

Achmea, Kramer and Disconnection Clauses: EU Legal Regionalism in Action

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Abstract: Over the past decades, the European Union has been gradually developing and maintaining legal regionalism within its jurisdiction. Its purpose is to preserve the achievements of integration, as well as the unity and autonomy of EU law. In this paper, I recount the toolbox of EU legal regionalism from primary law, through the case law of the Court of Justice of the European Union, to the institution of the so-called disconnection clauses employed by the EU in certain international treaties, expanding also on their possible effects on international law and the Member States' relations with third parties.

1. Introduction

According to Article 3 Section 5 of the Treaty on European Union (TEU), “in its relations with the wider world, the Union shall uphold and promote its values and interests” and contribute to “the strict observance and the development of international law.” To meet both of these objectives, a form of legal regionalism has been gradually developed under EU law, which has been most recently illustrated by the Achmea judgment of the Court of Justice of the European Union (CJEU). This attempt of the CJEU to insulate the internal market from international law commitments assumed on an *a priori* basis is not an exception, but a consistent policy of the EU to promote separate undertakings at global and EU, i.e. regional, levels.

According to the UN Commission on International Law, the concept of legal regionalism covers at least three phenomena: an approach to international law marked by historical, cultural or specific legal traditions; development of international law through a gradual expansion of the scope of regional rules; and an attempt to establish geographical exceptions to the application of universal rules of international law.¹ In the latter sense, legal regionalism is recognized by the UN Commission on International Law in two forms: either an international rule applies only to the states of a region, or an otherwise universal rule does not apply to the states of a region.²

Although the notion of legal regionalism was coined in the context of universal rules of international law, following Dawar, I will use it to illustrate the efforts of the treaty-makers, the CJEU and the Commission to insulate rules in and between Member States from the application of particular rules of international law.³ In all cases, the purpose of these tools is to exclude the application of international law between the Member States on matters governed by EU law, in the interests of the autonomy and unity of EU law. From a temporal perspective, Schütze distinguishes between tools for achieving legal regionalism in relation to international commitments that were made before and after EU accession, respectively;⁴ this paper is structured according to this temporal approach. First, I take stock of the instruments contained in the founding treaty and international treaties, as well as in the case law of the CJEU, which serve the purpose of legal regionalism. Next, I turn to the figure of disconnection clauses which effectively

¹ Report of the 57th session of the UN International Law Commission (2–3 June and 11 July – 5 August 2005), sec. 451; see also: Liliana Obregón, “Latin American International Law,” in *Routledge Handbook of International Law*, eds. David Armstrong et al. (Abingdon: Routledge, 2008), 154–64.

² Report of the 57th session of the UN International Law Commission (2–3 June and 11 July – 5 August 2005), sec. 456.

³ Kamala Dawar, “Disconnection Clauses: An Inevitable Symptom of Regionalism?,” Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, June 2010, 5.

⁴ Robert Schütze, “European Law and Member State Agreements. An Ambivalent Relationship?,” in *Foreign Affairs and the EU Constitution. Selected Essays*, ed. Robert Schütze (Cambridge: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139794756.006>, 122–3.

shield Member States' relations from the international commitments jointly undertaken towards third states. Finally, I summarize my findings with an outlook on the possible effects of disconnection tools on international law.

2. Rationale and Tools for Developing and Maintaining EU Legal Regionalism

The Member States of the European Union have achieved a high level of integration in certain areas and have an interest in both maintaining and deepening this integration, while at the same time developing fruitful relations with third countries through international treaties. To preserve the achievements of integration among them, and to secure the autonomy and unity of the ensuing EU legal order, Member States must ensure that the international commitments they undertake do not interfere with their existing EU arrangements, such as the rules of the internal market.

Comparable interests of trade groupings have been recognized in numerous international agreements. For example, Article 24 of the General Agreement on Tariffs and Trade (1947)⁵ provided for a special treatment of customs unions and free trade areas, foreseeing that the former “exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party” (Section 1). More recently, Article 27 of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters stipulated that “a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention (...)”

