Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited

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Abstract

This article is meant to contribute to the discussion of the relationship between EU and international law. It focuses on bilateral investment agreements between EU Member States (intra-EU BITs), the majority of which will continue to have practical relevance. So how should one deal with a scenario in which the compliance with EU law (for example, state aid law) means that a Member State must breach its obligation under an intra-EU BIT (for example, by cutting returns on income from an investment protected thereunder)?

The article answers this question by critically analysing the protection granted to pre-existing international obligations of the EU Member States under so-called anterior treaties. It criticizes established case law under Article 351 TFEU as having emphasized the wrong issues, and suggests to turn the discussion back to the real questions: precisely when is there a conflict, and how far do a Member State's duties under Article 351 (2) TFEU reach? It is argued that re-considering Article 351 TFEU will foster doctrinal clarity and flexibility in dealing with the "obligations", and also the "rights" of the EU Member States under anterior treaties. Doctrinal clarity and flexibility will then benefit the relationship between EU and international law more generally.

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Introduction

International investment treaty law has been attracting particular attention from EU law specialists for several years now. This is not only true with respect to the newly established competency framework by the Lisbon Treaty, enabling the EU for the first time to conclude international investment agreements (**IIA**s).[1] It is also true regarding the future of IIAs of the EU Member States that are currently in place.[2] The latter are of interest here: how could or should one deal with a scenario in which the compliance with EU law allegedly has the consequence that a Member State must breach its obligation under an IIA?[3]

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[1] See, e.g., Calamita, The Making of Europe's International Investment Policy – Uncertain First Steps, *in*: Calamita/Earnest, Burgstaller (eds.), The Future of ICSID and the Place of Investment Treaties in International Law, 97 (BIICL 2013); Dimopoulos, The Compatibility of Future EU Investment Agreements with EU Law, (2012) Legal Issues of Economic Integration (LIEI) 39, 447; Eeckhout, EU External Relations Law, OUP, 2nd ed. 2011, 56; Kleinheisterkamp, International Law and its Intersection with EU Law and Policy, *in*: Calamita/Earnest, Burgstaller (eds.), *ibid.*, 77 (BIICL 2013); Sattorova, Return to the Local Remedies Rule in European BITs? (2012) LIEI 39, 223.

[2] See, e.g., Burgstaller, Investor-State Arbitration in EU International Investment Agreements with Third States, (2012) LIEI 39, 207 (for bilateral investment treaties (**BITs**) between EU Member States and third states (**extra-EU BITs)**); for investment treaties between EU Member States themselves (**intra-EU BITs)**: Dimopoulos, The validity and applicability of international investment agreements between EU Member States under EU and international law, (2011) 48 C.M.L.Rev. 63; Eilmansberger, Bilateral Investment Treaties and EU Law, (2009) 46 C.M.L.Rev. 383, 406; Kleinheisterkamp, Investment Protection and EU Law: the Intra- and Extra-EU Dimension of the Energy Charter Treaty (2012) 15 J. Int.'l Econ. L. 85; Lavranos, New Developments in the Interaction between International Investment Law and EU Law, (2010) 9 The Law & Prac. Of Int.'l Cts & Trib. 409; Reinisch, Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action, (2012) LIEI 39, 157; Wehland, Intra-EU Agreements and Arbitration: is European Law an Obstacle? (2010) 58 I.C.L.Q. 297. For an overall perspective see also Ghouri, Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty, (2010) E.L.J. 16, 806.

[3] An illustrative example is the attempt by a state to justify its breach of an obligation either under the Energy Charter Treaty or a bilateral investment treaty by stating that affording the required level of investment protection would amount to granting state aid that is illegal under EU law ("state aid case"). See, e.g., *Micula et al. v Romania,* Award, ICSID Case No. ARB/05/20; *AES Summit Generation Limited v Republic of Hungary*, Award, ICSID Case No. ARB/07/22, and Decision on Annulment (June 2012); *Electrabel S.A. v Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19. The former case arose under a BIT, the latter two under the Energy Charter Treaty. For a discussion of the latter see Kleinheisterkamp, Investment Protection and EU Law: The intra- and extra-EU Dimension of the Energy Charter Treaty, (2012) 15 JIEL 85, 91. Other examples are cases in which compliance with EU law, in particular Article 344 TFEU, would arguably have the consequence that a Member State is hindered from complying with its obligation under an IIA to submit a dispute involving questions of EU law to investor-state arbitration in the first place. Such so-called jurisdictional objections are generally not accepted by investment tribunals, who often proceed to also dismiss any alleged substantive conflict, see, e.g. *Eureko B.V. v The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13 (Oct. 26, 2010) and *Achmea B.V.* (formerly known as Eureko B.V. *v The Slovak Republic,* Award (7 December 2012). The issue has also been addressed in the discussion of future investment agreements concluded by the EU; thereby distinguishing MS from EU responsibility for treatment of investors that is potentially illegal under EU law: Tietje et al., Responsibility in Investor-State-Arbitration in the EU – Managing Financial Responsibility, available at http://bit.ly/EST79450 ; Kleinheisterkamp, Managing Financial Responsibility for investor claims under EU investment agreements: Comments on the Commission proposal for a Regulation COM(2012) 335 final and Professor Tietje's study, available at www.ssrn.com/abstract=2222580, 13. See also Hoffmeister, Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations? (2010) EJIL 21, 723. This discussion has then led to the adoption of Regulation (EU) 2014/912 of the European Parliament and Council of 23 July 2014

This article addresses the question from an EU law perspective.[4] It is based on the assumption that this is a norm conflict[5] in the classic sense, and that it must be solved under one applicable conflicts rule.[6] The conflicts rule that the EU law regime offers is Article 351 TFEU.[7]

In dealing with Article 351 TFEU, this article will keep coming back to the specific example of IIAs. However, the doctrinal arguments that will be made here in principle also apply to any other pre-existing public law obligations of the Member States. It will be argued that the current reading of Article 351 TFEU is of limited usefulness, since it is overly restrictive and ultimately concerned with fostering EU supremacy in external relations. While from an EU "federalist"[8] or "constitutionalist"[9] perspective one could take the position that there is nothing wrong with fostering the doctrine of supremacy, the argument advanced in this article is that Article 351 (1) TFEU is first and foremost an exception to EU supremacy.[10] This exception specifically carves out international treaties concluded by the Member States before a certain point in time (*infra* 1.A); and it was arguably inserted precisely in order to safeguard (Member) "state" interests (*infra* 2.A). While acknowledging that supremacy is of course part of the foundation of the EU as supranational entity, it cannot be absolute or unconditional. This has been pointed out much earlier in the constitutionalism debate, with a specific critique of the overly formal character of the EU "Constitution" as created by the Court in its landmark judgments from the 1960s.[11] The argument advanced here is going in the same direction, but less far: at least where there is an exception like Article 351 (1) TFEU in the treaties themselves, some limits of the doctrine of supremacy must be carefully defined. It is therefore suggested to concentrate on defining conflict or "incompatibility" in the terminology of Article 351 (2), instead of resorting to formal reasoning along the lines of supremacy or competences. Therefore, it is proposed to re-think

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establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, [2014] OJ L257/121.

[4] Another point of view would be a public international law perspective. This is the perspective taken generally by the arbitral awards mentioned *supra* at note 3. See, e.g. Reinisch, *supra* note 2, (2012) LIEI 39, 157. A detailed critique of this approach is beyond the purpose of this article.

[5] Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, Cambridge Studies in International and Comparative Law, CUP 2003, 6 et seq.

[6] The problem is that it is not clear whether one should look at EU or public international law in order to find the applicable conflicts rule. One approach would be to start with the law that is overall applicable to the dispute, and then assume that this includes the conflicts rules of that particular regime. However, in international investment treaty cases there often is more than one applicable law. See the investment treaty cases referred to by Dolzer/Schreuer, Principles of International Investment Law, 2nd ed. OUP 2012, 288-293, in particular the case of *Maffezini v Spain,* Award, 13 November 2000. Dealing with conflicts rules of public international law and the question of how they relate to each other, or to EU law, is beyond the purpose of this article.

[7] Since there appears to be overall consensus that EU law can apply in an investment treaty case, see von Papp, Clash of 'Autonomous Legal Orders', (2013) 50 C.M.L.Rev. 1039 at note 5, there is thus an argument that Article 351 TFEU applies as well.

[8] See Weiler, Federalism without Constitutionalism: Europe's Sonderweg, *in*: Nicolaidis, Howse (eds.), The Federal Vision, OUP (online version) 2003, 54-55 with further references.

[9] See Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, EJLS 2007, 1 (2) at text accompanying note 5, available at www.ssrn.com/abstract=1134503.

[10] Craig/de Burca, EU Law: Text, Cases and Materials, 5th ed. OUP 2011, 267 (at note 37).

[11] Eleftheriadis, Aspects of European constitutionalism, E.L.R. (1996) 21, 32, 37 et seq.

established case law on what is now Article 351 TFEU, and to proceed to addressing the real issues like defining 'conflict', establishing the relevant point(s) in time, and clarifying the basis and scope of a Member State's duty to eliminate incompatibilities between public international and EU law. The proposed broader reading of Article 351 TFEU is based on the normative assumption that the purpose of this provision is neither a complete carve-out from EU supremacy (as the wording of its first paragraph may suggest), nor the opposite (as the broad reading of its second paragraph by the CJEU may suggest). Instead, the underlying assumption, fostered by a historical argument, is that what is now Article 351 TFEU was meant to leave in place, or to accommodate pre-existing rights and obligations of Member States and third countries under public international law.[12] 'Revisiting' Article 351 TFEU along those lines would then leave more room for pre-existing IIAs or any other public international law treaties, or at least provide for more flexibility in dealing with them.

1. Identifying the Shortcomings of Article 351 TFEU

The first two paragraphs of Article 351 TFEU (formerly Article 307 EC Treaty) read as follows:

> [1]'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.
> [2] To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take any 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.'
> (…)

The CJEU interprets this provision in a rather restrictive manner. First, Article 351 TFEU applies only to international treaties (including IIAs) concluded before the E(E)C/EU treaties became binding for the relevant EU Member State; and it seems not to apply to such treaties between the EU Member States themselves. Second, due to a very narrow textual reading, Article 351(1) TFEU appears not to apply to the benefit of an EU Member State vis-à-vis a third state. Third, Article 351 TFEU does not easily lend itself to the triangular relationship that is typical for an investment treaty case, where there are not only states' rights and obligations, but also investors' rights.[13] Fourth, there is no clear understanding as to precisely how its first and second

[12] So it is too narrow to read the purpose of Article 351 TFEU as protecting the "rights" of third (non-EU) countries; instead one must assume the Member States' perspective and require that norm conflicts be alleviated or even avoided. See Ziegler, The Relationship between EU law and International Law, (2015) University of Leicester School of Law Research Paper No. 15-04, 14.

