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Bilateral Investment Treaties between European Member States – Paradise Lost?

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Conference paper

The compatibility of intra-EU BITs with European law has been debated at large by academia, international arbitral tribunals and national courts, but the Court of Justice of the European Union (CJEU) has not yet had the chance to decide on the matter. It will soon have to do so, in proceedings commenced in relation to the high-profile Achmea and Micula arbitrations, and in the context of the infringement proceedings commenced by the European Commission against several Member States which had refused to terminate their intra-EU BITs. Opinions have been expressed vociferously both for and against the intra-EU BITs, and the way forward is still uncertain. It should, however, be noted that, recently, the opinion of the Advocate General in the case Slovak Republic v Achmea BV was released. The AG found that an intra-EU BIT does not constitute discrimination on the basis of nationality and does not undermine the allocation of powers provided for under the EU Treaties and the autonomy of the EU legal system. All eyes are now on the CJEU judges.

Keywords: intra-EU BITs, European law, arbitration, Micula, Achmea, infringement

I. Two legal orders at odds?

Throughout the past decade, we have been witnessing an ever-increasing tension between European law (the European Treaties[1] and the secondary legislation) and bilateral investment treaties ("BITs"), especially with regard to investor-state arbitration proceedings.

The potential conflict between European law and BITs has many faces. Among the most widely-discussed issues are whether the BITs concluded between EU candidate countries and European Member States have been terminated once the respective countries became part of the European Union (either automatically, as

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[1] For purposes of the present article, the European Treaties are the Treaty on European Union ("TEU") and the Treaty on the Functioning of the European Union ("TFEU").

successive treaties as per article 30 of the Vienna Convention of the Law of Treaties ("VCLT")[2], or by applying the so-called *lex posterior* rule in article 59 of the VCLT)[3]; whether delocalised investor-state arbitration interferes with the exclusive, final and authoritative jurisdiction of the Court of Justice of the European Union ("CJEU"), as well as with the preliminary ruling system; whether the preferential treatment given by BITs to investors from some states violates the fundamental principle of equality under EU law[4]; whether, in a case where both sets of norms are applicable and seem contradictory, there is a way to interpret the BIT and the European law provisions harmoniously, so that compliance with one legal order does not breach the other; and what consequences would occur if the European Treaties and BITs contained irreconcilable obligations.

Arbitral tribunals, national judges, practitioners and scholars alike have been discussing at large the issues above during the past years. However, the CJEU has yet to have its say with regard the compatibility between BITs and European law. This may change soon, as the BIT controversy is slowly moving from the debate forum to the desk of the Luxembourg judges.

II. Bilateral investment treaties

Bilateral investment treaties, sometimes also called treaties on the protection and promotion of investments, are instruments usually concluded between a developed and a developing state. BITs appeared in the wake of the Second World War, when organisations like the United Nations and the World Bank saw enhanced economic bonds between states as one way to prevent armed conflict.

[2] Article 30 VCLT reads, in relevant part: "Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. [...]"

[3] Article 59 VCLT reads, in relevant part: "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. [...]"

[4] Article 18 of the TFEU reads: "Within the scope of the application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

BITs grant investors from one signatory state in the other state substantive rights such as fair and equitable treatment, national treatment, most-favoured nation treatment, protection from discriminatory measures and illegal expropriation, full protection and security. They also provide investors with procedural rights, the most important one being the possibility to resolve investor-state disputes by international arbitration, sometimes to the complete exclusion of national court proceedings. Most BITs provide for arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) or by an *ad hoc* tribunal established under the UNCITRAL Arbitration Rules. Usually, more than one arbitration option is provided for in BITs: in most cases, investors can choose from a dispute settlement menu, with the Permanent Court of Arbitration, the Stockholm Chamber of Commerce or the International Chamber of Commerce in Paris being favourite choices in addition to the Washington-based ICSID.

At European level, the BIT controversy has been increasing over the past years.

The Lisbon Treaty gave the European Commission exclusive competence[5] in the field of foreign direct investment[6], being the only institution which may negotiate investment treaties on behalf of the Member States. As soon as 2010, the European Commission set up its priorities regarding the future investment policy of the European Union.[7] Already then, the European Commission was envisaging the termination of the BITs between its Member States and third countries and negotiating comprehensive, stand-alone investment agreements.[8] In parallel, the European Union adopted a Regulation concerning transitional arrangements relat-

[5] Article 3 TFEU reads: 1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy."

[6] Article 207(1) TFEU reads, in relevant part: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. [...]"

[7] Communication of the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions of 7 July 2010, Towards a comprehensive European international investment policy, COM (2010) 343.

