November 2019, para 236; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para 273; *Addiko Bank v Republic of Croatia* (n 21) para 210.

extrapolation of the sameness of subject-matter criterion proceeds from a misinterpretation of the relevant conflict rules.[47] This is further confirmed by the VCLT's *travaux préparatoires*.[48] Instead, this criterion should be considered as met every time a conflict between the later and the earlier international agreements can be identified.[49] In the interrelation of EU law with *inter se* agreements, this would be the case when compliance with the norms of EU law or the *inter se* agreement (be they mandatory or permissive): (i) leads or may lead to a violation of the norms of the *inter se* agreement or EU law respectively; (ii) frustrates or may frustrate its object and purpose; or (iii) if the *inter se* agreement falls within the scope of exclusive EU competence, *ab initio* or supervening.[50]

More importantly, Article 59 VCLT only applies when the contracting parties to the later international agreement include all parties to the earlier one. This does not mean that the parties to both treaties need to be identical (AB-AB scenario). The inclusion of third States in the later treaty does not exclude the application of Article 59 VCLT, as long as all the parties to the earlier treaty participate in the later one (AB-ABC scenario).[51] This is evidenced by the negotiating history of Article 59 VCLT. In his second report to the ILC, Special Rapporteur Waldock explicitly referred to this possibility in his proposal for the wording of what was then Draft Article 19:

> Article 19
>
> Implied Termination by Entering into a Subsequent Treaty
>
> 1. Where all the parties to a treaty, *either with or without third States*, enter into a new treaty relating to the same subject-matter, without expressly

47 See also Klabbers, 'Beyond the Vienna Convention' (n 19) 194.

48 See analysis in Chapter four.

49 Koskenniemi (n 14) 129 and further references in Chapter four.

50 See also analysis in Chapter four.

51 Giegerich (n 31) 1088; Villiger (n 13) 725; Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 284.

> abrogating the earlier treaty, the earlier treaty shall nevertheless be considered to be impliedly terminated –
>
> (a) when the parties to the later treaty have manifested an intention that the whole matter should thereafter be governed by the later treaty; or
>
> (b) when the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time [...].[52]

In the view of Special Rapporteur Waldock, the inclusion of third States in the later treaty could not affect the personal congruence of the two conflicting treaties. The ILC concurred with this perspective, despite ultimately removing the phrase 'either with or without [the addition of] third States' from the final draft of Article 56 (which became what is now Article 59 VCLT). To the ILC, an explicit reference to this point would be superfluous,[53] as

> [E]ven where the parties to the two treaties are not identical, the position is clearly the same [the parties are competent to abrogate the earlier treaty by the later one] if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States.[54]

Based on the composition of the contracting parties, Article 59 VCLT would – *prima facie* – cover the following cases of conflict in the interrelation of EU law with *inter se* agreements:

1. conflicts between an earlier universal *inter se* agreement and the later EU Treaties (AB-AB scenario);
2. conflicts between the earlier EU Treaties and a later universal *inter se* agreement (AB-AB scenario);

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52 Sir Humphrey Waldock, 'Second Report to the ILC on the Law of Treaties' (1963) 2 Yearbook of the International Law Commission 35, 71-72 (A/CN.4/156) (Emphasis added).

53 Waldock, 'Fifth Report to the ILC' (n 33) 33.

54 ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session, 4 May – 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No 9' (1966) 2 Yearbook of the International Law Commission 168, 252 (A/CN.4/191); ILC, 'Draft Articles on the Law of Treaties' (n 22) 252.

3. conflicts between an earlier partial *inter se* agreement and the later EU Treaties (AB-ABC scenario); and
4. conflicts between the earlier EU Treaties and the later universal *inter se* part of a mixed agreement (AB-ABC scenario).[55]

Conversely, Article 59 VCLT could not deal with conflicts between the EU Treaties and a later partial *inter se* agreement, given that in that case the parties to the later treaty would not include all the parties to the earlier one (ABC-AB scenario). For the same reason, Article 59 VCLT would equally not apply to conflicts between the earlier EU Treaties and a later partial mixed agreement (ABC-ABD scenario); or an earlier (universal or partial) mixed agreement and the later EU Treaties (ABC-AB scenario). The above can be illustrated by the table that follows:

Table 1
Article 59 VCLT – Personal Scope of Application

Conflict Scenario	Covered by Article 59 VCLT (Yes/No)
Earlier EU Treaties – Later Universal *Inter se* Agreement (AB-AB scenario)	Yes
Earlier Universal *Inter se* Agreement – Later EU Treaties (AB-AB scenario)	Yes
Earlier Partial *Inter se* Agreement – Later EU Treaties (AB-ABC scenario)	Yes
Earlier EU Treaties – Later Universal Mixed Agreement (AB-ABC scenario)	Yes
Earlier EU Treaties – Later Partial *Inter se* Agreement (ABC-AB scenario)	No
Earlier EU Treaties – Later Partial Mixed Agreement (ABC-ABD scenario)	No
Earlier Universal Mixed Agreement – Later EU Treaties (ABC-AB scenario)	No
Earlier Partial Mixed Agreement – Later EU Treaties (ABC-ABD scenario)	No

[55] See, in that respect, *RWE v Kingdom of Spain* (n 39) para 343, where the tribunal rejected the operation of Article 59 VCLT to the relationship between the ECT and the EU Treaties on the ground, *inter alia*, that the later EU Treaties 'were concluded by only certain of the parties to the [earlier] ECT'.

Apart from the two conditions of substantive and personal congruence set out in the *chapeau* of Article 59 VCLT, the implicit termination of an earlier treaty through the conclusion of a later one is further subject to two alternative criteria. These are: first, the intention of the parties to terminate the earlier treaty through the conclusion of the later treaty (Article 59(1)(a) VCLT); or, second, the degree of incompatibility between the provisions of the two agreements being so extensive that they cannot coexist (Article 59(1)(b) VCLT).

The condition set out in Article 59(1)(a) VCLT would only be met if it could be inferred with relative certainty from the later treaty or from the circumstances accompanying its conclusion and application that its contracting parties intended for it to terminate the earlier treaty as a whole.[56] On the other hand, for Article 59(1)(b) VCLT to be triggered, a broader conflict between the successive international agreements would be required that would prevent their harmonious coexistence at all times. Since Article 59 VCLT only allows for the termination of the earlier agreement as a whole, it would be necessary to establish the overall incompatibility of the successive international agreements; a conflict between individual provisions would not meet the threshold set by Article 59(1)(b) VCLT.[57] Unless the conditions of Article 59(1) VCLT are met and depending on the intention of the Member States-parties to the later treaty, the earlier treaty could then be suspended in operation under Article 59(2) VCLT; or, if the Member States intended no more than the partial abrogation of the earlier treaty, the conflict would be resolved pursuant to the principle of primacy of EU law.[58]

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56 Sadat-Akhavi (n 9) 48.

57 Giegerich (n 31) 1091; Villiger (n 13) 725, 727.

58 Giegerich (n 31) 1092. Article 30(4)(b) VCLT and the *pacta tertiis* codified therein would not be relevant as between the Member States in such a scenario, as the Member States-parties to both agreements would coincide.

When the conditions of Article 59 VCLT are met, the terminative effect of the later treaty is immediate; there is no need for the contracting parties to take further steps formally to terminate or denounce the earlier international agreement. Over the years, a number of arbitral tribunals have held otherwise, rejecting the applicability of Article 59 VCLT to conflicts between EU law and *inter se* agreements on the ground that the procedural requirements of Article 65 VCLT had not been followed.[59] However, this conclusion is erroneous; when it comes to implied termination under Article 59 VCLT, the procedural requirements of Article 65 VCLT do not apply.[60] The purpose of Article 65 VCLT is to prevent States from invoking arbitrary grounds of termination as a pretext to escaping treaty obligations.[61] This is further affirmed by that provision's preparatory works, according to which,

> the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.[62]

Yet, treaty termination pursuant to Article 59 VCLT is consensual, as it is necessarily based on the previous establishment of the parties' common intention to replace an earlier treaty with a later one. Therefore, the *ratio* underlying the application of Article 65 VCLT is not relevant in this context.

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59 *Ex multis*, see *United Utilities v Estonia* (n 32) paras 538, 551; *Achmea v Slovak Republic* (Jurisdiction) (n 38) para 235; *Eastern Sugar BV v. the Czech Republic*, SCC Case 088/2004, Partial Award of 27 March 2007, para 172; *RWE v Spain* (n 55) para 343.

60 *Adamakopoulos v Cyprus* (Statement of Dissent) (n 38) para 9; Villiger (n 13) 726. Article 65(1) VCLT provides that '[A] party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor'.

61 Heike Krieger, 'Article 65' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 1212.

62 ILC, 'Draft Articles on the Law of Treaties' (n 22) 262.

Meanwhile, the terminative effect of Article 59 VCLT is irreversible, as the earlier international agreement cannot recover its force and operation, even if the conflict with the later treaty disappears at some point in the future.[63] The termination/suspension in operation of the earlier treaty dates back to the moment when the conflict with the later treaty first arose; or when the later treaty entered into force for the last contracting party concerned, if the conflict between the earlier and the later treaty existed *ab initio*.[64] Nevertheless, the Member States remain, in principle, free to agree that the later treaty applies retroactively, a possibility further reflected in Article 28 VCLT:

> Article 28
>
> Non-retroactivity of treaties
>
> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

This intention of the Member States to confer retroactive effect upon the later treaty can either be explicitly laid down therein or inferred from its nature or interpretation.[65]

6.1.2 The Possible Conflict Scenarios

The fulfilment of the conditions of Article 59 VCLT in the interrelation of EU law with *inter se* agreements is, of course, a matter 'essentially [...] of the construction of the two treaties'[66] and would, therefore, necessarily take place on a case-by-case basis. However, in light of the analysis above, it is already possible to draw some general conclusions as to how a conflict between EU law and an *inter se* agreement would be dealt with pursuant to Article

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63 Sadat-Akhavi (n 9) 48, 88.

