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Intra-EU BITs in Light of the *Achmea* Decision

■ **ABSTRACT:** *In its Achmea decision rendered in March 2018, the Court of Justice of the European Union declared that arbitration clauses contained in intra-EU bilateral investment treaties are incompatible with EU law. The Court's judgment brought to an end the decade long legal battle between the Member States and the European Commission over the EU law compatibility of these treaties. In response to Achmea, the majority of Member States have agreed to terminate their treaties in order to eliminate the EU law incompatibility identified by the Court. At the same time, the political battle over the need for the special protection of cross-border investments in the EU continues. This paper looks back at the political and legal controversy that was sparked by intra-EU bilateral investment treaties and culminated in the Court's Achmea judgment, and briefly discusses the practical consequences of Achmea for intra-EU investment protection.*

■ **KEYWORDS:** Intra-EU BITs, Achmea, investment protection, investment arbitration, termination of intra-EU BITs.

Introduction

The existence of bilateral investment treaties between Member States of the EU ("intra-EU BITs") and the growing number of arbitration proceedings brought by EU investors against EU Member States on the basis of these treaties have given rise to a political and legal battle over their compatibility with EU law and the need for such treaties on the EU Internal Market. For over a decade, Member States have been divided on these issues. On the one hand, the capital-importing, "new" Member States (who were frequent respondents in intra-EU BIT arbitrations) viewed these treaties as incompatible with EU law and called for their termination. On the other, the capital-exporting, "old" Member States maintained that intra-EU BITs were not only compatible with EU law but in fact necessary to give special assurances and protections to cross-border

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investments in the EU that were not provided for under EU law. The European Commission ("Commission") embarked on a crusade against intra-EU BITs but remained unable to forge a political consensus among Member States regarding the need to terminate these treaties. Meanwhile, EU investors brought over 100 arbitrations against EU Member States on the basis of intra-EU BITs. In these proceedings, the respondent Member States, often with the assistance of the Commission, argued that although the treaties had not been terminated, they had been rendered invalid or inapplicable as a result of the respondent States' accession to the EU. These arguments were rejected by all intra-EU BIT tribunals, however. It was against this background that the Court of Justice of the European Union ("CJEU" or "Court") handed down its 2018 *Achmea* judgment, in which it found that arbitration clauses contained in intra-EU BITs are incompatible with EU law. The *Achmea* judgment gave new impetus to the Commission to force all EU Member States to finally terminate their intra-EU BITs. Yet, the termination process has been considerably slower than expected. Today, almost four years after *Achmea*, and two years after the adoption by 23 Member States of the 'Agreement for the termination of intra-EU bilateral investment treaties' ("Termination Treaty"), the Termination Treaty's ratification process has still not been completed. Pending the final termination of all intra-EU BITs, this article provides an overview of the political and legal controversy that was sparked by these treaties and culminated in the Court's *Achmea* judgment, as well as the of the practical consequences of the *Achmea* judgment for intra-EU BITs.

1. Intra-EU BITs

In the following sections, we first present the origin of intra-EU BITs (1.1). We then discuss the political battle between the Member States and the Commission over the need to terminate or maintain them (1.2) and the legal battle fought before arbitral tribunals over their validity and applicability in arbitration proceedings pending their termination (1.3).

■ *1.1. The origin of intra-EU BITs*

BITs are international treaties signed by two states to ensure the protection of their citizens' investments in each other's territory and to allow for the settlement of disputes arising in connection with these investments through investor–state arbitration. The policy rationale behind BITs is that guaranteeing the protection of foreign investments and allowing for the settlement of investment disputes before an independent international tribunal (rather than domestic courts) increases foreign investment flows between the two signatories of the BIT.[2] Since the 1960s, European States have concluded a significant number of BITs, mainly with countries in the Southern

2 Sornarajah, 2017, p. 204. Today, the role and usefulness of BITs in promoting foreign investment is increasingly questioned; see e.g. UNCTAD, 2009b.

Hemisphere that were of economic interest to their domestic companies.[3] To date, some 2,825 BITs have been concluded worldwide, 1,200 of which were concluded by European States.[4]

The six founding States of the EU did not conclude BITs with each other, and BITs between European States remained an isolated phenomenon until the late 1980s and early 1990s.[5] Only Germany had concluded a BIT with Greece and Portugal before they joined the EU in 1981 and 1986, respectively.[6] It was not until the collapse of the Communist regime in Central and Eastern Europe that a large number of BITs were concluded between the Western and the newly independent States of Eastern Europe. The IMF and the World Bank supported the conclusion of BITs as a mechanism for attracting foreign investment and facilitating the transition from a planned to a market economy.[7] The conclusion of BITs was also specifically encouraged within the framework of the "Europe Agreements" signed between the EU and its Member States and the Central and Eastern European States, which applied for EU membership after their independence in the early 1990s. The Europe Agreements provided that the EU Member States and the candidate states would cooperate in the "promotion and protection of investments" and that their cooperation would take the form of concluding, where appropriate, "agreements between Member States and [the candidate State] on investment promotion and protection".[8]

In line with the recommendations of the Europe Agreements, the candidate States built an extensive network of BITs with EU Member States in order to attract EU capital and went on to conclude BITs among themselves. For the "old" EU Member States, it was of interest to conclude BITs with the Central and Eastern European countries to protect their investors in this "new" region of Europe. Bearing witness to the successful reconstruction of their economies, thanks in part to the inflow of foreign investment from Western Europe, the candidate States of Central and Eastern Europe acceded to the EU in three successive waves of enlargement in 2004, 2007 and 2013.

At the time of the EU enlargements, the Commission was mainly concerned with BITs that the Central and Eastern European countries had signed with third

3 In fact, the very first BIT was entered into by Germany and Pakistan. Today, Germany is the country with the largest network of BITs (with 117 BITs in force). See UNCTAD Investment Policy Hub, International Investment Agreements Navigator.

4 Id.

5 For the sake of simplicity, we refer to the European Economic Community, the European Community and the European Union as the "EU".