[8] This intention would later be embodied by the CETA (Canada – EU Trade Agreement) and TTIP negotiations.

ing to investment agreements between Member States and third countries.[9] Once notified to the European Commission, such BITs may remain in force until being replaced by an investment treaty concluded between the EU and the respective third country. Exemptions apply if the BIT contains "serious obstacles" to the conclusion of future agreements between the EU and third countries. The sovereignty of Member States in negotiating new BITs or amendments to existing ones is significantly curtailed. The Commission is to be involved in all investment disputes initiated by an investor under BITs between a Member State and a third country. It also takes the ultimate decision of whether or not a Member State initiates disputes against a third country.

While this this indeed provides legal certainty to both EU and foreign investors operating under the terms of these agreements until the time when they will be replaced by agreements concluded by the EU, intra-EU BITs are subject to a debate on their compliance with EU law. This debate creates rather the opposite, namely a lack of legal certainty, until it will be finally settled by the CJEU. Cases like Achmea v The Slovak Republic and Micula v Romania have been providing plenty of food for thought regarding the future of intra-EU BITs-based arbitration. These cases culminated in the much awaited questions referred to the CJEU in the Achmea matter, as well as a recently-issued opinion by the Advocate General, and an award of damages deemed incompatible State aid by the European Commission in the Micula case.

III. Achmea v The Slovak Republic – the long road to the CJEU

In what is today known as Achmea v The Slovak Republic,[10] the dispute arose from various legislative measures enacted by the Slovak Republic which led to a reversal of the market situation on the basis of which the investor made its investment decision.[11] In summary, the transition, of the then Czech and Slovak Federal Republic[12], from a system of central economic planning to a market economy, necessitated the creation of a legal framework which would safeguard the functioning of the newly-instated system and protect the participants. According to the Dutch investor Achmea, the 2004 liberalisation was "instrumental" in deciding to invest in the Slovak health insurance sector.[13] However, a new government elected in 2006 amended the 2004 reforms. Most of the 2006 measures represented, in the view of Achmea, breaches of the BIT between the Slovak Republic and the Netherlands, more specifically an unlawful expropriation of the investment which led to significant damages.[14]

On 1 October 2008, Achmea commenced arbitration proceedings against the Slovak Republic on the basis of the Dutch-Slovak BIT. [15] As the seat of arbitration was chosen at Frankfurt am Main, the German law on arbitration became applicable.[16]

The German law on arbitration, modelled after the UNCITRAL Model Law[17], regulates the ability of an arbitral tribunal to rule on its own jurisdiction.[18] This provision was used by the Slovak Republic to introduce, together with its Statement of Defence, what it called "the intra-EU Jurisdictional Objection" and to state that the Slovak Republic's accession to the EU deprived the arbitral tribunal of jurisdiction. The Slovak Republic argued that, as a matter of international law, EU law, Slovak law and German law, its accession to the EU in May 2004 either terminated the BIT or at least rendered the provision opening the way to arbitration inapplicable. In summary, it stated that: as a matter of public international law, pursuant to Article 59 of the VCLT,[19] the BIT was terminated upon the Slovak Republic's accession

[9] Regulation (EU) No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351/40.

[10] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic).

[11] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Award on Jurisdiction, Arbitrability and Suspension dated 26 October 2010 ("Achmea Award on Jurisdiction"), para 6 et seq.

[12] The Slovak Republic separated from the Czech and Slovak Federal Republic and became an independent state on 1 January 1993. As of the date of its independence, it succeeded to the international agreements concluded by the Czech and Slovak Federal Republic.

[13] Achmea Award on Jurisdiction, para 53.

[14] The most relevant allegedly adverse effects were a cap on operating expenses, a ban on the distribution of profits to shareholders, scrutiny of the budgets of health insurance companies, and the obligation that health insurance companies contract with specific state hospitals.

[15] Article 8(5) of the Dutch-Slovak BIT reads: "The arbitration tribunal shall decide its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL)".

[16] § 1025 of the German Code of Civil Procedure (*Zivilprozessordnung*, "ZPO") reads: "Scope of application. The provisions of this Book apply if the seat of arbitration as referred to in § 1043(1) is situated in Germany."

[17] UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex I), as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

[18] The so-called principle *Kompetenz-Kompetenz* states that an arbitral tribunal may rule on its own jurisdiction.

[19] Article 59 of the VCLT reads, in relevant part: "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. [...]"

to the EU; as a matter of public international law, pursuant to Article 30 VCLT,[20] the arbitration clause in the BIT can no longer be considered applicable since the Slovak Republic's accession to the EC Treaty; as a matter of EU law (which is part of Slovak law), the arbitral tribunal lacks jurisdiction because the arbitration clause is incompatible with the EC Treaty, the principle of autonomy of EU law, and the principle of supremacy of EU law; and as a matter of German law, the tribunal lacks jurisdiction because the dispute is not arbitrable.[21]