64 See also Case C-3/91 *Exportur v LOR and Confiserie du Tech* [1992] ECLI:EU:C:1992:420, para 8.

65 Kirstin von der Decken, 'Article 28' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 510.

66 ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session' (n 54) 252-253.

59 VCLT. To that end, it is necessary to distinguish between cases where: first, the EU Treaties are the later treaty; or, second, the (universal) *inter se* or mixed agreement is the later treaty instead.[67] The EU Treaties would be the later treaty when membership to the *inter se* agreement in question or its latest amendment predated membership of the EU (via the Treaty of Rome or a subsequent accession agreement)[68] or came before the adoption of the Lisbon Treaty (as the latest amendment to the EU Treaties).

The first scenario would cover conflicts between EU law and earlier partial or universal *inter se* agreements. If it can be established with sufficient certainty that the intention of the Member States in entering the later EU Treaties was for their relationship henceforth to be regulated exclusively by EU law, the earlier *inter se* agreement would be considered implicitly terminated pursuant to Article 59(1)(a) VCLT or suspended in operation pursuant to Article 59(2) VCLT. The implicit termination/suspension of the *inter se* agreement would be effective since the entry into force of the EU Treaties (be that the Treaty of Rome, the Lisbon Treaty, or the relevant accession agreements, as the case may be) for the last Member State concerned,[69] unless a different intention of the Member States can be established. The terminative intention of the Member States may equally be presumed under Article 59(1)(b)

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67 As already explained, a conflict between EU law and a later partial *inter se* agreement could not trigger the application of Article 59 VCLT, as the parties to the two treaties are not the same.

68 Under Article 49 TEU, the accession of a State as member to the EU takes place through an international agreement concluded between that State and the Member States. For further analysis on the conditions for accession set out under Article 49 TEU see Friedrich Erlbacher, 'Article 49 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 314-315.

69 Giegerich (n 31) 1086; see also Churchill and Foster (n 36) 513. The point in time when the effects of the conflict rule are triggered in cases when international agreements subsequently become *inter se* has recently been confirmed by the Member States in practice through the Termination Agreement, whereby 23 Member States terminated the intra-EU BITs to which they were contracting parties, see Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] L 169/1. According to Article 4(1) of the Termination Agreement, '[T]he Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, *as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union*, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings' (emphasis added).

VCLT if the conflict between the earlier *inter se* agreement and EU law is so extensive that their simultaneous application is precluded at all times. EU law would then substitute for the *inter se* agreement since their conflict first arose, unless the Member States intended otherwise. In the interrelation of EU law with earlier *inter se* agreements, a *per se* conflict could be presumed to trigger the application of Article 59(1) VCLT. Since an earlier *inter se* agreement falling within (*ab initio* or supervening) exclusive EU competence would be incompatible with the later EU Treaties by its mere existence, the Member States could be presumed to have intended to terminate it by entering the later EU Treaties, thus fulfilling the condition of Article 59(1)(a) VCLT. Meanwhile, such a scenario would also meet the requirement of Article 59(1)(b) VCLT, since it would be impossible for the Member States to comply with any provision of the earlier *inter se* agreement without violating the later EU Treaties.

The second scenario potentially covered under Article 59 VCLT would comprise conflicts between EU law and a later universal (or mixed) *inter se* agreement.[70] Unlike Article 48 TEU on amendment of the EU Treaties and Article 50 TEU on withdrawal from the EU, the EU Treaties do not include a clause regulating the process of their consensual termination. In the absence of a special provision to that end, the implicit abrogation of the EU Treaties through a later international agreement between all Member States (with or without third parties) remains conceivable. Nevertheless, the conditions of Article 59 VCLT would be very difficult to meet in such a scenario. First, since Article 59 VCLT does not allow for the partial termination of the earlier agreement, the later universal *inter se*

[70] The conclusion of later universal *inter se* agreements is possible, albeit rare in practice. In fact, a number of *inter se* agreements negotiated among all Member States were finally concluded in the form of partial agreements due to last-minute disagreements or political developments in a number of Member States. The most recent example was that of the Termination Agreement, see (n 69). Although all Member States (including the UK at that point) participated in the negotiations of the Termination Agreement, in the end Austria, Finland, Sweden, Ireland and the UK decided not to sign it.

agreement would need to be at least as comprehensive as the EU Treaties to infer that the Member States intended to terminate them as a whole pursuant to Article 59(1)(a) VCLT. For the same reason, a conflict so extensive as to impede the simultaneous application of the later universal *inter se* agreement and EU law at all times on (almost) all topics, thus triggering the implicit termination of the EU Treaties under Article 59(1)(b) VCLT, would equally be rather fictitious.

As is clear from the above, Article 59 VCLT has limitations and does not suffice completely to eliminate genuine conflicts in the interrelation of EU law with *inter se* agreements. First, it does not apply when the later treaty is a partial *inter se* agreement, since Article 59 VCLT does not cover cases where the later international agreement does not include all parties to the earlier one. Equally, Article 59 VCLT does not cover conflicts between EU law and the *inter se* part of a mixed agreement, when the latter qualifies as the earlier treaty; or when it is the later treaty, yet not all Member States participate in it (partial mixed agreement). In any event, the application of Article 59 VCLT presupposes a significantly high threshold of conflict. Although Article 59 VCLT would not require EU law and the *inter se* agreement in question to be co-extensive in all respects, their overlap must be more than minor or incidental for its terminative/suspensive effect to be triggered.[71] This is further affirmed by the fact that Article 59 VCLT only allows for the earlier agreement to be terminated/suspended in operation *as a whole*. A conflict between individual provisions would, therefore, not be covered under Article 59 VCLT,[72] as it would not suffice to infer that the Member States intended to terminate/suspend the operation of the earlier agreement altogether.

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71 *Achmea v Slovak Republic* (Jurisdiction) (n 38) paras 241-242; *ESPF v Italy* (n 39) para 314.

72 Villiger (n 13) 725.

6.2 ARTICLE 30 VCLT

When the conditions of Article 59 VCLT are not met, the second provision potentially relevant to conflict resolution in the interrelation of EU law with *inter se* agreements is Article 30 VCLT.[73] It reads:

> Article 30
>
> Application of Successive Treaties Relating to the Same Subject-Matter
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between States parties to both treaties the same rule applies as in paragraph 3.
>
> (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension in operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Like Article 59 VCLT, the operation of Article 30 VCLT requires that EU law and the *inter se* agreement overlap *rationae temporis*. The later treaty for the purposes of Article 30 VCLT would equally be identified based on the date when the conflicting treaties were concluded.[74] Meanwhile, the application of Article 30 VCLT also appears to be contingent on the substantive congruence of the conflicting agreements. However, as with Article 59 VCLT,

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73 ILC, 'Draft Articles on the Law of Treaties' (n 22) 216.

74 See analysis above on Article 59 VCLT.

this criterion should be considered as met each time a conflict between EU law and the *inter se* agreement can be identified.[75]

Article 30 VCLT comprises two residual rules governing conflicts between successive international agreements, whose parties fully or partially coincide. These are Articles 30(3) and (4) VCLT respectively.

Article 30(3) VCLT regulates the relationship between successive international agreements with the same contracting parties, codifying the *lex posterior* conflict rule of customary international law;[76] a later treaty is conferred priority over an earlier one, as it is presumed to express the new contractual intent of the contracting parties. For Article 30(3) VCLT to operate, the parties to the later treaty do not need to be identical (AB-AB scenario). Instead, it is conceivable that the later treaty comprises additional parties to the earlier one, as long as all the parties to the earlier treaty also participate therein (AB-ABC scenario).[77] Unlike Article 59 VCLT, Article 30(3) VCLT is a priority rule; it establishes priority between inconsistent norms. Therefore, its application requires that both treaties remain in force. The later treaty would then take precedence over the earlier one to the extent of the conflict, thus resulting in the disapplication of the conflicting provisions of the earlier agreement.[78] Yet the earlier agreement would remain valid and continue to operate insofar as its provisions are not in conflict with the later treaty. The same will be true of the

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75 Koskenniemi (n 14) 129. See analysis above on Article 59 VCLT and further references in Chapter four.

76 *Achmea v Slovak Republic* (Jurisdiction) (n 38) para 240; Villiger (n 13) 405; Von der Decken, 'Article 30' (n 17) 542-543.

77 Von der Decken, 'Article 30' (n 17) 549; Mus (n 7) 219.

78 Von der Decken, 'Article 30' (n 17) 544-545; See also Alexander Orakhelashvili, 'Article 30, Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 764.

conflicting provisions in case the conflict with the later treaty disappears at some point in the future.