The European Union, for its part, develops and maintains legal regionalism through various tools, depending on whether the international commitment in question was undertaken before, or after accession, and whether such commitments were made toward Member States or third parties.

⁵ As early as the turn of the century, Nigel Nagarajan noted that while legal regionalism is on the rise, there are concerns that such trade groupings and their special treatment under the WTO may be undermining the “benefits which the multilateral system is supposed to deliver.” Nigel Nagarajan, “Regionalism and the WTO: New Rules for the Game?,” *European Economy. Economic Papers*, no. 128 (June 1998): 3.

In the subsequent sections, I describe this toolkit of the European Union following the above-mentioned temporal approach and distinguishing between inter-Member State and Member State/third state scenarios.

2.1. Status of International Treaties Concluded by Member States before EU Accession: Article 351 TFEU and Related Case Law

The main conundrum of EU legal regionalism is that

[t]he internal division of competences between the Union and the Member States did not correspond to the international law perspective that accords external sovereignty to the Member States. The continued existence of the states' treaty-making powers raised complex questions about the normative relationship between the European legal order and the international legal order.⁶

As a primary law solution to this situation, the principle of sincere cooperation enshrined in Article 4 Section 3 TEU implies that Member States must not conclude international treaties that could jeopardize the attainment of the Union's objectives.

While the principle of sincere cooperation effectively deals with undertakings of the Member States *pro futuro*, the Masters of the Treaty also had to deal with the international commitments of the Member States made prior to accession. It was Article 351 TFEU (ex Article 307 TEC) which sought to harmonize such commitments with EU law,⁷ stipulating the following:

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.

⁶ Schütze, "European Law and Member State Agreements," 121.

⁷ Petra Lea Láncoş, "Az Európai Unió tagállamai között a csatlakozást megelőzően létrejött nemzetközi szerződéseinek helyzete, különös tekintettel a vízpótlásról szóló 1995. április 19-i magyar-szlovák megállapodás időbeli hatályának meghosszabbítására" ["The Status of International Treaties Concluded between the Member States of the European Union Prior to Accession, with Particular Reference to the Extension of the Hungarian-Slovak Agreement of 19 April 1995 on Water Recharge"], in *Bonas Iuris Margaritas Quaerens. Emlékkötet a 85 éve született Bánrév Gábor tiszteletére [In Honour of Gábor Bánrév, Born 85 Years Ago]*, ed. Szabó Sarolta (Budapest: Pázmány Press, 2015), 139–41.

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. (...)

According to Bartha, Article 351 TFEU “in principle gives precedence to agreements previously concluded by the Member States, with the proviso that Member States must refrain from implementing any obligations imposed by these agreements which are contrary to Community law.”⁸ Article 351 TFEU does not foresee an automatic derogation from prior international commitments that are incompatible; however, there is a mandatory obligation for the Member States to resolve any existing conflicts: “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.”

What could be considered “appropriate steps” to eliminate a possible incompatibility? According to the ruling of the European Court of Justice in *Commission v. Portugal*, if the international agreement in question so permits, the Member State is obliged to withdraw from the treaty in order to eliminate the incompatibility and ensure the proper application of Community law.⁹ According to the Court, if an international agreement (foreseeing commitments incompatible with Community law) allows for its denunciation, this shall be a sufficient guarantee that the rights of the non-Member State third party will not be infringed.¹⁰

One of the main concerns regarding Article 351 TFEU was whether it applies to agreements concluded by Member States with any country or rather only with other EU Member States prior to accession. The case law of the Court of Justice seems to support the view that it applies only to the Member States’ prior agreements with third States. The *Budějovický Budvar* case concerned a bilateral agreement between the Czech Republic

⁸ Bartha Ildikó, “Az Európai Közösség és tagállamok nemzetközi szerződéskötési hatáskörei az Európai Bíróság esetjogában” [“The International Treaty-Making Powers of the European Community and the Member States in the Case Law of the European Court of Justice”] (PhD diss., University of Miskolc, 2009), 239.

