

SANJA DJAJIĆ<sup>1</sup>, MAJA STANIVUKOVIĆ<sup>2</sup>

## Changed Perspectives and Conflicting Treaty Obligations: What Is the Message of the CJEU *Achmea* Decision and the 2020 Plurilateral Termination Agreement for Candidate Countries such as Serbia?

- **ABSTRACT:** *The authors analyse the changed landscape of the EU BIT policy following the Achmea decision and the 2020 Termination Agreement, in particular, their relevance for candidate countries such as Serbia. The perceived risks strongly suggest that some action must be taken before the accession to avoid becoming caught between conflicting obligations under EU law and the BITs, as happened to respondent countries in the cases of Micula and Magyar Farming Company. The potential for conflicts exists in the case of Serbia as well because it already has an obligation to comply with EU law in areas such as competition and state aid law, which may cause it to inadvertently breach investors' rights under the BITs. Various options that a candidate country can pursue to adjust its bilateral investment treaties to EU law standards are considered in search of the best approach. Difficulties that may be encountered due to the premature termination of sunset clauses and the retroactive termination of arbitration clauses in pending arbitrations lead the authors to conclude that certain adjustments to the course of action adopted within the EU are called for. The proposed action in the case of Serbia consists of consensually amending the 22 Serbia-EU member state BITs following a two-step procedure so that the sunset clauses are terminated at once, whereas the remaining provisions of the BITs are designated by the contracting parties to be terminated on the date of accession. To prevent treaty shopping, these amendments need to be accompanied by comprehensive reform of Serbia's other BITs that contain overly broad definitions of investors and investments. Some alternative approaches are also taken into consideration, such as the replacement of ISDS with other forms of dispute resolution and the replacement of the Serbia-EU member state BITs with other types of agreements. The candidate countries are advised to adjust their pre-accession commitments, both procedural and substantive, in a timely manner with the*

---

1 Full Professor, Faculty of Law, University of Novi Sad, Serbia, sdjajic@pf.uns.ac.rs, ORCID: 0000-0002-5997-9714.

2 Full Professor, Faculty of Law, University of Novi Sad, Serbia, m.stanivukovic@pf.uns.ac.rs, ORCID: 0000-0002-0803-9191.



*incoming EU obligations. These inevitable adjustments should be pursued cautiously by candidate countries to minimise risks and maximise their bargaining power.*

- **KEYWORDS:** Plurilateral Termination Agreement, *Achmea*, bilateral investment treaties, conflict of international agreements, EU law standards, candidate countries.

## **1. Background – Changed landscape of the EU BIT policy: the CJEU decision in the *Achmea* case and the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union**

Much has already been said about the Court of Justice of the European Union (CJEU) decision in the *Achmea* case,<sup>3</sup> and for good reason. In its landmark decision, the CJEU ruled, for the first time, that arbitration clauses in intra-European Union (EU) bilateral investment agreements (BITs) are incompatible with EU law. The CJEU assessed intra-EU BITs against standards of EU law and found that these instruments and, consequently, intra-EU BITs arbitral clauses, were not compatible with EU law. This decision laid bare the conflict between two sets of obligations for EU member states, the first arising under the BITs and the second arising under EU law. The question here is not only how the CJEU arrived at this conclusion but also how it was possible to have normative conflict of such magnitude broiling within the EU for so long. An additional question is when and why this conflict came into existence in the first place.

As is already well known, after Slovakia lost its investment case before the United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal, initiated by the Dutch company *Achmea B.V.* (originally *Eureko B.V.*), on the grounds that the reversal of liberalisation measures in the health insurance market contravened Slovakian obligations under the Netherlands-Slovakia BIT,<sup>4</sup> Slovakia moved to set aside the award before the High Regional Court in Frankfurt am Main in Germany. The action was dismissed, but Slovakia appealed on a point of law before the Federal Court, which decided to stay the proceedings and refer several questions to the CJEU for a preliminary ruling pursuant to Art. 267 Treaty on the Functioning of the EU (TFEU). The questions referred to the CJEU were whether an arbitration clause in an intra-EU BIT that provides for an investor-state arbitration between the national of one member state and the government of another for investment disputes arising under such intra-EU

---

3 Judgement of the Court of Justice of the European Union (Grand Chamber) of 6 March 2018. *Slovakische Republic v. Achmea BV* (Case C-284/16). Hereinafter: CJEU *Achmea* decision.

4 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, Permanent Court of Arbitration (PCA), PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Final Award, 7 December 2012.

BIT was precluded by Arts. 18(1), 267, and 344 TFEU. Given that the intra-EU BIT was a treaty between member states, the issue of conflict was to be resolved by reference to the precedence of EU law over the provision of the BIT. On 6 March 2018, the CJEU found that the arbitration clause in the Netherlands-Slovakia BIT was incompatible with EU law and had an adverse effect on its autonomy.<sup>5</sup> The consequence of this finding was that the operation of the BIT arbitration clause was precluded. Following the CJEU *Achmea* decision, the German Federal Court annulled the UNCITRAL arbitral award in the *Achmea* case.<sup>6</sup> The main rationale of the CJEU *Achmea* decision was that the autonomy of EU law would necessarily be compromised by the possibility of having a court outside the control of the CJEU vested with jurisdiction to interpret and apply EU law.<sup>7</sup>

The question that was referred to the CJEU had already been heard before in different international forums and contexts. It had been raised as part of Slovakia's argument against the jurisdiction of the UNCITRAL arbitral tribunal in the *Achmea* case. In its preliminary objections, Slovakia argued that the Treaty Establishing the European Community (the EC Treaty) governed the same subject matter as the BIT such that the latter was to be considered terminated or inapplicable pursuant to rules of treaty law (Arts. 59 and 30 of the Vienna Convention on the Law of Treaties, VCLT) but also that the arbitration clause could not be applied because of its incompatibility with the EC Treaty and the exclusive jurisdiction of the CJEU over the claims of the claimant.<sup>8</sup> In the course of the arbitral proceedings, the European Commission joined the arguments that intra-EU BITs were incompatible with EU law on the basis of the precedence of EU law, prohibition of discrimination (given that investors from certain EU countries are potentially in a better position than others), and the exclusive jurisdiction of the CJEU.<sup>9</sup>

An important factor that coincided with the jurisdictional arguments of both Slovakia and the European Commission in the *Achmea* arbitration was the adoption and entry into force of the TFEU and its Art. 307, which vested the EU with exclusive competence with respect to foreign direct investment (FDI) as part of the common commercial policy.<sup>10</sup> This was in addition to Slovakia's argument that by its accession to the EU in May 2004, the BIT and its arbitration clause were terminated and/or became inapplicable, as they were contrary to EU law.

---

5 The CJEU *Achmea* decision, para. 59.

6 BGH, 31.10.2018 – I ZB 2/15. *Achmea* has filed a constitutional complaint before the Federal Constitutional Court of Germany against the judgement of the German Supreme Court that annulled the award following the ruling of the CJEU. See Adams et al., 2020.

7 The CJEU *Achmea* decision, paras. 57-59.

8 *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, 26 October 2010, para. 19.

9 *Ibid.*, paras. 176-186.

10 TFEU, Art. 207(1), Art. 3(1)(e)).

However, even before the *Achmea* case and the Lisbon Treaty, the same issue was raised in *Eastern Sugar v. The Czech Republic*,<sup>11</sup> the case that was initiated only one month after the Czech Republic had acceded to the EU.<sup>12</sup> Together with the Czech Republic, the European Commission argued in 2006 that intra-EU BITs were incompatible with EU law. The question that was pertinent in both the *Eastern Sugar* and *Achmea* cases was why there was no special termination of intra-EU BITs if they were perceived as incompatible with EU law. In the absence of a special termination agreement or clause, the respondent states and the European Commission were left to pursue arguments based on suspension or inapplicability due to incompatibility with EU law.

Therefore, problems with intra-EU BITs became visible soon after the new members had entered the EU. These problems piled up and controversies intensified in the years that followed, coupled with additional measures adopted at the EU level. Once the campaign against intra-EU BITs was launched by the European Commission (in 2005, just after ten new members had acceded to the EU), the EU stepped up to curtail intra-EU BITs. Since Art. 307 TFEU made clear that FDI became the exclusive competence of the EU but did not specifically address intra-EU BITs, the EU adopted several regulatory measures to foster its newly acquired competences but also to initiate the termination of the intra-EU BITs.

Shortly after the arbitral award in *Achmea*, the European Parliament and the Council of the EU adopted the *Regulation on establishing transitional arrangements for bilateral investment agreements between member states and third countries*.<sup>13</sup> This regulation was a game-changer for third countries, including candidate countries, because it could serve as a platform for renegotiating the existing BITs with EU member states. While the pre-Lisbon policy favoured the BITs of EU member states with candidate countries as a preparation for EU membership,<sup>14</sup> the Lisbon Treaty, the 2012 Regulation, and the CJEU *Achmea* radically changed this perspective. From the EU perspective,

---

11 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award of 27 March 2007.

12 Lavranos, 2020b, p. 446.

13 'Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union ('TFEU'), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.' – Regulation (EU) No 1219/2012 of 12 December 2012, Official Journal of the EU L 351/40, recital 1.

14 '40. For a very long time, the argument of the EU institutions, including the Commission, was that, far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe. The Association Agreements between the Union and candidate countries also contained provisions for the conclusion of BITs between Member States and candidate countries.' – Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slowakische Republik v Achmea BV*, para. 40.

renegotiation is required due to the change in legislative competences and the need to preserve uniformity in the interpretation of EU law.