Article 30 VCLT also regulates priority between successive treaties with partially identical parties in their mutual relationship.[79] Article 30(4) VCLT applies to conflicts between treaties with partly overlapping membership (ABC-ABD scenario); or decreasing membership, namely cases of a later treaty concluded between a subgroup of the parties to the earlier one (ABC-AB scenario). In the application of Article 30(4) VCLT, two relationships need to be distinguished: first, the one between States-parties to both agreements; and, second, the relationship between a State-party to both agreements and a State-party to only one of them. In the first case, Article 30(4)(a) VCLT contains a *renvoi* to the *lex posterior* rule of Article 30(3) VCLT; unless the parties have agreed otherwise, the earlier treaty applies only insofar as its provisions are compatible with those of the later treaty.[80] The second scenario is resolved under the *pacta tertiis* principle, set out in Article 30(4)(b) VCLT and further affirmed by Article 34 VCLT;[81] a subsequent treaty conflicting with an earlier one cannot legally affect the rights of a third State that only participates in the earlier one.[82] To that State, the later treaty would be *res inter alios acta*.[83] Meanwhile, Article 30(4) VCLT is also an expression of the *lex prior*; it ensures that the parties to the earlier treaty can count on their counterparts to honour their existing commitments irrespective of future commitments towards other treaty partners.[84]

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79 Sadat-Akhavi (n 9) 72.

80 Von der Decken, 'Article 30' (n 17) 549.

81 According to Article 34 VCLT '[A] treaty does not create either obligations or rights for a third State without its consent'.

82 Robert Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship' (2007) 9 CYELS 387, 391.

83 Alexander Proelss, 'Article 34' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 655.

84 Ferguson (n 8) 93.

While it is Article 30(4) VCLT that regulates priority in case of a conflict between treaties with decreasing membership, the legality of such *inter se* modifications would be established under Article 41 VCLT.[85] Unlike Article 30(4) VCLT, Article 41 VCLT is not a conflict rule. It does not regulate which of the two consecutive agreements with decreasing membership would prevail in a conflict scenario. Instead, Article 41 VCLT designates whether the *inter se* modification of the earlier treaty is permissible under international law. An *inter se* modification that does not fall within the scope of Article 41 VCLT or does not meet the conditions set out therein would still be valid on the international plane, albeit in violation of the earlier treaty.[86] However, the impermissible *inter se* modification would cause a conflict with the original agreement, which would then need to be dealt with under the applicable conflict rules. Meanwhile, the contracting parties to such an *inter se* modification would be held internationally responsible towards States-parties to the original agreement, irrespective of which treaty claims priority in their relationship.

In the interrelation of EU law with *inter se* agreements and based on the composition of the contracting Member States, the following conflict scenarios could in principle be addressed under Article 30 VCLT: first, Article 30(3) VCLT would apply to conflicts between EU law and (earlier or later) universal *inter se* agreements (AB-AB scenario), as well as between partial *inter se* agreements and the later EU Treaties or between the EU Treaties and a later universal mixed agreement (AB-ABC scenario). Meanwhile, conflicts between a later partial *inter se* agreement or a later partial mixed agreement and the EU Treaties would be dealt with under Article 30(4) VCLT (and Article 30(3) VCLT by way of

85 Kirstin von der Decken, 'Article 41' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 778; Sadat Akhavi (n 9) 64.

86 Czaplinski and Danilenko (n 14) 24 and further references there.

renvoi), as conflicts of treaties with decreasing (ABC-AB scenario) or partly overlapping membership (ABC-ABD scenario) respectively. The above are illustrated by the table that follows:

Table 2
Article 30 VCLT – Personal Scope of Application

Conflict Scenario	Covered by Article 30(3) VCLT	Covered by Article 30(4) VCLT (and 30(3) VCLT by way of *renvoi*)
Earlier EU Treaties – Universal *Inter se* Agreement (AB-AB scenario)	Yes	No
Earlier Universal *Inter se* Agreement – Later EU Treaties (AB-AB scenario)	Yes	No
Earlier Partial *Inter se* Agreement – Later EU Treaties (AB-ABC scenario)	Yes	No
Earlier EU Treaties – Later Universal Mixed Agreement (AB-ABC scenario)	Yes	No
Earlier EU Treaties – Later Partial *Inter se* Agreement (ABC-AB scenario)	Through Article 30(4) VCLT	Yes
Earlier EU Treaties – Later Partial Mixed Agreement (ABC-ABD scenario)	Through Article 30(4) VCLT	Yes
Earlier Universal Mixed Agreement – Later EU Treaties (ABC-ABD scenario)	Through Article 30(4) VCLT	Yes
Earlier Partial Mixed Agreement – Later EU Treaties (ABC-ABD scenario)	Through Article 30(4) VCLT	Yes

Depending on whether the EU Treaties or the *inter se* agreement qualified as the later treaty, the application of Article 30 VCLT would result in the disapplication of the *inter se* agreement or the EU Treaties respectively in the relationship of the Member States concerned under Article 30(3) VCLT (directly or through Article 30(4)(a) VCLT). Meanwhile, where relevant, the earlier treaty would still govern the relationship between these Member States and Member States that did not participate in the later agreement pursuant to the *pacta tertiis* set out in Article 30(4)(b) VCLT.

Scholarship[87] and international *fora* have consistently affirmed the possibility to deal with genuine conflicts between EU law and *inter se* agreements pursuant to Article 30 VCLT. In this context, Article 30 VCLT has more commonly been invoked to tackle conflicts between EU law and intra-EU BITs[88] or the ECT.[89] However, as with Article 59 VCLT, arbitral tribunals have never found the conditions of Article 30 VCLT to be met in the interrelation of EU law with *inter se* agreements, thus consistently rejecting its operation. More commonly, tribunals dismissed the application of Article 30 VCLT on the ground that there was no incompatibility between EU law and the intra-EU BIT or the ECT to begin with, as they did not satisfy the sameness of subject matter criterion.[90]

6.3 THE PRINCIPLE OF PRIMACY OF EU LAW AS A SPECIAL CONFLICT RULE

When Article 59 VCLT does not apply, a conflict between successive international agreements would trigger the application of the conflict rules enshrined in Article 30 VCLT, namely Article 30(3) or 30(4) VCLT as the case may be. However, irrespective of the fact that international *fora* have affirmed the applicability – yet so far consistently rejected the application – of Article 30 VCLT to conflicts between EU law and *inter se* agreements, the Member States have in fact set the residual *lex posterior* conflict rule enshrined therein aside by agreeing on a special conflict rule in their relationship.[91] That rule is the principle of

87 See references (n 35) above.

88 *Ex multis*, *Achmea BV v the Slovak Republic* (Jurisdiction) (n 38) para 271; *Oostergetel v Slovak Republic* (n 46) para 104; *Marfin Investment v Cyprus* (n 46) para 591; *B3 Croatian Courier Coöperatief U.A. v Republic of Croatia*, ICSID Case No ARB/15/5, Award of 5 April 2019, para 556; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic*, PCA Case No 2017-15, Final Award of 11 May 2020, para 357.

89 *Ex multis*, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No ARB/14/3, Final Award of 27 December 2016, para 289; *Vattenfall v Germany* (n 21) para 217.

90 *Ex multis*, *Magyar Farming v Hungary* (n 46) para 236; *BayWa v Kingdom of Spain* (n 46) para 273; *Oostergetel v Slovak Republic* (n 46) para 104; *Marfin Investment v Cyprus* (n 46) para 591.

91 Koskenniemi (n 14) 145; see also C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:978, Opinion of AG Campos Sánchez-Bordona, para 81; Marcus Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) 42 ELR 815, 821.

primacy of EU law. Pursuant to the latter, EU law takes precedence over conflicting *inter se* agreements irrespective of which treaty qualifies as the 'later' one. As a special conflict rule, the principle of primacy automatically excludes the application of Article 30(3) and 30(4)(a) VCLT in the interrelation of EU law with *inter se* agreements. Conversely, Article 30(4)(b) VCLT reflecting the *pacta tertiis* principle continues to operate when its conditions are met. These would be the conflict scenarios illustrated in Table 3 below.

The following subsections examine the principle of primacy of EU law as a special conflict rule in the interrelation of EU law with *inter se* agreements and outline how conflicts would be dealt with pursuant to it.

6.3.1 The General Principle of Primacy of EU law and its Consequences

The principle of primacy of EU law has been identified as the core conflict rule in the EU, setting the *lex posterior* conflict rule aside in a two-fold context: first – and more commonly – in the relationship between EU law and the national law of the Member States;[92] second – and more importantly for present purposes – in the interrelation of EU law with *inter se* agreements.

In the relationship between EU law and national law, the operation of the principle of primacy as a conflict rule has been long- and well-established. The CJEU first enunciated the primacy of EU law in its seminal judgment in *Costa v E.N.E.L.* Mr Costa, a shareholder of a newly nationalised electricity company, had brought proceedings before the competent Italian courts claiming that the Electricity Nationalisation Act of 1962 was incompatible with

[92] See, *inter alia,* Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECLI:EU:C:1964:66; Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 E L Rev 287, 289.