⁹ CJEU Judgment of 4 July 2000, *Commission v. Portugal*, Case C-62/98, ECLI:EU:C:2000:358.

¹⁰ Bartha, “Az Európai Közösség,” 256.

and Austria on the protection of geographical indications. According to the Court's judgment,

since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the Treaty (...). In addition, it must be pointed out that Article 307 TEC does not apply to such agreements since no third country is party to them.¹¹

The earlier *Deserbais* case revolved around a conflict that arose between French legislation implementing the International Convention on the Use of Designations of Origin and Names for Cheeses (Stresa Convention) and Community law governing the free movement of goods. The Court of Justice pointed out that only Denmark, France, Italy and the Netherlands were parties to the Stresa Convention.¹² According to the judgment, in the case of an agreement in which “the rights of non-member countries are not involved, a Member State cannot rely on the provisions of a pre-existing convention” to undermine the application of Community law.¹³ As such, Community law replaces prior international commitments in the relations between Member States. It should nevertheless be noted that the Court remained silent on the fact that the Stresa Convention actually involved several third States, including certain members of the European Economic Area. In assessing the situation of prior treaty relations between the Member States, Bartha pointed out that the Member States “undertake, together with the transfer of competence, to terminate their earlier commitments towards each other.”¹⁴ Incidentally, this is also the obligation that Member States are fulfilling when terminating bilateral investment protection treaties they concluded with each other following the *Achmea* judgment.¹⁵

¹¹ CJEU Judgment of 8 September 2009, *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, Case C478/07, ECLI:EU:C:2009:521, sec. 98–9.

¹² CJEU Judgment of 22 September 1988, *Ministere Public v. Deserbais*, Case C-286/86, ECLI:EU:C:1988:434, sec. 16.

¹³ *Ibid.*, sec. 18.

¹⁴ Bartha, “Az Európai Közösség,” 238.

¹⁵ CJEU Judgment of 6 March 2018, *Slovak Republic v. Achmea*, Case C-284/16, ECLI:EU:C:2018:158.

The case revolved around a bilateral investment treaty (BIT) between two Member States, the Netherlands and Czechoslovakia, concluded in 1991, i.e. before Czechia and Slovakia acceded to the European Union. Achmea B.V., a Netherlands company providing private sickness insurance brought action against Slovakia since the country had prohibited the sale of private medical insurance portfolios in 2006. Under the BIT arbitration clause, Achmea brought an action for damages before the competent arbitration tribunal in Frankfurt, which decided in favor of Achmea. Slovakia sought to have the award reversed before the competent Oberlandesgericht Frankfurt am Main, and subsequently appealed to the Bundesgerichtshof. This forum, in turn, referred for a preliminary ruling to the CJEU, inquiring whether the so-called intra-EU BITs foreseeing the jurisdiction of an arbitration tribunal were compatible with the EU law, in particular with Article 344 TFEU, which prohibits Member States from submitting disputes concerning the interpretation and application of the Treaties, and with Article 267 TFEU, which confers these specific powers of interpretation on the CJEU.

The CJEU recalled that “according to settled case law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system.” This is safeguarded by Article 344 TFEU, which precludes submitting disputes over the interpretation or application of the Treaties to other forums.¹⁶ The CJEU declared that the set of common values enshrined in Article 2 TEU forms the basis of EU law, which gives rise to mutual trust between the Member States that these values and EU law shall be respected. In addition, the duty of sincere cooperation under Article 4 Section 3 obliges Member States to apply and respect EU law.¹⁷ Indeed, the CJEU refers to the toolkit developed to maintain legal regionalism in the EU when stating that “in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.”¹⁸ The BIT between the Netherlands and Slovakia foresaw an arbitral tribunal

¹⁶ Ibid., sec. 32.