With respect to the termination of intra-EU BITs, it seems that not all EU member states were originally in favour of this option. For example, in both *the Eastern Sugar* and *Achmea* cases, the Netherlands argued in favour of the validity of BITs together with their arbitration clauses. More importantly, in the proceedings before the CJEU in the *Achmea* case, 15 member states submitted observations with opposing views on the issue of the compatibility of intra-EU BITs with EU law. The dividing line was the general position and experience of member states with investment arbitration – as many as 10 EU member states argued that intra-EU BITs were incompatible with EU law.<sup>15</sup> Advocate General Wathelet sided with a minority of EU member states supporting the intra-EU BITs. However, several member states began terminating their intra-EU BITs<sup>16</sup> even before the European Commission launched its campaign that culminated in infringement procedures against a number of member states.<sup>17</sup>

The 2018 CJEU decision in *Achmea* seemed to have consolidated both the EU and its member states in concerted efforts to terminate intra-EU BITs and all of their effects. EU member states first adopted a series of declarations on the legal consequences of the judgement of the CJEU in *Achmea* on investment protection in the EU, seeking, *inter alia*, to terminate all pending arbitral proceedings, prevent enforcement of intra-EU BITs arbitral awards, and terminate all sunset clauses<sup>18</sup> contained therein.<sup>19</sup> Further, EU member states, acting as respondents in pending arbitral proceedings, sought to

15 ‘The second group is made up of the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania and the Slovak Republic. Those States have all been respondents in a number of arbitral proceedings relating to intra-EU investments, the Czech Republic 26 times, the Republic of Estonia three times, the Hellenic Republic three times, the Kingdom of Spain 33 times, the Italian Republic nine times, the Republic of Cyprus three times, the Republic of Latvia twice, Hungary 11 times, the Republic of Poland 11 times, Romania four times and the Slovak Republic nine times.’ – *Ibid.*, para. 35.

16 Voon and Mitchell, 2016, pp. 428-430.

17 Titi, 2016, p. 435.

18 Pursuant to the Termination Agreement, Art. 1(7) “Sunset Clause” means any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time.’

19 There were three such declarations. The first was adopted on 15 January 2019 by 22 EU member states: *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court Of Justice in Achmea and on Investment Protection in the European Union* ([https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/190117-bilateral-investment-treaties\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf)). The second was adopted on 16 January 2019 by five EU member states: *Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (<https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf>). The third is a unilateral declaration of Hungary. Despite certain differences all EU member states were unanimous in upholding the inapplicability of intra-EU BITs and confirming the precedence of EU law over intra-EU BITs. For the reasons why Hungary made a separate declaration, see Korom, 2020, p. 71.

employ the *Achmea* decision in order to dismiss investment cases based on intra-EU BITs. However, all of these attempts failed.<sup>20</sup>

Following the 2019 Declarations, exchange of notes,<sup>21</sup> and failed attempts to dismiss investment arbitrations, on 5 May 2020, 23 EU member states signed the *Agreement for the termination of bilateral investment treaties between the Member States of the European Union* (hereinafter referred to as the Termination Agreement).<sup>22</sup> Its purpose was to terminate all remaining intra-EU BITs together with the sunset clauses contained therein, to assert the inapplicability of intra-EU BIT arbitration clauses because

20 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent's Request of 4 April 2018, 30 April 2018; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018; *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Article 9 Objection to Jurisdiction, 12 October 2018 (not public); *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, UNCITRAL, Award, 15 May 2019; *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*, PCA Case No. 2014-21, UNCITRAL, Award, 15 May 2019; *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, UNCITRAL Award, 15 May 2019; *WA Investments-Europa Nova Limited v. Czech Republic*, PCA Case No. 2014-19, UNCITRAL, Award, 15 May 2019; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020; *Ioan Micula and others v. Romania II*, ICSID Case No. ARB/14/29, Award, 5 March 2020; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent's Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility, 24 March 2020 (not public); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections, 30 September 2020.

21 In *Micula v. Romania* (II) Sweden and Romania submitted the exchange of notes to the effect that the arbitration clause was contrary to EU law and thus inapplicable. The tribunal refused to treat this exchange of notes as a binding agreement. – *Ioan Micula and others v. Romania II*, ICSID Case No. ARB/14/29, Award, 5 March 2020, para. 287-288.

22 Available at: [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200505-bilateral-investment-treaties-agreement\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf) (Accessed 15.01.2021.). States which did not sign the Termination Agreement are Austria, Finland, Ireland and Sweden (and the UK). In May 2020, shortly after the Termination Agreement was signed, the Commission sent the formal notice of infringement proceedings against Finland and the UK. Available at: [https://ec.europa.eu/commission/presscorner/detail/en/INF\\_20\\_859](https://ec.europa.eu/commission/presscorner/detail/en/INF_20_859) (Accessed 15.01.2021.).

Pursuant to Art. 16(1) of the Termination Agreement it entered into force 30 calendar days after the receipt of the second ratification instrument. Following the ratification by the Kingdom of Denmark on 6 May 2020 and the second ratification by Hungary on 30 July 2020, the Termination Agreement entered into force on 29 August 2020. On 11 January 2021, the Agreement was in force also in Bulgaria, Croatia, Cyprus, Malta and Slovakia and provisionally applicable in Spain. For the current status of the Agreement, see <https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement?id=2019049&DocLanguage=en> (Accessed 15.01.2021.).

of their incompatibility with EU Treaties, and to exclude any new arbitral proceedings following the 2018 CJEU *Achmea* decision. With respect to proceedings initiated prior to the CJEU *Achmea* decision that are still pending, parties are expected to negotiate a settlement through ‘a structured dialogue’ before an independent facilitator within six months following the entry into force of the Termination Agreement or before national courts.<sup>23</sup> However, while EU member states consider that all listed intra-EU BITs that are still in force are terminated by virtue of the Termination Agreement, it seems that their position regarding the validity of arbitral clauses remains the same as before: that arbitration clauses became inapplicable much earlier, immediately following a state’s full membership in the EU.<sup>24</sup>

The agreement prompted mixed reactions. There are voices of doubt (‘Right or wrong, just or unjust, it remains to be seen, but the Agreement, in its current form, appears to be an affront to the rule of law, which may undermine its intended purpose.’)<sup>25</sup> and voices of praise (‘the Termination Treaty demonstrates a moderating of the European attitude toward intra-EU arbitration. Indeed, by adopting a graduated approach to dealing with concluded, pending, and new arbitrations, the Termination Treaty seeks to order the relationship between EU law and international law, without imposing absolute conclusions. Rather, it employs the language of moderate legal pluralism by providing for “transitional measures” and “structured dialogue”.’),<sup>26</sup> but certainly, there is no lack of commentaries and academic literature on the Termination Agreement, the full effect of which is yet to be tested.

Undoubtedly, the perspective of BITs has changed in the eyes of the EU and its member states over about the last decade. This change was unequivocally demonstrated to the world by the ECJ *Achmea* judgement and the conclusion of the 2020 Termination Agreement.

Candidate countries have been somewhat slow to react to this change. The purpose of this article is to shed light on the messages that these two events carry for candidate countries such as Serbia. Is the era of Serbia-EU member state BITs soon to end? What actions should be taken even before accession? What are the consequences for existing investments and pending arbitrations? The search for answers is divided into several chapters. First, a brief reminder of *Micula v. Romania* and *Magyar Farming Company v. Hungary* is provided as these are telling examples of the experience of other

---

23 Arts. 9 and 10 of the Termination Agreement.

24 Pursuant to Art. 7 of the Termination Agreement ‘[w]here the Contracting Parties are parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated’, they shall inform the arbitral tribunal of the consequences of the CJEU *Achmea* decision by submitting the statement envisaged in the Annex C: ‘The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.’

25 Bray and Kapoor, 2020.

26 Restrepo Amariles, Farhadi, Van Waeyenberge, 2020, p. 941.

candidate countries confronted with conflicting BIT and EU obligations (2). This is followed by a chapter outlining the potential for conflicts in the future between the obligations arising simultaneously under the BITs with EU member states and under the *acquis communautaire* that Serbia must align its legal system with the Stabilisation and Association Agreement (3). The following chapter offers potential answers on mechanisms that may be used to ensure compatibility of the Serbian BITs with EU law, which are partly to be found in the Termination Agreement but possibly also in the broader EU investment treaty practice (4). The possibility of creating a new mechanism that will replace investment arbitration is also briefly considered in the final chapter (5) preceding the Conclusion chapter (6).

## 2. Learn fast – experiences of other candidate countries with respect to conflicting treaty obligations – the case of Romania (*Micula v. Romania*)

State aid is one of the areas of potential conflict between multiple layers of international obligations of the candidate country. There were at least seven intra-EU investment arbitrations centred around issues of state aid<sup>27</sup> before the sudden upsurge, starting in 2012, that concerned state aid in the field of renewable energy, when more than 40 new cases were brought, mostly against Spain, Italy, and the Czech Republic.<sup>28</sup>

The best paradigm of the troubles a candidate country may encounter trying to navigate between the requirements of investment protection and EU accession is provided by *Micula et al. v. Romania*,<sup>29</sup> an International Centre for Settlement of Investment Disputes (ICSID) case that was pursued by two former Romanian citizens who had acquired Swedish nationality but then returned to invest in Romania and their Romanian companies.<sup>30</sup> The case raised issues regarding the enforcement of EU state aid law and the enforcement of ICSID awards based on intra-EU BITs. The BIT in question was concluded between Sweden and Romania in 2002, five years before the Romanian accession to the EU. Ironically, its conclusion was part of Romania's obligations under the Europe Agreement, which entered into force on 1 February 1995, and provided legal framework for Romania's accession to the European Community, which was later transformed into the EU. Article 74 of the Europe Agreement provided

27 *Saluka (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *E.D.F. International v. Hungary*, UNCITRAL, Award, 4 December 2014; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (Hereinafter: *Micula et al. v. Romania (I) award*).