6 See BIT between Germany and Greece of 27 March 1961 and BIT between Germany and Portugal of 16 September 1980.

7 Wierzbowski and Gubrynowicz, 2009, p. 544.

8 See e.g. the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, OJ L 347, 31.12.1993 p. 2-266, Article 72; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, OJ L 348, 31.12.1993, p. 2-266, Article 73.

countries and reviewed them thoroughly as to their compatibility with EU law.[9] The Commission suggested that BITs signed with the "old" EU Member States and among candidate States would become obsolete following EU accession but did not require that they be amended or terminated.[10] The provisions of the BITs themselves did not provide that the agreements would be affected by EU accession in any way. Therefore, the nearly 200 BITs signed among the States of Western and of Central and Eastern Europe remained fully in force following the EU accession of the latter, becoming "intra-EU BITs".[11]

■ *1.2. The political battle over the need to terminate or maintain intra-EU BITs*

The possibility of EU investors using intra-EU BITs to initiate investment arbitration proceedings against EU Member States was first brought to the attention of the Member States and the Commission by the Czech Deputy Minister of Finance in the context of the *Eastern Sugar* arbitration.[12] As part of the Czech Republic's defence strategy, the Czech Deputy Minister of Finance addressed a letter to the Commission concerning the compatibility of intra-EU BITs with EU law and the effect of EU accession on these treaties. In particular, the Czech Deputy Minister of Finance asked for clarity on when, exactly, the Netherlands–Czechoslovakia BIT was to be regarded as ceasing to apply as a consequence of the Czech Republic's accession to the EU, whether any form was necessary to render effective the substitution of intra-BITs by EU law (such as the formal termination of intra-EU BITs by the Member States) and, if termination was necessary, when such termination would take effect.[13]

The questions raised by the Czech Republic left the EU Member States divided for over a decade.

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9 Eastern Sugar B.V. v. Czech Republic (SCC Case No. 088/2004), Partial Decision, 27 March 2007 ("Eastern Sugar"), para. 119. In 2006, the Commission brought Sweden and Austria, and later also Finland, to the CJEU for failing to eliminate the so-called "transfer clauses" in their BITs with non-European countries. The CJEU found that Sweden, Austria and Finland had breached their obligations under Article 307 EC Treaty by failing to take appropriate steps to eliminate the incompatibilities between their pre-accession agreements and the TFEU; see Commission v Austria (Case C-205/06), Commission v Sweden (Case C-249/06), and Commission v. Finland (Case C-118/07).

10 See the annual reports of the Economic and Financial Committee of the European Union, which did not address the issue of intra-EU BITs until after 2006, e.g., 2006 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 4 January 2007, p. 7. See also Letter from Mr Jörn Sack, expert of the Legal Services of the European Commission, quoted in Eureko B.V. v. The Slovak Republic (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 ("Eureko"), para. 90.

11 The network of BITs between Member States and accession states was not complete, as out of the 300 or so possible treaties between the then 28 Member States, only about 200 have actually been concluded; see Gaillard, 2011, p. 199.

12 See Letter from Mr. Schaub, EC, DG Internal Market and Services, in response to the letter from the Deputy Minister of Finance of the Czech Republic, quoted in Eastern Sugar, para. 119. The Germany–Greece BIT and the Germany–Portugal BIT never served as a basis for investment claims.

13 Eastern Sugar, para. 119.

The Commission, which in the 1990s had urged newly independent Central and Eastern European States applying for EU accession to enter into BITs with the "old" Member States, and which did not require the termination of these treaties upon the enlargements of the EU, quickly took sides against intra-EU BITs, becoming a driving force for their termination.

The Commission identified a number of legal concerns arising from the continued existence of intra-EU BITs. It considered that intra-EU BITs (i) lead to discriminatory treatment between EU investors from different Member States and between Member States, (ii) violate the principle of mutual trust and (iii) encourage forum shopping. It also considered that they (iv) violate the CJEU's exclusive competence to interpret EU law insofar as they give rise to a parallel jurisprudence through arbitration procedures that could result in situations where EU law is ignored, circumvented or wrongly applied without the possibility of review by the CJEU.[14]

Despite these concerns, the Commission initially accepted that "the effective prevalence of the EU acquis does not entail ... the automatic termination of the concerned BITs" and that in order "to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves".[15] The Commission therefore invited Member States to review the need for their intra-EU BITs and to terminate them.[16] It added that extra reassurances such as those provided by intra-EU BITs were no longer necessary in the EU as EU law provides sufficient protection guarantees to all cross-border investments in the EU Internal Market.[17]

Only a minority of Member States followed the Commission's invitation to terminate their treaties voluntarily, however. The Czech Republic, which was the most frequent respondent in intra-EU BIT arbitrations, was one of the first Member States to initiate formal termination procedures for its 23 intra-EU BITs.[18] Further, Ireland, Italy and

14 Eastern Sugar, para. 119; Eureko, paras. 183-185; European Commission Observations, European American Investment Bank AG v Slovak Republic (PCA Case No. 2010-17), 13 October 2011; 2007 Annual EFC Report, paras. 14-15; 2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 17 December 2008, para. 17; 2009 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 10 December 2009 ("2009 Annual EFC Report"), paras. 16-18; 2010 Annual EFC Report, para. 22; 2011 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 13 December 2011 ("2011 Annual EFC Report"), para. 22; Press Release, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties, 18 June 2015; European Commission, Inception Impact Assessment on the Prevention and Amicable Resolution of Investment Disputes Within the Single Market, FISMA B1, 25 July 2017.

15 Eastern Sugar, para. 109.

16 See e.g. 2007 Annual EFC Report, p. 4.

17 Eastern Sugar, para. 126; 2007 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 8 January 2008 ("2007 Annual EFC Report"), para. 14; 2010 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 14 December 2010 ("2010 Annual EFC Report"), para. 22.

18 Eastern Sugar, para. 127; See UNCTAD, 2009a, p. 5; Peterson, 2009; Peterson, 2011. Shortly after its accession to the EU, Slovakia, another frequent respondent in intra-EU BIT arbitrations, launched invitations to commence discussions on the validity of its intra-EU BITs, see Eureko, paras. 165-166.

Denmark proceeded to terminate their intra-EU BITs in response to the Commission's invitation.[19] Interestingly, although many of the Central and Eastern European States facing arbitration claims were also of the view that intra-EU BITs had become inapplicable as a result of their accession to the EU,[20] they were initially reluctant to begin treaty termination proceedings for fear of sending the wrong message to the EU investor community.