According to the Slovak Republic, there are two main reasons why the arbitration clause in the BIT is at odds with the EU legal order: (i) it violates the exclusive competence of the CJEU, and (2) it violates the fundamental principle of equality in Article 18 TFEU. According to the Slovak Republic, the subject matter of the dispute was governed by EU law, and the CJEU had an "interpretative monopoly" under Article 267 TFEU[22]. However, unlike national courts, arbitral tribunals are not entitled to raise preliminary questions of law to the CJEU under the *Nordsee* doctrine,[23] despite the fact that they are called to apply fundamental EU law which has become part of the national law of the Member States. The Slovak Republic warned that, because of the many arbitral tribunals applying EU law without the recourse to the CJEU, the uniform application of EU law is endangered. Furthermore, the Slovak Republic showed that investors from Member States which had not concluded BITs with the Slovak Republic are discriminated against in comparison to Dutch investors, since they do not enjoy the same level of substantive and procedural protection of the Dutch-Slovak BIT.

[20] Article 30 of the VCLT reads, in relevant part: "[...] When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. [...]"

[21] See Achmea Award on Jurisdiction, para 57 ff.

[22] Article 267 of the TFEU reads, in relevant part: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. [...]"

[23] Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG,* ECR 1982, 1095.

During the arbitral proceedings, the Slovak Republic was supported by an intervention of the European Commission.[24] In its written submission,[25] the European Commission stated that intra-EU BITs represent an "anomaly within the EU internal market" which called into question the very existence of these instruments. The European Commission relied on Article 344 TFEU to say that EU Member States may not resort to inter-state arbitration mechanisms for matters even partially covered by EU law.[26] The European Commission did not support the Slovak Republic's argument that the BIT was terminated automatically under Article 59 VCLT.[27] It however stated that "both EU Member States should terminate this type of bilateral agreement." It went on to warn that an international arbitral tribunal called to rule over EU disputes may well render an award which is incompatible with EU law. According to the European Commission, the Slovak Republic would then be prevented from executing or enforcing such an award, risking infringement proceedings should it chose to do otherwise.[28]

The arbitral tribunal rejected all the Slovak Republic's objections to jurisdiction, including the ones based on EU law. In the tribunal's view, the role played by EU law in the dispute before it was a matter of substance, and not one that would be relevant at the jurisdictional stage.[29] The arbitral tribunal stated that the CJEU did not have what was called an interpretative monopoly of EU law, that courts and arbitral tribunals throughout the EU apply and interpret EU law daily, and that even final courts do not have to refer questions for preliminary rulings by all means.[30]

Under German law, after the arbitral tribunal decides on its own jurisdiction, any party may request, within one month of receiving written notice of that ruling, a

[24] At the time when the arbitral tribunal was hearing this dispute, an infringement procedure against the Slovak Republic under Article 258 TFEU, as well as an administrative investigation into the Slovak health care legislation, was ongoing.

[25] The European Commission submitted its written observations on 7 July 2010 at the invitation of the arbitral tribunal, in accordance with Rule 37 of the ICSID Rules of Procedure for Arbitration Proceedings. See Achmea Award on Jurisdiction, para 175 ff.

[26] In the MOX Plant case between UK and Ireland, the then ECJ found that it had exclusive jurisdiction in resolving a dispute between two EU Member States that was at least partially covered by EU law. The MOX Plant dispute, nonetheless, concerned a dispute between two states, and not one between an individual and state.

[27] Achmea Award on Jurisdiction, para 187.

[28] Achmea Award on Jurisdiction, para 194.

[29] Achmea Award on Jurisdiction, para 278 ff.

[30] The so-called *acte clair* doctrine was established by the CJEU in Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, Judgement of 6 October 1982, [1982] ECR I-03415.

national court to decide on that matter.[31] Meanwhile the arbitral tribunal may continue with the arbitral proceedings and render an award.

Just one month after the arbitral tribunal rendered the Achmea Award on Jurisdiction, the Slovak Republic filed an application before the Higher Regional Court of Frankfurt am Main (*Oberlandesgericht Frankfurt*, the Frankfurt Court) to set it aside, arguing the same lack of jurisdiction of the arbitral tribunal, this time for five reasons.[32] The Slovak Republic argued that its accession to the EU rendered the Dutch-Slovak BIT void and inapplicable, because under Article 344 TFEU ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"), the European courts enjoyed an exclusive jurisdiction on the interpretation and application of EU law.[33] Next, the Slovak Republic argued that the arbitration clause in the BIT was inconsistent with the association agreement between the Slovak Republic and the EU.[34] It also embraced the argument formulated by the European Commission during the arbitration proceedings that the arbitration clause in the BIT breached the non-discrimination principle enshrined in Article 18 TFEU, as it contains preferential treatment standards for the signatories of the BIT.[35] In the view of the Slovak Republic, the arbitration clause in the BIT, which opens the way to a parallel dispute resolution system, also infringed upon the principle of mutual trust between EU Member States.[36] Lastly, the Slovak Republic stated that yet another obstacle to jurisdiction were considerations related to procedural economy, as an arbitral tribunal cannot make a referral for a preliminary ruling under Article 267 TFEU.[37] The Slovak Republic also requested the Frankfurt Court to refer the case to CJEU for a preliminary ruling.