¹⁷ Ibid., sec. 34.

¹⁸ Ibid., sec. 35.

which “may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.”¹⁹ However the tribunal cannot be considered a court that can make preliminary references to the CJEU; therefore, the arbitration clause may jeopardize the full effectiveness and autonomy of EU law and “call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties.”²⁰

Member States were quick to react to the Achmea judgment, concluding that such intra-EU BIT arbitration clauses are incompatible with EU law and that the BITs between them must be terminated.²¹ To that end, they signed the Agreement for the Termination of all Intra-EU Bilateral Investment Treaties on May 5, 2020. Of course, from the perspective of the MOX plant case,²² the Achmea judgment may have been a foregone conclusion. In MOX plant, the CJEU declared that “[a]n international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system.” Indeed, Article 293 TFEU (ex Article 220 TEC) vests the CJEU with exclusive jurisdiction in disputes concerning the interpretation and application of Community law, and Article 344 TFEU (ex Article 292 TEC) bars Member States from submitting disputes concerning the interpretation and application of EU law to any method of settlement other than those provided for in the Treaty.²³

The Achmea judgment clearly illustrates the CJEU’s efforts to insulate the European Union legal regime from possible incursions by prior international commitments of the Member States, incurred while pursuing autonomy-related goals.²⁴

¹⁹ Ibid., sec. 42.

²⁰ Ibid., sec. 56, 58, 59.

²¹ An immediate reaction was the Declaration of the Representatives of the Governments of the Member States of 16 January on the Enforcement of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 16 January 2019.

²² CJEU Judgment of 30 May 2006, Commission of the European Communities v. Ireland, Case C-459/03, ECLI:EU:C:2006:345.

²³ Cf. Marcel Szabó, “A MOX Plant ügy: út az eurosóvinizmus felé?” [“The MOX Plant Case: On the Path Towards Eurochauvinism?”], *Európai Jog* 10, no. 2 (2010): 18–28.

²⁴ These autonomy-related goals are detailed in length in Opinion No. 2/13 of 18 December 2014, ECLI:EU:C:2014:2454. Notably, while the apparent obstacle in upholding BITs, as per

2.2. International Commitments of Member States Assumed after Accession: Sincere Cooperation, Pre-emption and Supremacy

After joining the European Union, Member States did not lose their prerogative to conclude international agreements, not only in areas falling outside the scope of EU competence but also in areas covered by EU law. However, as noted by Schütze, there is a distinction between agreements that are *erga omnes* within the EU, i.e. to which each Member State is a Party, and other international agreements concluded by only some of the Member States.²⁵

In the former case, Member States may be inclined to conclude agreements outside the scope of the EU, aiming to exclude EU institutions and their possible encroachment by them upon the process to forego the implications of EU law such as direct effect in their cooperation. However, such agreements may be deemed an attempt to amend the Treaties, and indeed, in *Defrenne*, the CJEU confirmed that the Treaties can only be amended through a proper procedure.²⁶

As far as international agreements involving some but not all Member States, are concerned, these do not pose a threat of effectively amending the Treaties. As stressed by Schütze, Member States were encouraged to conclude bilateral agreements in certain areas, while the supremacy of EU law ensured that States Parties could not contract out of their obligations under EU law.²⁷

In *Kramer*, the European Court of Justice conceded that in so far as the Community did not exercise its powers in a specific area, Member States could continue to enter into agreements with third states on such matters. However, this power of the Member States is not without limits. For example, the Netherlands joined the North-East Atlantic Fisheries Convention (NEAFC) in 1959, that is, after becoming a Member State of the European Communities. As a state party to the NEAFC, it was bound by certain

the *Achmea* ruling, is that their arbitration tribunals cannot make preliminary references, this obstacle was actually put in place by the CJEU itself in *Dorsch Consult*. See: CJEU Judgment of 17 September 1997, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, Case C-54/96, ECLI:EU:C:1997:413.