The capital-exporting "old" Member States whose investors had heavily invested in Central and Eastern Europe did not share the Commission's concerns about arbitration risks and the discriminatory treatment of investors. They preferred to keep their intra-EU BITs to maintain the protection they guaranteed, which according to them was otherwise unavailable under EU law.[21] The Netherlands government, for example, expressed the view that intra-EU BITs were unaffected by EU law and remained fully in force, noting that casting doubt on the legal validity of existing intra-EU BITs is unnecessarily harmful and undermines the rights and legitimate expectations of EU investors who relied on them.[22] Similarly, the German government took the view that intra-EU BITs were not terminated or superseded by EU law and that intra-EU BITs and EU law do not guarantee equivalent investment protection.[23] Faced with the opposition of the influential, "old" Member States, the Commission set up informal expert groups and conducted bilateral meetings to convince them to terminate their intra-EU BITs voluntarily.[24] The Commission also revised its earlier position; rather than accepting that intra-EU BITs remained in force and would have to be terminated in accordance with their provisions, it now maintained that these treaties were incompatible with EU law and were therefore automatically terminated or invalidated as a result of EU accession.[25]

The "old" Member States resisted the Commission's efforts, however, and were willing to envisage the termination of intra-EU BITs only on the condition that they were replaced by a new, pragmatic and efficient mechanism for the settlement of intra-EU

19 Hepburn and Peterson, 2015; Dahlquist and Peterson, 2016; European Commission, Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, 18 June 2015.

20 2011 Annual EFC Report, para. 23.

21 2007 Annual EFC Report, paras. 14-15; 2009 Annual EFC Report, paras. 16-17; 2010 Annual EFC Report, para. 23.

22 Eureko, paras. 155-163.

23 Letter from Mr. Tillmann Rudolf Braun, M.P.A., International Investment, Federal Ministry for Economics and Technology, Republic of Germany, 15 January 2007, quoted in Rupert Joseph Binder v. Czech Republic (UNCITAL), Award on Jurisdiction, 6 June 2007, para. 61.

24 Eureko, para. 197; 2013 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 17 December 2013, p. 2 ("2013 Annual EFC Report").

25 See e.g. 2011 Annual EFC Report, para. 22; 2012 Annual EFC Report to the Commission and the Council on the Movement of Capital and Freedom of Payments, 15 January 2013; 2014 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 25 March 2015 ("2014 Annual EFC Report"), para. 22; 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, para. 102; Commission amicus submission in the Micula annulment proceedings, Ioan Micula, Viorel Micula and Others v Romania (ICSID Case No. ARB/05/20), Decision on Annulment, 26 February 2016 ("Micula Annulment"), paras. 330-335.

investment disputes.[26] The Commission was apparently unwilling or unable to meaningfully engage with the Member States' request for a replacement regime for intra-EU investment protection. This led to a political deadlock over the fate of intra-EU BITs.

In the hope of overcoming this political impasse, the Commission stepped up the pressure. It first threatened Member States with infringement proceedings if they continued to refuse to terminate their intra-EU BITs and subsequently delivered on this threat.[27] In the summer of 2015, it launched infringement proceedings against five Member States whose intra-EU BITs had given rise to the most discussed and most controversial intra-EU BIT arbitrations – namely the Netherlands, Austria, Sweden, Slovakia and Romania – and commenced pilot proceedings against 20 other Member States.[28] The initiation of infringement proceedings still failed to bring about the large-scale termination of intra-EU BITs demanded by the Commission, however. Instead, the Member States voiced concern over the Commission's methods and reiterated their demand that an EU-wide replacement regime be put in place simultaneously with the termination of the treaties. Sweden, for example, noted that the termination of intra-EU BITs would have to take place in a coordinated way, ensuring predictability, foreseeability and transparency, and should be followed by the establishment of an EU-wide regime that would guarantee the continued protection of intra-EU investments.[29] Sweden's position was echoed in the so-called Non-Paper submitted by Austria, Finland, France, Germany and the Netherlands to the European Council's Trade Policy Committee in 2016 in connection with the forced termination of intra-EU BITs. As a possible compromise, the Non-Paper proposed the conclusion of an agreement among all Member States on the phasing out of existing intra-EU BITs that would at the same time offer appropriate new guarantees, as a matter of both substantive and procedural protection, to EU investors investing in the EU Internal Market.[30]

The Commission again refused to meaningfully engage with the Member States' request. Instead, it continued its crusade against intra-EU BITs and pursued infringement proceedings to show that it would not back down until all intra-EU BITs had finally been terminated. In September 2016, it issued a reasoned opinion to put Austria, the Netherlands, Romania, Slovakia and Sweden on notice that it would bring them before the CJEU if they refused to terminate their treaties.[31] In light of these developments,

26 See e.g. 2013 Annual EFC Report, p. 2; 2014 Annual EFC Report, para. 22; 2016 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, 23 March 2017, pp. 2, 15.

27 Eureko, para. 182.

28 Press Release, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties, 18 June 2015.

29 Sweden, Ministry of Foreign Affairs, Response to letter of formal notice regarding the treaty between the Government of the Kingdom of Sweden and the Government of Romania regarding the promotion and mutual protection of investments (COM ref. SG-Greffe 2015D/6898, matter number 2013/2207), 19 October 2015.

30 Intra-EU Investment Treaties, Non-paper from Austria, Finland, France, Germany and the Netherlands, 7 April 2016.

31 Lukic and Grill, 2016.

Romania and Poland launched proceedings for the termination of their intra-EU BITs in 2016 and 2017.[32] Yet until the Court handed down its judgment in the *Achmea* case, declaring once and for all that intra-EU BITs were incompatible with EU law, the majority of Member States continued to refuse to terminate their treaties, taking the view that intra-EU BITs were not only *not* contrary to EU law but indeed necessary for the adequate protection of intra-EU investments.

▪ *1.3. The legal battle over the validity and applicability of intra-EU BITs*

In parallel with the political battle between the Member States and the Commission over the fate of intra-EU BITs, another battle opened up over the validity and applicability of intra-EU BITs, this time before arbitral tribunals constituted on the basis of intra-EU BITs to hear EU investors' claims against EU Member States.

As a result of the significant flow of West–East investment in the EU in the 1990s and 2000s,[33] intra-EU BITs were increasingly invoked in investment disputes between EU investors and the new Member States. Between 2004 and 2018, over 100 investment arbitrations were brought on the basis of intra-EU BITs, mainly (although not exclusively) against Member States of Central and Eastern Europe.[34] In many of these arbitrations, the respondent Member States argued that, although the intra-EU BITs had not been terminated or denounced by their signatories, they were no longer valid or had ceased to apply as a result of the accession of the two signatory States to the EU. As a consequence, tribunals lacked jurisdiction to hear arbitration claims on the basis of these treaties. This "EU law objection to jurisdiction" was essentially composed of public international law arguments on the one hand and EU law arguments on the other.