28 Baetens, 2019.

29 *Micula et al. v. Romania (I) Award*.

30 The ICSID arbitration against Romania was initiated in 2005 under the Sweden-Romania BIT. The claimants were the twin brothers, Ion and Viorel Micula and three food and soft drinks manufacturing companies owned and established by them in Romania: European Food, Starmill and Multipack.

for cooperation aimed at establishing a favourable climate for private investment in Romania. Among the aims of this cooperation, the same article listed ‘the conclusion by the Member States and Romania of Agreements for the promotion and protection of investment’. Thus, the conclusion of BITs between member states and Romania was a direct consequence of the Europe Agreement.<sup>31</sup> The BITs had a European context and origin.<sup>32</sup> However, it was not envisaged in the Europe Agreement what would happen to those BITs once the candidate country became itself a member state. This prompted the Tribunal to note that it ‘cannot therefore assume that by virtue of entering into the Accession Treaty or by virtue of Romania’s accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT’.<sup>33</sup>

The Europe Agreement also required Romania to harmonise its existing and future legislation with that of the Community. The obligation of harmonisation extended to the area of competition law, which included the prohibition of illegal state aid. That portion of the *acquis* was applicable in Romania well before the date of accession.<sup>34</sup>

During the period preceding accession, Romania adopted measures designed to attract and promote investment. In the Emergency Government Ordinance number 24 adopted in 1998 (‘EGO 24’), Romania introduced a plan for the development of its ‘disfavoured’ regions. The plan included exemptions from customs duties and corporate profit taxes for investors investing in those regions. Ştei-Nucet-Drăgăneşti was designated as a disfavoured region for a period of ten years, beginning on 1 April 1999. A government decision implementing EGO 24 declared that incentives offered under EGO 24 would be available to investors as long as that region was designated as disfavoured. Nevertheless, the incentives were prematurely revoked by Romania on 22 February 2005, in response to advice from the European Commission, which made this a condition for closing the competition chapter in the accession negotiations. According to the Commission, the incentives constituted state aid that was incompatible with EU law, which prohibited such anticompetitive schemes. The brothers Micula and their companies, being the investors and recipients of such incentives, initiated ICSID arbitration proceedings against Romania in August 2005. They claimed that they had made substantial investments in the Ştei-Nucet-Drăgăneşti region in reliance on the incentives and on the expectation that the incentives would remain in place during the entire ten-year period. They argued that the premature repeal of EGO 24 and the revocation of the incentives by Romania breached their legitimate expectations protected under the fair and equitable treatment standard of the BIT.<sup>35</sup> The respondent argued that the revocation was necessary to comply with EU state aid law, which, in turn,

---

31 *Micula et al. v. Romania* (I) Award, para. 304.

32 *Ibid.*, para. 317.

33 *Ibid.*, para. 321.

34 *Ibid.*, para. 210.

35 *Ibid.*, para. 131.

was necessary to complete accession to the EU in 2007.<sup>36</sup> In 2013, the arbitral tribunal found for the claimants and ordered Romania to pay cca EUR 82 million in damages and interest compounded on a quarterly basis. One of the decisive facts was that the three companies owned by the Micula brothers had been issued Permanent Investor Certificates (PICs), which were valid for ten years. According to the tribunal, the EGO 24 framework in conjunction with the PICs instilled in the Claimants a legitimate expectation that they would be entitled to receive the incentives until 1 April 2009.<sup>37</sup> Analysing the legitimacy of the investors' expectations in the context of Romania's impending accession to the EU, the tribunal concluded that between 1998 and late 2003, when the investments were made, it was reasonable for the Miculas to believe that the EGO 24 incentives were compliant with the Europe Agreement. According to the tribunal, it was decisive that the Romanian government had held a reasonable belief that EGO 24 was a valid regional operating aid under EU law. It follows that Miculas' beliefs were also reasonable.<sup>38</sup> On 18 April 2014, Romania filed an application for annulment of the award before an ICSID ad hoc committee, which was rejected in February 2016.

Meanwhile, on 1 January 2007, while the ICSID proceedings were still pending, Romania became a member state of the EU. The compensation granted in the 2013 award comprised an amount corresponding to the amount of incentives that the Micula companies would have received from the moment that EGO 24 was repealed until its scheduled expiry, on 1 April 2009, as well as lost profits resulting from the premature termination of the plan. By December 2013, the total sum owed by Romania to the claimants more than doubled due to compounded interest.<sup>39</sup> What ensued was a legal battle between the European Commission and the Micula brothers fought within the EU territory. Romania was caught in between the two fronts, torn between its international obligation and willingness to comply with the ICSID award and the prohibition to enforce the same award because it contravened the EU rules on state aid. In January 2014, the Commission advised Romania that any implementation or execution of the award would constitute impermissible new state aid and would have to be notified to the Commission. In February 2014, Romania informed the Commission that it had partly implemented the award by offsetting a portion of the compensation awarded to the claimants by the tribunal against taxes owed by one of the Claimants.<sup>40</sup> The European Commission then issued a suspension injunction in May 2014 to ensure that 'no further incompatible State aid would be paid'.<sup>41</sup> The Miculas sought annulment of this

---

36 *Ibid.*, para. 132.

37 *Ibid.*, para. 675.

38 *Ibid.*, para. 706.

39 Commission Decision (EU) 2015/1470 of 30 March 2015 on state aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013, OJEU L 232/43, para. 1.

40 A Romanian court later declared the asserted tax set offs to be unlawful under Romanian law. See *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 284.

41 European Commission, Decision C(2014) 3192 of 26 May 2014 State aid SA.38517 (2014/NN) – *Micula v Romania* (ICSID arbitration award).

decision before the CJEU.<sup>42</sup> Slovakia and Spain intervened in support of the European Commission.<sup>43</sup> Because of the European Commission's investigation, Romania passed a law that suspended all of the enforcement actions initiated by the claimants.<sup>44</sup> Nevertheless, the claimants managed to obtain partial enforcement from the Romanian court and seized approximately EUR 10.17 million from Romania's Ministry of Finance. The Romanian authorities transferred the remaining amount of approximately EUR 106.5 million into a blocked account in the name of the five claimants.<sup>45</sup> On 30 March 2015, the European Commission issued a final decision declaring that the payment of the compensation awarded by the arbitral tribunal constituted state aid that was incompatible with the internal market within the meaning of the TFEU, Art. 107(1), because it sought to compensate the Miculas for advantages equivalent to those that were considered to be unlawful state aid. The Commission ordered Romania not to pay any further amounts and to recover the compensation it had already paid to the claimants or face infringement proceedings before the CJEU.<sup>46</sup> This decision was also challenged by the Micula brothers and their numerous companies in three separate proceedings that were joined before the General Court of the EU. Hungary and Spain intervened in support of the European Commission, but in an unexpected turn, the decision was annulled by the General Court.<sup>47</sup> The Commission lodged an appeal of the General Court's decision with the CJEU.

The Micula brothers also led an aggressive campaign for the enforcement of the 2013 award in various national jurisdictions in addition to Romania, including the US, the UK, France, Belgium, and Sweden.<sup>48</sup> Within the EU, the UK Supreme Court granted the Miculas' application despite the efforts of Romania and the EC Commission to prove that this would be contrary to the duty of sincere cooperation, as the EU Commission's investigation of the state aid in question was still ongoing.

---

42 Action brought on 2 September 2014 – *Micula a.o. v Commission* (Case T-646/14).

43 The case was discontinued by Order of the President of the Fourth Chamber of the General Court, 29 February 2016.

44 *Ioan Micula, Viorel Micula and Others v. Romania*, Decision on Annulment of 26 February 2016, ICSID Case no. ARB/05/2, para 73.

45 Subsequently, after the State Aid Decision of the Commission in 2015, Romania withdrew the funds from this account. See *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 285.

46 European Commission, Decision 2015/1470 of 30 March 2015 on state aid SA.38517(2014/C)(ex 2014/NN)(E) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013, OJEU L 232/43, Art. 2. On 7 December 2018 European Commission issued a Press release informing that it had decided to refer Romania to the CJEU for failing to fully recover illegal state aid worth up to €92 million from Viorel and Ioan Micula and their group of companies, as required by the Commission Decision 2015/1470 of 30 March 2015. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10147.pdf> (Accessed 16.01.2021)

47 Judgement of the CJEU (General Court) of 18 June 2019. *European Food and Others v Commission* (Joined Cases T-624/15, T-694/15 and T-704/15).

48 Some decisions of national courts are accessible at <https://www.italaw.com/cases/697>.

In the US, litigation over enforcement lasted over six years. The District Court for the District of Columbia (the US court) rejected Romania's and the Commission's<sup>49</sup> jurisdictional argument that the CJEU's decision in *Achmea* rendered the arbitration agreement in the Sweden-Romania BIT invalid and unenforceable as of the date of Romania's accession to the EU.<sup>50</sup> The arbitration agreement was the sole basis for subject matter jurisdiction of the US court over Romania under the Foreign Sovereign Immunities Act (the arbitration exception from immunity, 28 U.S.C. § 1605(a)(6)). The US court distinguished *Micula* from *Achmea* for three reasons. The first was the difference in the factual matrix. In *Achmea*, the challenged government action occurred and the arbitration proceedings commenced after Slovakia entered the EU, whereas in *Micula*, all key events occurred before Romania acceded to the EU. The incentives were repealed in 2005, and the Micula brothers invoked the arbitration clause in the same year. At that time, Romania remained outside the EU and, according to the US court, thus remained subject, 'at least primarily, to its own domestic law'. The US court acknowledged in a footnote that at that time, Romania had been subject to the Europe Agreement, which formed part of the EU law, but in its view, the tribunal did not pass on questions of EU law. The treatment of EU law in the award was the second reason for distinguishing between the two cases. According to the US court, the *Micula* award was not related to the interpretation or application of EU law in the sense that the CJEU identified in the case of *Achmea*. Although EU law formed part of the factual matrix of the case, it was not the applicable law. The BITs' substantive rules solely supplied the applicable law. The tribunal did not decide a question of EU law in a way that would implicate the concerns expressed by the CJEU in *Achmea*. The third reason for distinguishing *Achmea* was the judgement of the General Court of the EU that intervened in 2019. This was, in fact, just a confirmation of the first two reasons, as the General Court itself distinguished *Micula* from *Achmea* on the basis of two facts: that the events giving rise to the *Micula* award occurred before the accession and that the *Micula* tribunal was not bound to apply EU law to events occurring prior to the accession.<sup>51</sup> Therefore, the US court concluded that Romania's position that the *Achmea* decision nullified the arbitration agreement in the Sweden-Romania BIT was untenable. Consequently, FSIA's arbitration exception applied. The judgement was affirmed on appeal.<sup>52</sup>

In November 2020, the same US court issued a civil contempt order against Romania. The Miculas moved to compel Romania to answer post-judgement

49 The European Commission entered the proceedings before the district court of the District of Columbia as *amicus curiae* in December 2018.