The Frankfurt Court rendered its decision on 10 May 2012. The Frankfurt Court was not convinced that the arbitration clause in the BIT would violate Article 344

[31] See § 1040(1) ZPO and § 1040 (3) ZPO. The decision rendered by the state court is binding for the tribunal and the parties; however, under § 1065(1) ZPO the parties may lodge an appeal with the German Federal Supreme Court (*Bundesgerichtshof*, BGH).

[32] Notably, during the Frankfurt court proceedings, the Slovak Republic no longer pursued its initial argument that the Dutch-Slovak BIT was terminated as a result of the accession of the Slovak Republic to the EU as per Article 59 VCLT.

[33] The Slovak Republic vs. EUREKO B.V., Higher Regional Court of Frankfurt, Decision of 10 May 2012, 26 SchH 11/10, ("the Frankfurt Court Decision"), para 21.

[34] Frankfurt Court Decision, para 24.

[35] Frankfurt Court Decision, para 25.

[36] Frankfurt Court Decision, para 26. That principle was established by the CFEU in Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014 (EU:C:2014:2454, paragraph 191).

[37] Frankfurt Court Decision, para 27.

TFEU, and for two reasons: Article 344 TFEU applies to disputes between Member States, and not to a dispute between an investor and a Member State[38]; the Frankfurt judges also concurred with the arbitrators to the effect that no such thing as an interpretative monopoly in interpreting EU law exists.[39] The Frankfurt Court stated that, although indeed tribunals lack the possibility to request a preliminary ruling from the CJEU, state courts come into play at the enforcement stage,[40] and it is then when they can rely on Article 267 TFEU and submit questions on application and interpretation of EU law.[41] The Frankfurt Court also ruled that the arbitration clause in the BIT had not become invalid per Article 30 VCLT.[42] There was also no breach of the non-discrimination principle in the view of the Frankfurt judges: even if indeed access to arbitration may constitute an advantage for investors from some countries, the solution should be the extension of the better treatment to all investors, rather than restricting the rights of some.[43] Further on, the Frankfurt Court saw no breach of the principle of mutual trust in the courts of the EU Member States, since arbitration is a means of resolving disputes widely recognised and which, in principle, can be seen as equivalent to state courts.[44] Lastly, the Frankfurt judges were not convinced by the Slovak Republic's procedural economy arguments,[45] and stated that, at least under German law on arbitration, arbitral tribunals can ask the state courts for assistance,[46] and thus could ask them in theory to submit questions to the CJEU for a preliminary ruling.[47] Notably, the Frankfurt Court rejected the Slovak Republic's request to submit the case to CJEU.[48]

The Slovak Republic then took the case to the highest court in Germany, the German Federal Supreme Court (*Bundesgerichtshof*, BGH) for judicial review

[38] Frankfurt Court Decision, paras 79-97.

[39] Frankfurt Court Decision, paras 98-106.

[40] The Frankfurt Court compared the case before it with the *Eco Swiss* matter, in which the CJEU admitted that matters of EU law which are part of the public policy of the EU Member States may represent a ground for annulment of an arbitral award. See *Eco Swiss China Time Ltd v Benetton International NV*, Judgment of the Court of 1 June 1999.

[41] Frankfurt Court Decision, para 86.

[42] Frankfurt Court Decision, paras 107-111.

[43] Frankfurt Court Decision, paras 112-116.

[44] Frankfurt Court Decision, paras 117-124.

[45] Frankfurt Court Decision, paras 125-129.

[46] State courts may indeed become involved in arbitration proceedings, especially assisting arbitral tribunals with the taking of evidence and provisional measures. This, however, does not happen in the "self-contained" ICSID system.

[47] § 1050 ZPO.

[48] Frankfurt Court Decision, para 138.

(*Rechtsbeschwerde*). The BGH was, as a matter of German procedure, prevented from addressing the substance of the Slovak Republic's submission: meanwhile, the arbitral tribunal had issued a final award (the Final Award)[49], which made the Slovak Republic's application for judicial review inadmissible (*unzulaessig*), as it could not demonstrate the need for legal relief. The BGH could therefore not rule on the merits of the dispute, but only issue a procedural order recognising its limitations.[50]

The Slovak Republic followed the same path as with the Award on Jurisdiction and challenged the Final Award before the Frankfurt Court. It largely used the same arguments as in the previous case. Unsurprisingly, the Frankfurt Court upheld its previously-expressed views: in its order dated 18 December 2014[51] it stated that Article 344 TFEU only applies to disputes between European Member States and not to disputes between a state and an investor; that the position of the Slovak Republic was not supported by the CJEU's case-law on commercial arbitrations, since CJEU had previously ruled that, although commercial arbitral tribunals may not ask for a preliminary ruling, arbitration clauses are in line with the European Treaties; that there was no breach of Article 18 TFEU (and that nothing would prevent the Slovak Republic from extending the favourable treatment to all investors). The Frankfurt Court then refused, for the second time, to request a preliminary ruling from the CJEU on the validity of arbitration clauses in intra-EU BITs.

