Death Sentence for EU Investment Treaties

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Bilateral investment treaties (**BITs**) are agreements between two countries protecting investments made by investors from one contracting State in the territory of the other contracting State. BITs provide companies whose cross-border investments are expropriated without proper compensation with a basis for a direct claim against the host State. Essentially the same investment protections are included in certain multilateral treaties, the most commonly invoked in practice is the Energy Charter Treaty (**ECT**).[1] The real genius of investment treaties is that a maligned investor can submit the dispute to a neutral arbitration tribunal, thus mostly bypassing the potentially biased courts of the host country.[2] As of today there are over 2800 BITs and over 400 multilateral investment treaties worldwide.[3] Many European investors have received hefty payouts from EU Member States for violations of BIT-obligations. A well-known example is *CME Czech Republic B.V. v. Czech Republic*, which resulted under the Dutch-Czech Republic BIT in a USD 270 million arbitral award against the Czech Republic for effectively expropriating an investment made by a Dutch entity that provided exclusive services to the first privatized Czech Republic's TV channel.[4]

The undeniable success of BITs has not gone unnoticed and resulted in significant push-back. Briefly stated, BITs and the arbitrations they give rise to are said to be opaque legal proceedings and affect governments legitimate right to regulate.[5] A notorious example is the arbitration that was initiated under the Hong Kong-Australia BIT by Philip Morris Asia Limited challenging tobacco plain packaging legislation enacted by Australia, which legislation was rightly regarded by many as a legitimate public health measure.[6] However, the investor-state dispute resolution system actually worked in that case: the arbitral tribunal unanimously declined jurisdiction and deemed the claim to constitute an abuse of process.[7]

The European Commission (**EC**) jumped the anti-BIT bandwagon early. As far back as 2010, the EC argued, *inter alios*, that there is a serious potential for discrimination between EU investors from different EU Member States because some investors are covered by a BIT and granted the opportunity to resort to investor-state arbitration while others are not. In such a case '*EU law takes supremacy not only over the national legal systems, but also over bilateral agreements concluded between EU Member States*'.[8] The EC faced steep obstacles in its mission to curtail the investment protections offered by BITs entered into between EU Member States (**intra-EU BITS**). In particular, capital-exporting EU Member States and their investors clearly benefited from intra-EU BITs that had been entered into

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1 As of today, the Energy Charter Treaty has fifty-three signatories, including the EU, *see* https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty.

2 The arbitral proceedings are regularly conducted under auspices of the International Centre for Settlement of Investment Disputes (**ICSID**) that was established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States on 18 Mar. 1965 (the **Washington Convention**) as an initiative of the World Bank. The Washington Convention has been ratified by 155 States, including all EU Member States except Poland. Awards rendered by an ICSID tribunal are binding on parties and not subject to any court or other appeal, provided that an award can be annulled by a second ICSID panel on very narrow grounds. Crucially and uniquely, States must recognize an arbitral award rendered by an ICSID tribunal as binding and enforce the monetary obligations under the award, as if it were a final judgment of a court of that state (Art. 54 of the Washington Convention).

3 UNCTAD keeps a register of investment treaties that are currently in force for each country, which is available at, https://investmentpolicy.unctad.org/international-investment-agreements.

4 *See* investmentpolicy.unctad.org/investment-dispute-settlement/cases/52/cme-v-czech-republic.

5 *See* e.g., OECD, *The Impact of Investment Treaties on Companies, Shareholders and Creditors* 227 (2016).

6 *See* https://www.ag.gov.au/international-relations/international-law/tobacco-plain-packaging-investor-state-arbitration.

7 *See* https://pca-cpa.org/en/cases/5/.

8 *Eureko v. Czech Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 183.

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with Eastern European countries before their accession to the EU. Logically, these EU Member States strongly favoured the continued validity of intra-EU BITs.[9] Despite these formidable challenges, the EC has by and large achieved its mission to rid the EU of intra-EU BITs in a remarkable short time frame.

The dismantling of intra-EU BITs has primarily taken shape by way of three judgments from the CJEU. On 6 March 2018, the CJEU rendered its landmark decision *Slovak Republic v. Achmea*, in essence ruling that the investor-State arbitral dispute mechanism included in intra-EU BITs is contrary to EU law.[10] The CJEU observed that disputes which the BIT-tribunal is called on to resolve under the BIT at issue, *may* concern the interpretation or application of EU law. That is, however, impermissible because the BIT-tribunal cannot be classified as a court or tribunal of an EU Member State within the meaning of Article 267 Treaty on the Functioning of the EU, and the BIT-tribunal can therefore not ask questions on EU law to the CJEU for a preliminary ruling.[11] The limited review of arbitral awards by a court of an EU Member State was deemed insufficient to remedy that deficiency.[12] In *Republic of Moldova v. Komstroy*, the CJEU extended its *Achmea* decision to intra-EU arbitration under the ECT, finding of no relevance that the European Union itself is a party thereto.[13] Finally, the CJEU considered its *Achmea* decision also fully applicable in its recent *Micula* decision, so that the consent given by Romania to arbitration in the 2002 Romania-Sweden BIT '*lacked any force*' as soon as Romania acceded to the EU on 1 January 2007.[14]