50 *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 276-283.

51 The General Court's suggestion that some portion of the award might be subject to EU state aid rules because it constituted compensation for the period after Romania's accession to the EU, which was subject to EU law, was considered by the US court to be an argument that goes to the merits of the ICSID award and was not a valid ground on which to reject the enforcement of the award. *Micula v. Gov't of Rom.*, 404 F. Supp. 3d 265, 276-80 (D.D.C. 2019), 286.

52 See, Judgement of the US Court of Appeals for the District of Columbia, 10 May 2020. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11504.pdf> (Accessed 16.01.2021).

interrogatories, seeking additional information about its assets. Romania refused to answer those interrogatories because one of its main arguments against enforcement was that it had fully satisfied the award. The court granted the Miculas' request for a starting sanction of US\$ 25,000 per week, progressing up to an amount of US\$ 100,000 per week, 'to coerce Romania's adherence to the Discovery Order and to compensate Petitioners for the 'losses sustained' from Romania's noncompliance thus far'.<sup>53</sup> Romania finally paid this compensation to avoid enforcement measures on American soil against its state-owned enterprises.<sup>54</sup>

In 2014, the Micula brothers and their companies initiated another ICSID arbitration against Romania, claiming damages of over EUR 1.8 billion. This time, their claims were denied,<sup>55</sup> but the legal battle continues, as they currently seek annulment of this award before an ICSID *ad hoc* committee.<sup>56</sup>

The drama with Miculas begins in a candidate country aspiring to become a member of the EU and, at the same time, striving to attract foreign investment by granting various types of state aid. These two goals ultimately conflict and place the main protagonist in a hopeless situation. When finding Romania liable to pay damages, the tribunal did not point to any alternative means that would have allowed Romania to act fairly toward the claimants and avoid liability without sacrificing its policy goal of joining the EU in 2007. The tribunal recognised that 'Romania was in a quandary whilst trying to balance two conflicting policies, i.e. first, the continuation of the facilities regime and the protection of the interests of PIC holders in the disfavoured regions, and second, EU accession'.<sup>57</sup>

When one looks back at 15 years of litigation and the costs and humiliation that Romania had to endure, it becomes clear that the current legal framework exposes the candidate countries to grave risk of being caught between the Scylla and Charybdis of investment treaties and EU law. Certain EU requirements might oblige candidate countries to renege on their previous commitments to investors when they join the EU.<sup>58</sup> The *Achmea* judgement of the CJEU apparently offers no solution for candidate countries as 'the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgement of 6 March 2018, *Achmea*'.<sup>59</sup> The candidate countries will have to learn fast from the experience of Romania in *Micula* if they wish to avoid or attenuate that risk.

---

53 US District Court for the District of Columbia, Memorandum, Opinion and Order, 20 November 2020.

54 Szilágyi and Andréka, 2020, p. 104.

55 *Micula et al. v. Romania II*, ICSID Case No. ARB/14/29, Award of 5 March 2020.

56 The Annulment proceedings were registered on 13 July 2020. <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/29>.

57 *Micula et al. v. Romania I*, Award, para. 864.

58 *Ibid.*, para. 595.

59 Judgement of the CJEU (General Court) of 18 June 2019. *European Food and Others v Commission* (Joined Cases T-624/15, T-694/15 and T-704/15), para. 87.

### 3. Potential or prospective conflict of Serbia's treaty obligations arising simultaneously under BITs with EU countries and those arising under *acquis communautaire* (Agreement on Stabilisation and Association)

Serbia was granted the status of a candidate country by the European Council in 2012, and accession negotiations began in January 2014. Preceding its status as a candidate country, Serbia signed the Stabilisation and Association Agreement with the European Communities and their Member States (SAA) in April 2008, which entered into force in September 2013.<sup>60</sup> This agreement remains the main legal framework for the accession of Serbia to the EU. The comprehensive regime of the SAA, which is concomitant with the pre-accession Europe Agreements of new EU member states, requires direct application of EU rules on competition and state aid. Apart from being directly applicable, these rules became effective even before the SAA's entry into force, based on the Interim Agreement on Trade and Trade-related Matters signed simultaneously with the SAA in April 2008, which entered into force in February 2010. In other words, pursuant to Art. 139 of the SAA, EU rules on state aid were among the first rules that were binding to Serbia in its process of accession, which is one of the common features in the accession process of any candidate country.<sup>61</sup>

The principal provision on state aid in the SAA prohibits 'any state aid which distorts or threatens to distort competition by favouring certain undertakings or certain products', provided that it may affect trade between the EU and Serbia.<sup>62</sup> The benchmark for assessing legality is set forth in Art. 73(2) of the SAA: 'Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions.' As several commentators noted, this is an all-encompassing provision that implies the direct applicability of the EU's state aid law, even the soft law, and all EU law that is yet to be adopted without the possibility of participating in rule making.<sup>63</sup> It follows that, with respect to EU state aid law, an association country becomes a rule taker without being a rule maker.

Other obligations related to state aid include, *inter alia*, the obligation to set up a special institutional mechanism entrusted with authorising state aid schemes and individual aid grants, ordering the recovery of unlawfully granted state aid, providing regular information to the European Commission on individual decisions on state aid, and drawing up a regional aid map on the basis of the relevant Community guidelines.<sup>64</sup>

---

60 Stabilisation and association agreement between the European Communities and their member states and the Republic of Serbia, 30 April 2008, Official Journal of the European Union, L 278/16, 18.10.2013.

61 Papadopoulos, 2010, p. 120.

62 Art. 73(1) of the SAA.

63 See Milenkovic, 2018, p. 70, also citing Cremona, 2003, p. 265.

64 Arts. 73(4)(7)b of the SAA.

Transition and implementation periods vary but do not exceed five years from entry into force of the SAA. This can explain the relatively slow harmonisation of national legislation on state aid in Serbia with EU law. For example, the 2009 Law on State Aid Control was amended, in line with the European Commission recommendations, only in October 2019 and entered into force on 1 January 2020. In the opinion of the European Commission, this law is generally aligned with EU legislation on state aid, but several additional requirements are still missing: implementation of secondary legislation, strengthening a still-novel Commission on State Aid Control, transparency, and non-discriminatory allocation of subsidies and other forms of state aid.<sup>65</sup> Therefore, the EU rules on state aid are slowly but steadily becoming incorporated into Serbian law.

On the other hand, Serbia, like many former and current pre-accession countries, relies heavily on state aid as part of its foreign investment policy. The total amount of state aid awarded by different governmental authorities to all beneficiaries, both domestic and foreign, fluctuated between EUR 319.82 million in 2005 and EUR 939.6 million in 2019. Official data on the allocation and distribution of state aid demonstrate that it is awarded through different instruments such as subsidies, tax incentives (tax credits, cancellation of tax debts, tax write-offs), loans, and guarantees. Subsidies are by far the most frequently used instrument of state aid, comprising 50-70% of total state aid.<sup>66</sup> However, official figures do not disclose the amount of subsidies granted as incentives to foreign investors, so these amounts remain within the sphere of speculation, and the government is often criticised by the media and civil society for the lack of transparency in this domain.

The 'invisibility' of subsidies to foreign investors, subsidies which may be in contravention of Art. 73(1) SAA, can also explain the comments made by the European Commission in its 2020 Progress Report regarding the inventory of schemes and certain aid schemes, which still need to be finalised or, in certain areas, harmonised with the *acquis*.<sup>67</sup> One of the obligations under the SAA is to establish a comprehensive inventory of aid schemes in line with the *acquis* no more than four years from the entry into force of the SAA.<sup>68</sup>

---

65 European Commission, Serbia 2020 Report – Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2020 Communication on EU Enlargement Policy, SWD(2020) 352 final, 6 October 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0352>. (Hereinafter: 2020 Progress Report), 58, 78.

66 E.g. 60.7% in 2016, 69.6% in 2018, and 55.4% in 2019. – Official data of the Commission on State Aid Control of Republic of Serbia, Report on State Aid Granted in the Republic of Serbia in 2016, p. 27; Report on State Aid Granted in the Republic of Serbia in 2018, p. 27; Report on State Aid Granted in the Republic of Serbia in 2019, p. 27. Available at: <http://www.kkdp.gov.rs/izvestaji.php> (Accessed 16.01.2021).

67 'The existing aid schemes, namely the fiscal state aid schemes part of the laws on corporate income tax, on personal income tax and on free zones, are not yet harmonised with the EU *acquis*. Some progress has been noted on creation of a new inventory of schemes.' – 2020 Progress Report, 78. It is to be noted that tax legislation allows for tax exemptions for large investments (Art. 50a of the Law on Corporate Income Tax).