[13] See also the more general critique in this respect by Klabbers, Re-Inventing the Law of Treaties: the Contribution of the EC Courts, 30 Netherlands Yearbook of International Law (1999), 45, 64 et seq.; *idem*, Treaty Conflict and the European Union, Cambridge 2009, 121 with further references, in particular to literature looking at modern public international law treaties as protecting a particular "community interest"; *ibid.*, 125 ("multipolar treaties").

paragraphs intersect. Therefore Article 351 TFEU does not adequately address or comprehensively resolve the outlined scenario.[14] After addressing these four points in turn (A – D), the current reading of Article 351 TFEU is criticized for being too narrow and distracting from the real issues (2). A broader reading will then be proposed, focusing on the issues that have so far been neglected (3).

A. Article 351 TFEU can only apply to specific international treaties concluded between an EU Member State and a third state

Article 351 (1) TFEU affords exclusive protection to treaties that have been concluded before 1 January 1958 or before accession of a new EU Member state (**anterior treaties**).[15] This means that an EU Member state abiding by its international law obligation under an *anterior* treaty is generally excused from complying with any conflicting provision of EU law.[16] There is, however, a limit to the protection afforded to such *anterior* treaties under Article 351(1), which is contained in Article 351(2) TFEU.[17]

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[14] See *supra* note 3 and accompanying text.

[15] Commentators seem to agree that by way of analogy, Article 351 also applies to international treaties that have been concluded by Member States under competences that at the time remained national but have since been transferred to the EU. See, e.g., Krück in Schwarze (ed.), EU-Kommentar, 1st ed. Nomos 2000, Article 308 EGV para 15; Terhechte, Article 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties, European Yearbook for International Economic Law, January 2010 (electronic copy available at www.ssrn.com.abstract=1638357), 6. The protection of Article 351 TFEU in such cases may, however, be qualified or limited in the sense that Member States are not protected to the extent that the transfer of competences to the EU was foreseeable when they concluded the international treaty. The same is true regarding any other breach of EU law such as the fundamental freedoms which put constraints on Member state action even before a transfer of (legislative) competences to the EU. Regarding both these qualifications see Schmalenbach in Calliess/Ruffert (eds), EUV/AEUV, Das Verfassungsrecht der Europäischen Union (…), Kommentar, 4th ed. Beck 2011, Article 351 AEUV para 8. For the opposite view (no analogous application of Article 351 in cases of transfer of competences to the EU), see Manzini, The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law, EJIL (2001) 12, 771, 786.

[16] This in principle includes EU primary law, see Case C-124/95 *The Queen ex parte Centro-Com* [1997] ECR I-81 paras 57, 60, 61. However, the *Kadi* genealogy has thrown doubts upon this, because the CJEU afforded absolute protection to 'fundamental' provisions of EU law. Under *Kadi*, the CJEU must ensure full review of the "lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of community law." Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351 para 326. This review by the CJEU is not limited to fundamental rights in their strict sense, but embraces the "very foundations of the Community" (*ibid*. para 282). These comprise the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in then-Article 6(1) EU Treaty as a foundation of the EU (*ibid.* para 303). Put differently, Member States cannot derogate from what is deemed 'fundamental' under EU law, even if required by an otherwise hierarchically superior international treaty. See, e.g., Ziegler, *supra* note 12, 11-12 (approving of the *Kadi* cases to the extent that accountability for the limitation of personal freedoms is raised on the international level). The reference to the "very foundations of the Community" under *Kadi* must be understood as an exception to the holding in *Centro Com,* which the CJEU generally upheld by saying that the primacy of UN law extends to primary EU law except for the "*general principles of which fundamental rights form part.*"

[17] See *infra* 1.D.

Treaties concluded after the relevant date on the other hand (**posterior treaties**) are not protected. This follows implicitly and *e contrario* Article 351(1) TFEU.[18] What might be even more restrictive, Article 351 does not apply to international treaties (*anterior* or *posterior* ones) between the EU Member States themselves (**intra-EU agreements**). With regard to *anterior* treaties between EU Member States, the CJEU has held as much in *Commission v Italy*[19] and *Matteucci v Belgium*[20]. Regarding *posterior* treaties between EU Member States, the same must be true:[21] If even *anterior* treaties cannot set aside EU law, the EU Member States cannot escape their EU law obligations by simply referring to a conflicting obligation under a newly created international treaty.[22] This is an argument *de minore ad majorem* and does also implicitly follow from the CJEU's argumentation in *Commission v Austria*, *Sweden* and *Finland* discussed below.[23]

This means that the only circumstance in which the protection of IIAs under Article 351(1) TFEU appears to apply to the outlined scenario[24] is upon accession of a new Member State to the EU, bringing with it IIAs with third states as *anterior* treaties.

B. Separating 'rights' of third states and 'obligations' of EU Member States

In the leading case of *Commission v Italy* the CJEU is commonly understood to have upheld the Commission's view that "by assuming a new obligation which is incompatible with rights held

[18] For example, with respect to such BITs that were concluded between EU Member States and States acceding to the EU, the CJEU held that post-accession treaties that contained obligations that were incompatible with EU law were unenforceable insofar as they amounted to amendments of the EC Treaty without following the procedure as required by what was then Article 309 EC. See Joined Cases 241 and 242/91P *Radio Telefis Eireann and Independent Television Publications Ltd v Commission* [1995] ECR I-743 para 73.

[19] Case 10/61 *Commission v Italy* [1961] ECR 1, 10. This case concerned a fixed customs duty on radio tubes and valves that was applied to goods from other EU Member States. Italy claimed that this was allowed under then-Article 234 (1) EEC Treaty since the relevant customs duty had been agreed upon within the framework of the GATT prior to the EC Treaty. The CJEU held that: "In fact, in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT." See for more details of this case *infra* note 26 and accompanying text.

[20] Case 235/87 *Matteucci v Belgium* [1988] ECR 5589 paras 21-22. This case concerned a bilateral treaty regarding cultural cooperation between Belgium and Germany, which had been concluded prior to the EC Treaty. The CJEU clarified that the rule established in *Commission v Italy,* carving out intra-EU from the protection of then-Article 307(1) EC Treaty, also extended to policy fields which were left within the competencies of the Member States.

[21] See Koskenniemi (Chair of study group), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 of 4 April 2006, para 284 with further references.

[22] See the hypothetical case scenario described by Klabbers, Treaty Conflict (*supra* note 13), 180 et seq.

[23] See *infra* 1.D. See also the Opinion of AG Kokott in Case C-308/06 *Intertanko* [2008] ECR I-4057 para 77 (Member States cannot in principle invoke agreements concluded after accession as against Community law). See further *Electrabel S.A. v Hungary,* (Decision on Jurisdiction, Applicable Law and Liability), ICSID Case No. ARB/07/19 para 4.186.

[24] See *supra* note 3 and accompanying text.

under a prior treaty a State ipso facto gives up the exercise of these rights to the extent necessary for the performance of its new obligations".[25]

The CJEU on this basis rejected Italy's argument that within the framework of the GATT, it had secured the 'right' to introduce a specific minimum levy that would also apply to intra-EU trade in the relevant products.[26] Subsequent case law and commentators have since differentiated between the 'obligations' of EU Member States on the one hand, and the 'rights' of third states on the other. Only the latter are deemed protected under Article 351 (1) TFEU, while 'rights' of the EU Member States under *anterior* treaties are excluded.[27]

So to further refine the conclusion under (1.A) *supra*: the only circumstance in which the protection of IIAs under Article 351 (1) TFEU appears to apply in the outlined scenario[28] is where upon EU-accession the new Member State relies on an *anterior* treaty with a third state, which imposes an 'obligation' on this EU Member State that allegedly excuses it from fully complying with its 'obligations' under EU law (as opposed to merely granting a 'right' the exercise of which would make compliance with EU law impossible).

C. Whose 'rights': is there room for rights of individuals?

The next question is whether 'rights' can only be those of States, or whether there is any room for arguing that Article 351 TFEU is also meant to protect the 'rights' of individuals under *anterior* treaties. The relevance of this issue for investment treaty arbitration is obvious if one acknowledges the triangular relationship between the contracting states and the individual investor who benefits from the protection promised under the relevant investment treaty.[29]

Illuminating in this respect is the *Burgoa*-case:[30] In that case, which preceded Spain's accession to the EC, Mr. Burgoa, a Spanish fisherman, claimed fishing rights within a particular zone under the 1964 London Fisheries Convention. When he was prosecuted in Ireland for fishing

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[25] *Supra* note 19.

[26] To give a more detailed account of the facts of this case: Italy had within the GATT framework consented to the abolition of a higher duty (35 %) for tubes, valves and lamps for radio receivers. This was replaced with a lower duty (30%), but only to the extent that Italy had in return retained the 'right' to introduce a [corresponding] minimum levy, which was then applicable to the lower duty. Italy then essentially attempted to apply this minimum levy to intra-EU trade, which for some products from other Member States led to a clear breach of the provisions on the customs union. Since the relevant GATT agreement preceded the (then) EEC Treaty, Italy claimed protection for its 'right' to secure the minimum levy under Article 351(1) TFEU.

[27] In Case C-158/91 *Levy* [1993] ECR I-4287 para 12 the CJEU thus stated as follows: "According to the judgment in Case 10/61 (Commission v Italy) … the purpose of the first paragraph of … [now Article 351 TFEU] is to make clear, in accordance with the principles of international law, that application of the treaty does not affect the commitment of the Member State concerned to respect the rights of non-member countries under an earlier agreement and to comply with its corresponding obligations. It follows that … the terms 'rights and obligations' refer, as regards 'rights', to the rights of non-member countries and, as regards 'obligations', to the obligations of the Member States." This will be dealt with critically *infra* 2.A.

[28] See *supra* note 3 and accompanying text.

[29] Von Papp, Biting the Bullet or Redefining 'Consent' in Investor-State Arbitration, 16 (2015) JWIT 695, 698 et seq.