The international law branch of this argument was based on the Vienna Convention on the Law of Treaties ("VCLT") and the premise that intra-EU BITs and the EU Treaties relate to the "same subject matter" and are incompatible with each other. From there, respondent States argued that as a result of their accession to the EU, the BITs were automatically terminated by operation of Article 59 VCLT. In the alternative, even if a BIT could not be considered terminated, its dispute resolution clause, which formed the basis of the tribunals' jurisdiction, was no longer valid by virtue of Article 30(3) VCLT.[35]

32 Lavranos, 2016; Jones, 2017; Analysis of Bilateral Investment Treaties, Ministry of Treasury of the Republic of Poland, 25 February 2016; Orecki, 2017a; Orecki, 2017b; Latvia to terminate bilateral investment treaties with Poland, Czech Republic at EU request, the Baltic Times, 2 February 2018.

33 The rapid increase in the number of BITs concluded between Member States and candidate countries over the last twenty years has been followed by an acceleration of investment flows closely linking the economies of Western and Eastern Europe. See International Monetary Fund, 2011,pp. 90-92; Internal Market Scoreboard, No. 18, December 2008, p. 29; Hussain andIstatkov, 2009.

34 See UNCTAD, 2018; UNCTAD, 2021; The ICSID Caseload, Statistics Special Focus – European Union, April 2017.

35 See e.g. Eureko, paras. 65-77, 86-96, 109-119, 127-128; Jan Oostergetel and Theodora Laurentius v. Slovakia (ad hoc), Decision on Jurisdiction, 30 April 2010 ("Oostergetel"), paras. 65-67; Anglia Auto Accessories Ltd. v. Czech Republic, (SCC Case No. V 2014/181), Final Award, 10 March 2017 ("Anglia Auto"), paras. 98-102, 119-124.

The EU law branch of the EU law objection to jurisdiction was based on the premise that intra-EU BITs are incompatible with EU law, in particular with the principles of equal treatment and mutual trust, and that their arbitration clause violates the exclusive jurisdiction of the CJEU to interpret EU law. Given these incompatibilities, and given the principle of primacy of EU law, the provisions of the BIT can no longer be applied, and their arbitration clause cannot give rise to a valid agreement to arbitrate.[36]

The first States to raise the EU law objection to jurisdiction were the Czech Republic and Slovakia. Most of the other respondent States, such as Poland, Hungary, Romania and Croatia, raised this objection only once the *Achmea* case had been referred to the CJEU[37] or the CJEU had handed down its judgment.[38] The likely reason for this was, as noted above in respect to treaty termination, that these States did not want to give investors the impression that they were reneging on their international obligations, in particular given that arbitral tribunals had consistently rejected the EU law objection to jurisdiction.

Recognizing that its efforts to convince Member States to terminate their intra-EU BITs were not meeting with success, the Commission tried to convince arbitral tribunals to reject any claims brought by EU investors on the basis of these treaties, even in the absence of the express denunciation of intra-EU BITs by their signatories. Positioning itself as the "guardian of the EU Treaties … entrusted with ensuring and overseeing the proper application of EU law",[39] the Commission intervened as a non-disputing party (*amicus curiae*) in a number of intra-EU BIT cases in support of the respondent Member State's claim of lack of jurisdiction. In fact, the Commission intervened and argued for a lack of jurisdiction even in cases where the respondent State either did not raise the objection itself or specifically argued that it did not consider the applicable intra-EU BIT to have been superseded or terminated as a result of EU accession.[40]

Arbitral tribunals have consistently rejected the EU law objection to their jurisdiction, however. They found that intra-EU BITs and the EU Treaties did not relate to the "same subject matter" and were in fact complementary rather than incompatible,

36 See e.g. Eureko, paras. 132-138; WNC Factoring Ltd v. Czech Republic (PCA Case No. 2014-34), Award, 22 February 2017 ("WNC Factoring"), paras. 66-68.

37 See e.g. PL Holdings S.a.r.l. v. Poland (SCC Case No. 2014/163), Partial Award, 28 June 2017, para. 53; Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland (ICSID Case No. ADHOC/15/1), Partial Award on Jurisdiction, 4 March 2020 ("Strabag"), para. 1.47.

38 See e.g. UP and C.D. Holding Internationale v. Hungary (ICSID Case No. ARB/13/35), Award, 9 October 2018 ("UP v. Hungary"), paras. 89-91.

39 United States Court of Appeals for the Second Circuit 4 February 2016, Case 15-3109-cv, Brief for Amicus Curiae by the Commission of the European Union in Support of Defendant-Appellant before the US Court of Appeals, p. 7.

40 See e.g. Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic (PCA Case No. 2014-03), Final Award, 11 October 2017, para. 249; Electrabel S.A. v. Republic of Hungary (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.54.

such that intra-EU BITs were not terminated or invalidated by operation of the VCLT. They also found that EU law did not supersede the provisions of the BITs or render them inapplicable.[41]

Having failed to persuade intra-EU BIT tribunals of the merits of the EU law objection to jurisdiction, the Commission intervened as *amicus curiae* in annulment proceedings to obtain the reversal of intra-EU BIT awards.[42] Further, it threatened that if EU investors were to bring intra-EU BIT arbitrations, the Commission would render their awards unenforceable.[43] It delivered on this threat by intervening in various enforcement proceedings in the EU and overseas,[44] and by using and abusing its State aid powers to effectively block the payment of intra-EU BIT awards.[45] Yet, not even its increasingly aggressive stance against intra-EU BIT arbitration sufficed to discourage EU investors from pursuing intra-EU BIT arbitrations or to convince tribunals to accept the EU law objection to jurisdiction. It likewise failed to persuade Member States to finally agree to terminate their intra-EU BITs.

2. The *Achmea* Decision

It was in the midst of this turmoil that the issue of the EU law compatibility of intra-EU BITs came before the CJEU in March 2016. At long last, the Court was given the opportunity to take a position on the question that had divided Member States and kept tribunals busy for over a decade. Unsurprisingly, the Court's conclusion regarding the EU law compatibility of intra-EU BITs was the exact opposite of that reached by arbitral tribunals constituted on the basis of intra-EU BITs. Below, we will first discuss the factual background to the *Achmea* ruling (2.1) and then present the Court's ruling (2.2). We will conclude this section with a brief overview of the consequences of the *Achmea* ruling for intra-EU BITs (2.3).

41 See e.g. Eureko, paras. 217-292; Oostergetel, paras. 72-109; Anglia Auto, paras. 113-118, 126-128; WNC Factoring, paras. 294-311.