The 2014 order of the Frankfurt Court was appealed by the Slovak Republic and the matter arrived again on the desk of the judges of the BGH, which this time could look into the substance of the matter. The BGH decided, on 3 March 2016, to stay the proceedings and ask three preliminary questions on the compatibility of investment arbitration based on intra-EU BITs and European law to the CJEU.[52] The BGH inquired whether Article 344 TFEU precludes application of provisions in BITs which allow investors from European Union Member States to bring other Member States before arbitration tribunals, if the BIT had been signed before the accession of one of the Member States to the European Union, and arbitration proceedings were instituted only after both countries were part of the European

[49] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Final Award dated 7 December 2012. The arbitral tribunal found a breach of the BIT and awarded damages in the amount of EUR 22,1 million to Achmea.

[50] Bundesgerichtshof, order (*Beschluss*) dated 30 April 2014, file no. III ZB 37/12. A provisional order along the same lines had been issued on 19 September 2013.

[51] Oberlandesgericht Frankfurt am Main, order (Beschluss) dated 18 December 2014, file no. 26 Sch 3/13.

[52] The decision of the German Federal Supreme Court was published on 11 May 2016. See Bundesgerichtshof, order (*Beschluss*), dated 3 March 2016, file no. I ZB 2/15.

Union; if the answer to the previous question is negative, whether Article 267 TFEU precludes the existence of such arbitration proceedings; and if the answers to both previous questions are negative, whether Article 18(1) TFEU precludes the existence of such arbitration proceedings.

At the same time, the Federal Supreme Court took a pro-arbitration position, provisionally stating that it is not persuaded by the arguments raised by the Slovak Republic, but that it had to ask the questions for lack of a clear and definitive ruling from the CJEU on the matter.[53]

On 19 September 2017, the Advocate General's Opinion was issued in the case Slovak Republic v Achmea BV (The AG Opinion).[54]

According to Advocate General Wathelet, the arbitration clause in the investment protection agreement concluded between the Netherlands and Slovakia does not constitute discrimination on grounds of nationality. The Opinion makes a parallel between bilateral investment treaties and conventions for the avoidance of double taxation, which have never been deemed incompatible in principle with the EU Treaties.[55] The Advocate General concludes that an investor-state dispute settlement mechanism similar to the one provided under BITs does not constitute discrimination on grounds of nationality, prohibited under Article 18 TFEU.[56] The AG Opinion also notes that there are no provisions in the intra-EU BITs which may prevent the establishment of a single BIT or similar act of the EU, which would be applicable to all investors from all Member States.[57]

The AG also opined that an arbitral tribunal constituted under a BIT is a court or tribunal common to the two signatory states, and it may make requests for preliminary rulings. In his analysis, the Advocate General distinguished state-investor arbitration under BITs from commercial arbitration of the *Nordsee* type. He stated that arbitral tribunals constituted under BITs are established by law[58], as such a

[53] The BGH stated that Article 344 TFEU does not prevent investor-state arbitration; that the national courts of a member state where enforcement of an award is sought may make the Article 267 TFEU reference, if need be; and that any discrimination should be solved by extending the rights to any non-privileged investors. See paras 36-39, 45-52, and 70-78 of the BGH order dated 3 March 2016.

[54] Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16, Slovak Republic v Achmea BV (Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany)).

[55] The AG Opinion, paras 49-80.

[56] The AG Opinion, para 82.

[57] The AG Opinion, para 81.

[58] The AG Opinion, paras 90-99.

tribunal derives its jurisdiction not only from an international treaty, but also from the Netherlands and the (then) Czechoslovakian statues ratifying the BIT which then became part of their respective legal orders. The Advocate General also stated that arbitral tribunals are permanent, in particular since the proceedings took place under the aegis of the Permanent Court of Arbitration in the Hague,[59] and that they are compulsory as the mere existence of a choice between arbitration and litigation does not affect the compulsory nature of an arbitral tribunal once that choice is made.[60] They also comply with the criteria of independence and impartiality characterizing a "court or tribunal" under the CJEU's case law.[61].Hence, in the AG's Opinion, the arbitration system does not fall outside the scope of the preliminary ruling mechanism established under Article 267 TFEU.