68 Art. 73(6) of the SAA.

The general justification for state aid is to protect the market's competitiveness and provide an impetus for economic development. However, the figures illustrate that Serbia has 'a higher share of state aid in GDP compared to the European Union member states, on the one hand, and an unfavourable position from the standpoint of competitiveness, on the other hand, which is reflected in weaker scores in the Global Competitiveness Index and, consequently, ranks in the Global Competitiveness Report by the World Economic Forum'.<sup>69</sup>

Trends in regulating and distributing state aid in Serbia have been closely monitored by the European Commission. The monitoring power of the European Commission was laid down in the legal framework established by the SAA. The clout of the European Commission also transpires from official reports of Serbian governmental agencies entrusted with the control of state aid. For example, the Commission on State Aid Control regularly reflects on comments made by the European Commission and marks areas in which changes were made in line with its recommendations. Additionally, the general reports on the progress made by Serbia in the process of accession include the EU analysis and recommendations in the area of state aid. In its 2020 Progress Report, the European Commission is moderately critical of the Serbian state aid framework, pointing primarily to institutional and structural deficiencies as well as to a lack of transparency. The European Commission remarks are made in general terms with respect to all types of state aid. However, with respect to subsidies for foreign investors specifically, the 2020 Progress Report merely notes that 'Serbia continues to use budgetary subsidies for newly created jobs as an incentive for foreign direct investments'.<sup>70</sup>

It seems that despite the large amounts of distributed state aid and lack of transparency in the process of allocation, the European Commission still hesitates to demand the full compliance of Serbia with EU state aid requirements. There are possibly several reasons for this: the national institutional framework is yet to be redesigned to gain full structural independence so that it can, by itself, provide adequate monitoring of state aid in close cooperation with the European Commission; for the first five years of the SAA, Serbia as a whole, similar to Romania in the period from 1995 to 2000, was categorised as an underdeveloped region in terms of Art. 87(3) (a) of the EC Treaty, pursuant to Art. 73(7) of the SAA, which provided it with a wider margin of discretion in allocating state aid. Furthermore, there are likely other priorities on the European Commission's list. Finally, given the 'conditionality' approach of the EU in the accession process<sup>71</sup> and a larger set of requirements for Western Balkan countries to join the EU,<sup>72</sup> there seems to be plenty of manoeuvring space and extra time for further adjustments and harmonisation. However, despite the changed accession criteria and procedures,

69 Radukić and Vučetić, 2019, p. 34.

70 2020 Progress Report, 98.

71 'The transposition of key legislation under other chapters (e.g. *acquis* on environmental impact assessment, anti-discrimination legislation, public procurement, and state aid control) is a prerequisite for using European structural and investment funds.' – 2020 Progress Report, 100.

72 Milenkovic, 2018, p. 68.

compared to the last three rounds of EU accession,<sup>73</sup> one should still cautiously read the European Commission's hesitant approach. Given the current state of implementation of the EU rules on state aid,<sup>74</sup> together with the possibility of the change of pace in implementing those rules as illustrated in the case of Romania, it is not unlikely that Serbia will find itself between conflicting obligations arising under EU law, on the one hand, and international commitments to foreign investors, on the other.

#### **4. Mechanisms for ensuring compatibility of the dispute settlement clauses in Serbia-EU country BITs with EU law**

The structural changes of the Serbian exchange with the EU defined in the SAA have had an impact on the trade regime between the two economies but also on the FDI policies of Serbia and the inflow of FDI from the EU member states. EU countries have been not only Serbia's most important trade partners but also its dominant investment partners. From 2010 to 2016, EU countries were among the top five major investor partners by FDI inflow into Serbia. Their share was rarely below 50%, and in some years, it reached nearly 90%.<sup>75</sup>

Since 2005, when it encountered its first investment claim, Serbia has had to defend 12 arbitration cases, all of which involved investors from at least one EU member state.<sup>76</sup> Given that Serbia has 22 BITs with EU member states,<sup>77</sup> and in light of the *Achmea* decision and the Termination Agreement, on this front as well, the risks are imminent, and actions are required.

---

73 The Europe Agreements generally required, within the pre-accession arrangements, the conclusion of BITs between EU member states and candidate countries. ('Indeed, in the context of the Europe Agreements, which the EU signed with the accession countries in order to prepare them for the EU, the EU was encouraging the Eastern and Central European countries to conclude BITs.' – Lavranos, 2020b, p. 445). There is no such provision in the SAA with Serbia. Nevertheless, Art. 93 of the SAA requires Serbia to 'improve the legal frameworks which favours and protects investment.' On the other hand, Art. 15 of the SAA requires Serbia to 'start negotiations with the countries which have already signed a Stabilisation and Association Agreement with a view to concluding bilateral conventions on regional cooperation, the aim of which shall be to enhance the scope of cooperation between the countries concerned.' This is the condition for 'the further development of the relations between Serbia and the European Union.'

74 'SAA state aid rules effectiveness stands at the level where it was in 2009 when the Agreement was signed. No added value to the minimum liberalisation can be identified.' – Sretić, 2018, p. 162.

75 Bjelić and Milovanović, 2018, pp. 137–138.

76 Four of those cases are still pending. For chronology and the parties, see: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/187/serbia> (Accessed 16.01.2021).

77 Serbia has BITs with Malta, Portugal, Denmark, Cyprus, Finland, Lithuania, Belgium/Luxembourg, Spain, Slovenia, Netherlands, Austria, Hungary, Croatia, Czech Republic, Greece, Poland, Bulgaria, Slovakia, Romania, Germany, Sweden, and France. The BIT signed with Italy has not entered into force.

Serbia should be prepared to take certain steps to align its treaties with EU law requirements even before it reaches the stage of accession. This is clear from the latest progress report for Serbia, which states the following:

‘For all investment and trade agreements, it is important that Serbia ensures compatibility with the EU *acquis* and includes a sunset clause allowing it to denounce the agreement upon accession to the EU. Serbia should also develop a strategy for amending or terminating existing bilateral investment agreements that fail short of EU standards and expose the country to risks due to the broad and open language used.’<sup>78</sup>

Serbia should thus, according to the recommendation of the European Commission, follow the beaten path set forth by the Termination Agreement. This path entails the amendment of the existing BITs to ensure their compatibility with the EU *acquis* by including a termination clause that would enable the contracting parties to terminate those agreements once Serbia accedes to the EU. Within the scope of the termination, two additional situations need to be addressed and agreed upon with the EU partners: the treatment of any newly initiated arbitrations and the destiny of pending arbitrations. Finally, Serbia should proceed to a systematic and comprehensive examination of the language of its existing treaties (with both EU and non-EU countries) to determine whether they fall short of EU standards, are incompatible with the EU *acquis*, or contain overly broad or open language that exposes Serbia to unnecessary risks.

#### ■ 4.1. *Amendments to Ensure Termination of Serbia-EU member state BITs Upon Accession*

Ensuring the timely phase-out of Serbia-EU member state BITs would entail inserting amendments into the existing 22 BITs that would provide for the automatic termination of those treaties on the date of Serbia’s accession to the EU. As for the sunset clauses contained in those BITs, they should be terminated by these amendments.<sup>79</sup> Their termination before the accession would, to a certain extent, resolve the problem of retroactivity, which will be further discussed in connection with the new arbitration proceedings. The investors who made their investments before the termination could still rely on sunset clauses provided that the sunset clause expired before the accession.<sup>80</sup> However, investors who made investments after the termination could no longer rely on them as the sunset clauses would no longer be part of the BIT. In this manner,

<sup>78</sup> 2020 Progress Report, 114.

<sup>79</sup> ‘The Czech Republic adopted a two-step approach to the termination of its BITs with, at least, Denmark, Italy, Malta and Slovenia. The parties first agreed to amend the treaty by terminating the survival clause and then, secondly, to terminate the treaty itself.’ – Titi, 2016, p. 436. ‘[T]his has been the preferred solution, which the European Commission has been pushing all member states to adopt.’ – Lavranos, 2016.

<sup>80</sup> Sunset clauses commonly provide extended validity for the period of 10 to 20 years.

at least some of the sunset clauses with EU member states would be allowed to expire before the accession.

The proposed amendments should be acceptable to EU countries and the European Commission because they are aware of the problems caused by pre-accession intra-EU BITs. Pursuant to Regulation 1219/2012,<sup>81</sup> the European Commission is entitled to supervise any new BITs as well as amendments to existing BITs and must ultimately authorise them.

There is one important problem to be noted in connection with the prospective termination of intra-EU BITs pursuant to the 2020 Termination Agreement. There are predictions that the termination of intra-EU BITs may lead to the restructuring of intra-EU investments such that they would be covered by extra-EU BITs.<sup>82</sup> EU investors may migrate to more favourable destinations from which they would place their FDI inflows to EU countries. Some British<sup>83</sup> and Swiss<sup>84</sup> law firms have already sensed the potential for hosting such affluent migrants, distrustful toward the host EU member state courts as the exclusive forums for investment protection. If such restructuring is undertaken before any dispute is in existence or reasonably anticipated, most investment tribunals would likely hold that the restructured investment qualifies for the extra-EU treaty protection.