42 See e.g. Micula Annulment, paras. 53-64; UP and C.D. Holding Internationale v. Hungary (ICSID Case No. ARB/13/35), Decision on Annulment, 11 August 2021, paras. 18, 38, 40.

43 Peterson, 2014.

44 The Commission intervened as *amicus curiae*, for example, in the Micula enforcement proceedings in the UK, Belgium and the USA. It also intervened in the proceedings for the enforcement of the Eiser award in the USA; see United States District Court for the District of Columbia, Civil Action No. 1:18-cv-1686, Eiser Infrastructure Limited and Energia Solar Luxembourg S.A R.L. v. Kingdom of Spain, Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, 13 March 2019.

45 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 (OJ 2015 L 232, p. 43); Cases T-624/15, T-694/15 and T-704/15, Ioan Micula et all v. Commission, Judgment, 18 June 2019, in which the General Court found that the Commission retroactively applied its State aid powers to events predating Romania's EU accession and annulled Commission Decision 2015/1470. See also Press Release, State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain, 19 July 2021.

■ *2.1. The factual background to the* **Achmea** *ruling*

In 2004, at the time of its accession to the European Union, Slovakia opened its health insurance market to private investors, as a result of which several foreign operators invested in Slovakia.[46] In 2006–2007, however, Slovakia partially reversed this privatisation by imposing, *inter alia*, a ban on the distribution of insurance companies' profits to shareholders, the examination of insurance companies' budgets and new solvency requirements.[47] These measures gave rise to three investment arbitrations against Slovakia on the basis of intra-EU BITs: HICEE BV v. Slovakia (Netherlands–Slovakia BIT), EURAM v. Slovakia (Austria–Slovakia BIT) and Achmea v. Slovakia (Netherlands–Slovakia BIT). Whereas the first two cases were dismissed at the jurisdictional stage, the *Achmea* arbitration proceeded to a final award. In this case, Achmea (previously Eureko), a Dutch private insurance company, claimed that the new measures imposed by the Slovak government in the course of 2006 destroyed the value of its investment in Slovakia.[48] Before starting the arbitration procedure, Achmea filed a complaint with the European Commission over Slovakia's measures, which led to the opening of an infringement procedure against Slovakia.[49] Subsequently, noting that its influence on the progress and direction of the complaint procedure was limited and that its damages could not be redressed via the EU mechanism, in October 2008 Achmea filed an investment claim against Slovakia on the basis of the Netherlands–Slovakia BIT before an UNCITRAL arbitral tribunal seated in Frankfurt-am-Main (Germany).[50] In the arbitration proceedings, Slovakia objected to the tribunal's jurisdiction on the grounds that its accession to the EU deprived the tribunal, on the basis of international law, EU law, Slovak law and German law, of its jurisdiction to hear Achmea's claims.[51] Slovakia argued in particular that the BIT's arbitration clause violated the CJEU's exclusive competence to interpret EU law laid down in Articles 267 and 344 TFEU and gives rise to nationality-based discrimination in breach of Article 18 TFEU.[52] Slovakia further submitted that it follows from the autonomy, supremacy and direct effect of EU law that EU law takes precedence over the BIT.[53] Invited by the tribunal to participate in the arbitration proceedings as *amicus curiae*, the Commission echoed Slovakia's arguments.[54] In its Award on Jurisdiction, Arbitrability and Suspension issued in 2010, the tribunal dismissed all of Slovakia's and the Commission's jurisdictional arguments. It found that investor–state arbitration was not incompatible but rather complementary to EU law

46 Eureko, para. 52.
47 Eureko, para. 54.
48 Eureko, paras. 7, 53.
49 Eureko, para. 55. In her Opinion issued in the PL Holdings case, AG Kokott noted that infringement proceedings are "relatively cumbersome" and cannot ensure the full effectiveness of EU law; see Opinion of AG Kokott delivered on 22 April 2021, Republic of Poland v. PL Holdings Sàrl (Case C-109/20), para. 60.
50 Eureko, para. 56.
51 Eureko, paras. 9, 19, 58.
52 Eureko, paras. 109-119.
53 Eureko, paras. 135-138.
54 Eureko, paras. 176-196.

and that there was no rule of EU law that prohibited investor–state arbitration.[55] The tribunal also noted that the "argument that the ECJ has an 'interpretative monopoly' and that the tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law: but that is quite different".[56] The tribunal went on to issue a Final Award in 2012, awarding Achmea 22.1 million EUR in compensation for Slovakia's violations of the BIT.[57] Slovakia challenged both the Award on Jurisdiction, Arbitrability and Suspension and the Final Award before the German courts on the grounds that the arbitration clause of the Netherlands–Slovakia BIT was incompatible with EU law and that the tribunal therefore lacked jurisdiction to entertain Achmea's claim. In May 2012, the Frankfurt Higher Regional Court dismissed Slovakia's challenge and ruled that because the Netherlands–Slovakia BIT had not been invalidated by Slovakia's EU accession, Achmea was entitled to initiate arbitration proceedings on the basis of the treaty.[58] Slovakia subsequently appealed the Higher Regional Court's decision to the German Federal Court of Justice ("BGH"). Although the BGH did not share Slovakia's doubts regarding the compatibility of intra-EU BITs with EU law and the tribunal's lack of jurisdiction,[59] in March 2016 it agreed to refer three questions relating to the compatibility of arbitration clauses contained in intra-EU BITs with Articles 18, 267 and 344 TFEU to the CJEU for a preliminary ruling.[60]

■ *2.2. The CJEU's* **Achmea** *ruling*

On 6 March 2018, the CJEU, sitting in the Grand Chamber formation, rendered its judgment in the *Achmea* case. In the proceedings before the CJEU, an unusually high number of EU Member States intervened to make observations. The intervening Member States were divided along the battle lines outlined above: the first group, consisting of the capital-importing, "new" Member States and Italy and Spain, which had each been respondents in a large number of intra-EU arbitrations, argued that the Court should find that the arbitration clauses contained in intra-EU BITs are incompatible with the TFEU, while the second group, consisting of capital-exporting, "old" Member States, made submissions to the opposite effect.[61] Advocate General Wathelet delivered his Opinion in September 2017 and, siding with the latter group,

55 Eureko, paras. 246-263.

56 Eureko, para. 282.

57 Achmea B.V. (formerly known as "Eureko B.V.") v. The Slovak Republic (PCA Case No. 2008-13), Final Award, 7 December 2012, para. 352.

58 OLG Frankfurt am Main, Case No. 26 SchH 11/10, Judgment dated 10 May 2012; BGH, Case No. III ZB 37/12, Judgment dated 19 September 2013; OLG Frankfurt am Main, Case No. 26 Sch 3/13, Judgment dated 18 December 2014.