EU law and the Italian Constitution.[93] The Italian Constitutional Court had already dismissed the case on the basis of the *lex posterior*: since, in the dualist Italian legal order, EU law had been transposed through a national law, a later national law would necessarily prevail in case of a conflict.[94] However, the CJEU had a fundamentally different view. In a preliminary ruling, the Court rejected the applicability of the *lex posterior* to conflicts between national law and EU law, since

> the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[95]

Instead, the Court identified the primacy of EU law as a general principle, applicable to conflicts between EU law and national legislation. To the CJEU, EU law takes precedence over national measures, as Member States are not allowed to 'accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity'.[96] Following *Costa*, the CJEU gradually developed the principle's ambit, expanding its application to conflicts between EU law and national law of any type and status,[97] irrespective of whether the adoption of the national rules at issue predated or followed that of the relevant EU rule.[98] Once found incompatible with EU law, conflicting

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93 Amedeo Arena, 'The Twin Doctrines of Supremacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (Vol I, OUP 2018) 303.

94 Robert Schütze, 'Supremacy without Pre-Emption: The Very Slowly Emergent Doctrine of Community Pre-Emption' (2006) 43 CMLR 1023, 1026.

95 *Costa v. E.N.E.L.* (n 92) 594; Paul Craig and Grainne de Búrca, *EU Law: Texts, Cases and Materials* (7th edn, OUP 2020) 314-315; see also Eric Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case' (1965) 63 Mich L Rev 491, 499.

96 *Costa v. E.N.E.L* (n 92) 593-594.

97 Case C-11/70 *Internationale Handelsgesellschaft mbH* [1970] ECLI:EU:C:1970:114; Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, paras 56-57.

98 Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECLI:EU:C:1978:49; Case C-573/17 *Poplawski* [2019] ECLI:EU:C:2019:530, para 58.

domestic legislation must be set aside.[99] Yet the application of the principle of primacy in favour of EU law does not result in the invalidity of conflicting national rules. It is consistent case law of the CJEU that the incompatible national provisions are merely disapplied;[100] they do not cease to exist altogether and can, therefore, apply anew if the conflict with EU law disappears in the future.

Albeit not nearly as thoroughly theorised in this context, the primacy of EU law is an equally well-established conflict rule in the interrelation of EU law with (other) *inter se* agreements.[101] In fact, the CJEU had found EU law to take precedence over incompatible *inter se* agreements before it pronounced itself on the primacy of EU law over conflicting national legislation.[102] The primacy of EU law over *inter se* agreements was based on an *a contrario* reading of the conflict clause of Article 351 TFEU; the fact that Article 351 TFEU confers priority upon prior extra-EU agreements over EU law was held to imply that EU law must prevail over any other type of agreement, including those concluded between Member States *inter se*.[103] The CJEU first enunciated this interpretation in *Commission v Italy*. In that case, the Commission had brought infringement proceedings against Italy for introducing a new custom charge on intra-EU imports contrary to what was then Article 12 EEC (now Article 25 TFEU).[104] As a defence, Italy argued that the imposed intra-EU customs charge was permitted under an international agreement made within the framework of the GATT.

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99 *Commission v Germany* (n 3) para 11; Case C-103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECLI:EU:C:1989:256, para 30; Case C-118/00 *Larsy* [2001] ECLI:EU:C:2001:368, para 53.

100 Case C-213/89 *The Queen v Secretary of State for Transport,* ex parte *Factortame* [1990] ECLI:EU:C:1990:257, para 21; Joined Cases C-10-22/97 *Ministero delle Finanze v IN.CO.GE.'90 and Others* [1998] ECLI:EU:C:1998:498, para 21.

101 More recently, see Case C-109/20 *PL Holdings* [2021] ECLI:EU:C:2021:321, Opinion of AG Kokott, para 61.

102 Arena (n 93) 302.

103 Case C-812/79 *Attorney General v Burgoa* [1980] ECLI:EU:C:1980:231; Case C-121/85 *Conegate v HM Customs & Excise* [1986] ECLI:EU:C:1986:114, para 25.

104 Case C-10/61 *Commission v Italy* [1962] ECLI:EU:C:1962:2.

To Italy, the fact that the agreement was concluded prior to the EEC triggered the conflict clause of what was then Article 234 EEC (now Article 351 TFEU). Consequently, any conflict with EU law would have to be resolved in favour of the international agreement. The Court rejected this argument, holding that Article 234 EEC and, therefore, the provisions of an anterior treaty conflicting with EU law cannot be invoked in the relationship between Member States *inter se*. Instead, it ruled that 'in matters governed by the EEC, that Treaty takes precedence over agreements concluded between Member States before its entry into force [...]'.[105] The CJEU has consistently affirmed this conclusion since then.[106]

The principle of primacy operates in the relationship between EU law, and both *inter se* agreements and the *inter se* part of mixed agreements. However, in this latter case the operation of primacy would require an additional condition to be met for an irreconcilable conflict to be avoided: the mixed agreement must either impose bilateral obligations on its contracting parties or include a disconnection clause. If the mixed agreement cannot be broken down to bilateral treaty relations, the obligations imposed by it would be owed collectively to all contracting parties, any of which could invoke the international responsibility of another party for their violation.[107] A disconnection clause warrants that the operation of primacy in favour of EU law and its precedence over the *inter se* part of the mixed agreement in case of a conflict would not render the Member States liable towards

105 ibid p 10; Jan Klabbers, *Treaty Conflict and the European Union* (n 30) 125.

106 Case C-235/87 *Annunziata Matteucci v Communauté française of Belgium and Others* [1988] ECLI:EU:C:1988:460, para 22, where the Court found EU law to take precedence over the conflicting provisions of a bilateral agreement between Belgium and Germany concluded before the entry into force of the Treaty of Rome; also *Exportur* (n 64) para 8.

107 Case C-34/79 *Henn and Darby* [1979] ECLI:EU:C:1979:246, Opinion of AG Wagner, p 3833; Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 916.

their third country counterparts for its violation.[108] Unless there is a disconnection clause, in case of a conflict the Member States concerned would be in violation of a set of international obligations irrespective of how they act. By complying with EU law, a Member State would violate the mixed agreement towards both other Member States[109] and its third country counterparts. On the other hand, by choosing to comply with the *inter se* part of the mixed agreement, the Member State concerned would violate EU law. As irreconcilable conflicts fall outside the scope of this thesis, they are not examined further. Suffice it to say that, in case a Member States chooses to comply with the *inter se* part of the mixed agreement in such a scenario, the Commission and any other Member State could bring it before the CJEU under Articles 258 and 259 TFEU respectively.

In a similar vein, the principle of primacy applies to conflicts between *inter se* agreements and both primary and secondary EU legislation, binding on the Member States under Article 288 TFEU. This has been affirmed in *Budvar*, where the CJEU held that the EU system of protection laid down by Regulation No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs precludes the application of the equivalent system of protection laid down by *inter se* agreements in case of a conflict.[110] This conclusion can also be affirmed by reference to the ICJ's ruling in *Lockerbie* regarding the operation of another primacy clause, namely Article 103 UN Charter. In that case, the ICJ found Article 103 UN Charter to confer priority over incompatible obligations under any other international agreement upon both the provisions

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108 Pauwelyn, 'A Typology of Multilateral Treaty Obligations' (n 107) 916; see also Paz Andrés Sáenz de Santa María, 'The European Union and the Law of Treaties: A Fruitful Relationship' (2019) 30 EJIL 721, 744.

109 In such a scenario, a Member State requiring adherence to a mixed agreement that conflicts with EU law would equally be in violation of EU law.

110 Case C-478/07 *Budejovicky Budvar* [2009] ECLI:EU:C:2009:521, para 129.

of the UN Charter themselves, as well as upon UNSC Resolutions, binding on the parties to the UN Charter pursuant to its Article 25.[111]

The operation of primacy in the interrelation of EU law with *inter se* agreements renders the latter inapplicable to the extent of the conflict with EU law.[112] As the CJEU held in *Exportur,*

> the provisions of a convention concluded after 1 January 1958 by a Member State with another State could not, from the accession of the latter State to the Community, apply in the relations between those States if they were found to be contrary to the rules of the Treaty.[113]

However, the inapplicability of the conflicting provisions alone would not rectify their incompatibility with EU law. As is also the case with the relationship between EU law and national law, the operation of primacy in favour of EU law does not invalidate the incompatible provisions of the *inter se* agreement, which do not automatically cease to exist on the international plane.[114] To eliminate the conflict with EU law and all its legal effects, the Member States concerned would still be required to amend the incompatible provisions of the *inter se* agreement or, depending on the extent of the conflict, (bilaterally or

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111 *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 3, para 39.

112 Case C-469/00 *Ravil* [2003] ECLI:EU:C:2003:295, para 37; *Exportur* (n 64) para 8; *Simmenthal* (n 98) para 21; *Factortame* (n 100) para 17; Konstantina Georgaki and Thomas-Nektarios Papanastasiou, 'The Impact of *Achmea* on Investor-State Arbitration under Intra-EU BITs: A Treaty Law Perspective' (2019) XXXIX Polish Yearbook of International Law 209, 218.

113 *Exportur* (n 64) para 8.