²⁵ Schütze, “European Law and Member State Agreements,” 139.

²⁶ CJEU Judgment of 8 April 1976, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43-75, ECLI:EU:C:1976:56, sec. 58.

²⁷ Schütze, “European Law and Member State Agreements,” 151.

recommendations of the Convention's Fisheries Commission, one of which was contrary to the system of Community fishing quotas. While acknowledging the lack of Community conservation rules, the European Court of Justice stated that based on the principle of sincere cooperation

Member States participating in the Convention and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community in carrying out the tasks entrusted to it (...), but also under a duty to proceed by common action within the Fisheries Commission. (...) [M]ember States will be under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the Convention and in other similar agreements.²⁸

In effect, the Community replaced the Member States in the Convention, thus securing harmony between the common fisheries and conservation policy and the NEAFC rules, respectively.

Consequently, while Member States are not excluded from concluding agreements with third states, they must abide by the principle of sincere cooperation and refrain from entering into agreements or commitments which could jeopardize the attainment of the objectives of the Treaties. Compatibility of agreements between Member States and third countries with EU law is ensured through pre-emption and supremacy: according to the former, Member States may not conclude agreements in areas that are covered by EU law;²⁹ at the same time, any conflicting commitment of the Member States are overridden by EU law due to its supremacy.

3. Decoupling Obligations from International Agreements to which Member States and the EU Are Parties: Disconnection Clauses

The purpose of disconnection clauses is to allow individual Member States that joined an international agreement to derogate from provisions of the agreement in their relations with other Member States. In general, Dawar distinguishes between three kinds of disconnection clauses: a “complete”

²⁸ CJEU Judgment of 14 July 1976, Cornelis Kramer and others, Cases 3, 4 and 6/76, ECLI:EU:C:1976:114, sec. 44/45.

²⁹ Schütze, “European Law and Member State Agreements,” 162–3.

disconnection clause, where the relevant international agreement is replaced in its entirety by another law regulating the relations between the States concerned; a “partial” disconnection clause, where the States concerned apply another law only in place of certain provisions of the agreement; and an “optional” disconnection clause, allowing the States Parties concerned to exclude by declaration the application of provisions of the international treaty in their relations with each other.³⁰

Disconnection clauses were introduced in the late 1980s by the European Community in certain international treaties concluded by the EC and the Member States to decouple international treaty obligations in respect of inter-Member State relations since these were governed by Community law.³¹ At the same time, Member States had to guarantee that they would give full effect to the provisions of the international treaty *vis-à-vis* third countries that were States Parties to the international agreement.³²

The following clause, developed by the Council of Europe Secretariat, is included in several ET conventions:

In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

³⁰ Dawar, “Disconnection Clauses,” 5. Dawar cites the following examples of different types of disconnection clauses: “complete”: article 27 (1) of the European Convention on Transfrontier Television, Strasbourg, 1989, “partial”: Article 20 (2) of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003, “optional”: Article 13 (3) of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.

³¹ The first convention containing a Community disconnection clause was the 1988 Council of Europe/Organisation for Economic Cooperation and Development Convention on Mutual Administrative Assistance in Tax Matters. According to Article 27 (2) of the Convention: “[P]arties which are member States of the European Union can apply, in their mutual relations, the possibilities of assistance provided for by the Convention in so far as they allow a wider co-operation than the possibilities offered by the applicable European Union rules.”; Maja Smrkolj, “The Use of the Disconnection Clause in International Treaties: What Does It Tell Us about the EC/EU as an Actor in the Sphere of Public International Law?,” May 2008, <http://dx.doi.org/10.2139/ssrn.1133002>.

³² Dawar, “Disconnection Clauses,” 1.