59 Case C-284/16, Slowakische Republik v. Achmea BV, Judgment of 6 March 2018 ("Achmea Judgment"), paras. 14-23.

60 BGH, Case No. SchiedsVZ 2016/328, Decision, 3 March 2016.

61 Opinion of AG Wathelet delivered on 19 September 2017, , Slowakische Republik v. Achmea BV (Case C-284/16) ("Walthelet Opinion"), paras. 34-38.

recommended that the Court answer the BGH's questions by confirming that EU law does not conflict with the investor–state dispute settlement mechanisms contained in intra-EU BITs.[62] In its judgment, the Court disregarded the AG Opinion in its entirety, and concluded that investor–State arbitration provisions contained in intra-EU BITs are precluded by EU law.

The CJEU based its reasoning on the principle of autonomy of EU law and on the system of judicial protection instituted by Article 19 TEU and Articles 267 and 344 TFEU to preserve this autonomy by ensuring consistency and unity in the interpretation of EU law. The CJEU pointed out that an international agreement cannot affect the allocation of powers fixed by the EU Treaties. It recalled that the autonomy of EU law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law, characterised in particular by its independent source, namely the EU Treaties, its primacy and its direct effect. The Court went on to state that EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded. It also noted that that premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected.

The Court then recalled that, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the EU Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. It also stated that that system has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the EU Treaties.

Responding to the BGH's first and second question, the CJEU applied a three-step analysis to ascertain whether investor–State dispute settlement mechanisms contained in intra-EU BITs were likely to upset the preservation of the autonomy of EU law. First, the CJEU recalled the dual nature of EU law, which forms part of international law and the national law of Member States, and found that a tribunal constituted pursuant to the arbitration clause of an intra-EU BIT may be called upon to interpret or apply EU law (whether as international law or as national law) to rule on possible violations of the BIT.[63] Second, it found that an intra-EU BIT tribunal could not be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU and was therefore not entitled to make a reference to the Court for a preliminary ruling to ensure the full effectiveness of EU law.[64] The Court noted in particular that the exceptional nature of the tribunal's jurisdiction (compared with that of the courts of the Member State

62 Wathelet Opinion, para. 273.
63 Achmea Judgment, paras. 39–42.
64 Id., paras. 43–49.

signatories of the BIT) was one of the principal reasons for the existence of the BIT's arbitration clause.[65]

Third, the CJEU noted that the resulting intra-EU BIT arbitral award was subject to limited judicial review by the competent national courts, allowing only for a review of the validity of the arbitration agreement and the consistency of the recognition or enforcement of the arbitral award with public policy. In the Court's view, this was insufficient to ensure that the questions of EU law that the tribunal had to address in its award could be submitted to the Court by means of a preliminary ruling. In this regard, the CJEU distinguished between investment arbitration, which is derived from a treaty by which the Member States agree to remove disputes about the application or interpretation of EU law from the jurisdiction of their own courts, and commercial arbitration, which originates in the freely expressed wishes of the parties. It found that with the latter, the courts of the Member States are justified in conducting a limited review of awards.[66]

On the basis of the above, the CJEU concluded that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".[67]

Exercising judicial restraint, the CJEU did not address the third question referred to it by the BGH regarding the compatibility of intra-EU BITs' arbitration clauses with Article 18 TFEU.

■ *2.3. The consequences of the* **Achmea** *ruling for intra-EU BITs*

Without much surprise, in its *Achmea* ruling, the Court confirmed the supremacy of EU law over intra-EU BITs and their arbitration clauses. The Court also made clear that its findings are not limited to the Netherlands–Slovakia BIT, but apply to arbitration clauses contained in all intra-EU BITs, irrespective of whether the clause directs the arbitral tribunal to apply EU law as part of the applicable law and irrespective of whether the tribunal in fact applies EU law in rendering its award.[68] While largely in line with the CJEU's earlier case law, the *Achmea* ruling was nevertheless heavily criticised by the international arbitration community for being politically motivated and weakly reasoned.[69]

65 Id., para. 45.
66 Id., paras. 50–57.
67 Id., paras. 58–60.
68 Id., para. 62 ("Articles 267 and 344 TFEU must be interpreted as precluding a provision in *an* international agreement concluded between Member States, *such as* Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic…"); Korom, 2018, p. 2007.
69 See e.g. Gaillard, 2018, pp. 616-630.

Be that as it may, the *Achmea* ruling put to bed the much-debated question of the EU law compatibility of arbitration clauses contained in intra-EU BITs. *Achmea* thus gave new impetus to the Commission in its battle with the Member States over the fate of intra-EU BITs, although the disagreement on the termination of these treaties and the need for a replacement regime continued for the years to come.

In a Communication issued in July 2018, the Commission publicly declared that it follows from *Achmea* that all arbitration clauses in intra-EU BITs are inapplicable and tribunals lack jurisdiction due to the absence of a valid agreement to arbitrate.[70] It also stated that Member States will have to formally terminate their treaties to comply with the Court's judgment. Responding to the Member States' calls for a replacement regime to protect intra-EU investments, the Commission noted in its Communication that EU law (i.e. the fundamental freedoms and the Charter of Fundamental Rights of the European Union) provides for adequate safeguards, thus suggesting that there is no need for any new measures.

In the meantime, ignoring the Court's findings in *Achmea* as well as the Commission's interpretation of those findings in its Communication, EU investors continued to bring new intra-EU BIT claims,[71] and intra-EU BIT tribunals continued to confirm their jurisdiction and issue compensation awards in favour of EU investors.[72]

Therefore, in January 2019, the Member States adopted political declarations to inform the investor community that in the aftermath of *Achmea* no new intra-EU investment arbitration proceeding should be initiated.[73] In these declarations, the Member States also announced that they would terminate their intra-EU BITs in order to preclude the application of arbitration clauses that the CJEU had deemed incompatible with EU law. Although for the purposes of eliminating the EU law incompatibility identified by the Court it would have sufficed for Member States to cancel the arbitration clauses of their treaties while allowing intra-EU BIT investment disputes to be taken to national courts, Member States agreed to abandon their treaties altogether, likely in

70 Communication from the Commission to the European Parliament and the Council on Protection of intra-EU investment, COM(2018) 547 final, 19 July 2018. This Communication was adopted as the result of the "Inception Impact Assessment on Prevention and amicable resolution of investment disputes within the single market" and the "Roadmap on Interpretative Communication on the existing EU standards for the treatment of cross-border intra-EU investments" launched by the Commission in July 2017.