114 Case C-284/16 *Achmea* [2018] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para 47; *IN.CO.GE* (n 100) para 21.

unilaterally) to terminate the agreement as a whole.[115] This obligation constitutes a special application of the duty of loyalty enshrined in Article 4(3) TEU.[116]

The primacy of EU law in its interrelation with *inter se* agreements has been accepted by scholarship and the case law of international *fora*. Among others, the ILC Study Group on Fragmentation, led by Koskenniemi, recognised that EU law 'takes absolute precedence over agreements the Member States have concluded between each other'.[117] Söderlund also adopts this perspective:

> EC law will prevail in the particular respect [to the extent of the conflict] over legislation at the national level. The same state of subordination goes for provisions of international agreements entered into between Member States [...].[118]

The tribunal in *Electrabel* agreed with this view, finding the primacy of EU law over *inter se* agreements to derive from a negative interpretation of Article 351 TFEU.[119] However, arbitral practice seems rather torn on this point. By contrast to the *Electrabel* tribunal, the *Vattenfall* and *Landesbank* tribunals both rejected this argument, finding Article 16 ECT to be a clearer conflict rule that 'must prevail over a rule derived from an *a contrario* interpretation of Article 351 TFEU which cannot be found in the text of the TFEU itself'.[120]

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115 Case C-74/86 *Commission v Germany* [1988] ECLI:EU:C:1988:198, para 10; Case C-358/98 *Commission v Italy* [2000] ECLI:EU:C:2000:114, para 16; Case C-160/99 *Commission v France* [2000] ECLI:EU:C:2000:410, para 22; Case C-522/04 *Commission v France* [2007] ECLI:EU:C:2007:405, para 70. On the obligation of the Member States to abolish the *inter se* agreement altogether, see, by way of analogy, the CJEU's case law under Article 351(2) TFEU, Case C-62/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:358, para 34; Case C-84/98 *Commission v Portugal* [2000] ECLI:EU:C:2000:359, para 40; Case C-170/98 *Commission v Belgium* [1999] ECLI:EU:C:1999:411, para 42.

116 Case C-104/86 *Commission v Italy* [1988] ECLI:EU:C:1988:171, para 12.

117 Koskenniemi (n 14) 143; see also Georgaki and Papanastasiou (n 112) 217.

118 Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2017) 24 Journal of International Arbitration 455, 463.

119 *Electrabel v Hungary* (n 10) para 4.183.

120 *Vattenfall v Germany* (n 21) para 227; *Landesbank Baden-Württemberg and Others v Kingdom of Spain*, ICSID Case No ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection of 25 February 2019, para 193.

6.3.2 The Principle of Primacy as a Special Conflict Rule Carving Out the *Lex Posterior*

Considering the above, a follow-up question necessarily comes to mind: what is the basis behind the argument that the principle of primacy constitutes a *lex specialis*, carving out the *lex posterior* in the interrelation of EU law with *inter se* agreements? After all, in the cases cited above, the application of the *lex posterior* would have generated the same outcome; the provisions of EU law would equally have taken precedence over the conflicting provisions of the earlier *inter se* agreement pursuant to Article 30(3) or 30(4)(a) VCLT, as the case may be, the EU Treaties being a later treaty between the same parties. AG Wathelet also made this point in his Opinion in *Achmea*. While supporting EU law's precedence over *inter se* agreements, he argued that:

> That position is consistent with Article 30(3) of the Vienna Convention, according to which 'when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'.[121]

The principle of primacy of EU law and the *lex posterior* may indeed generate identical outcomes. Whenever the EU Treaties qualify as the later treaty, they would prevail over a conflicting *inter se* agreement irrespective of whether one applies the *lex posterior* of Articles 30(3) and 30(4)(a) VCLT (as the case may be) or the principle of primacy of EU law. However, the *lex posterior* may also have a reverse application, this time in favour of a later *inter se* agreement; in case of a conflict, EU law would only apply to the extent that its provisions were compatible with those of the later *inter se* agreement. By contrast, in the interrelation of EU law with *inter se* agreements the CJEU has excluded this possibility. In *Ravil*, the CJEU held that 'the provisions of a convention between two Member States cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty', and that irrespective of the fact that said *inter se* agreement between France and

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121 *Achmea* (AG Wathelet) (n 114) para 47, fn 51.

Italy was concluded after the EU Treaties.[122] This finding has been consistently upheld since then.[123] By clarifying that the disapplication of EU law is not an option in the interrelation of EU law with *inter se* agreements, the CJEU's case law clearly stipulated the carve-out of the *lex posterior* in favour of the principle of primacy as a *lex specialis*. Unlike the *lex posterior*, the principle of primacy gives precedence to EU law over *inter se* agreements in any event; not only when the conclusion of the *inter se* agreement in question preceded that of the EU Treaties, but also when it came later in time.

But then one may still argue: how can the principle of primacy constitute a special conflict rule if it has never been reflected in the text of the EU Treaties? The answer is simple: albeit not explicit in the EU Treaties,[124] the principle of primacy is nevertheless covered by the common accord of the Member States both implicitly and explicitly. Implicitly, the Member States have affirmed the primacy of EU law over conflicting *inter se* agreements by choosing not to abstain from the CJEU's case law proclaiming its applicability in any of the multiple amendments to the EU Treaties. The Member States have also explicitly confirmed the

122 *Ravil* (n 112) para 37.

123 *Achmea* (AG Wathelet) (n 114) para 47; *Budvar* (2009) (n 110) 98. Even though in both *Achmea* and *Budvar* the EU Treaties qualified as the later treaty, the ruling in *Ravil* was cited as a relevant reference; Koskenniemi (n 14) 143; Jan Klabbers, 'The Validity of EU Norms Conflicting with International Obligations' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill 2011) 122; Schütze, 'EC Law and International Agreements of the Member States' (n 82) 395; Manzini (n 21) 784.

124 In the relationship between EU law and national law, a codification attempt was made with the inclusion of an express provision on primacy in the failed Treaty establishing a Constitution for Europe, which read: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States', see Article I-6 of the Treaty establishing a Constitution for Europe. This provision did not make its way into the text of the Treaty of Lisbon. It was, however, later on enshrined in Declaration 17 annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon (see Chapter 2). Despite the Declaration's ambiguous wording and the uncertainty regarding its legal status, there can be no doubt that the principle of primacy of EU law codified therein has now been explicitly and unanimously (re)affirmed by the Member States, Craig and de Búrca (n 95) 325-326; Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of *Kompetenz-Kompetenz*: A Conflict between Right and Right in Which There is No *Praetor*' (2011) 17 ELJ 470, 472; Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLR 1417.

primacy of EU law over *inter se* agreements on many occasions. Over the years, several Member States, as well as the Commission in its capacity as *amicus curiae,* invoked the principle of primacy as a conflict rule in arbitral proceedings brought under intra-EU BITs and the ECT.[125] For instance, in *Achmea,* both Slovakia and the Commission argued that violations of EU law cannot be justified by recourse to an *inter se* agreement, as EU law takes precedence in case of a conflict.[126] In the same vein, all Member States accepted that EU law takes precedence over conflicting *inter se* agreements in their 15 and 16 January 2019 declarations 'on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union'.[127] The primacy of EU law over *inter se* agreements can also be inferred from the wording of Article 4(1) of the Termination Agreement that followed these declarations, which reads:

> Article 4
>
> Common provisions
>
> 1. The Contracting Parties hereby confirm that Arbitration Clauses *are contrary to the EU Treaties and thus inapplicable*. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a

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125 *Ex multis*, *Achmea v Slovak Republic* (Jurisdiction) (n 38) para 180; *United Utilities v Estonia* (n 32) paras 500, 509; *Landesbank v Spain* (n 103) para 189; *RWE v Spain* (n 55) para 290; Reinisch (n 35) 161.

126 *Achmea v Slovak Republic* (Jurisdiction) (n 38) para 180.

127 See also, in that respect, *Adamakopoulos v Cyprus* (Statement of Dissent) (n 38) paras 52, 55; Declaration of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en>, which reads: 'Union law takes precedence over bilateral investment treaties concluded between Member States'. Moreover, in their declaration, Finland, Luxembourg, Malta, Sweden and Slovenia also accepted the primacy of EU law as a special conflict rule, quoting the CJEU's judgment in Case C-478/07 *Budvar* as a reference, <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> accessed 25 June 2021. This was also the case with Hungary, which issued a declaration of its own on the topic, reading: '[U]nion law takes precedence over bilateral investment treaties concluded between Member States', with references to the CJEU's relevant case law. In its declaration, Hungary also states that, in the interrelation of EU law with intra-EU BITs, the same result would flow from the VCLT and the *lex posterior* rule of customary international law, since the EU Treaties constitute the later treaty.

> Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.[128]

By agreeing on the primacy of EU law and the rights and obligations stemming from it[129] over both earlier and later *inter se* agreements,[130] the Member States have effectively set aside the residual *lex posterior*, codified in Articles 30(3) and 30(4)(a) VCLT, in their relationship. Conversely, Article 30(4)(b) VCLT, reflecting the *pacta tertiis* principle, continues to apply. As already explained, Article 30(4) VCLT would cover the following conflict scenarios:

Table 3
Article 30(4) VCLT – Personal Scope of Application

Conflict Scenario	Covered by Article 30(4) VCLT
Earlier EU Treaties – Later Partial *Inter se* Agreement (ABC-AB scenario)	Yes
Earlier EU Treaties – Later Partial Mixed Agreement (ABC-ABD scenario)	Yes
Earlier Universal Mixed Agreement – Later EU Treaties (ABC-AB scenario)	Yes
Earlier Partial Mixed Agreement – Later EU Treaties (ABC-ABD scenario)	Yes

Against this background, the earlier EU Treaties would still govern the relationship between the Member States-parties to a later partial *inter se* (or mixed) agreement and Member States that did not participate in that agreement pursuant to Article 30(4)(b) VCLT.[131] However, in

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128 Emphasis added.