[30] Case 812/79 *Attorney General v Burgoa* [1980] ECR 2787.

without a license in exclusive Irish waters, he argued that the Convention rights prevailed over the later Council Regulation No 1376/78. The CJEU held that what is now Article 351 TFEU does not "adversely affect the rights which individuals may derive from such an agreement".[31] This has been understood as an acknowledgement that Article 351 TFEU does not merely protect the 'rights' of the States as treaty parties, but could also protect the 'rights' of individuals.[32]

However, it remains to scrutinize how far this can actually reach. *Burgoa* itself marks the threshold for finding that the 'rights' of an individual in a specific case are indeed protected under Article 351 TFEU:

> 'Since *the purpose of the first paragraph* ... [of what is now Article 351 TFEU] *is to remove any obstacle to the performance of agreements previously concluded with non-member countries* … it cannot have the effect of altering the nature of the rights which may flow from such agreements. From that *it follows that that provision does not have the effect of conferring upon individuals ... rights which the national courts of the Member States must uphold*. Nor does it adversely affect the rights which individuals may derive from such an agreement.'[33] [Emphasis added]

So Article 351 TFEU cannot itself confer any 'rights' upon individuals. It is merely a *blank provision* that from the EU point of view allows *for the enforcement of rights if and to the extent* those can be *established under the relevant anterior treaty*. In other words, the protection of individuals under Article 351 TFEU does only reach as far as the protection provided by the *anterior* treaty. Therefore, the principle established by *Burgoa* is potentially far-reaching, but at the same time clearly confined. Any individual investor who wanted to benefit from this principle must establish that the *anterior* investment treaty in question actually does confer 'rights' upon it (see further *infra* 2.C).

But at least in principle, Article 351(1) TFEU is open to the possibility that its protection of 'rights and obligations' under anterior treaties also extends to 'rights' of individuals under such treaties. This appears to follow from the CJEU's acknowledgment that (now-)Article 351 does not "adversely affect the rights which individuals may derive from an international law agreement".[34]

D. How much of the protection granted under Article 351(1) TFEU is left by its second paragraph?

This leaves the determination of the exact scope of protection of *anterior* treaties under Article 351(1) TFEU in light of its second paragraph. Under Article 351(2) TFEU, the EU Member

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[31] *Ibid.* para 10.
[32] See, e.g., Klabbers, Treaty Conflict (*supra* note 13) 129.
[33] Case 812/79 (*supra* note 30) para 10.
[34] *Supra* text accompanying note 31. See also Eeckhout, Expert Opinion in *AES v Hungary* (*supra* note 3), available at www.italaw.com/documents/AESEeckhoutExpertOpinion.pdf at para 107.

State(s) concerned shall take all appropriate steps to eliminate any 'incompatibilities' between their international law obligations and EU law. Under this provision, a Member State may even be obliged to denounce the respective treaty.[35] In other words, Article 351 TFEU provides only a *temporary* protection of *anterior* treaties. So ultimately, there is an explicit EU treaty provision requiring the elimination of any 'incompatibility' between an anterior treaty and EU law. In other words, Article 351(2) TFEU clearly aims at exporting the supremacy doctrine into EU external relations.[36] This poses the question of to what extent this is possible from a public international point of view, and to what extent this can be reconciled with Article 351(1) TFEU.[37] Only the latter problem will be addressed here. So what is the exact relationship between Article 351(1) TFEU, which in principle shows an openness towards public international law, and Article 351(2) TFEU, which essentially is a statement of EU supremacy?[38]

Put differently, there is a clear tension between the legal consequence in the first paragraph (*anterior* treaties remain binding), and the legal consequence provided by the second (any incompatibilities therein with EU law cannot remain). This tension between openness towards or respect of international law, and protection of EU supremacy can be traced in other contexts as well.[39] In the realm of Article 351 TFEU, it has sometimes led to the conclusion that Article

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[35] Case C-62/98 *Commission v Portugal* [2000] ECR I-5171 para 49.

[36] So Article 351(2) TFEU fulfills essentially the same function as the judgment in Case 22/70 *AETR* [1971] 263: this decision has also been understood as giving effect in external relations law to the doctrine of supremacy. The latter ultimately has its origin in the EU's "autonomous legal order" as established in the *Costa v Enel* case. See van Rossem, The Autonomy of EU Law: More is Less? *in:* Wessel/Blockmans, Between Autonomy and Dependence, The Hague 2013, 21-22 (text accompanying notes 38-41).

[37] Only the latter point will be addressed here.

[38] To be clear, Article 351 has a third paragraph saying that "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." This paragraph was of particular importance in the early days of the EEC: its purpose essentially is to clarify that most favored nation clauses under *anterior* treaties cannot have the effect of extending (trade) preferences under the EU's customs union to third countries. See Krück (*supra* note 15) para 14; Lorenzmeier in Grabitz/Hilf/Nettesheim (eds.), Das Recht der Europäischen Union, Kommentar, Band III, Beck 2015, Article 351 (51st suppl. 2013) para 45 with further references; Schmalenbach (*supra* note 15) para 22. Systematically, the third paragraph of Article 351 simply specifies both preceding paragraphs, see Petersmann in Groeben/Thiesing/Ehlermann (eds.), Kommentar zum EU/EG-Vertrag, Band V, 5th ed. Nomos 1997, Artikel 234 para 9. Both Lorenzmeier and Petersmann read Article 351(3) *not* as a strict prohibition on the extension of EU preferences to third countries. This – textually sound – reading has the consequence that Member States may still be protected under Article 351(1) if the relevant *anterior* treaty contained a strict obligation to accord most favor nation treatment, without any exemption for preferences granted under a regional customs union. See Petersmann *ibid.* This shows that the main tension between the general rule of EU supremacy underlying Article 351(2) and the exception for anterior treaties in Article 351(1) TFEU lies in these two paragraphs of Article 351, which is why this article focuses on them.

[39] See, e.g. the summary by Ziegler (*supra* note 12), 15 et seq. (concluding that the Court seems less open to international law where the latter limits powers of the EU). This observation is correct also with regard to the CJEU's own powers: this can be nicely illustrated by the recent refusal to accept the first draft of the ECHR accession agreement (Opinion 2/13 of 18 December 2014). See in particular paras 181-190 (adverse effect on EU autonomy cannot be excluded because there is no provision ensuring that the level of protection as guaranteed by the CJEU under the EU Fundamental Rights Charter will not be undermined); and paras 201-208 (risk that the CJEU's exclusive jurisdiction over disputes between Member States with regard to EU law will be lost).

351(1) TFEU is a 'fixed-term competency' of the Member States in the sense of an *interim* power to derogate from EU law.[40] However, even if correct, this view leaves open the question of how to determine the length of such *interim* and, more importantly even, the legal consequence of a Member State's failure to comply with its obligation under the second paragraph.

That issue was partly solved by the CJEU's decision in the cases of *Commission v Austria* and *Commission v Sweden*, which concerned the fate of *anterior* treaties in the form of BITs of Austria and Sweden with several third states.[41] The Court concluded that there was a breach of Article 351(2) TFEU from the fact that the so-called "transfer clauses" in the relevant treaties[42] did not contain any provision for the case that the Council of the European Union were to restrict movement of capital and payments between Member States and third countries.[43] The CJEU's decision in *Commission v Finland*[44] followed along the same lines insofar as one of the BITs in question did not contain a clause limiting the obligation to permit free transfer of capital and payments. Insofar as the remaining BITs contained a clause stating that such obligation to permit free transfer existed only "within the limits authorised under its own laws and decrees" the question became whether Finland could rely on this wording in order to enforce any potential Council measure restricting movement of capital and payments. Although this could have been regarded as a fair argument, the CJEU held that the interpretation, scope and effects of this wording were too uncertain as to guarantee compatibility with EU law.[45]

The result in all three cases was controversial, especially in light of the fact that *de lege late* no such restriction had in fact been imposed by EU secondary law. Therefore, the 'incompatibility' was merely hypothetical.[46] By contrast, AG Maduro in his Opinion pointed out that the obligation under [now-] Article 351(2) TFEU is just an expression of the general duty of loyal cooperation.[47] He therefore suggested that the ECJ treat the issue in the same way as other scenarios which give rise to that duty, and in particular adopt the formulation regularly used regarding EU directives while the deadline for implementation is still pending.[48] Approaching the cases in this way, the Advocate General concluded that, in the time following the

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[40] Schmalenbach (*supra* note 15), para 13 with further references.
[41] Cases C-205/06 *Commission v Republic of Austria* [2009] ECR I-1301 and C-249/06 *Commission v Kingdom of Sweden* ECR I-1335.
[42] Essentially guaranteeing investors of either state party the free transfer of capital connected with their investment.
[43] Which is possible under specific circumstances according to then-Articles 57(2), 59 or 60(1) EC Treaty. Cases C-205/06 (*supra* note 41) paras 34-45, and C-249/06 (*supra* note 41) paras 35-45. For a more detailed account of these cases see *infra* 2.4.
[44] Case C-118/07 *Commission v Finland* [2009] ECR I-10889.
[45] *Ibid.* paras 40-42.
[46] Opinion of Advocate General Maduro in Cases C-205/06 and C-249/06 (*supra* note 41) para 17. See also Denza, Bilateral Investment Treaties and EU Rules on Free Transfer, (2010) E.L.Rev. 263, 271; Lavranos, Member States' Bilateral Investment Treaties (BITs): Lost in Transition, (2011) Hague Yearbook of International Law, 281 at note 1 with further references (electronic copy available at www.ssrn.com/abstract=2169218).
[47] Advocate General Maduro, *ibid.* para 33.
[48] That is, Member States are obliged to refrain from any measures liable *seriously to compromise* the exercise of Community competence, *ibid.* para 42.

Commission's reasoned opinion, both Sweden and Austria had failed to comply with their duty to "take all appropriate steps to prevent their pre-existing international obligations from jeopardizing the exercise of Community competence."[49] While the CJEU reached the same conclusion, it did so without following the AG's nuanced reasoning (see further *infra* 2.D).

The broad understanding of Member States' obligations under Article 351(2) TFEU in the cases against Austria, Sweden and Finland suggests that there is effectively no *interim* protection of *anterior* treaties as per the first paragraph of Article 351 TFEU. Instead, it is all about EU supremacy. This is questionable since it seems to suggest to simply read Article 351(1) TFEU out of the Treaty, an approach which the Court has effectively been adopting elsewhere as well.[50] However, following the structure of that provision, there must be room for application of both its first and second paragraphs: one must first ask whether the investment agreement is an *anterior* treaty, which in principle would put it under some protection under the first paragraph. One must then decide whether there is an 'incompatibility' between this *anterior* treaty and EU law. If this is the case, then according to the second paragraph the Member State would eventually be obliged to eliminate this 'incompatibility'. Put differently, the protection under the first paragraph proves to be merely temporary, raising the question of when it ends, and therefore when the duty to eliminate materializes.[51]

So it is fair to say that there are question marks over the exact reach of Article 351(1) TFEU in light of Article 351(2), with a trend to shifting the emphasis to the latter. This means that one can further refine the conclusion reached at 1.A and B *supra*: the only circumstance in which the protection of IIAs under Article 351(1) TFEU appears to apply in the outlined scenario[52] is where upon EU-accession a new EU Member State relies on 'obligations' of an *anterior* treaty with a third state, whereas the protection afforded by Article 351(1) TFEU is *temporary* at best and non-existent at worst, since it is subject to a potentially broad duty of the relevant EU Member State under Article 351(2) TFEU to align its duties under an *anterior* treaty with those under EU law.