71 See e.g. Oļegs Roščins v. Republic of Lithuania (ICSID Case No. ARB/18/37), brought under the Latvia-Lithuania BIT and registered at ICSID on 16 October 2018; Société Générale S.A. v. Republic of Croatia (ICSID Case No. ARB/19/33), brought under the France-Croatia BIT and registered at ICSID on 20 December 2019.

72 See e.g. Strabag; UP v. Hungary.

73 Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, 15 January 2019; Declaration of the representatives of the Governments of Finland, Luxembourg, Malta, Slovenia and Sweden on the enforcement of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, 15 January 2019; Declaration of the representative of the Government of Hungary on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union, 16 January 2019.

response to pressure from the Commission. At the same time, in their declarations, the Member States expressed their determination to intensify discussions with the Commission with the aim of better ensuring the complete, strong and effective protection of intra-EU investments.

In a press statement issued in October 2019, the Commission announced that the 28 Member States had reached an agreement on a plurilateral treaty for the termination of intra-EU BITs.[74] Therefore, it came somewhat as a surprise that the Termination Treaty, finally adopted on 5 May 2020, was signed by only 23 out of the then 28 Member States.[75] Five Member States – Austria, Finland, Ireland, Sweden, and the UK – did not sign the Termination Treaty, although they had all signed up to the political declarations announcing the Member States' determination to give effect to the *Achmea* judgment by terminating their treaties.

A possible explanation for this change of heart may lie in the Termination Treaty's 'transitional provisions' relating to ongoing arbitrations, which would have adversely impacted investors from Austria, Sweden, and the UK who were pursuing high-profile and high-stakes intra-EU BIT arbitrations at the time.[76] Indeed, in addition to terminating some 130 intra-EU BITs (and their survival clauses), the Termination Treaty puts EU investors pursuing intra-EU BIT arbitrations on notice that they will not be able to enforce their award.[77] As regards ongoing proceedings commenced before the *Achmea* judgment, the Termination Treaty encourages investors to refer their disputes either to State courts or to a facilitator in the framework of a settlement procedure set up by the Treaty (called structured dialogue).[78] Given the continuing concerns over the independence of the judiciary in several Member States,[79] and the entirely voluntary nature of the structured dialogue procedure, which, in addition, is available only in cases where the Member State measure giving rise to the dispute is or has been found to be contrary to EU law,[80] neither of the proposed alternative dispute resolution solutions seem entirely satisfactory (tellingly, there have thus far been no reported cases where

74 Lavranos, 2019.

75 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169, 29.5.2020, p. 1–41. For a short commentary see Korom, 2020, pp. 1687–1689.

76 See e.g. Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary (ICSID Case No. ARB/17/27); Erste Group Bank AG and others v. Republic of Croatia (ICSID Case No. ARB/17/49); Ioan Micula, Viorel Micula and others v. Romania [II] (ICSID Case No. ARB/14/29).

77 Termination Treaty, Article 7.

78 Termination Treaty, Articles 8-10.

79 EU Justice Scoreboard 2021, 8 July 2021.

80 See e.g. the 2012 changes adopted by Hungary in relation to the food voucher market, which resulted in proceedings against Hungary both for the violation of the TFEU and the France-Hungary BIT, see European Commission v. Hungary (Case C-179/14), Judgment of 23 February 2016; UP v. Hungary; Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20); Edenred S.A. v. Hungary (ICSID Case No. ARB/13/21). In contrast, in the *Achmea* case, the Commission closed the infringement proceedings against Slovakia without finding a violation of EU law – while the *Achmea* tribunal found a violation of the BIT and issued a 22.1 million EUR compensation award in favor of the Dutch investor.

an investor abandoned its arbitration to pursue the 'structured dialogue' instead). As regards ongoing proceedings commenced after *Achmea*, the Termination Treaty simply considers them null and void by declaring that arbitration clauses in intra-EU BITs cannot serve as a valid legal basis for such proceedings.[81] The Termination Treaty's 'transitional provisions' thus give the termination of intra-EU BITs a de facto retroactive effect (likely in order to make up for the Member States' inability to come to a political consensus sooner) which goes against the VCLT.[82] Moreover, they create an unjust discrimination between EU investors depending on the timing of their arbitration. Investors who commenced arbitrations over unlawful Member State measures and obtained final awards before the *Achmea* judgment remain unaffected by the Termination Treaty and can keep the compensation awarded to them.[83] Conversely, investors whose proceedings were pending at the time of the *Achmea* judgment or were commenced thereafter – either because the unlawful State measures were adopted later in time, or the investor waited longer to start arbitration proceedings or the tribunal was slower to render its award – fall under the Termination Treaty's 'transitional provisions' and will likely be unable to enforce their awards. This differentiation between investors is also entirely inconsistent with the Termination Treaty's own provision according to which "Arbitration Clauses are contrary to the EU Treaties and thus inapplicable.... as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union"[84] and which should in principle deprive all intra-EU arbitrations of their legal basis, irrespective of whether they have already been concluded or are ongoing.

Another, at least partial, explanation for the five Member States' refusal to sign up to the Termination Treaty might have been the Commission's reluctance to work on a replacement regime for the protection of intra-EU investments. In the Preamble to the Termination Treaty, the Member States recalled that discussions would have to be led "without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union". In response, the Commission launched a public consultation with stakeholders at the end of May 2020 to assess the existing framework of investment protection in European law.[85] In light of the feedback received from stakeholders, the Commission undertook in its Capital Markets Union Action Plan published in September 2020 to take steps aiming at "enhancing the rules protecting intra-EU investment, enhancing dispute resolution mechanisms at a national and/or EU level, and consolidating information on investor rights and opportunities in a single access point and stakeholder engagement mechanisms to prevent

81 Id., Article 5.
82 See Articles 28 and 70(1)(b) VCLT.
83 Termination Treaty, Article 6.
84 Termination Treaty, Article 4.
85 European Commission, Inception Impact Assessment, Investment protection and facilitation framework, 26 May 2020; The consultation on intra-EU investment protection: an opportunity that should not be missed, GAR, 8 July 2020.

problems and resolve disputes amicably" by the second quarter of 2021.[86] By the time of the publication of this paper, however, no action has been taken by the Commission, and it remains unclear whether and if so when any tangible new measures will be proposed to enhance intra-EU investment protection.