According to Dawar, the function of the disconnection clauses is to inform contracting states that the Member States will apply different Community rules in their relations with each other, and that said clauses secure the uniform application of Community law even when an international treaty requires otherwise.³³ Under the disconnection clause, the Member States are barred from invoking international treaties between themselves in matters governed by Community law.

According to Tell, it is the rules of the Vienna Convention on the Law of Treaties that force states to use such disconnection clauses in their treaties. The wording of the Vienna Convention itself is too strict; it does not offer an adequate solution for members of regional integration organizations such as the European Union, and we should expect to see similar clauses in the future.³⁴ Still, the UN International Law Commission has noted that disconnection clauses pose a risk because they undermine the international treaty itself by impeding its uniform application.³⁵

Although the EU legislator wants to use disconnection clauses to ensure the benefits of international treaties and the autonomy and unity of EU law, i.e. the best of both worlds, it is no longer only third countries that are opposed to the inclusion of these clauses in international treaties, but also the Member States. For example, during the Uruguay Round of World Trade Organisation (WTO) negotiations (1986–1994), which resulted in a mixed treaty under the competence of the European Economic Community, the Community negotiators sought to create rights and obligations only in relation to third states. “At this time however, on the brink of the close of negotiations, the mistrust of the Member States was, if possible, even greater than that of third States. They believed that [the insertion of the disconnection clause] was another convoluted tactic of the Commission

³³ Ibid.

³⁴ Olivier Tell, “La ‘Disconnecting Clause’. Disconnection Clause,” presentation at the UIA Seminar (20–21 April 2001, Edinburgh), 6, accessed January 20, 2024, <http://www.cptech.org/ecom/jurisdiction/Tell.pdf>.

³⁵ Report of the International Law Commission, 57th session, 2005, supplement No. 10 (A/60/10), Ch XI.

to undermine their full status of membership in the WTO,³⁶ and the attempt failed because of the resistance of the Member States.

Likewise, when joining the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the Community sought both to protect cultural goods and to guarantee unrestricted trade in these goods on the internal market. Articles 6 through 8 of the Convention allow contracting states to adopt regulatory instruments to protect cultural property, to identify serious threats to their own culture and to subsidize local cultural activities and industries. The European Community originally intended to prevent the Convention from affecting the EC itself by introducing a disconnection clause to make it impossible for Member States to restrict the free movement of cultural goods or services in the internal market in order to protect cultural goods. However, the introduction of the clause was again rejected due to the resistance of the Member States, who probably saw the Convention as a major opportunity to protect their culture within the EC. Since international treaties rank below the provisions of the founding treaties in the hierarchy of sources of Community law, but above the provisions of secondary law, the rules of the Convention may undermine secondary acts in the absence of a disconnection clause.³⁷

A recent example is the Energy Charter Treaty (ECT), where, in the absence of a disconnection clause, it is the primacy of EU law over the international commitments of Member States that is at stake. The Charter, which entered into force in 1998, was originally concluded by the Community and its Member States as a mixed agreement with third countries. As made clear by the *travaux préparatoires*, both the Community and the Member States intended to include in the ECT a disconnection clause to rule out its application in relations between Member States.³⁸ However, in the course of the negotiations, the disconnection clause was eventually abandoned due

³⁶ Pieter Jan Kuijper, “The Conclusion and Implementation of the Uruguay Round Results by the European Community,” *European Journal of International Law* 6, no. 2 (1995): 228–9.

³⁷ Petra Lea Láncoš, *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban [Language Policy and Linguistic Diversity]* (Budapest: Pázmány Press, 2014), 147–52.