Therefore, the extinction of Serbia-EU member state BITs cannot work in isolation from other BITs. Investors from EU member states could restructure their investments to meet the requirements of another non-EU member state BIT, such as Serbia's BITs with the UK and Switzerland,<sup>85</sup> countries that aspire to welcome the restructured investors fleeing from their former EU nests. To effectively avoid risks, any move to terminate Serbia-EU Member State BITs should be accompanied with provisions in the BITs addressing the issue of the restructuring of investments, shareholder claims, and reflective loss.<sup>86</sup> The definitions of investors and investments should also be adjusted. Only investors with substantial business activities in their home state should be protected.<sup>87</sup> Other provisions to be considered for inclusion are denial of benefits and good

---

81 Regulation (EU) No 1219/2012 of 12 December 2012, Official Journal of the EU L 351/40, Arts. 9 and 11.

82 Lavranos, 2020b, p. 457; Bray and Kapoor, 2020; Triantafylou and Manoli, 2020, p. 24.

83 Storrs and Witzorek, 2020.

84 Terrapon and Feit, 2020, pp. 2–3.

85 <https://investmentpolicy.unctad.org/international-investment-agreements/countries/187/serbia> (Accessed 16.01.2021).

86 See, UNCITRAL, Working Group III, Possible reform of investor-State dispute settlement (ISDS), Shareholder claims and reflective loss, Note by the Secretariat, A/CN.9/WG.III/WP.170, available at <https://undocs.org/en/A/CN.9/WG.III/WP.170> (Accessed 16.01.2021). For example, CETA (2016) provides in Art. 8.23 that a claim may be submitted to an investment arbitral tribunal by (a) an investor of a Party on its own behalf; or (b) on behalf of a locally established enterprise which it owns or controls directly or indirectly. In the latter case, Art. 8.39(2) provides that (a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the locally established enterprise; and (b) an award of restitution of property shall provide that restitution be made to the locally established enterprise.

87 See, for example, the explicative part of the definition of investor from the CETA (2016).

faith clauses.<sup>88</sup> In other words, the incompatibility of ISDS clauses with EU law should be addressed from a wider perspective of the reform of investment treaty law, which currently, with its broad definitions of investors and investments and protection of indirect shareholders, allows large-scale potential for treaty shopping.<sup>89</sup> These definitions should be in line with EU standards. Therefore, once the process of amendment is initiated, it should not stop at providing for the termination of the future intra-EU BITs or the termination of sunset clauses but should proceed to a comprehensive reform of BITs in line with the new generation of EU investment agreements.

#### ■ 4.2. *New arbitrations*

If the amended Serbia-EU member state BITs provide that they are terminated upon the date of accession, that termination will affect the new proceedings initiated after the accession date, such as *Achmea*. Those proceedings will not be based on the consent of Serbia as the potential respondent, and, presumably, the tribunals will have to decline jurisdiction. However, some uncertainties remain regarding the legal possibility of terminating the sunset clauses in this manner.

The EU likely anticipates that sunset clauses apply only in cases of unilateral terminations, whereas they do not apply in cases of consensual terminations.<sup>90</sup> Nevertheless, EU member state investors could claim before the arbitral tribunals that once they have made the investment in Serbia (prior to the accession), they have obtained a vested or acquired right to rely on the BIT protections that can expire only upon expiry of the promised term of the sunset clause. Alternatively, they could put forward an argument based on making the investment in reliance on the specified term of the sunset clause, just as the *Miculas* made their investments in reliance on the ten-year term of the incentives.<sup>91</sup> In *Magyar Farming Company*,<sup>92</sup> the tribunal addressed the issue of the purported termination of the sunset clause by the 2019 Declarations of the Member States:

‘222. The Tribunal’s finding that the 2019 Declarations were not the proper procedure to terminate or amend the BIT is not based on mere formalism.

88 CETA contains a denial of benefits clause in Art. 8.16 and a good faith clause in Art. 8.18(3).

89 Notably, the widespread use of the Dutch BITs by non-Dutch investors in the past years has led the Netherlands to order an investigation by UNCTAD which found that ‘[i]n around three quarters of Dutch cases, the ultimate owners of the claimants are not Dutch. In two-thirds of those cases, the relevant foreign-owned group of companies does not appear to engage in substantial business activities in the Netherlands.’ – Treaty-based ISDS cases brought under Dutch IIAs: An Overview, available: <https://investmentpolicy.unctad.org/uploaded-files/document/treaty-based-isds-cases-brought-under-dutch-iias-an-overview.pdf>. Accessed on 16 January 2021.

90 This argument, attributed to Anthea Roberts, is cited in Titi (2016), p. 438.

91 Bray and Kapoor, 2020.

92 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27 Award of 13 November 2019. For the review of this case, see, Szilágyi and Andréka, 2020, pp. 92–105.

The BIT is an international treaty that confers rights on private parties. While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*. This is evident for instance from Article 13(3) of the BIT, which grants a guarantee of stability to investors who have made investments in reliance on the BIT:

In respect of investment made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

223. This provision shows that, even where the Contracting Parties terminate the treaty on mutual consent, they acknowledge that long-term interests of investors who have invested in the host State in reliance on the treaty guarantees must be respected. This is the purpose served by the 20-year sunset provision. If the protection of existing investments outlives an unambiguous termination of the Treaty, then the protection must continue a fortiori in respect of a decision of an adjudicatory body constituted under a different treaty or of declarations that purport to clarify the legal consequences of that decision.’ (references omitted)

Many authors have already expressed their reservations regarding the retroactive effect of Arts. 2(2) and 3 of the Termination Agreement, which terminate the sunset clauses. Some of them question whether the tribunals in the ‘New Arbitration Proceedings’<sup>93</sup> will accept that the sunset clauses contained in the terminated intra-EU BITs are moot and inapplicable for investments already made.<sup>94</sup> Others qualify these clauses as ‘a further troubling blow to basic principles of international public law, among them *pacta sunt servanda* and legal certainty’<sup>95</sup> and wonder ‘whether the intended effects of the Termination Agreement actually are compatible with the VCLT’.<sup>96</sup> Further criticism comes from those authors who consider that the Termination Agreement ‘also raises some questions concerning its conformity with fundamental principles recognised by the CJEU, such as legal certainty, non-retroactivity and the protection of legitimate expectations’.<sup>97</sup>

Considering these views, it is not unlikely that future investment tribunals would be inclined to interpret the termination of sunset clauses prospectively, such that the termination would not apply to investments that were already made before the termination in reliance on the sunset clause. Indeed, the costly testing of this controversial

93 Pursuant to the Termination Agreement, Art. 1(6) “New Arbitration Proceedings” means any Arbitration Proceedings initiated on or after 6 March 2018.

94 Lavranos, 2020a.

95 Adams et al., 2020.

96 Triantafilou and Manoli, 2020, p. 24; Bray and Kapoor, 2020.

97 Guarín Duque, 2020, p. 817.

question only requires an investor who is willing to risk initiating new arbitration proceedings.<sup>98</sup> For this reason, the candidate countries would be well advised to terminate the sunset clauses from their BITs well before their accession.

#### ■ 4.3. Pending arbitrations

It is probable that there would be certain pending arbitrations with investors from EU member states at the time that Serbia accedes to the EU, such as the arbitration that was occurring between the Micula brothers and Romania.<sup>99</sup> The Termination Agreement defines ‘Pending Arbitration Proceedings’ as those that were initiated prior to 6 March 2018 and do not qualify as concluded arbitration proceedings. The solution envisaged for those arbitrations in the Termination Agreement is for the two state parties of the terminated BIT to inform the arbitral tribunal about the consequences of the *Achmea* judgement, that is, that the arbitration clause is contrary to the EU Treaties and thus inapplicable.<sup>100</sup> This provision cannot be transposed into a candidate country’s BITs with member states of the EU as the date of the *Achmea* judgement is not the date of termination for that country. The provision that could be agreed upon would require the acceding state and the other member state to inform the tribunal in such pending arbitration that the BIT has been terminated pursuant to its own terms on the date of accession based on the BIT provision mentioned above that would envisage termination upon accession. The desired outcome would be that the arbitral tribunal, upon receiving such a notification, dismisses the claims due to lack of jurisdiction.

However, such an outcome is not certain. As the tribunal in *Magyar Farming Company* held, even if the BIT has been terminated, as argued by Hungary (in that case, by virtue of the 2019 Declarations), the relevant time for determining jurisdiction in an investment arbitration case is the date of initiation of the arbitration.<sup>101</sup> The tribunal found that ‘the Claimants accepted the BIT’s offer to arbitrate prior to its purported termination’.<sup>102</sup> The tribunal then quoted the ICSID Convention, Art. 25, which provides that ‘when the parties have given their consent, no party may withdraw its consent unilaterally’.<sup>103</sup> Following this rationale, other arbitral tribunals in the pending cases

98 Tropper, 2020. The author mentions a case where a tribunal implied that the member states parties to a treaty may denounce a sunset clause: ‘As is undisputed, neither Hungary nor France has made any attempt to renegotiate, modify, or shorten the relevant ‘survival’ period. Accordingly, [...] the Tribunal would still have jurisdiction to hear this case’. – *UP & CD Holding Internationale v. Hungary*, ICSID Case ARB/13/35, Award, 9 October 2018, para. 265.

99 According to one source, there were at least 55 pending intra-EU arbitrations only before ICSID at the end of 2020. See Yanos and Ramos-Mrosovsky, 2020, p. 2. Other sources refer to approximately 15 pending intra-EU arbitrations based on BITs that would be terminated once the Termination Agreement enters into force and around 45 pending intra-EU arbitrations based on the ECT. See Prantl and Pettazzi, 2020.

100 See, the Termination Agreement, Art. 7(a).

101 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, para. 213.

102 Ibid.

103 Ibid. See, also, *Marfin Investment Group v The Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, para. 593 and *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, para 226.

might decide to retain and confirm jurisdiction, as the ‘consent to arbitrate, in the sense of a meeting of the minds, which is perfected by the investor’s acceptance of the State’s offer to arbitrate expressed in the BIT would not be retroactively invalidated by a subsequent termination of the BIT’.<sup>104</sup> According to the holding in *Magyar Farming Company*, therefore, the Parties’ agreement to terminate the BIT upon accession could not invalidate the consent to arbitrate, which was given and accepted prior to the termination.