Furthermore, the Advocate General considered that a dispute between an investor and a Member State is not covered by Article 344 TFEU, as this provision does not extend to investor-state disputes, and disputes under BITs do not "concern the interpretation or application of the Treaties" (unlike in *the MOX Plant* case where the EU was party to the UNCLOS Convention).[62] In the case at issue in *Achmea*, EU law did not even impact the substance of the dispute (unlike in the *Micula* case reported below). Moreover, the AG also acknowledged that the protection offered to investors under BITs is wider and potentially more effective than the EU acquis, including the Charter of Fundamental Rights of the European Union.[63]

In conclusion, the AG found that a BIT is not undermining the allocation of powers provided for under the EU Treaties and the autonomy of the EU legal system.[64] He based this view on the fact that in reviewing the legality of arbitral awards and/or their enforcement under the New York Convention, BITs cannot circumvent national courts which in turn are bound to apply EU law and may refer to the CFEU under Article 267 TFEU. EU law is part of public policy, as the CFEU had made very clear in the *Eco Swiss* case.[65] The AG, however, expressed doubts as to the suitability of the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC for settling intra-EU BITs, as ICSID awards cannot be appealed to Member State courts.

[59] The AG Opinion, paras 100-109.

[60] The AG Opinion, paras 110-119.

[61] The AG Opinion, paras 120-131.

[62] Case C-459/03, *Commission* v *Ireland*, EU:C:2006:345.

[63] The AG Opinion, paras 179-228.

[64] The AG Opinion, paras 229-272.

[65] Case C-126/97 *Eco Swiss,* EU:C:1999:269.

All eyes are now on the CJEU judges. Their upcoming ruling will hopefully give the much-awaited guidance regarding the legitimacy of intra-EU BITs and intra-EU investor-states arbitration proceedings.

IV. Micula v Romania – European Commission against an ICSID award

On 11 December 2013, an ICSID arbitration tribunal rendered an award in Micula v Romania[66], putting a (temporary) end to eight years of arbitration proceedings.[67]

The dispute arose from the gradual revocation, by the Romanian Government, of an investment incentive scheme (the so-called Emergency Government Ordinance no 24/1998, "EGO 24"[68]).[69] EGO 24 was granting to investors in disfavoured regions tax incentives, including customs duties exemptions. It was in reliance on those incentives, and the expectation that they would be kept in place for ten years, as initially envisaged, that the claimants allegedly decided to invest in the disfavoured areas of Romania.[70] However, soon after the EGO 24 had been instated, the Romanian Competition Council and the European Commission called for their abolishment since they constituted operational State aid.[71] In the form of customs duties exemptions, this type of aid, aimed at reducing an undertaking's expenses, is particularly distortive of competition in the internal market and is therefore strictly sanctioned by the European Commission.[72]

The gradual repeal, between 2001 and 2004, of the EGO 24 facilities, was made due to increasing pressure from the European Commission, which threatened not to close chapter six of the EU accession negotiations (on competition issues). In the EU Common Position issued on 21 November 2001, the European Commission stressed "the particular importance of the acquis under chapter 6 for the proper functioning of the internal market, including

[66] ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, Final Award of 11 December 2013 ("the Micula Award").

[67] The Request for Arbitration was dated 28 July 2005.

[68] EGO 24/1998 was subsequently approved and amended by Law No. 20/1999 of 15 January 1999.

[69] The Micula Award, para 130 ff.

[70] The Micula Award, para 156 ff.

[71] Decision No 244/2000 of the Romanian Competition Council.

[72] The Micula Award, para 741.

the creation of a level playing field for investment", and reminded Romania that "the acquis under chapter 6, in accordance with the Europe Agreement, has to be applied by Romania already now."[73] It further urged Romania to align the incompatible State aid schemes without delay. According to Romania's chief negotiator, the repeal of the incompatible EGO 24 facilities was a precondition for EU accession, which Romania tried to negotiate on, but it ultimately had to comply with the European Commission's will.[74]

Romania repealed all the incompatible facilities by 22 February 2005.[75] On 25 April 2005, the Member States of the European Union signed the Accession Treaty with Romania and Bulgaria, and the two countries became Member States on 1 January 2007.

In the Micula Award, the majority of the tribunal found that Romania breached article 2(3) of the Swedish-Romanian BIT (the fair and equitable standard), and ordered payment of compensation in the amount of approximately RON 380.000.000 plus interest.[76]

Romania's case before the arbitral tribunal had been supported by the European Commission's intervention as *amicus curiae*.[77] Its arguments, however, were less aggressive than in the Achmea arbitration, focusing mostly on the necessity of interpreting the BIT provisions and the European State aid rules harmoniously.[78] Compliance with one treaty should not lead to a breach of the other, and State aid provisions should be taken into account when interpreting BIT provisions. The novelty in the Micula case was that the European Commission had warned the tribunal already in 2009 that any award requiring Romania to re-establish investment schemes which have been found incompatible with the internal market during accession negotiations, is again subject to EU State aid rules", and "[t]he execution of such award can thus not take place if it would contradict the rules of EU State aid policy".[79] The tribunal acknowledged the European Commission's intervention, but it barely took it into account when deciding on the matter. Rather than applying European State aid rules to the dispute, the tribunal merely stated that European law was just part of the "factual matrix".[80] With regard to alleged unenforceability of an award of damages made in favour of the claimants, the tribunal simply refused to address the matter,[81] finding some comfort in the enforcement system provided under the ICSID Convention.[82]