129 The primacy of EU law is not limited to the EU Treaties, but extends to secondary EU legislation, which is binding on the Member States under Article 288 TFEU, see analysis above, p 216.

130 *Republic of Poland v PL Holdings* (AG Kokott) (n 101) para 61; *Achmea* (AG Wathelet) (n 114) para 47; *Budejovicky Budvar* (n 123) para 98; *Ravil* (n 112) para 37; *Exportur* (n 64) para 8; *Matteucci* (n 106) para 22; *Commission v Italy* (n 104) p 10.

131 A conflict between an earlier universal or partial mixed agreement and the later EU Treaties would only trigger Article 30(4) VCLT with respect to the relationship between the Member States and the third parties included therein.

this scenario, the special conflict rule of primacy would replace the *lex posterior* of Article 30(3) VCLT (which would normally apply by way of *renvoi* from Article 30(4)(a) VCLT) in the relationship between the Member States-parties to both the earlier and the later treaty, thus rendering the conflicting provisions of the *inter se* agreement inapplicable.

Over the years, several arbitral tribunals have examined the principle of primacy as a special rule to tackling conflicts in the interrelation of EU law with intra-EU BITs and the ECT. However, the operation of primacy has consistently been rejected on various grounds. As with Article 30 VCLT, several arbitral tribunals dismissed the application of primacy altogether, as they found there to be no incompatibility between EU law and the relevant agreement at issue that could trigger its operation.[132] More importantly, some tribunals found the principle of primacy irrelevant to conflict resolution between EU law and *inter se* agreements, on the ground that it is not a conflict rule applicable to treaty conflict on the international plane. Instead, they saw the principle of primacy as a construct of the CJEU in the EU legal order, which could, therefore, not be determinative 'of the position of EU law in the hierarchy of different legal systems from an international law perspective'.[133]

However, the principle of primacy is undeniably part of the broader system of international law. It has been enunciated by an international *forum*, the CJEU, and is covered by the common accord of the Member States. It complements the interpretation and application of a sub-system of international law, namely EU law. It applies to a particular set of treaty conflicts on the international plane, affording relative normative priority to the EU Treaties and the rights and obligations stemming from them over *inter se* agreements,

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132 *Rupert Joseph Binder v Czech Republic*, UNCITRAL, Award on Jurisdiction of 6 June 2007, para 63; *Jurgen Wirtgen and Others v Czech Republic*, PCA Case No 2014-03, Final Award of 11 October 2017, para 178;

133 *United Utilities v Estonia* (n 32) para 517; *GPF GP S.à.r.l v Republic of Poland*, SCC Case No 2014/168, Award of 29 April 2020, para 347.

thus carving out the *lex posterior*. As a special conflict rule of international law, the principle of primacy can be applied by any international *forum* as part of international law.[134]

6.3.3 The Operation of the Principle of Primacy to Conflicts between EU Law and *Inter se* Agreements

So, how is primacy to operate in the interrelation of EU law with *inter se* agreements? To answer this question, I need to distinguish between two broader conflict scenarios: first, cases, where the *inter se* agreement does not include a conflict clause or includes a subordination clause in favour of EU law; and, second, cases, where the *inter se* agreement contains a conflict clause conferring priority upon the *inter se* agreement instead. While the effects of primacy remain the same in both cases, the *ratio* underlying its application differs.

Cases where the *inter se* agreement is silent on its interrelation with EU law are rather unproblematic. Once a genuine conflict is identified, the principle of primacy would confer precedence upon EU law over the incompatible provisions of the *inter se* agreement, thus rendering them inapplicable. This would be so both when the conclusion of the *inter se* agreement preceded that of the EU Treaties, as well as when it followed; in the absence of an express provision to the contrary, the Member States are presumed not to have intended to set aside the principle of primacy of EU law simply by concluding a conflicting partial or universal *inter se* agreement.[135]

The above would also be true of cases where the *inter se* agreement[136] at hand contains a subordination clause. Subordination clauses confer priority upon an international agreement

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134 See, in that vein, *Adamakopoulos v Cyprus* (Decision on Jurisdiction) (n 10) para 160.

135 Schütze, 'EC Law and International Agreements of the Member States' (n 82) 411; see also Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 339, who makes a similar argument with respect to Article 103 of the UN Charter.

136 Bruno De Witte and Thibault Martinelli, 'Treaties Between EU Member States as Quasi-Instruments of EU Law' in Marise Cremona and Claire Kilpatrick (ed), *EU Legal Acts: Challenges and Transformations* (OUP 2018) 176.

over the treaty in which they are enshrined. They constitute special conflict rules, carving out an exception to the residual conflict rules of the VCLT in the relationship between the contracting parties to the treaties at hand.[137] The possibility for the parties to an international agreement to agree on a subordination clause is explicitly recognised in Article 30(2) VCLT. Subordination clauses operating in favour of EU law have the same effects as the principle of primacy, setting the *lex posterior* conflict rule codified in Article 30(3) and 30(4)(a) VCLT aside. The Member States have inserted relevant clauses in several international treaties. Examples include Article 11(2) of the Bilateral Investment Treaty between Austria and Croatia, which provides that '[T]he Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time'.[138] More recently, Article 2(2) of the Fiscal Compact provides that '[T]his Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law.'[139] The same subordination clause was also inserted in Article 2(2) of the Agreement on the SRF.[140]

However, what would happen if an *inter se* agreement contained a clause conferring it priority over EU law instead? In such a scenario, the conflict with EU law would be two-fold; apart from the genuine conflict that triggered the need to identify the applicable conflict

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137 *Raiffeisen v Croatia* (n 21) para 131; *Addiko v Croatia* (n 21) para 209.

138 Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments of 19 February 1997, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/180/download> accessed 2 June 2021. This subordination clause was interpreted extensively in *Raiffeisen* and *Addiko*, see *Raiffeisen v Croatia* (n 21) paras 131-150; *Addiko v Croatia* (n 21) paras 201-220.

139 Article 2(2) of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, full text available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0302(01)&from=EN> accessed 27 May 2021.

140 Article 2(1) of the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, full text available at <https://data.consilium.europa.eu/doc/document/ST%208457%202014%20INIT/EN/pdf> accessed 27 May 2021.

rule in the first place, there would also be a conflict between the primacy each instrument claims for itself. So, how would this conflict between the two 'primacies' be resolved?

The primacy of EU law would provide the solution in this scenario as well. A conflict clause conferring priority upon an *inter se* agreement would be incompatible with the primacy of EU law as a special conflict rule. Just like any other conflict in the interrelation of EU law with *inter se* agreements, a conflict between the applicable conflict rules would also be resolved in favour of EU law, using the principle of primacy as a special conflict rule. As a result, the conflict clause set out in the *inter se* agreement would be inapplicable. This would be so irrespective of whether the *inter se* agreement is earlier or later than the EU Treaties, as the Member States have agreed to accord primacy to EU law over conflicting provisions in any *inter se* agreement, existing or future.

Against this background, a follow-up question arises: since the Member States remain sovereign, could they not agree to confer priority upon another *inter se* agreement over EU law by inserting a conflict clause to that end in a later treaty? In fact, in his third report to the ILC, Special Rapporteur Waldock argued that

> [...] when concluding the later treaty they [the contracting parties] are fully competent to abrogate or modify the earlier treaty which they themselves drew up. It is simply a question of what they intend by the provision of the later treaty [...].[141]

This was further affirmed by the Commentaries to the VCLT.[142] Several scholars agree with this view. Karl characterised conflict rules claiming the priority of an international agreement over future (later) agreements as futile, *inter alia* on account of the fact that 'they

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141 Sir Humphrey Waldock, 'Third Report to the ILC on the Law of Treaties' (1964) 2 Yearbook of the International Law Commission 5, 38-39 (A/CN.4/167).

142 ILC, 'Draft Articles on the Law of Treaties' (n 22) 216.

can always be overcome by the common will of the parties'.[143] In the same vein, Pauwelyn argues that

> conflict clauses may well provide that the treaty prevails over future treaties, but nothing prevents the parties to the first treaty from changing their minds and deciding in the later treaty that, notwithstanding the earlier conflict clause, the later treaty must prevail.[144]

Why is it, then, that the principle of primacy would apply over a conflict clause enshrined in a later *inter se* agreement? To explain this, I need to distinguish between: cases where the conflict clause is set out in a partial *inter se* agreement; and cases where the conflict clause is set out in a universal *inter se* agreement instead. While the principle of primacy remains the applicable conflict rule in both scenarios, depending on the type of *inter se* agreement as universal or partial, different considerations lie behind its operation.

First, a conflict clause claiming the priority of a later partial *inter se* agreement over EU law would qualify as an attempt to effect an *inter se* modification of the EU Treaties and, more specifically, of the primacy of EU law as a special conflict rule. However, the EU Treaties rule out the possibility of *inter se* modifications, since they impose integral obligations on the Member States. This conclusion is further affirmed by the fact that the EU Treaties in principle require unanimity for any revision to their text under Article 48 TEU. Consequently, a partial *inter se* agreement cannot carve out the Member States' obligations under EU law or modify any of its provisions.[145] In such a scenario, the conflict clause conferring priority upon the *inter se* agreement would be valid, but illegal. The illegality of said conflict clause would generate a conflict with EU law and, more specifically, Article 48

143 Wolfram Karl, 'Conflicts between Treaties' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (VII, North Holland 1981) 471.