Some authors have noted that the outcomes of the tribunals’ examination of this issue may differ depending on the dispute resolution mechanism chosen by the claimant as the ICSID Convention expressly prevents unilateral withdrawal of consent to arbitration.<sup>105</sup> Other authors highlight the public international law implications of the Parties’ attempt to extend the effects of termination to already pending arbitrators. Bray and Kapoor refer to VCLT, Art. 70(1)(b), which states that the termination of a treaty ‘does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination’ and to Art. 26 *pacta sunt servanda* obligations, particularly in cases in which the promises given have been relied on by individuals.<sup>106</sup>

It should be noted that, pursuant to Art. 1(5) of the Termination Agreement, the term ‘Pending Arbitration Proceedings’ also encompasses final arbitral awards that were rendered before the termination of the relevant BITs (and before the *Achmea* judgement of the CJEU) but were not yet executed at the time of termination, such as the *Micula* award. In such cases, pursuant to Art. 7(b), the EU member states are obliged to resist enforcement, that is, ‘to ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it’. Again, the retroactive renegeing of investors’ rights under a final award is dubious and may be viewed as expropriatory, especially by the courts of non-EU countries. Nardell and Rees-Evans argue that the attempt to undercut arbitrations commenced well before the agreement came into force, including those resulting in awards rendered before the *Achmea* judgement, is incompatible with investors’ rights under the European Convention on Human Rights and the EU’s Charter of Fundamental Rights. They argue that ‘by purporting to deprive investors of the fruits of valid claims in this way, the Agreement infringes on Article 1 of the First Protocol to the ECHR [...] and may also breach the rights of access to justice and a fair hearing under Article 6(1) (and their equivalents in the Charter)’.<sup>107</sup>

The ICSID award in *Magyar Farming Company* would also fall under the definition of ‘Pending Arbitration Proceedings’ in terms of the Termination Agreement but for the fact that the UK is not a party to the Termination Agreement. Therefore, it appears

---

104 *Magyar Farming Company Ltd., Kintyre Kft, and Inícia Zrt v. Hungary*, para. 214.

105 Guarín Duque, 2020, p. 822; Triantafylou and Manoli, 2020, p. 24.

106 Bray and Kapoor, 2020.

107 Nardell and Rees-Evans, 2020, p. 1.

that the UK-Hungary BIT remains in force.<sup>108</sup> However, now that the new EU-UK Trade and Cooperation Agreement was signed on 24 December 2020<sup>109</sup> it remains to be seen whether the UK-Hungary BIT will be deemed in force or repealed. This case also ended up in the US courts, in the same district court for the District of Columbia in which enforcement was sought by the UK claimants in March 2020.<sup>110</sup>

Both *Micula* and the *Magyar Farming Company* case flag the risk of respondent countries being dragged to third-country courts<sup>111</sup> by investors from members states in ‘Pending Arbitration Proceedings’ pursuant to intra-EU BITs even after the accession. For these reasons, it seems that candidate countries should strive to settle all their pending arbitrations with investors from EU countries before the date of accession<sup>112</sup> to avoid protracted legal battles over the enforceability of the awards and the effects of the retroactive termination of the arbitration clauses.

#### ■ 4.4. Other possible amendments to the existing Serbia-EU member state BITs

There are other possible avenues for tackling issues raised by the *Achmea* decision and the Termination Agreement with respect to Serbia-EU member state BITs. One possible option would be to renegotiate these BITs to exclude existing ISDS clauses and sunset clauses entirely and to replace them with different dispute settlement mechanisms, such as inter-state arbitration. Given that some authors caution that these amendments could be easily circumvented via the MFN clause,<sup>113</sup> it follows that renegotiation should also include an MFN clause to exclude ISDS clauses from its scope of application. A more radical alternative would be to replace them all with one EU-Serbia BIT, which would have different ISDS provisions as agreed upon by all parties. Recent EU treaty-making practice provides support for both propositions. For example, the EU-UK Trade and Cooperation Agreement, adopted on 24 December 2020 contains provisions on substantive protection for the Contracting Parties’ investors but no ISDS

108 Guarín Duque, 2020, p. 821.

109 This is a free trade agreement which also contains provisions on investment protection excluding investor-state dispute settlement clauses. It is not yet in force but has been provisionally applied since 1 January 2021. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6039/download> (Accessed 16.01.2021).

110 Information available at <https://www.italaw.com/sites/default/files/case-documents/italaw11363.pdf> (Accessed 16.01.2021). Hungary filed an annulment application against the ICSID award, and the annulment proceedings are currently pending. – <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/839/magyar-farming-and-others-v-hungary> (Accessed: 16.01.2021).

111 There are currently enforcement actions concerning intra-EU investor-state awards of approximately US\$600 million in value that are pending before United States federal district courts. Yanos and Ramos-Mrosovsky, 2020, p. 2.

112 Such settlement is also envisaged in the Termination Agreement, Art. 6(2): ‘[...] this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018.’

113 Titi, 2016, p. 440.

mechanism, which is replaced by interstate arbitration.<sup>114</sup> Further, certain EU member states have substantially changed their investment-treaty policies not only regarding other EU member states but also regarding non-EU states. The Netherlands terminated several of its non-EU BITs<sup>115</sup> and, in 2018 (revised in March 2019), substantially revised its Model Investment Agreement.<sup>116</sup> These two trends combined provide a platform for renegotiating the Serbia-EU member state BITs.

Another option for amending the existing Serbia-EU member state BITs is to insert a clause that would provide for the supremacy of obligations stemming from EU membership. Similar provisions have already been in place for former pre-accession countries, such as Croatia. The 1991 BIT between Austria and Croatia, for example, provides the following in Art. 11(2): ‘The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time.’ Although Croatia’s challenges to the jurisdiction of investment tribunals based on this provision were unsuccessful,<sup>117</sup> the *obiter dictum* of the *Addiko* tribunal provides support for inserting such provisions in BITs with pre-accession countries because they may prospectively invalidate the consent to arbitration, following the *Achmea* decision:

‘The Tribunal thus finds that as a matter of international law, any invalidation of Article 9(2)’s stated “irrevocabl[e] consent[] in advance” to arbitration, by virtue of an incompatibility with the EU *acquis* pursuant to Article 11(2) of the BIT, could not be applied to invalidate a consent to arbitration that was given before the *Achmea* Judgement, but only prospectively for investors who had not yet initiated a BIT arbitration. In the Tribunal’s view, this conclusion holds whether the *Achmea* Judgement *itself* is considered under EU law to be applied *ex nunc* or alternatively *ex tunc*.’<sup>118</sup>

114 Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Official Journal of the European Union, L 444/14, 30 December 2020.

115 With South Africa (as of 1 May 2014), Indonesia (as of 1 July 2015), India (as of 1 December 2016), and Tanzania (as of 1 April 2019). – Lavranos, 2020b, p. 444.

116 Available at: <https://www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> (Accessed: 16.01.2021).

117 *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on the Respondent’s Request of 4 April 2018, 30 April 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent’s Article 9 Objection to Jurisdiction, 12 October 2018; *UniCredit Bank Austria AG and Zagrebačka banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31, Decision on the Respondent’s Application for Reversal of the Article 9 Decision and Decision on Jurisdiction and Admissibility, 24 March 2020 (UniCredit decisions are not public – information gathered from the awards that are publicly available); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent’s Jurisdictional Objections, 30 September 2020.

118 *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, para. 280.

There are EU member states that have recently concluded BITs with third countries, including clauses that provide for priority of obligations arising under EU membership while at the same time excluding EU law as applicable under the BIT. For example, Hungary signed a BIT with Kyrgyzstan in 2020 that contains the following provision:

“This Agreement shall apply without prejudice to the obligations deriving from Hungary’s membership in the European Union, and subject to those obligations. Consequently, the provisions of this Agreement may not be invoked or interpreted neither in whole nor in part in such a way as to invalidate, amend or otherwise affect the obligations of Hungary arising from the Treaties on which the European Union is founded.”<sup>119</sup>

The same BIT excludes the applicability of EU law by a prospective arbitral tribunal in the following manner:

“When rendering its decision, the tribunal shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties. For greater certainty the national law of the Parties shall not constitute part of the applicable law. In case of Hungary the term “national law” comprises the law of the European Union.”<sup>120</sup>

Similar provisions are to be found in the Hungary-Belarus BIT<sup>121</sup> and the Lithuania-Turkey BIT<sup>122</sup> as well as in the Dutch Model Investment Agreement.<sup>123</sup> The recent EU-Singapore BIT, which replaces all existing Singapore-EU member state BITs, sets forth a specific dispute settlement mechanism and excludes the applicability of the parties’ domestic law.<sup>124</sup>

119 Art. 16(1) of the Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, signed on 29 September 2020. Not in force.

120 Art. 9(7) of the Hungary-Kyrgyzstan BIT.

121 Arts. 9(8), 16(4) and 17(1) of the Agreement Between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments, signed on 14 January 2019, entered into force on 28 September 2019.

122 Art. 2(3) of the Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments signed on 28 August 2018. Not in force.

123 Art. 2(5) of the Dutch Model Investment Agreement.

124 Art. 3.31(2) of the Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part, signed on 19 October 2018, not yet in force. OJ L 279 (09/11/2018).

Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download> (Accessed: 16.01.2021).

## 5. Creating a new mechanism for efficient dispute settlement

The candidate countries should also bear in mind that the European Union has firmly stood by the position that the best protection against all concerns raised by investment arbitration would be its replacement with a multilateral investment court (MIC).<sup>125</sup> Since November 2015, when it publicly announced the establishment of an international investment court as its policy goal,<sup>126</sup> the EU has actively worked on the realisation of the MIC project, including in the UNCITRAL Working Group III.<sup>127</sup>

For seamless implementation of this idea, states are advised to introduce buckle clauses into current BITs that would enable transition from the current ISDS mechanisms to MIC once it comes into place. For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains the following provisions:

‘The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.’