The possible final nail in the coffin for intra-EU BITs is that all EU Member States (other than Austria, Finland, Ireland and Sweden) implemented *Achmea* and its progeny by signing an agreement to terminate all intra-EU BITs on 5 May 2020, which treaty has as of today entered into force for 18 EU Member States.[15] Notably, this termination agreement also ends the sunset clauses in intra-EU BITs that would have protected investments made prior to the termination of the treaty for a period of typically ten or fifteen years. The termination agreement does not cover the ECT.

In essence, the settled case law of the CJEU unequivocally provides that EU law trumps international law under intra-EU BITs in case of conflict. That may perhaps be understandable for EU constitutional law practioners, but it is hard to square with applicable rules of international law that govern intra-EU BITs.[16] As a matter of international law, domestic laws of EU Member States, including for this purpose EU law, cannot and should not override the international law obligations undertaken by EU Member States in investment treaties, otherwise the investment protection those treaties offer becomes illusory. This should be apparent from a cursory reading of the applicable Vienna Convention on the Law of Treaties (**VCLT**), which the CJEU seems to have ignored. Without intending to be complete, Article 27 of the VCLT provides that a contracting state '*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*'. Likewise, Article 46(1) of the VCLT provides that a State cannot invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law,[17] which provision the CJEU does not seem to have considered in its recent *Micula* decision. Finally, there can be no doubt that intra-EU BITs concluded with Eastern European countries before they were part of the EU were not terminated solely by their subsequent accession to the EU,[18] as the EC itself has acknowledged.[19] It is therefore not surprising that arbitral tribunals constituted under intra-EU BITs as well as the ECT have so far consistently disregarded *Achmea* because their jurisdiction is derived from the BIT at issue and thus international law and not from EU law.[20]

In light of these developments, European investors with existing or planned investments in other EU Member States can no longer rely on intra-EU BITs. Unless a dispute has already arisen or is foreseeable, investors can mitigate these risks by structuring their

9 *See* e.g., *ibid.*, para. 161: '*The Netherlands affirms again that the BIT in question in this dispute continues to be fully in force. (…) In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal*'.

10 CJEU, ECLI:EU:C:2018:158, Case C-284/16 (*Slovak Republic v. Achmea*), 6 Mar. 2018, paras 35–60.

11 *Ibid.*, paras 39–42. This also constitutes a violation of Art. 344 of the Treaty on the Functioning of the EU, under which the EU Member States undertake not to submit a dispute concerning the interpretation or application of the EU treaties to any method of settlement other than those provided for in the EU treaties.

12 CJEU, ECLI:EU:C:2018:158, Case C-284/16 (*Slovak Republic v. Achmea*), 6 Mar. 2018, paras 45–53.

13 CJEU, ECLI:EU:C:2021:655, Case C-741/19 (*Republic of Moldova v. Komstroy*), 2 Sept. 2021, paras 48–66.

14 CJEU, ECLI: EU:C:2022:50, Case C-638/19 (*Commission v. European Food SA and Others*), 25 Jan. 2022, paras 137–145.

15 Belgium, Italy, Luxembourg, Portugal and Romania have signed but not yet ratified the treaty as of 23 Feb. 2022.

16 This follows from Art. 2(1) under (a) of the VCLT that defines a 'treaty' as '*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation*'. [underlining by the author].

17 Article 46(1) of the VCLT reads as follows: '*A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance*'.

18 *See* among others, Art. 59(1) of the VCLT: '*A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter (…)*'.

19 *Eureko v. Czech Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 Oct. 2010, para. 186: *The Commission thus agrees that 'the entire Dutch-Slovak BIT has not been implicitly terminated or suspended by virtue of Article 59(1) of the Vienna Convention'*.

20 *See* among others: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 199; *UP and C. D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 4 May 2017; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 Feb. 2018; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 332; *Vattenfall AB* et al. *v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Award, 31 Aug. 2018; *Electrabel S. A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 Nov. 2012.

investments through non-EU Member States that have also entered into a BIT with the relevant host State. That would ideally be a jurisdiction where the host State already has assets, whose courts are strongly pro-arbitration and where the applicable sovereign immunity laws are relatively weak. In case a dispute subsequently arises, it is important that insofar as possible claimant opts for ICSID arbitration (thus no review at all of the arbitral award by domestic EU courts)[21] and ensures that the seat of arbitration is located outside the EU.

21 Please refer to footnote 2 for a brief explanation of ICSID arbitration.