144 Pauwelyn, *Conflict of Norms in Public International Law* (n 2) 335-336.

145 See also Sadat-Akhavi (n 9) 83-84.

TEU,[146] which, like any conflict in the interrelation of EU law with *inter se* agreements, would be dealt with pursuant to the principle of primacy. As a result, the conflict clause conferring priority upon the *inter se* agreement would be inapplicable in favour of EU law. Therefore, the principle of primacy would remain the conflict rule under which the original conflict between EU law and the *inter se* agreement would also be tackled.

EU law would also take precedence over the conflicting provisions of an *inter se* agreement even if the Member States had agreed on a different conflict clause in a later universal *inter se* agreement instead. According to Special Rapporteur Waldock,

> [W]hen a treaty contains a clause purporting to override *future* treaties inconsistent with it, the clause can be of no significance if all the parties to the earlier treaty are also parties to the later one.[147]

However, a valid amendment to the principle of primacy of EU law would need to take place within the specific framework set out by the EU Treaties.[148] Article 48 TEU rules out informal amendments to the EU Treaties. Apart from requiring the Member States' common accord to the proposed treaty amendment(s), it sets out several other procedural safeguards that need to be followed. In the context of an ordinary revision procedure, these would include a decision by the European Council, upon consultation with the European Parliament and the Commission, on convening a convention of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission; as well as an intergovernmental conference to determine by common accord the amendments to be made to the EU Treaties. By agreeing on the special amendment process of Article 48 TEU, the Member States imposed procedural

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146 Trevor C Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (8th edn, OUP 2014) 92.

147 Waldock, 'Third Report to the ILC on the Law of Treaties' (n 141) 38-39 (emphasis in the original).

148 Marcus Klamert, 'Article 48 TEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019) 304.

limitations on their freedom to agree on treaty revisions. This does not mean that the Member States have given up on their sovereignty and can, therefore, no longer amend them if they so agree. Quite the contrary; they remain free to change any provision of the EU Treaties they please, including the very provision on amendment, on condition that they do so explicitly within the framework of Article 48 TEU. In fact, the right to agree on a specific amendment process is itself a facet of sovereignty. This premise has long been affirmed by the PCIJ in *Wimbledon*, which has been characterised as 'the locus classicus of the modern international law doctrine of sovereignty':[149]

> The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[150]

The CJEU has also early on ruled out the possibility of informal amendments to the EU Treaties. In *Defrenne*, the Member States had adopted a resolution aiming at delaying the full implementation of the principle of equal pay for equal work laid down in Article 119 EEC, which had to be implemented before the end of the first stage of the transitional period (1 January 1962). However, the CJEU found Article 119 EEC to have been directly effective since the end of 1961, as 'the Resolution of the Member States of 30 December 1961 was ineffective to make any valid modification of the time-limit fixed by the Treaty'.[151] To the Court, '[...] the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236' (now Article 48 TEU).[152] Similarly, in *Manghera*, the CJEU answered in the negative the question of whether a Council resolution could change

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149 Bruno De Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' (1995) 2 Maastricht J Eur & Comp L 145, 146.

150 PCIJ Series A, No 1 (1923), 25.

151 Case C-43/75 *Defrenne v SABENA* [1976] ECLI:EU:C:1976:56, para 57.

152 ibid para 58.

the time scale provided in Article 37 EEC on the abolition of discrimination arising out of national monopolies.[153] In *United Kingdom v Council*, the Court equally rejected the possibility of an informal amendment to the EU Treaties, this time by means of a 'mere practice' of the EU institutions.[154] In the same vein, the CJEU has also early on rejected the possibility of informal amendments to the EU Treaties through the use of Article 352 TFEU.[155]

In light of the above, the Member States could still amend the primacy of EU law in its interrelation with *inter se* agreements. However, they would need to follow the specific amendment procedure provided by the EU legal framework and, in particular, Article 48 TEU to do so. Informal amendments to the EU Treaties outside the framework of Article 48 TEU, including by means of a universal *inter se* agreement, would not suffice to that end. To the extent that a universal *inter se* agreement leads to an informal amendment to the EU Treaties, it would be illegal (albeit valid), thus generating a conflict with Article 48 TEU.[156] As with any conflict between EU law and an *inter se* agreement, said conflict would be resolved in favour of EU law pursuant to the principle of primacy. Consequently, the conflict clause conferring priority upon the universal *inter se* agreement would be inapplicable. Primacy would, therefore, remain the applicable rule, through which the original conflict with EU law would be tackled.

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153 Case C-59/75 *Manghera and Others* [1976] ECLI:EU:C:1976:14, paras 19-21.

154 Case C-68/86 *United Kingdom v Council* [1988] ECLI:EU:C:1988:85, para 24; see also Case C-455/14 *H v Council and Commission* [2016] ECLI:EU:C:2016:212, Opinion of AG Wahl, para 49; Case C-202/13 *McCarthy and Others* [2014] ECLI:EU:C:2014:345, Opinion of AG Szpunar, para 82.

155 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECLI:EU:C:1996:140, para 21.

156 Hartley (n 146) 93.

EPILOGUE

This thesis focused on conflicts in the interrelation of EU law with *inter se* agreements, including with the *inter se* part of mixed agreements. My core argument was that conflicts between EU law and *inter se* agreements should be approached and resolved as conflicts of treaty norms in public international law.

In support of the argument that conflicts between EU law and *inter se* agreements are normative conflicts on the international plane, I first had to prove that EU law and *inter se* agreements were both part of the legal system of international law. To that end, I argued that EU law remains an inextricable part of international law, as the distinctiveness of its characteristics does not suffice to sever its bonds with its international law origins. The EU's external autonomy has often been emphasised, but acceptance of this claim does not necessarily lead to the conclusion that EU law has ceased to be a part of international law. In that sense, the concept of external autonomy and the features it encompasses remain derivative, dependent on the Member States.[1] The EU is undeniably a special legal experiment, compared to other international organisations. Yet this alone cannot render the EU self-referential. EU law should, therefore, not be treated as a 'new legal order', outside of and existing in parallel with international law. Instead, EU law's claim to external autonomy needs to be – and, in fact, seems to have been – addressed within the broader system of international law. EU law constitutes a 'self-contained regime', in the sense of an 'autonomous' sub-system *within* international law,[2] designed to exclude the application of general international law, at least in principle. However, the self-contained regime of EU

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1 Jan Willem van Rossem, 'The Autonomy of EU Law: More or Less?' in Ramses A Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer 2013) 25.

2 Bruno De Witte, 'Sources and the Subjects of International Law: The European Union's Semi-Autonomous System of Sources' in Jean d'Aspremont and Samantha Besson (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 771.

law may still have recourse to general international law as a last resort to the interpretation and rectification of regulatory failures or *lacunae* therein.[3] The case law of the EU Courts has firmly and consistently affirmed this position, resorting to general international law indirectly, through the case law of the ECtHR for the interpretation of Charter rights pursuant to Article 52(3) of the Charter. Meanwhile, the EU Courts have also employed international law directly: for the interpretation of international agreements, to which the EU is a contracting party; for guidance on the interpretation of EU law, including the EU Treaties; as a reference for assessing the legality of secondary EU legislation; and as a gap-filler, in the absence of EU-specific rules on matters where the EU Courts needed guidance to reach a decision.

Having proved that EU law is treaty law and forms part of the broader system of international law, I argued that conflicts between EU law and *inter se* agreements are to be addressed pursuant to the rules of international law applicable to treaty conflicts.[4] In this context, I defined 'conflict' in the broadest sense possible, considering EU law to be in conflict with an *inter se* agreement, irrespective of whether the areas covered by EU law and the agreement at issue (fully) coincide, when compliance with the norms of EU law or the *inter se* agreement (be they mandatory or permissive): (i) leads or may lead to a violation of the norms of the *inter se* agreement or EU law respectively; (ii) frustrates or may frustrate its object and purpose; or (iii) if the *inter se* agreement falls within the scope of exclusive EU competence, *ab initio* or supervening. Against this background, I further distinguished between: apparent conflicts, which may be avoided through methods of conflict avoidance;

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3 See also Theodore Konstadinides, 'Customary international Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) 35 YEL 513, 515.

4 Derrick Wyatt, 'New Legal Order or Old?' (1982) 7 E L Rev 147, 148.

and genuine conflicts, which need to be resolved using the conflict rules of international law instead.

When it comes to apparent conflicts between EU law and *inter se* agreements, I argued that there are two applicable conflict avoidance techniques: the principle of systemic integration, enshrined in Article 31(3)(c) VCLT; and the principle of a consistent-with-EU-law-interpretation of *inter se* agreements, as a special application of the principle of harmonious interpretation applied in international law. Albeit distinct, these principles operate cumulatively and consecutively. As a first step, the principle of systemic integration of Article 31(3)(c) VCLT ensures that EU law is considered in the interpretation of an *inter se* agreement. Once EU law penetrates the interpretative process, the *inter se* agreement is then to be construed (so far as possible) in a manner harmonious with EU law under the principle of a consistent-with-EU-law-interpretation.