Some EU model BITs already include provisions by which the state parties automatically accept the jurisdiction of the MIC once it becomes operational.<sup>128</sup> These provisions could serve as a model for the amendment of the Serbia-EU member state BITs.

## 6. Conclusion

There are several messages for candidate countries such as Serbia regarding their investment treaty making and policy to be taken from the recent conflicts between the EU and international investment arbitrations. Recent events have exposed the potential for conflicts between existing BITs and EU law on both procedural and substantive levels. The landscape of the intra-EU BIT policy has drastically changed following the CJEU *Achmea* decision and the 2020 Plurilateral Termination Agreement. The EU set

---

125 Possible reform of investor-State dispute settlement (ISDS) – Submission from the European Union, 12 December 2017, A/CN.9/WG.III/WP.145. For a comprehensive analysis of this idea, see Bungenberg and Reinisch, 2018.

126 Available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396> (Accessed: 16.01.2021).

127 See, submissions of the European Union in documents A/CN.9/WG.III/WP.145 and A/CN.9/WG.III/WP.159/Add.1.

128 For example, the 2019 Dutch Model Investment Agreement, Art. 15 – Multilateral investment court. See also Lavranos, 2020b, p. 453.

new red lines that are on the opposite side from the EU accession procedure, compared to the last wave of accessions – while, originally, BITs with EU member states were trendy and desirable, they are now a no-fly zone. However, this is not the only problem with BITs signed between candidate countries and EU member states. As illustrated by the experiences of Romania and Hungary, newly-EU-weds can run into conflicting obligations and find themselves torn between BITs and EU law to such an extent that no reconciliation seems possible. Therefore, candidate countries such as Serbia should be advised to adjust their pre-accession commitments, both procedural and substantive, with incoming EU obligations within their new setting in a timely manner. These inevitable adjustments should be conducted cautiously to minimise the countries' potential conflicting treaty obligations and maximise their bargaining power.

## Bibliography

- Adams, Ch., Bühler, M., Dolenz, N., Elsing, S., Faulhaber, K., Kaplan, Ch. (2020) 'The Ill-fated Termination of Intra-EU Bilateral Investment Treaties', *JDSupra* [online]. Available at: <https://www.jdsupra.com/legalnews/the-ill-fated-termination-of-intra-eu-69735/> (Accessed: 17 January 2021).
- Baetens, F. (2019) 'Renewable energy incentives: reconciling investment, EU State aid and climate change law', *EJIL: Talk!*, 18 December 2019, [online]. Available at: <https://www.ejiltalk.org/renewable-energy-incentives-reconciling-investment-eu-state-aid-and-climate-change-law/> (Accessed: 17 January 2021).
- Bjelić, P., Milovanović, M. (2018) 'The Case of Serbia: Effects of the SAA on trade with the EU' in Medjak, V. (ed.) *Effects of Stabilisation and Association Agreements and CEFTA 2006 on WB6 European Integration and Regional Cooperation: Achievements and Ways Forward*. 1<sup>st</sup> Belgrade: European Movement in Serbia, pp. 114–144. Available at: <http://www.emins.org/wp-content/uploads/2018/06/SAP-CEFTA-WB6.pdf> (Accessed: 17 January 2021).
- Bray, D., Kapoor, S. (2020) 'Agreement on the Termination of intra-EU BITs: Sunset in Stone?', *Kluwer Arbitration Blog*, 4 November 2020. Available at: <http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/> (Accessed: 17 January 2021).
- Bungenberg, M., Reinisch, A. (2018) *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Springer Nature Switzerland, <https://doi.org/10.1007/978-3-030-01189-5>.
- Cremona, M. (2003) 'State Aid Control: Substance and Procedure in the European Agreements and Stabilisation and Association Agreements', *European Law Journal*, 9(3), pp. 265–287, <https://doi.org/10.1111/1468-0386.00178>.
- Guarín Duque, G.A. (2020) 'The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions', *Journal of International Arbitration*, 37(6), pp. 797–826.
- Korom, V. (2020) 'The Impact of the Achmea Ruling on Intra-EU BIT Investment Arbitration, A Hungarian Perspective', *Hungarian Yearbook of International Law and European Law*, 8(1), pp. 53–74.
- Lavranos, N. (2016) 'The end of intra-EU BITs is nearing', *Practical Law – Arbitration Blog*, 13 May 2016. Available at: <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/> (Accessed: 17 January 2021).
- Lavranos, N. (2020) 'Quo vadis investment protection within the EU?', *Practical Law – Arbitration Blog*, 28 September 2020, [Online]. Available at: <http://arbitrationblog.practicallaw.com/quo-vadis-investment-protection-within-the-eu/> (Accessed: 17 January 2021).
- Lavranos, N. (2020) 'The Changing Ecosystem of Dutch BITs', *Arbitration International*, 36(3), pp. 441–457, <https://doi.org/10.1093/arbint/aiaa009>.
- Milenkovic, M. (2018) 'The Transformation of State Aid Control in Serbia and EU Conditionality', *European State Aid Law Quarterly*, 17(1), pp. 66–79, <https://doi.org/10.21552/estal/2018/1/8>.
- Nardell, G., Rees-Evans, L. (2020) 'The agreement terminating intra-EU BITs: are its provisions on 'New' and 'Pending' Arbitration Proceedings compatible with investors'

- fundamental rights?’, *Arbitration International*, 2020/00, pp. 1–41, <https://doi-org.peacepalace.idm.oclc.org/10.1093/arbint/aiaa046>.
- Papadopoulos, A.S. (2010) *The International Dimension of EU Competition Law and Policy*. 1<sup>st</sup> Cambridge: Cambridge University Press.
  - Prantl, D., Pettazzi, G. (2020) ‘The Agreement terminating intra-EU BITs’, 5 August 2020, [online]. Available at: <https://riskandcompliance.freshfields.com/post/102g7ke/the-agreement-terminating-intra-eu-bits> (Accessed: 12 January 2021).
  - Radukić, S., Vučetić, V. (2019) ‘Comparative Analysis of State Aid and Competitiveness of the Republic of Serbia and the Neighbouring Countries’, *Journal of Central Banking Theory and Practice*, 8(3), pp. 21–38.
  - Restrepo Amariles, D., Farhadi, A. A., Van Waeyenberge, A. (2020) ‘Reconciling International Investment Law and European Union Law in the Wake of Achmea’, *International and Comparative Law Quarterly*, 69(4), pp. 907–943, <https://doi.org/10.1017/S0020589320000299>.
  - Sretić, Z. (2018) ‘Legal approximation of the legislation with the EU acquis under the SAA framework’, in Medjak, V. (ed.) *Effects of Stabilisation and Association Agreements and CEFTA 2006 on WB6 European Integration and Regional Cooperation: Achievements and Ways Forward*. 1<sup>st</sup> Belgrade: European Movement in Serbia, pp. 145–203. Available at: <http://www.emins.org/wp-content/uploads/2018/06/SAP-CEFTA-WB6.pdf> (Accessed: 17 January 2021).
  - Storrs, N., Witzorek, M. (2020) ‘The termination of bilateral investment treaties in the EU – one agreement to end them all?’, *Taylor Wessing, Insights and events*, 7 May 2020 [online]. Available at: <https://www.taylorwessing.com/en/insights-and-events/insights/2020/05/the-termination-of-bilateral-investment-treaties-in-the-eu> (Accessed: 17 January 2021).
  - Szilágyi, J.E., Andréka, T. (2020) ‘A New Aspect of the Cross-Border Acquisition of Agricultural Lands: The Inicia Case Before the ICSID’, *Hungarian Yearbook of International Law and European Law*, 8(1), pp. 92–105; <https://doi.org/10.5553/hiyel/266627012020008001006>.
  - Terrapon, Ch., Feit, M. (2020) ‘Time to Act for EU Investors – EU States Cancel Intra-EU BITs’, *WalderWyss Newsletter Special Edition*, May 2020, pp. 1–3 [Online]. Available at: [https://www.walderwyss.com/user\\_assets/publications/Special-Edition-Newsletter\\_Time-to-Act-for-EU-Investors.pdf](https://www.walderwyss.com/user_assets/publications/Special-Edition-Newsletter_Time-to-Act-for-EU-Investors.pdf) (Accessed: 17 January 2020).
  - Titi, C. (2016) ‘Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law’, *Journal of International Arbitration*, 33(5), pp. 425–440.
  - Triantafilou, E.E., Manoli, A. (2020) ‘Focus: More than a BIT of confusion’, *The Resolver*, 2020/3, pp. 22–24.
  - Tropper, J. (2020) ‘The Treaty to End All Investment Treaties: The Termination Agreement of Intra-EU BITs and Its Effect on Sunset Clauses’, *Völkerrecht Blog*, 12 May 2020, [online]. Available at: <https://voelkerrechtsblog.org/articles/the-treaty-to-end-all-investment-treaties/> (Accessed: 17 January 2020).
  - Voon, T., Mitchell, A.D. (2016) ‘Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law’, *ICSID Review*, 31(2), pp. 413–433, <https://doi.org/10.1093/icsidreview/siw010>.
  - Yanos, A.A., Ramos-Mrosovsky, C. (2020) ‘Intra-EU Investment Treaty Disputes in US Courts: Achmea, Micula and Beyond’, *Global Arbitration Review (GAR)*, 13 October 2020 [Online]. Available at: <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/intra-eu-investment-treaty-disputes-in-us-courts-achmea-micula-and-beyond> (Accessed: 17 January 2020).