On 9 April 2014, Romania filed an application requesting the annulment of the Micula Award by an ICSID-appointed *ad hoc* Committee.[83] Romania invoked three of the five grounds for annulment in the ICSID system. Some of them are relevant for the purposes of the present paper. In Romania's submission, the failure by the tribunal to apply the applicable law (which would have led to the conclusion that EGO 24 was not inconsistent with State aid law) represented both a manifest excess of powers and a failure to state reasons; Romania submitted that the tribunal provided no reasons for not applying the international obligations that it had identified to the facts of the case.[84] Furthermore, the tribunal's refusal to decide on the enforceability of the award represented, again, a manifest excess of powers, since the tribunal had failed to exercise its jurisdiction over a question, and a failure to state reasons.[85]

On 9 January 2015, the European Commission filed its submission as a non-disputing party in the annulment proceedings.[86] It supported Romania's position

[73] The Micula Award, para 216.

[74] The Micula Award, paras 778-779.

[75] See substantiation report for Emergency Government Ordinance 94/2004 dated 26 August 2004.

[76] By 11 December 2013, the total amount owed by Romania was approximately EUR 178 million. The compound interest continues to accrue.

[77] On 20 July 2009, the European Commission submitted its observations as a non-disputing party.

[78] The Micula Award, paras 316-317.

[79] The Micula Award, para 335.

[80] The Micula Award, para 328.

[81] The Micula Award, para 340.

[82] Article 53 of the ICSID Convention reads, in relevant part: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. [...]". Article 54 of the ICSID Convention reads, in relevant part: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [...]"

[83] The application was made pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("the ICSID Arbitration Rules").

[84] Ioan Micula, Viorel Micula and others v Romania (ICSID Case No. ARB/05/20), Decision on Annulment dated 26 February 2016 ("the Micula Annulment Decision"), paras 144-162.

[85] Micula Annulment Decision, paras 204-212.

[86] Micula Annulment Decision, paras 308-339.

that the Micula Award should be annulled, for failure to apply European State aid law to the dispute, for misapplying and misinterpreting the applicable law and for failing to address the conflict of treaties that was inherent in the underlying dispute.

In February 2016, the *ad hoc* Committee decided that the flaws presented by Romania were not sufficient to annul the Micula Award.[87]

In parallel with the ICSID annulment proceedings, the European Commission conducted a State aid investigation into the Micula Award. As a first step, the European Commission issued a suspension injunction, which enjoined Romania to suspend immediately any action which may lead to the execution or the implementation of the Award. On 1 October 2014, the European Commission informed the Romanian authorities of its decision to initiate the procedure provided for in Article 108(2) TFEU.[88] The European Commission stated that "any execution of the Award of 11 December 2013 would amount to the granting of incompatible 'new aid', subject to the State aid rules contained in the Treaty." The European Commission also noted with regret that Romania at that time had already partially executed the Micula Award by offsetting a significant part of the damages due by the claimant companies against the tax debts of one of the claimants, European Food. The investigation of the European Commission was concluded on 30 March 2015, when it issued a negative State aid decision, ordering Romania not to pay the incompatible State aid (ie, the damages awarded by the tribunal) and to seek repayment of any amount which had already been paid.[89]

As a result, Romania found itself between conflicting obligations: under the ICSID Convention, it had to pay damages to the investors as the ICSID tribunal awarded and the ICSID annulment committee confirmed; under the European Treaties, it had to comply with the negative decision of the European Commission.

V. The way forward

The Micula arbitration is the first reported case in which an investment arbitration tribunal, ruling on an intra-EU dispute, and the European Commission, subject a European Member State to irreconcilable obligations. Until today, a practical solution has not been found, and there is a risk that the claimants will continue to attempt to enforce the award in various jurisdictions, forcing the state authorities

[87] Micula Annulment Decision, para 355.

[88] State aid SA.38517 (2014/C) – Romania, C(2014) 6848 final.