2. Critical analysis

The following section will critically analyze the shortcomings that have been identified so far, and provide alternative ways of interpretation.

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[49] *Ibid.* paras 42, and 64-67. See further *infra* 2.4.

[50] Over-emphasizing the second paragraph of Article 351 TFEU (and thus EU supremacy) is just another way of reducing the effect of its first paragraph. The same tendency can be seen in the *Kadi* cases: albeit using a different technique, these have also scaled back the protection of *anterior* treaties. As seen *supra* (at note 16), the technique employed there was to exceptionally exclude from protection under Article 351(1) TFEU a "challenge to principles that form part of the very foundations of the EU legal order", see Joined Cases C-402/05 P and C-415/05 P (*supra* note 16) para 304. This carve-out from Article 351(1) TFEU eventually provides the basis for the CJEU scrutinizing EU acts that implement UN sanctions against the benchmark of EU fundamental rights, see Joined Cases C-584/10 P, C-593/10 P, C-595/10 P *European Commission et al v Kadi* paras 97 et seq.

[51] See *infra* 3.B.

[52] See *supra* note 3 and accompanying text.

A. Anterior treaties between an EU Member state and a third state

It makes certainly much sense to conclude that Article 351 TFEU does not apply to *posterior* intra-EU agreements. Otherwise Member States would have an incentive to conclude international treaties with each other simply in order to escape their EU law obligations. Such a result would undermine the supranational nature of the EU, and in particular, the doctrines of supremacy and *effet utile* as well as the pursuit of uniformity. Although Member States remain the Masters of the Treaties, they would have to employ the formal treaty amendment procedures in order to change their EU law obligations. They cannot simply do so bi- or even multilaterally by relying on public international law generally.[53]

More questionable is why one should also exclude *anterior* intra-EU agreements from the protection afforded under Article 351 TFEU. An explanation for this maybe the *lex posterior* rule,[54] which seems to be the basis for the CJEU's holding in *Commission v Italy* that: "… in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of the GATT."[55] However, under public international law this would only be true to the extent that the GATT contains *lex prior* that is incompatible with EU law as *lex posterior*. If on the other hand there is no 'incompatibility' between an intra-EU agreement and EU law, there appears to be no reason why such an *anterior* treaty should not apply alongside EU law. Therefore, not applying Article 351 TFEU in intra-EU scenarios in general seems to be over-inclusive. Instead, the better approach would be to clearly confine the non-applicability of Article 351 TFEU in intra-EU scenarios to such situations in which there actually is an 'incompatibility' of an *anterior* treaty with EU law.

Such an approach can be corroborated by looking at the drafting history of what was then Article 234 EEC Treaty. The original draft stated as follows:

> 'Les droits et obligations *des Etats membres* découlant de leur participation à des organisations internationales à caractère économique ne sont pas affectées par les dispositions du présent Traité."[56] [Emphasis added. - "The rights and obligations *of the*

[53] This can also be seen from the slightly different angle of EU external relations law, especially the above-mentioned *AETR* judgment (*supra* note 36): EU competences in external relations (especially with regard to the establishment of a common commercial policy by concluding international trade agreements with third countries) have been interpreted very generously, thus narrowing down remaining competences of the Member States. See, e.g., Eeckhout (*supra* note 1), 67. Whether in light of the Judgment of 27 November 2012 in Case C-370/12 *Pringle v Ireland*, [2012] ECR I-756 there is currently a trend to the contrary remains to be seen. See, e.g., Craig, *Pringle* and Use of EU Institutions Outside the EU Legal Framework, (2013) European Constitutional Law Review 9, 263.

[54] Article 30(3),(4)(a) of the Vienna Convention on the Law of Treaties (**VCLT**) works on the presumption of *lex posterior derogat legi priori* in the sense that an earlier treaty between the same treaty parties relating to the "same subject matter" remains applicable only to the extent that it is compatible with the later treaty.

[55] See *supra* note 19.

[56] Neri/Sperl, Traité instituant la Communauté Economique Européenne (Travaux Préparatoires …), Luxembourg 1960, Article 243.

Member States stemming from their participation in international economic organizations are not affected by the provisions of this Treaty,' translation by the author].

Relying on drafting material of course always begs the question whether one should stress the fact that this was merely a draft that eventually did not get formally adopted in the same words, or whether one can draw any inferences from the wording of the draft. At a minimum, however, one can draw conclusions about what the drafting parties had in mind. In this respect, the original wording here demonstrates that what was at the mindset of the EU Member States were very much their own rights and obligations under existing international treaties. This is why any attempt to completely reduce the purpose of what is now Article 351 TFEU so as to only protect "*rights" of third countries* must ultimately fail.[57] Even if one were to stress the fact that the language of the draft was eventually changed, one has to take into consideration what the apparent reason(s) for this change were. Here, the original wording drafted by the President of the so-called Common Market Group was changed into the current wording by its Editorial Group. This was not due to any substantial dissatisfaction with the draft or change of intention. The revised wording was simply thought to better reflect the fact that the EEC Treaty was likely to somehow impact upon the legal position of EU Member States under public international law more generally.[58] But the relevant *rights and obligations* were of course those of the Member States, and the obvious concern was to leave them in place as far as possible.

Therefore, in the absence of an 'incompatibility' with other EU law, the protection afforded under Article 351(1) TFEU should also be understood as extending to intra-EU agreements.

This historical argument acknowledges that initially, there was considerable reluctance to publish or make otherwise available drafting or discussion material regarding the original Rome treaties.[59] Nevertheless, any concerns to the effect that this may pose a risk to the then very young European project should by now have become less strong, especially in light of the fact that this material is now available. The CJEU itself has started to embrace a historical interpretation of EU law,[60] and has taken the initiative to reflect on the evolution of its case law

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[57] See the underlying assumption of this article *supra* at text accompanying note 12.

[58] *Ibid.* And there are indeed examples of intra-EU agreements like bilateral tax treaties that co-exist with EU law: these, in essence, are deemed to be compatible with EU law because the general EU law prohibition of discrimination in this context is construed narrowly. See Kofler/Schindler, Dancing with Mr. D: the ECJ's Denial of Most-Favoured-Nation Treatment in the "D" case, (2005) European Taxation 45, 530**.** Therefore, if BITs between Member States were treated as falling under Article 351 TFEU, then the focus would correctly shift as to whether these are (in)compatible with EU law, whereby the case law regarding bilateral tax treaties could serve as a point of reference.

[59] Also, it is acknowledged that under international law more generally there appears to be reluctance in allowing recourse to contextual material for interpretive purposes too readily. This can be seen from Article 32 VCLT that provides for recourse to preparatory work of a treaty only as supplementary means of interpretation; and only if the general rule of interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.

[60] See Case C-583/11 P *Inuit* para 50: "[i]n accordance with the Court's settled case-law, the interpretation of a provision of European Union law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of European Union law as a whole (see, to that effect, Case 283/81

since the *Van Gend en Loos* judgment in a specially designed conference for this purpose.[61] Together with the further publication of historical data, this has been rightly understood in the literature as opening up new avenues of historical evaluation of the European project, eventually leading to the establishment of a new research area on "New History of European Law".[62]

B. Recognizing 'mutual rights and obligations'

The artificial distinction between 'rights' applying only to those of third states, and 'obligations' applying only to those of EU Member States is even less justified, either from a historical, or a textual or systematical point of view. As seen above, that distinction was first made in the case of *Commission v Italy* (*supra* 1.B). However, there it was merely made as an argument by the Commission, followed by the statement that:

> "by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a State ipso facto gives up the exercise of these rights to the extent necessary for the performance of its new obligations."[63]

In response to this, the CJEU held that this "interpretation is well founded."[64] It is not entirely clear whether this approval refers back to the specific distinction between 'rights' of third states and 'obligations' of EU Member States, or the general analogy to public international law, or (possibly) both. In any event, what is remarkable is that the only positive statement which the CJEU here makes to justify its approval of the Commission's argument is that:

> "in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of the GATT."[65]

But this statement can only corroborate the reading that EU law should take precedence in an intra-EU scenario; it adds nothing to explain precisely why a distinction between 'rights' of third states and 'obligations' of EU Member States should be made. As to the former (EU law taking precedence), this is simply a reference to the doctrine of supremacy, which is a conflicts rule. Therefore, the rule that EU law takes precedence only applies to the extent that there is a conflict or 'incompatibility'. Conversely, it does not apply if there is none. Put differently, this would mean that (rights and obligations under) *anterior* treaties are left in place to the extent that they do not give rise to a conflict or 'incompatibility' with EU law. There is no reason why this

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Cilfit and Others [1982] ECR 3415, paragraph 20). *The origins of a provision of European Union law may also provide information relevant to its interpretation (see, to that effect, the judgment of 27 November 2012 in Case C-370/12 Pringle [2012] ECR, paragraph 135).*" [Emphasis added].

[61] See Schorkopf, Rechtsgeschichte der europäischen Integration, Juristenzeitung (JZ) 2014, 421, 423 with references at note 16.

[62] So Schorkopf *ibid.* with references to the work of scholars like Morten Rasmussen, Bill Davies, Anne Boerger-de Smedt, and Antoine Vauchez.

[63] Case 10/61 *Commission v Italy* (*supra* note 19), *ibid*.

[64] *Ibid*.

[65] *Ibid.*

should only be true for extra-EU (as per the traditional reading of *Commission v Italy),* and not also for intra-EU scenarios.

As to the latter (separation of 'rights' of third states and 'obligations' of Member States), this distinction is artificial and very likely wrong for the following reasons. First, there is nothing in the text of Article 351(1) that would support such a distinction. Article 351(1) simply refers to 'rights and obligations'. Second, the drafting history confirms that what was intended here was actually to protect the legal position of the Member States' (rights and obligations) under *anterior* treaties to the extent possible.[66] Third, the attempted analogy with public international law in general does not explain why such a distinction needs to be made either: Article 30(4)(b) VCLT, which is often used as the basis for an analogy between Article 351 TFEU and public international law,[67] explicitly refers to "*mutual* rights and obligations" of the respective treaty parties [emphasis added].[68] In other words, public international law in general protects 'rights' and 'obligations' of either state party to the older treaty and does therefore not only *not* support the artificial distinction made in Article 351 TFEU,[69] but even delivers a strong argument against such a restrictive reading: if the claim that Article 351 TFEU was meant to import public international law principles into EU law is correct, "rights and obligations" must indeed be read to mean 'mutual rights and obligations'.