³⁸ Johann Robert Basedow, “The *Achmea* Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration,” *Journal of International Economic Law* 23, no. 1 (2020): 272–3, <https://doi.org/10.1093/jiel/jgz025>.

to opposition from third parties,³⁹ and an international legal commitment was established between the Member States under the ECT, including investment arbitration. Meanwhile, according to the Commission, the treaty contains an “implied disconnection clause,” which can be inferred from its *travaux préparatoires*, the ECT negotiations and the political circumstances in which it was concluded.⁴⁰

Of course, from the point of view of international law, a possible way forward for the EU Member States is not to apply the ECT among themselves as a consistent practice on a permanent basis. If the Member States do not apply ECT consistently and with legal conviction in their relations with each other over a longer time, a kind of regional customary law will emerge. However, other States Parties to the ECT may invoke a breach of the ECT by a Member State, even if such third states are not affected by its non-application in their relations with the Member States.

4. Instead of a Conclusion: A Critique of Disconnection Clauses

From an external perspective, EU law may be considered regional international law, which forces Member States to choose between two different international commitments (EU law and international law), justifying their choice by the principles of sincere cooperation, pre-emption, supremacy and the infringement procedure. Over the decades, primary law, with its Article 4 Section 3 TEU and Article 351 TFEU and coupled with the jurisprudence of the CJEU, effectively managed the possible threats to the autonomy and unity of EU law stemming from conflicting international agreements concluded by the Member States before or after their accession to the EU. Meanwhile, the European Community also had to face the conundrum of wishing to join international agreements without allowing them to override Community rules governing relationships between Member States at the same time. The solution to this quandary was to be the insertion of disconnection clauses in agreements concluded by the EU and its Member States with third states. However, there seems to be resistance against this practice from both third states and Member States since disconnection clauses have various effects on international law.

³⁹ Ibid., 289.

⁴⁰ Ibid., 273.

According to a report on the fragmentation of international law by the Study Group of the UN Commission on International Law, while disconnection clauses are not very different from treaty changes between individual contracting parties, they may be used by third parties to impose a legal regime that will change in the future. In the view of the International Law Commission, the law applicable between parties affected by a disconnection clause should not be open to unlimited amendments to a degree that is incompatible with the object and purpose of a treaty. This is because the third parties allowed the inclusion of the disconnection clause in light of the specific content of the law applicable between the states concerned, as they knew it.⁴¹

A disconnection clause can affect the rights and obligations of third states party to a treaty, as illustrated by *Commission v. United Kingdom* and its consequences.⁴² According to the European Commission, the United Kingdom did not correctly transpose Directive 89/552/EEC on audiovisual media services when defining the broadcasters under its jurisdiction. The UK transposed the rules of the Directive in the light of the Council of Europe's 1989 European Convention on Television without Frontiers, stressing that a different approach would place Member States in an impossible situation by requiring them to infringe their legal obligations either at the international or Community level.⁴³ As Azoulai points out, the development of Community law, protected by a disconnection clause, eventually led the Council of Europe to amend the Convention "to avoid the risks of fragmentation and to create 'a coherent approach' in the audiovisual sector 'at the pan-European level'".⁴⁴ Thus, secured by the disconnection clause, the development of EU law prompted a change in international law.

⁴¹ Fragmentation of international law: the difficulties arising from the diversification and expansion of international law. Report of the 58th session of the United Nations Commission on International Law (1 May – 9 June and 3 July – 11 August 2006), 291–3; Smrkolj, "The Use of the Disconnection Clause in International Treaties," 8.

⁴² CJEU Judgment of 10 September 1996, *Commission v. United Kingdom*, Case C-222/94, ECLI:EU:C:1996:314.

⁴³ *Ibid.*, sec. 52.

⁴⁴ Loic Azoulai, "The *Acquis* of the European Union and International Organisations," *European Law Journal* 11, no. 2 (2005): 201, <https://doi.org/10.1111/j.1468-0386.2005.00257.x>.

Finally, as noted by Smrkolj, disconnection clauses can also affect the position of international treaties in the EU hierarchy of norms: while international treaties concluded by the EU are part of the primary law of the Union, which cannot be contradicted by secondary legislation, the disconnection clause overrides this rule.⁴⁵

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