[89] Commission Decision (EU) 2015/1470 dated 30 March 2015, C(2015) 2112.

to recover the amounts collected as ordered by the Commission decision, in what looks like a never-ending game.[90]

Against that background, the European Commission seems to have decided to put an end to intra-EU arbitration at all costs. In July 2015, the European Commission commenced infringement proceedings against five Member States for their failure to terminate the intra-EU BITs they were signatories to;[91] the Micula case was used to portray the danger that intra-EU investor-state arbitration, under the current framework, may lead to illegal results from the point of view of European law.[92] The Member States are divided on this issues, as discussed by AG Wathelet in his Opinion in the Achmea case: those who never or rarely find themselves as respondents in investor-state disputes support the continuation of the current regime, whereas those which are often involved in such disputes, including the Member States which joined the EU in or after 2004 but also Italy, Spain and Greece, usually side with the European Commission. However, out of the latter group only Italy has terminated its intra-EU BITs.

On 7 April 2016, Austria, Finland, France, Germany and the Netherlands submitted a so-called "non-paper" on the issue of the intra-EU BITs to the Trade and Policy Committee of the Council of the European Union.[93] The non-paper proposes a coordinated and immediate termination of all intra-EU BITs, in a way that, however, would not impact the pending investor-state dispute settlement proceedings. The five Member States also propose the replacement of intra-EU BITs with a single agreement between all EU Member States. The standard of protection offered to investors by this agreement should be similar to the average BIT standard. Among others, the envisaged agreement would also contain an investor-state mediation scheme, which would help parties to an investment dispute to reach amicable solutions. The agreement would also ensure that nothing would interfere with the CJEU's competence to finally interpret EU law.

It remains to be seen whether the CJEU will support the point of view of the European Commission on the non-compliance of intra-EU BITs with EU law. The judgment in the Achmea referral and the outcome of the infringement proceedings for refusal to terminate the intra-EU BITs will hopefully bring back certainty for European investors. While AG Wathelet's arguments are indeed compelling, a "po-

[90] So far, the claimants have attempted to enforce the final award in Romania, USA, the United Kingdom, France, Belgium and Luxembourg.

[91] The infringement proceedings were initiated against Austria, the Slovak Republic, Romania, the Netherlands and Sweden). So far, Ireland and Italy have terminated their intra-EU BITs.

[92] See Commission Press Release dated 18 July 2015, IP/15/5198.

[93] Available at https://www.tni.org/files/article-downloads/intra-eu-bits2-18-05_0.pdf.

litical" judgment along the fault lines between Member States "pro" and "contra" intra-EU BIT cannot be excluded.

The CJEU actually has already had the chance to address the issue of the dispute settlement regime between investors and states in its opinion on the free trade agreement between the EU and Singapore.[94] According to Article 9.16 of the agreement, a claimant investor could decide to submit a dispute directly to arbitration without any possibility for the Member State concerned to be able to oppose it. In that context, the CJEU stated that the provisions related to investor-state dispute settlement do not fall within the exclusive competence of the EU, but within a shared competence between the Member States and the EU. Such a regime, which permits the removal of disputes from the jurisdiction of the courts of the Member States, cannot be established, in the view of the CJEU, without the consent of all Member States.[95] As a result, in the CJEU's opinion, the free trade agreement between EU and Singapore could not be concluded in the form submitted to it.[96]

As discussed above, the legal situation concerning intra-EU BIT differs to a large extent from the one concerning BITs with third countries. Yet, the exclusive competence granted to the EU under the Lisbon Treaty should, in principle, lead to a gradual replacement of all bilateral BITs by solutions for investment dispute resolution designed and adopted by the EU legislature. In this respect, it seems like the days of classic investor-state arbitration are numbered.

The most prominent example for an "enhanced" free trade agreement concluded recently is the one between EU and Canada (CETA).[97] Investor-state dispute settlement in the CETA is strictly limited to breaches of the investment protection standards established therein (non-discrimination, expropriation only for public purposes, as well as fair and equitable treatment). Article 8 of the CETA regulates the issue of investment protection. Article 8.27 and 8.28, respectively, create a permanent investment tribunal, and an appellate tribunal. Article 8.29 contains a firm commitment that both EU and Canada will join efforts with other interested parties for the creation of an international multilateral investment court. CETA also contains comprehensive transparency provisions. According to its Article 8.36, full transparency in investment dispute settlement proceedings shall be ensured: all

[94] Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376.

[95] Opinion 2/15 of the Court, 16 May 2017, ECLI:EU:C:2017:376, paras 291-292.

[96] Following the opinion, a debate with the Council and the European Parliament on the best architecture for EU trade agreements and investment protection agreements is ongoing.

[97] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) entered into force provisionally on 21 September 2017. National parliaments of the Member States still have to approve it.

documents (including submissions by the parties and the decisions of the arbitral tribunals) shall be publicly available on a website financed by the EU.

We also recall that in the context of the TTIP negotiations, the European Commission had proposed the creation of an investment court.[98] On 13 September 2017, the European Commission released a recommendation,[99] which once adopted by the Council would permit the EU to take part in negotiations for a new multilateral investment court.

[98] See Commission Press Release dated 16 September 2015, IP/15/5651; draft proposal available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[99] Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 13 September 2017 COM(2017) 493 final.