Thus, under the reading suggested here Article 351(1) TFEU safeguards 'mutual rights and obligations' of the EU Member States under *anterior* treaties to the extent that these are compatible with EU law. This must be true for intra-EU agreements and agreements between an EU Member State and a third state. The advantage of such a reading is that it would make perfect sense of the intersection between Article 351(1) and 351(2) TFEU: if the protection under Article 351(1) TFEU extends to rights and obligations under *anterior* treaties that do not give rise to incompatibilities with EU law, the point where Article 351(2) TFEU steps in is only where such an incompatibility arises. If and when it does, EU supremacy and the duty of loyal cooperation demand that the Member States align their international law obligations with their obligations under EU law. Since this is true for intra-EU scenarios anyway, Article 351(2) insofar would only have declaratory effect. Its main purpose under the reading here suggested would be to extend this relative protection of *anterior* treaties and the obligation to align those with EU law to agreements between an EU Member State and a third state.

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[66] See *supra* 2.1, in particular text accompanying notes 56 and 58.
[67] See, e.g., by the CJEU itself in Case C-466/98 *Commission v UK* [2002] ECR I-9496 para 24.
[68] Article 30 VCLT 'Application of successive treaties relating to the same subject matter': (…)
(4)(b) "When the parties to the later treaty do not include all the parties to the earlier one: 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 govern their mutual rights and obligations."
[69] The fact that there is a clear difference in this respect between Article 30(4)(b) VCLT and Article 351 TFEU is also seen by Lorenzmeier (*supra* note 38) para 10 (concluding in light of the CJEU's case law that Article 351 TFEU has only imported "parts" of this public international law principle). To put this differently: if Article 351 TFEU is meant to import Article 30(4)(b) VCLT, the CJEU's case law is too restrictive.

So it is suggested that in principle and subject to a finding of any 'incompatibility', '*mutual* rights and obligations' under *anterior* treaties are protected under Article 351(1) TFEU in both intra- and extra-EU scenarios.

C. Protecting rights of individual investors under Article 351 TFEU

But what exactly are '(mutual) rights and obligations'? Starting with the former, any precise definition of 'rights' first requires being clear about the respective holder of such 'rights': there may be 'rights' of the state, and 'rights' of individuals. As stated *supra* at 1.C, for the purposes of investment treaty arbitration, one of the most essential questions would be whether Article 351 TFEU can in principle also protect the 'rights' of individual investors under *anterior* investment treaties. The *Burgoa*-case mentioned *supra* (1.C) would at least allow this in principle.

However, an obvious hurdle to overcome is that under the proposed reading of '*mutual* rights and obligations', any rights of individuals have no immediate place anymore. Instead, one could conclude this via a longer chain of argumentation, which would run as follows: states may enter an obligation towards each other to protect certain 'rights' (to the benefit) of individuals. They do so on the understanding that the other state party within its respective jurisdiction is affording the same protection. The result is that both states are now bound by a (mutual) 'obligation' to protect these 'rights' of individuals. And therefore, to the extent that protecting these 'rights' is an *anterior* 'obligation', the 'rights' of investors may thus be (indirectly) protected by Article 351 TFEU. This reasoning is in fact underlying the decision in *Burgoa* itself, where the CJEU held as follows:

> '[The] purpose of … [Article 351 TFEU] is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder.'[70]

This illustrates that the CJEU does not in fact start from any 'right' of an individual, but from the 'obligation' of the EU Member States under *anterior* treaties to protect such 'rights'. In the language of legal theory, the correlation[71] of 'rights' and 'obligations' lies between the state parties only. This can also be seen from the *Levy* case.[72] Mr. Levy had been prosecuted for employing women on night work, which was penalized by French law implementing the relevant prohibition of night work for women in Convention No. 89 of the International Labour Convention (ILO Convention). Mr. Levy claimed that the respective French law provision was

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[70] Case 812/79 *Burgoa* (*supra* note 30) para 8.

[71] This terminology goes back to the legal theorist Hohfeld, who precisely attributed the entitlement of one person to the respective ('correlative') disablement of another person. For a contemporary and simplified summary see Schlag, How to Do Things with Hohfeld, Law and Contemporary Problems, 78, No. 185, 2015 (available at www.ssrn.com/abstract=2465148).

[72] Case C-158/91 *Levy* (*supra* note 27).

incompatible with Council Directive 76/207/EEC on the implementation of the principle of equal treatment or men and women as regards access to employment […] and working conditions. The CJEU had held previously that this directive was directly applicable with the effect that a Member State court would have to dis-apply any conflicting national legislation.[73] However, the question was whether this was also true where the conflicting national provision was implementing an *anterior* treaty.[74] The CJEU, relying on *Commission v Italy*, held that what is now Article 351 TFEU made clear that:

> '[A]pplication of the Treaty does not affect the commitment of the Member State concerned to respect the rights of non-member countries under an earlier agreement and to comply with its *corresponding obligations*… Consequently, in order to determine whether a Community rule may be deprived of effect by an earlier international agreement, it is *necessary to examine whether that agreement imposes on the Member State* concerned *obligations whose performance may still be required by non-member countries* which are parties to it.'[75] [Emphasis added]

As the quote makes clear, *Levy* is not primarily concerned with an individual woman's right not to have to work at night.[76] Instead, what counts is the relationship between EU Member and third states, and *obligations owed to each other* under public international law. In the suggested terminology of 'mutual rights and obligations', each state party would have the 'obligation' not to employ women at night, while the respective other state has the 'right' to request compliance with this 'obligation'. As a matter of Article 351 TFEU, the individual can only enter the picture as a beneficiary of this *inter*-states obligation. The question of whether it actually does, as seen *supra* 1.C, is to be solved by interpreting the relevant *anterior* treaty.

This poses a genuine challenge for international investment treaty law, because the issue of whether an investor by way of investment treaty arbitration typically enforces its own rights (**direct rights theory**) or merely the rights of its home state as the correct party to the investment treaty (**derivative rights theory**) is an unresolved question.[77] If the direct rights theory could ultimately establish itself as a matter of international investment law, the indirect protection of the 'rights' of investors under Article 351 TFEU would also extend to the EU, being bound to respect the *anterior* commitments of its Member States:

> "[Article 351 TFEU] … would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement..."[78]

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[73] *Ibid.* para 9 with further reference.
[74] *Ibid.* para 10.
[75] *Ibid.* paras 12-13.
[76] Although there may well be such a right under the national (French) law implementing the ILO Convention.
[77] See von Papp, *supra* note 29, at note 13.
[78] Case 812/79 *Burgoa* (*supra* note 30) para 9.

Put differently, the scope of protection under Article 351(1) TFEU of investors' 'rights' under *anterior* investment treaties to a crucial extent depends upon the further development of international investment law itself.[79] If the direct rights theory were to make an eventual breakthrough, there would be a rather straightforward argument in the outlined scenario:[80] the investor's (direct) 'right' under the *anterior* investment treaty would deserve as much protection under Article 351(1) TFEU as would the host state's obligation to respect investors' rights and the home state's 'right' to request compliance with this obligation. But precisely how much protection would this be?

D. The duty to eliminate 'incompatibilities' under Article 351(2) TFEU

If the overall purpose of Article 351 TFEU is allowing *anterior* treaties to remain binding on the Member States to the extent only that they do not give rise to 'incompatibilities' with EU law (see *supra* 1.D and 2.B), the question then becomes what constitutes an 'incompatibility'. The ECJ held in *Burgoa* that there already is an 'incompatibility' if the relevant provision of the *anterior* treaty is "capable of affecting the application of the Treaty."[81] This is a broad definition, which seems to have been further developed in a Dassonville-type style if looking into the cases of *Commission v Austria*, *Sweden*, and *Finland*: there clearly was no incompatibility *de lege lata* (see *supra* 1.D). Even *de lege ferenda*, at least in the case against Finland, there would have been a fairly strong argument saying that any potentially arising 'incompatibility' could have been dealt with as a matter of international law.[82] Nevertheless, effectively using an effet-utile argument, the CJEU concluded that any hypothetical 'incompatibility' was sufficient to trigger the duty under Article 351(2) TFEU.[83] Such a broad definition of the duty to eliminate 'incompatibilities' seems to follow logically from the generous approach to 'incompatibilities' in *Burgoa.*[84] This raises two issues: first, whether 'incompatibilities' could not be defined in a more concise manner, addressing also the issue of precisely when the 'incompatibility' must present itself. Second, if the meaning of 'incompatibility' were clarified, one could then better address when or how the duty to eliminate 'incompatibilities' under Article 351(2) TFEU is triggered. This would lead to a better acceptance of decisions like those in the cases of *Commission v Austria*, *Sweden*, and *Finland.*[85]

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[79] von Papp, *supra* note 77, *ibid.*
[80] *Supra* note 3 and accompanying text.
[81] *Burgoa* (*supra* note 30) para 6.
[82] See text accompanying notes 44 and 45.
[83] See text accompanying notes 43 et seq.
[84] So Opinion of Advocate General Maduro (*supra* note 46) para 62.
[85] To be clear, the Court's decision in these cases has also met with approval, see, e.g., Lorenzmeier (*supra* note 38) para 68. The main point of criticism here is not that Member States should not be asked to align their international law duties with their obligations under EU law (for which there would appear to have been ample time in the cases of the Swedish, Finnish, and Austrian IIAs since the EU-accession of these countries). The problem is that the Court out of broadly stated efficiency concerns merely requires a non-defined potential conflict in a situation where such a potential conflict apparently had never materialized since the accession of these three countries.