Unless a consistent-with-EU-law-interpretation of the *inter se* agreement is possible or practicable, a genuine 'conflict' between EU law and the *inter se* agreement will be identified. Genuine treaty conflicts are to be dealt with using the conflict rules of customary international law, unless the parties to the conflicting instruments have agreed on special conflict rules to regulate their relationship. Against this background, I argued that Article 59 VCLT on the implicit termination of an earlier agreement by the conclusion of a later between the same parties and Article 30(4)(b) VCLT on the *pacta tertiis* remain relevant to conflict resolution between EU law and *inter se* agreements. However, I argued that the Member States have carved out an exception to the application of the *lex posterior* codified in Articles 30(3) and 30(4)(a) VCLT by agreeing on the principle of primacy of EU law as a special conflict rule. The principle of primacy of EU law applies to conflicts in the interrelation of EU law (including secondary EU law legislation) with *inter se* agreements,

as well as with the *inter se* part of mixed agreements, insofar as they impose bilateral obligations or include a disconnection clause. As a result of the principle of primacy, EU law would prevail over incompatible provisions of both earlier and later *inter se* agreements, thus rendering them inapplicable.

Since it was the interrelation of EU law with intra-EU BITs that generated the idea of this thesis, I will be concluding by applying the above to the conflict between EU law and intra-EU BITs identified in *Achmea*. In that case, the CJEU affirmed that there was a genuine (substantive) conflict between an ISA clause included in an *inter se* agreement, such as the Dutch-Slovak Republic BIT, and Articles 267 and 344 TFEU. Insofar as an arbitral tribunal is bound to apply EU law as part of international law for the adjudication of intra-EU BIT disputes, it is equally bound to give effect to the exclusive competence of the CJEU authoritatively to apply and interpret EU law provisions. Therefore, the CJEU's ruling finding a genuine conflict between EU law and intra-EU BITs would be binding on the arbitral tribunal, which would need to skip conflict avoidance techniques and proceed directly to conflict resolution.

So, how would the genuine conflict between EU law and an intra-EU BIT ISA clause, such as the one in the Dutch-Slovak Republic BIT, be resolved?

The first step would be to examine whether the conditions of Article 59 VCLT are met. In the interrelation of EU law with intra-EU BITs, the EU Treaties are the later treaty in the sense of Articles 59 and 30 VCLT, given that all BITs became intra-EU following the accession of the last of their contracting parties to the EU. As a result, the tribunal would be dealing with an AB-ABC conflict scenario, which could in principle trigger the operation of Article 59 VCLT. Nevertheless, since the CJEU in *Achmea* only affirmed a conflict between specific provisions of EU law and intra-EU BITs, said conflict would not meet the high

threshold set for the implicit abrogation of the earlier agreement under Article 59 VCLT – at least not unless a conflict between EU law and other provisions of the BIT could also be identified. Consequently, the conflict between EU law and intra-EU BIT ISA clauses would need to be addressed pursuant to the principle of primacy of EU law as a special conflict rule. Given the type of conflict as AB-ABC, the principle of primacy would be the only applicable conflict rule, as Article 30(4)(b) VCLT and the *pacta tertiis* reflected therein would not be relevant.

Under the principle of primacy, EU law would take precedence over the incompatible intra-EU BIT ISA clause, which would be rendered inapplicable. However, contrary to what arbitral tribunals seem to have supported so far, the inapplicability of intra-EU BIT ISA clauses would not be limited to within the EU. Instead, intra-EU BIT ISA clauses would be rendered ineffective on the international plane; since conflicts between EU law and *inter se* agreements are conflicts between treaty norms in public international law, the effects of conflict resolution extend to the broader system of international law, within which EU law and intra-EU BITs coexist.

In practical terms, the inapplicability of an intra-EU BIT ISA clause would strike a blow against the competence of an arbitral tribunal to entertain claims under the relevant BIT from the moment said conflict arose, namely when the BIT became intra-EU.[5] Intra-EU BIT

[5] Clément Fouchard and Marc Krestin, 'The Judgment of the CJEU in Slovak Republic v. *Achmea* – A Loud Clap of Thunder on the Intra-EU BIT Sky!' Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/> accessed 28 August 2021; Matthieu Gregoire, 'Intra-EU BIT Arbitrations Declared Incompatible with EU Law Judgment Rendered in C-284/16 – Slowakische Republik v Achmea BV' 4 New Square, available at <http://www.4newsquare.com/wp-content/uploads/2018/03/Note-on-Slowakische-Republik-v-Achmea-BV-by-Matthieu-Gregoire-2.pdf> accessed 28 August 2021, para 30; Nicolas De Sadeleer, 'The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded Between Two Member States' (2018) 9 European Journal of Risk Regulation 355.

arbitral tribunals are international *fora*, whose jurisdiction is always consent-based.[6] In the context of investor-state arbitration, the tribunal's jurisdiction derives from the applicable treaty, bilateral or multilateral, whereby the contracting states agreed *ex ante* on the tribunal's jurisdiction to hear disputes brought against them by investors-nationals of the other contracting State.[7] ISA clauses reflect a unilateral offer of consent to arbitration by the treaty's contracting parties. Hence, the tribunal's jurisdiction is only established once an eligible investor accepts the offer to arbitrate disputes included in the treaty.[8] At that point, the investor perfects an arbitration agreement with the Member State and the latter's consent to the tribunal's jurisdiction becomes irrevocable.[9] The inapplicability of an ISA clause due to its incompatibility with EU law means that the Member States could not have validly consented to arbitration via the respective ISA clause since the conflict with EU law first arose.[10] In the case at hand, this would be the time of accession of the last of the BIT's

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6 Kenneth Valdevelde, *Bilateral Investment Treaties* (OUP 2010) 433; Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013) 20; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility' in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch and Yun-I Kim (eds), *International Investment Law: A Handbook* (Hart 2015) 1222; Andrea Marco Steingruber, *Consent in Investment Arbitration* (OUP 2015) 225.

7 Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2015) 1 McGill Journal of Dispute Resolution 1, 2.

8 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 257; Christoph Schreuer, 'Consent to Arbitration' in Peter T Muchlinski, Federico Ordino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2015) 836; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 257; Kjos (n 6) 2072.

9 Douglas makes a distinction between the 'derivative' model, in the context of which it is supported that investment arbitration is nothing but the mere 'institutionalisation' of the diplomatic protection model. According to this view, the investor is enforcing the rights of its national state, simply stepping into the procedural shoes of the latter; and the 'direct' model, under which the investor is considered to be conferred an individual right that it will seek to vindicate by means of international treaty arbitration. Based on the 'direct' model, once the investor brings a claim before the arbitral tribunal, the contracting parties to the BIT may no longer withdraw their consent to arbitrate such dispute, as to do so would violate the investor's right to proceed to arbitration, see Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 10-11; see also Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Review 232.

10 The question of whether the respondent Member State in a dispute brought under such an intra-EU BIT ISA clause could have implicitly accepted the jurisdiction of the arbitral tribunal by not objecting to it in a timely manner during the arbitral proceeding is currently pending before the CJEU, see Case C-109/20 *Republic of Poland v PL Holdings Sàrl* (pending).

contracting parties to the EU. Therefore, no valid arbitration agreement could have been concluded based on such an ISA clause and an arbitral tribunal established thereunder would lack jurisdiction to entertain claims under the BIT.[11]

In light but also irrespective of the above, the interrelation of EU law with *inter se* agreements in cases of normative conflict is one of the most complex and lively topics in both international and EU law. Currently, there are several cases pending before various international *fora*, all of which pertain to (possible) conflicts between EU law and *inter se* agreements.[12] In this thesis, I attempted to enunciate a solution that could effectively tackle the problem of conflicts between EU law and *inter se* agreements, while preserving the coherence of the international legal order. Whether I have succeeded, and the proposed approach will be taken up by scholarship and in practice, remains to be seen. One thing is for sure: unless and until the Member States choose to pursue further integration exclusively within the channels of the EU and EU law, the interrelation of EU law with *inter se* agreements will remain in the spotlight for many more years to come.

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11 Konstantina Georgaki and Thomas-Nektarios Papanastasiou, 'The Impact of *Achmea* on Investor-State Arbitration under Intra-EU BITs: A Treaty Law Perspective' (2019) XXXIX Polish Yearbook of International Law 209, 221.

12 See, for example, Case C-741/19 *Republic of Moldova* and Opinion 1/20, on the intra-EU application of the ECT and its conformity with EU law (pending); Case C-109/20 *PL Holdings*, on the compatibility with EU law of a tacit agreement between an investor of a Member State and another Member State to arbitrate a dispute under an intra-EU BIT. Moreover, there are currently several cases pending before arbitral tribunals under intra-EU BITs and the ECT, see, *ex multis*, *Rockhopper Italia S.p.A, Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No ARB 17/14 (pending on the merits); *VC Holding II S.à.r.l. and Others v Italian Republic*, ICSID Case No ARB/16/39 (pending); *Erste & Steiermärkische Bank d.d., Erste Group Bank AG, and Steiermärkische Bank und Sparkassen AG v. Republic of Croatia*, ICSID Case No ARB/17/49 (pending); *AS PNB Banka and Others v Republic of Latvia*, ICSID Case No ARB/17/47 (pending); *Alverley Investments Limited and Germen Properties Ltd v. Romania*, ICSID Case No ARB/18/30 (pending).

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