As to the first issue, the CJEU has continuously shied away from giving a precise definition of what constitutes an 'incompatibility' in the sense of Article 351(2) TFEU.[86] The CJEU's reluctance to take a stance as to the existence of 'incompatibilities' may be understandable in in preliminary ruling proceedings. However, given that the CJEU does have to take such a stance in infringement proceedings, it would much foster legal certainty and uniformity if it provided more guidance in preliminary ruling proceedings as well.[87] As to the second issue, there is much more guidance by the CJEU on conflicts outside the context of Article 351(2) TFEU, which could serve as a starting point. For example, in *VEMV*[88] the CJEU held that the Netherlands by continuing to grant to one company priority access to the network for cross-border transmission of electricity (which was later liberalized within the EU) were in breach of the non-discrimination provisions of Directive 2003/54/EC. While the Advocate General in *VEMV* ultimately left the decision to the referring court, she acknowledged both the long-term character of the investment before Directive 2003/54/EC became effective, including the need to amortize costs,[89] as well as the interest of the general public in the continuance of the service.[90] The CJEU, not following her suggestion, employed a contextual and purposive interpretation of Directive 2003/54/EC,[91] relying on the fact that the Netherlands had failed to make use of any of the exemptions available thereunder.[92] This relatively strict reading of the directive in *VEMV* makes sense to the extent it is embedded in the general duty of Member States to abide by the result prescribed by an EU directive under (now) Article 289(3) TFEU, and the more general duty of loyal cooperation under (now) Article 4(3) TEU.[93]

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[86] The CJEU in preliminary ruling procedures leaves the task of interpreting *anterior* treaties to the Member State courts, as can be illustrated by Case C-124/95 *Centro-Com* (*supra* note 16): this case concerned legislation based on [then-] Article 113 of the EEC Treaty [now Article 207 TFEU), implementing a sanctions regime imposed by the UN against Serbia and Montenegro. This regime essentially consisted of an export embargo with exceptions for medical products and certain foodstuffs if previously notified. *Centro-Com* had exported certain (thus exempt) products from Italy to Montenegro, with payment to be made via an English bank account. Permission to debit this account was first given, and then withheld for the last few consignments due to a change of UK policy. The UK had made this change, which consisted of granting exemptions only if the goods were actually exported from UK territory, because of evidence of abuse of the notification procedure. So the question was whether this additional condition for granting an exemption under the UN regime was allowed under what are now Articles 207 and 351 TFEU. The CJEU held that a Community rule may be deprived of its effect by an earlier international agreement if the latter imposes obligations on a Member State the performance of which may still be required by non-Member States. However, determining the extent of obligations under an earlier agreement was a task left to the referring court, who would also have to decide to which extent such previous international obligation "thwart application of the provisions of [EU] law" (See *supra* note 16 at para 58). So it was left to the Member State courts both to define the potentially conflicting international law obligation, as well as to decide the extent of any conflict with EU law.

[87] Suggestions for a theoretically more coherent framework see *infra* 3.A.

[88] Case C-17/03 *Vereniging voor Energie, Milieu en Water et al v Directeur van de Dienst uitvoering en toezicht energie* (*VEMW*) [2005] ECR I-4983. It should be noted that Article 351 TFEU did not play any role in this case.

[89] Opinion of Advocate General Stix-Hackl *ibid.* paras 61 et seq.

[90] *Ibid.* paras 72 et seq., 93 et seq.: while not directly applying [then-] Article 86(2) EC, the Advocate General essentially used its framework of analysis.

[91] Case C-17/03 *VEMW supra* note 88 para 41.

[92] *Ibid.* para 82.

[93] Unfortunately, the CJEU did not elaborate on either.

In short, the lack of definition of 'incompatibility' under Article 351(2) TFEU leads to uncertainty as to what constitutes a breach of the duty to eliminate 'incompatibilities': is the failure or inability to eliminate these necessarily a breach (as per *Commission v Austria, Sweden,* and *Finland* even with regard to *hypothetical* incompatibilities), or not? The CJEU's case law is somewhat misleading as can be further shown by the case of *Commission v Slovakia.*[94] In this case, the Court had to decide whether Slovakia was in breach of the "equal access" provisions of EU Directive 2003/54/EC by granting preferential rights of transmission to a Swiss investor. The counter-argument was that EU law had to give way to such preferential treatment because of a BIT between Switzerland and the Czech and Slovak Federative Republic of 1990 (the **Investment Agreement**). The CJEU found that there was indeed an investment which the Slovak Republic was obliged to protect under the Investment Agreement, which had been concluded prior to the Slovakia's EU accession and thus constituted an *anterior* treaty.[95] But instead of finding 'incompatibilities',[96] and then turning to the question of whether Slovakia could eliminate any such 'incompatibilities' by amending the Investment Agreement,[97] the CJEU drew merely an analogy with its case law under Article 351(2) TFEU. Using the *obiter dictum* in the case of *Commission v Portugal*,[98] which was that Article 351(2) TFEU may require a Member State to denounce an *anterior treaty*, the CJEU concluded that since the contract granting the preferential treatment could not be "denounced" without breaching the Investment Agreement,[99] the Slovak Republic could not be placed under an 'obligation' to simply terminate the relevant contract.[100] On this basis the CJEU was satisfied that the preferential access was an investment that was protected under Article 351 TFEU.[101]

However, this argumentation by the Court essentially puts Article 351 TFEU on its head: first, the analogy with *Commission v Portugal* and the use of the same ("denunciation") language is prone to misunderstanding: its suggests that the Court is reviewing Article 351(2) TFEU, while in reality it addresses not the possibility to terminate the *anterior* treaty, but the individual contract arguably protected by that treaty. Second, the argumentation is inherently circular: any individual contract that is arguably protected by an *anterior* treaty can by definition not simply

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[94] Case C-264/09 *European Commission v Slovakia* [2011] ECR I-8065.
[95] *Ibid.* paras 37 et seq.
[96] At best, the CJEU can be understood to implicitly reject the Slovak Republic's argument that there was no discrimination by way of preferential access since the right of transmission was merely one way to ensure that the investor could recover its investment. *Ibid.* para 21.
[97] Which it could not address as such, because the Commission had failed to plead the second paragraph of Article 351 TFEU. See Opinion of Advocate General Jääskinen in Case C-264/09 (*supra* note 94) para 72.
[98] Case C-62/98 *Commission v Portugal* (*supra* note 35). Here, in contrast to *Commission v Slovakia*, the Commission and Portugal in had actually been in agreement as to the existence of a conflict between several *anterior* treaties regarding merchant shipping and Council Regulation (EEC) No. 4055/86. The centre of the dispute thus was the reach of Portugal's obligation to make the necessary adjustments as required by the EU Regulation. *Ibid.* paras 32 et seq. The duty to eliminate 'incompatibilities' under [then-] Article 234, and the denunciation as *ultima ratio* was only mentioned in an *obiter dictum*, *ibid.* para 49.
[99] Because this would amount to indirect expropriation, Case C-264/09 *Commission v Slovakia* (*supra* note 94) paras 47 and 50.
[100] *Ibid.* para 46.
[101] *Ibid.* para 51.

be terminated without breaching the *anterior* treaty. Article 351 TFEU addresses not individual contracts, but the *anterior* treaties themselves. So the question would have been whether the Slovak Republic was or could come under a duty to amend the Investment Agreement as the *anterior* treaty, or possibly even have to denounce it.[102]

Going forward, defining and finding an 'incompatibility' is necessary in light of the clear wording of Article 351(2) TFEU. If one follows the reading suggested here, which understands the combined purpose of the first and second paragraphs of Article 351 TFEU as ensuring that *anterior* treaties are allowed to stand to the extent only that they do not give rise to 'incompatibilities' with EU law, a precise definition and finding of 'incompatibilities' is not only necessary for the purpose of the second, but also the first paragraph of Article 351 TFEU. What needs to follow then is a discussion of precisely when the duty to eliminate such 'incompatibilities' arises, and how far it reaches.

3. Addressing the real issues posed by Article 351 TFEU

To summarise, under the suggested reading of Article 351 TFEU '*mutual* rights and obligations' of the Member States under *anterior* treaties remain in place to the extent that they are compatible with EU law, in both intra- and extra-EU scenarios. As a default rule, this would give stronger protection to existing IIAs (and indeed *anterior treaties* more generally) than currently recognized. To be clear, since the Treaty of Lisbon "foreign direct investment" forms part of the common commercial policy under Article 207 TFEU. This may appear to suggest that IIAs of the Member States deserve no longer any protection, because the common commercial policy is now an exclusive EU competence. However, such a conclusion would disregard the distinction between *anterior* treaties and those that Member States may *now* wish to conclude as *posterior* treaties. Article 351 TFEU makes that precise distinction and explicitly protects the former.[103] Moreover, as indicated *supra* in the introduction, the traditional line of reasoning on the basis of EU supremacy and competences is overly formal and worth revisiting: as to EU supremacy, Article 351(1) TFEU is an explicit exception that needs to be filled with life.[104] As to EU competences, the *AETR* judgment itself is a nice illustration of how the finding of an exclusive EU competence provided the *deus ex machine* in a situation where the real question would have been whether the Member States' international transport agreement conflicted with the (EU)

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[102] In light of the insufficient pleading of the Commission in this respect (see *supra* note 97) it is somewhat understandable that the CJEU did not openly address Article 351(2) TFEU. However, it could have made clear under which circumstances there may be a duty under Article 351(2) TFEU, instead of trying to deal with "denunciation" at the level of the individual contract.

[103] The German Constitutional Court in its *Lisbon* judgment of 30 June 2009 (2 BvE 2/08) therefore robustly held that existing BITs of the Member States were not at all affected by the transfer of competency to the EU, relying on the literature drawing an analogy to Article 351 TFEU in a situation of a later transfer of competencies to the EU, see *supra* note 15. See www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208 at para 380. See also Terhechte (*supra* note 15), 13.

[104] See *supra* text accompanying note 10.

Council Regulation on the subject matter.[105] Taken together, it is suggested that this means anterior treaties under Article 351(1) TFEU[106] remain unaffected by EU supremacy or competences to the extent this is allowed by Article 351(2) TFEU: they either do not give rise to an "incompatibility"; or the Member States have done all they can in order to comply with their duty to eliminate incompatibilities.

Continuing with the summary, in line with the CJEU's case law, rights of individuals are protected via 'obligations' of a Member State to the extent that they are directly protected under the relevant *anterior* treaty. As a further amendment or clarification of the traditional approach, only to the extent '*mutual* rights and obligations' of the Member States under *anterior* treaties are not compatible with EU law, Member States must eliminate these 'incompatibilities'. Such a reading would conform with the actual text of the provision as well as the overall concern of EU law to achieve uniformity and supremacy (see *supra* 1.D and 2.B). The focus then needs to shift to defining more precisely what constitutes an 'incompatibility' (3.A), specifying the correct point in time when the duty to eliminate such 'incompatibility' materializes (3.B), as well as the extent of this duty (3.C).

A. Defining 'incompatibility' under Article 351(2) TFEU

In order to be clear regarding terminology, 'incompatibility' could refer to both a norm conflict in the strict or in the broader sense. In the strict sense, a norm conflict arises where norm A regulates a certain situation in a way different from norm B, with the effect that the addressee of both norms can only comply with either one and thereby breach the other.[107] If one uses the division of norms into those regulating conduct and those regulating competences,[108] we are here dealing with the former. Norms regulating conduct can further be sub-divided into those imposing obligations, either positive (*do!)* or negative (*do not!* – that is, a prohibition), and those that are simply permissive, again either in the form of a positive (*you may choose to do x)* or negative (*you may choose not to do x)* 'permission'.[109] In the strict sense, a total conflict arises

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[105] This is not the place to enter into a detailed critique of Case 22/70 *AETR* (see *supra* note 36). Suffice it to say here that in particular para 28 of the judgment refers to a "necessary" EU power in light of the relevant Council Regulation on harmonization of legislation (…) relating to road transport without explaining where this necessity came from. Behind this was of course a concern of uniformity, or, put differently, a concern of potential conflicts: the Council itself had mentioned the need of "avoid(ing) any differences of content … [between EU rules and AETR]"*, ibid*. 272. What would have been needed then is a discussion of where that conflict, if any, lied. Instead, the Court chose to go down the formal road of competences, the exclusivity of which it had not convincingly established. See also Klabbers, Treaty Conflict (*supra* note 13), 11 with further references.

[106] Including, by way of analogy, treaties that concern subject matters which only later were consumed by EU competences, see *supra* note 15.

[107] Such a narrow understanding of conflict for example appears to lie behind the reasoning of the investment tribunal in *ADC v Hungary*, Award, ICSID Case No. ARB/03/16, para 272: "Although the Respondent repeatedly attempted to persuade the Tribunal that the … [challenged state acts] were *necessary* … for the *harmonization* of [Hungarian law] with EU law, it failed to substantiate such a claim …." [Emphasis added]

[108] Vranes, The Definition of "Norm Conflict" in International Law and Legal Theory, (2006) EJIL 17, 395, 396.

[109] Pauwelyn, *supra* note 5, 158-159 (referring to a negative permission as "exemption"); Vranes, *ibid.,* 407, 408 (using Bentham's definition of 'norms of conduct' comprising obligations, prohibitions, and permissions).

only where norm A imposes an obligation on the addressee to do something which norm B prohibits.[110] In a traditional international law context, the norm addressee would be the state: this is why *Jenks* defined the norm 'conflict' in international law *stricto sensu* as a situation in which the state faced two incompatible treaty obligations only one of which could be complied with, in contrast to a mere 'divergence'.[111] Such a conflict in the strict sense could be said to exist in the state aid cases: the obligation under the relevant BIT or Energy Charter Treaty to guarantee investment returns under either the prohibition of "indirect expropriation", or the "fair and equal treatment" standard may clash with the EU prohibition of state aid. But even more scenarios could be regarded as 'conflict': a strict definition of conflict has proven rather controversial in international law insofar as a definition of 'incompatibility' under Articles 30 and 59 VCLT is concerned.[112]

A similar discussion is thus needed for EU law: does an 'incompatibility' under Article 351(2) TFEU only exist if a Member State faces an international law obligation that clashes with an obligation under EU law? Or, more broadly defined, is there also an 'incompatibility' if international law merely allows a certain conduct that EU law prohibits (or *vice versa*)? In other words, there may be an 'incompatibility' in the broader sense if a permissive norm conflicts with an obligation. So even if the BIT or Energy Charter Treaty did not *require* a certain treatment of the investment, there may still be an argument that there is a conflict with EU (state aid) law. Or, even if EU (state aid) law did not strictly prohibit a cutting of investment returns, the standard of protection required under a BIT or the Energy Charter Treaty may still be said to conflict with EU law. What is clear from *Commission v Italy* and its progeny is that an EU law obligation eventually trumps a mere 'permission' under an *anterior* treaty.[113] What remains unclear, however, is whether this means that there is no 'incompatibility' in the first place,[114] or that implicitly, the duty under Article 351(2) is at play here, requesting the Member State to eliminate 'incompatibilities' by not exercising a 'permission'. What is also not clear is how the opposite

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[110] Vranes *ibid.* 415 (at text accompanying note 103). This goes back to Kelsen, Allgemeine Theorie der Normen, Wien 1979, 99. One could further distinguish the situation in which one norm explicitly claims to derogate from another, see Kammerhofer, The Theory of Norm Conflict Solutions in International Investment Law, *in*: Cordonier Segger/Gehring et al. (eds.), Sustainable Development in World Investment Law, Global Trade Series, 30 Kluwer Law International 83, 85 (2011).

[111] Jenks, The Conflict of Law-Making Treaties, (1953) BYIL 30, 401, 426.

[112] For an analysis and discussion of narrow and wider approaches to defining what constitutes "conflict" in PIL (with a focus on WTO case law) see Vranes (*supra* note 108), 407-415 et seq. (concluding that an adequate definition of "conflict" would have to be a wider one, also comprising permissive norms).

[113] With regard to *Commission v Italy* (*supra* note 19), this concerned the permission under GATT to introduce or maintain a minimum levy. In *Centro Com* (*supra* note 16) this case law has been summarized as follows: insofar as an *anterior* treaty *allows, but does not require* a Member State to adopt a measure that may conflict with EU law, the Member State must refrain from adopting such measure (Case C-124/95 *supra* note 16 para 60 with further references).

[114] That is, any potential 'incompatibility' is being avoided since it is possible for the Member State, by not making use of the permission, to abide by all obligations. This is an approach that public international law would refer to as conflict avoidance by "joint compliance", see Vranes (*supra* note 108), 395-396 (with further references), 418. Regarding the general tendency in public international (and, in particular, WTO law) to avoid conflicts by way of interpretation see Pauwelyn, *supra* note 5**Error! Bookmark not defined.**, 240 et seq.

scenario should be resolved (obligation under *anterior* treaty clashes with a permissive norm under EU law).

In attempting a clearer definition of 'incompatibilities' one would then have to take into account that there are not only norms of conduct, but also norms of competences. The latter are defined as norms that enable the holder of the 'power' or 'competence' to transform the legal situation of those that are subject to it.[115] Precisely how should one assess a situation in which such a norm of competence conflicts with an obligation? Without putting it this way, this was the issue the CJEU addressed in *Commission v Austria, Sweden,* and *Finland* (*supra* at 1.D and 2.D): an EU 'power' to put transfer restrictions with third states into place conflicted with the obligation of EU Member States under *anterior treaties* to ensure that there are no such restrictions. The CJEU's judgment implies that such a conflict in the broader sense can constitute an 'incompatibility'. What may be even more, the CJEU here also suggests that Member States can only comply with their duty to eliminate 'incompatibilities' under Article 351(2) TFEU if they carve out from an *anterior* treaty both their *rights and* obligations under EU law.[116] If this is reading is correct, this would provide a rather one-sided definition of 'incompatibility' to the sole benefit of EU law, where permissive norms eventually supersede even obligations under an *anterior* treaty, while the same is not true under the current approach with regard to "rights" under such *anterior* treaties.[117]

Instead of facilitating a discussion of these issues, the CJEU's case law starting with *Commission v Italy* (see *supra* 1.A-B, and 2.A-B) has rendered a definition of 'incompatibility' difficult, because it clouded a precise understanding of "rights and obligations" in the first place. To be clear, Italy did not invoke a 'right' as per "rights and obligations" under an *anterior* treaty at all. Instead, *Commission v Italy* really was about something that could either be regarded as a 'permission' or a remaining 'competence' ('power') to regulate. The correct question would have been whether the conflict between such 'permission' or 'competence' under GATT and the EU law obligation to reduce customs duties (and hence the prohibition to introduce the minimum levy) constituted an 'incompatibility'. So the real issue would have been to what extent "rights and obligations" under Article 351(1) TFEU were at all triggered, and whether 'incompatibility' under Article 351(2) TFEU could be understood broadly so as to embrace more than conflicts *stricto sensu.*[118]

One question that has also been neglected so far is the correct point in time when the 'incompatibility' must present itself. One rare example of where this question is adequately

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[115] Vranes (*supra* note 108), 417.
[116] Case C-205/06 *Commission v Republic of Austria* [2009] ECR I-1301 para 37 (emphasis added).
[117] Which would further explain why the CJEU's approach under Article 351 TFEU has been criticized as 'Eurocentric', see Klabbers, Treaty Conflict, *supra* note 13, 140.
[118] To use the terminology of legal theorists again, the question would be whether Article 351 TFEU addresses only "contrary conflicts" that is conflicts between obligations, or also "contradictory conflicts" involving also permissions, Vranes *supra* note 108, 409.

addressed is the arbitral award in the *Electrabel* case:[119] there, two possible points in time were considered as relevant for determining whether the host state's action constituted a breach of the fair and equitable treatment standard under the relevant IIA: first, the state's behaviour before the final Commission decision finding state aid and thus an 'incompatibility' with EU law.[120] This means looking at the state action with a view of determining whether a) the state more generally complied with EU law up to that point and b) whether it did anything to increase the likelihood that the Commission would eventually render that decision. Second, the state's behaviour following the final Commission decision. In this respect, the Tribunal proceeded to determining what exactly the Commission decision had asked Hungary to do;[121] and eventually held that it had indeed required Hungary to terminate the investment contracts that contained state aid and were thus incompatible with EU law.[122]

The next issue then is to determine the exact point in time when the duty to eliminate an 'incompatibility' (thus defined) materializes. In order to address this in a doctrinally more coherent way, one would have to start with understanding Article 351(2) TFEU as expression of the general duty of loyal cooperation. This would provide both the basis for explaining why and when the EU Member States have to align their international law obligations with EU law, and the consequence of any breach of this duty. As Advocate General Maduro stated in his Opinion in Cases C-205/06 and C-249/06 it is "not permissible for a Member State to frustrate any form of Community action."[123] While the CJEU did not mention the duty of loyal cooperation as suggested by the AG in these cases, it neither explicitly rejected nor endorsed it.[124] So the correct understanding would be that Article 351(2) reiterates an *unspecified* duty of loyal cooperation:[125] hence, a specific duty not to compromise an EU directive even before expiry of the deadline for implementation emerges only if otherwise there would be a "frustration" of EU action. At least, the same must then be true for the emergence of a specific duty to eliminate 'incompatibilities' under Article 351(2) TFEU. So the specific obligation of Member States to eliminate any 'incompatibility' must first be triggered by an event different from the mere existence of Article 351(2) TFEU. In *Commission v Portugal*[126] the CJEU could entirely rely on the adjustment requirements laid down by the relevant EU Regulation. By contrast, in cases where such specific duties are not yet imposed by secondary law, the test becomes whether otherwise EU action would be "frustrated". Put differently, Article 351(2) TFEU does not yet answer the question of

[119] See *supra* note 3.
[120] *Electrabel S.A. v Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19 paras 6.66 et seq.
[121] *Ibid.* paras 6.76 et seq.
[122] *Ibid.* paras 6.82-6.90.
[123] *Supra* note 41 para 38.
[124] The CJEU's decision is here understood as being based on a different basis, namely following the Commission's argument that the legislative powers in (then-) Articles 57(2), 59, and 60(1) EC have pre-emptive effect even if not exercised: see Opinion of General Advocate Maduro in Cases C-205/06 and C-249/06 (*supra* note 46) paras 30 et seq. See also *infra* 3.C.
[125] AG Maduro *ibid.* para 34: "It is in the nature of the duty of loyal cooperation that it cannot be applied on its own …."
[126] See Case C-62/98 *Commission v Portugal* (*supra* note 98).

when exactly the specific duty to eliminate 'incompatibilities' arises. So one issue to be added is finding the correct point in time when the specific duty to eliminate 'incompatibilities' materializes.

B. When does the duty to eliminate an 'incompatibility' under Article 351(2) TFEU materialize?

Therefore, the focus needs to shift to determining the relevant point in time for the coming into existence of a duty to eliminate an 'incompatibility'. This cannot be earlier than the acknowledgement of an 'incompatibility' (see *supra* 3.A).

In *Commission v Austria, Sweden,* and *Finland*, the CJEU relied on the argument that the *anterior* treaties did not contain any, or (in the case of Finland) sufficiently strong clauses providing for the event that EU legislation would be passed, restricting the transfer of capital between EU Member States and the respective third states.[127] One reading would be that the relevant point in time thus is the conclusion of the *anterior* treaty. This cannot be correct, however: at the time of the *conclusion* of an *anterior* treaty a state (who at the time *per definitionem* is not an EU Member State) cannot be deemed under an EU law obligation to align its obligations under international law with EU law. So the case must be read in light of its factual and procedural background, as well as the proposed conclusion by the Advocate General. All this would suggest that the relevant point in time is seen as the expiry of the time-limit of two months set by the reasoned opinion of the Commission.[128] Nevertheless, the point of reference is the fact that the *anterior* treaty as originally concluded does not properly provide for a potential future event, which the Member States now need to address by way of re-negotiation and amendment, or possibly denunciation as *ultima ratio*.[129]

A doctrinally more coherent solution would probably have to adopt a more moderate approach. Reading Article 351(2) TFEU as expression of the general duty of loyal cooperation would require one to determine separately when this general duty materializes as a specific obligation on part of the Member State. The exact determination of the relevant point in time would then depend upon the individual circumstances of the case. In cases like *Commission v Slovakia* or *VEMW* (*supra* 2.D), where there is an 'incompatibility' between an *anterior* treaty granting preferential access and existing EU law, Member States would normally be under a specific obligation to eliminate this, and *by the latest* so with receipt of any Commission's request for compliance. By contrast, in cases where there is no specific obligation under EU law *de lege lata* (for example in cases like *Commission v Austria, Sweden,* and *Finland*) the duty to eliminate any 'incompatibility' could only come into existence *by the earliest* with any Commission's

[127] See *supra* at 1.D, especially text accompanying notes 43 - 45.
[128] With Sweden not having reacted at all, and Austria having taken steps only with regard to one out of several *anterior* treaties. See Opinion of General Advocate Maduro in Cases C-205/06 and C-249/06 (*supra* note 46) paras 64-67.
[129] *Ibid.* para 70.

request for compliance.[130] Even this is not uncontroversial, because arguably the Member States remain free to regulate in the absence of EU secondary law having actually been passed. Here, an analogy with a situation in which national law contradicts an EU directive before the expiry of its deadline for implementation could indeed be useful.[131] However, there still is a difference between an EU competence that has actually been exercised (with the content of secondary law being clear but just not yet in force), and an EU competence that has not been exercised at all (see further *infra* C).

C. Extent of the duty to eliminate 'incompatibilities' under Article 351(2) TFEU

The normal consequence of a Member State's failure to comply with its obligation under Article 351(2) TFEU would be that the Member State is in breach of EU law. Although this may sound straightforward, the analysis so far has shown that a breach is difficult to establish given that it is unclear exactly when the obligation materializes (*supra* 3.B).

In general, Member States' duties under EU law in principle must be the same, independent from the factual question of whether they allegedly conflict with *national* or *international* law. Although there may be a difference between the two to the extent *international* law under Article 351 TFEU, at least for the time being, remains "fully valid",[132] EU supremacy in Article 351(2) TFEU eventually has the same effect of overriding *international* obligations (see *supra* 1.D). So the general rule must be that a failure to comply with a specified duty under Article 351(2) TFEU by the relevant point in time puts the Member State in breach of EU law.

The question then is which threshold to apply in order to determine the extent of the duty to eliminate 'incompatibilities' with *anterior* treaties. Here one would have to account for the fact that it is generally more difficult for a Member State to align its *international* law obligations with EU law than it is to align its *national* law with EU law. Therefore, Member States must have more discretion when trying to comply with Article 351(2) TFEU as opposed to domestic scenarios. Or, put differently, the threshold for holding that a Member State is in breach of EU law in situations involving *anterior* treaty obligations must be higher: here one could take up Advocate General Maduro's test of whether upholding a Member State's 'rights and obligations' under an *anterior* treaty "frustrates or jeopardises the purpose of EU action",[133] or "seriously compromises the exercise of [EU] competence."[134] However, the benchmark may have to be set even higher in those cases in which there is no specific obligation under EU law *de lege lata* (*supra* 3.B and 2.D). This scenario can be compared with, but must also be distinguished from the awaited expiry of a deadline for implementation of a directive: in the latter scenario, the EU legislator has already acted, and the exact content of the legislation is known, as is the latest

[130] See also the CJEU's emphasis on the Commission's role under what is now Article 17 TEU in Cases C-205/06 *Commission v Austria* and C-249/06 *Commission v Sweden* (*supra* note 41) para 44.
[131] Opinion of General Advocate Maduro in Cases C-205/06 and C-249/06 (*supra* note 46) paras 35 et seq.
[132] *Ibid.* para 33.
[133] See *supra* text accompanying note 123.
[134] See *supra* note 48.

point in time from which this is binding (being the deadline for transposition). By contrast, in the first scenario, it is unknown if and when the EU might take action, as well as the exact content of any future EU legislation.

In this scenario it is suggested that the threshold for holding that a Member State is in breach of Article 351(2) TFEU should be even higher than the one proposed by AG Maduro. For example, one could test whether upholding a Member State's "rights and obligations" under an *anterior* treaty would *seriously* frustrate or jeopardise the purpose of EU action, or *undermine* the exercise of [EU] competence. As much as AG Maduro's analogy with the situation of a directive the transposition deadline of which has not yet passed makes sense, it does not fully account for the difference just mentioned. Treating both scenarios in exactly the same way puts the distinction between exclusive and non-exclusive EU competences at risk, effectively treating *any* EU competence as an exclusive one.[135]

A final question is whether there should be any exceptions to the rule stated above. For example, a genuine inability of the Member State to align its obligations under *international* with EU law could become relevant here.

4. Conclusion

The above analysis leads to the following conclusion: despite the narrow understanding of what is now Article 351 TFEU in the CJEU's case law, this provision should be read literally, as supported by its historic background. This means that it could generally apply not only to extra-EU, but also to intra-EU scenarios, provided that the IIA relied upon is an *anterior* treaty. In contrast to the CJEU's case law, it should also be read as protecting the 'rights' of an EU Member State under such an *anterior* treaty, provided that these are properly defined as correlatives to obligations of the other contracting state. Rights of investors under IIAs would be protected indirectly as 'obligations' by the host state to protect such rights, and this would be an issue to be taken on by investment law itself via the direct rights as opposed to the derivative rights theory.

Article 351 TFEU being a conflicts rule, the decisive issue must be whether there is an 'incompatibility' between an obligation under an IIA, and an obligation under EU law – that is, a conflict in the strict sense, and at the relevant point in time. Depending on the factual evidence, there might be such a conflict in the strict sense in the outlined scenario.[136] If so, EU Member States are under a general obligation of loyal cooperation and must thus eliminate this 'incompatibility'. Here the focus needs to shift to establishing the exact point in time when a Member State has to comply with such a duty. It is suggested that the duty in Article 351(2) TFEU should be read as an unspecified one, with a need to specify the relevant point in time when it materializes on a case-by-case basis. This would not only allow for some flexibility, but

[135] Something that AG Maduro himself warns against (*supra* note 46) at para 30.
[136] See *supra* note 3 and accompanying text.

also for a distinction between situations in which there already is a conflicting EU rule, and situations in which there is merely an EU competence to act.

Further discussion is required as to whether Article 351 TFEU is also meant to address conflicts in the broader sense, for example where a mere 'permission' or 'power' under an IIA conflicts with an 'obligation' under EU law. The case law so far would suggest that in such a scenario, EU Member States have to give up the 'permission' or 'power' under an IIA and abide by the EU law 'obligation'. However, the underlying theoretical concept is unclear, as is the question of how to solve the converse scenario, in which an obligation under international law clashes with a mere 'power' or 'permission' under EU law. The cases of *Commission v Austria, Sweden and Finland* suggest a generous understanding of 'conflict', albeit in a one-sided way, thereby broadening the Member States' duty to eliminate such 'incompatibility'. From an international law perspective, this is bound to raise serious concerns. Either the CJEU is grouped amongst other international tribunals that simply act in their own self-interest, thereby disregarding other relevant norms of international law. Or, what would be worse, the EU is not taken seriously as an international actor at all; and instead regarded as such a highly integrated (former) sub-regime of international law that it should better be compared with a purely domestic legal order. Both cannot be in the EU's interest. The least the EU should have to offer as a response is a coherent doctrinal and theoretical framework, which allows for more flexibility in accommodating *anterior treaties* (including but not limited to IIAs) than is currently being recognized in the case law.

The suggestion to revisit Article 351 TFEU in this sense should not be misunderstood as Euroscepticism or misapprehension of EU constitutionalism. It merely acknowledges the special nature of Article 351 TFEU within this picture, and proposes to make an effort so as to not render its first paragraph redundant. This is done against the background of a slightly more pluralist than constitutionalist understanding of the EU.[137]

[137] For a recent overview of the debate regarding constitutional pluralism see Lock, The European Court of Justice and International Courts (International Courts and Tribunals Series), OUP 2015 *forthcoming*, Chapter 1 (manuscript with author).