While the Commission has remained slow to progress talks on a replacement regime for intra-EU BITs, it was very quick to move against the Member States that refused to sign the Termination Treaty. Less than 2 weeks after the adoption of the Termination Treaty, the Commission sent letters of formal notice to Finland and the UK for failing to sign the Termination Treaty or otherwise terminate their intra-EU BITs.[87] In the case of the UK, the Commission was obviously concerned that the UK would leave the EU without terminating its 12 BITs with Central and Eastern European States and Malta, and that following Brexit EU investors could rely on these treaties as a potential structuring solution for their intra-EU investments.[88] Therefore, in October 2020, the Commission issued a reasoned opinion and threatened to refer the matter to the CJEU if the UK failed to terminate its intra-EU BITs voluntarily.[89] The UK left the EU on 31 January 2021, however, without its intra-EU BITs being formally terminated which have since been used by UK investors to bring new arbitration proceedings against EU Member States.[90]

As regards the 23 Member States that did sign the Termination Treaty, the ratification process has been particularly slow in the majority of these States, with the result that over 1,5 years after its adoption, the Termination Treaty has still not entered into force in respect to all of its signatories. For this reason, the Commission has again resorted to the infringement mechanism to put pressure on recalcitrant Member States. In December 2021, it brought new infringement proceedings against Austria and Sweden who did not sign the Termination Treaty (and who also did not otherwise terminate their intra-EU BITs), and against Belgium, Luxembourg, Portugal, Romania and Italy who did sign it but have failed to ratify it.[91] From the reservations submitted by Luxemburg and Portugal to the Termination Treaty, it would seem that one explanation for this could be that the Commission has not put forward any concrete

86 European Commission, Communication, A Capital Markets Union for people and businesses-new action plan, COM(2020) 590 final, 24 September 2020.

87 See European Commission, Press Corner, May infringement package: key decisions, 14 May 2020. To recall, the Commission launched infringement proceedings in 2015 against Austria and Sweden, which were still ongoing, and Ireland had terminated its intra-EU BIT with the Czech Republic previously.

88 McCloskey, 2021.

89 See European Commission, Press Corner, October infringements package: key decisions, 30 October 2020.

90 The UK's intra-EU BITs have since been used by investors for new investment claims against EU Member States, see Christopher Jock Murdoch MacKenzie v. Hungary (ICSID Case No. ARB/21/66), brought under the UK-Hungary BIT and registered at ICSID on 23 December 2021.

91 See European Commission, Press Corner, December infringements package: key decisions, 2 December 2021; Ballantyne, 2021.

plans for ensuring the effective protection of intra-EU investments in the absence of intra-EU BITs.[92]

The question of the need for an EU law compliant replacement regime will likely continue to occupy the political agenda for the years to come. In the meantime, the Termination Treaty has finally ended intra-EU BIT arbitration in those Member States that have ratified the Treaty,[93] and there is no doubt that the Commission will continue to push for the termination of BITs in all EU Member States in the months to come. Thus, at long last, the Commission and those Member States who did not want investment protection via intra-EU BITs on the Internal Market will have prevailed in this decade long political and legal battle. But whether this is a win in the long run for the EU and intra-EU investment flows remains to be seen.

92 See reservations of Luxembourg, Portugal, Netherlands and Lithuania to the Termination Treaty available on the website on the European Council.

93 One of the last intra-EU BIT arbitrations (brought under the Hungary-Croatia BIT) was the case OTP Bank Plc v. Republic of Croatia (ICSID Case No. ARB/20/43), which was launched just a few days before the entry into force of the Termination Treaty in respect to both Hungary and Croatia.

Bibliography

- Ballantyne, J. (2021) 'EU Commission launches infringement proceedings over intra-EU BITs', *Global Arbitration Review* [online]. Available at: https://globalarbitrationreview.com/achmea/eu-commission-launches-infringement-proceedings-over-intra-eu-bits (Accessed: 27 January 2022).
- 'The consultation on intra-EU investment protection: an opportunity that should not be missed' (2020), *Global Arbitration Review* [online]. Available at: https://globalarbitrationreview.com/achmea/the-consultation-intra-eu-investment-protection-opportunity-should-not-be-missed (Accessed: 27 January 2022).
- Dahlquist, J., Peterson, L. E. (2016) 'Investigation: Denmark Proposes Mutual Termination of its Nine BITs with Fellow EU Member-States, Against Spectre of Infringement Cases', *IAReporter* [online]. Available at: https://www.iareporter.com/articles/investigation-denmark-proposes-mutual-termination-of-its-nine-bits-with-fellow-eu-member-states-against-spectre-of-infringement-cases/ (Accessed: 27 January 2022).
- Gaillard, E. (2011) 'Conclusions' in Kessedjian, C., (ed.) *Le droit européen et l'arbitrage d'investissement*. Paris: Éditions Panthéon-Assas.
- Gaillard, E. (2018) 'L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16)', *Revue critique de droit international privé,* 2018/3, pp. 616–630.
- Hepburn, J., Peterson, L. E. (2015) 'Italy is the EU's model citizen, when it comes to following European Commission demands to terminate intra-EU investment treaties', *IAReporter* [online]. Available at: https://www.iareporter.com/articles/investigation-italy-is-the-eus-model-citizen-when-it-comes-to-following-european-commission-demands-to-terminate-intra-eu-investment-treaties/ (Accessed: 27 January 2022).
- Hussain, M., Istatkov, R. (2009) 'Internal market still accounts for more than 50% of EU foreign direct investments and trade in services', *Eurostat, Statistics in Focus,* 56/2009.
- International Monetary Fund (2011) 'Regional Economic Outlook – Europe'
- Jones, T. (2017) 'Romania paves way for intra-EU BITs termination', *Global Arbitration Review* [online]. Available at: https://globalarbitrationreview.com/romania-paves-way-intra-eu-bits-termination (Accessed: 27 January 2022).
- Korom, V. (2018) 'Jurisprudence Achmea: la fin de l'arbitrage d'investissement au sein de l'Union européenne?', *Recueil Dalloz,* 2018/36, p. 2007.
- Korom, V. (2020) 'Signature de l'accord plurilatéral portant extinction des traités bilatéraux d'investissement intra-européens: la dernière heure de l'arbitrage d'investissement en Europe a-t-elle sonné?', *Recueil Dalloz,* 2020/30, pp. 1687–1689.
- Lavranos, N. (2016) 'Romania's termination of its intra-EU BITs: a counterproductive move', *Practical Law Arbitration Blog* [online]. Available at: http://arbitrationblog.practicallaw.com/romanias-termination-of-its-intra-eu-bits-a-counterproductive-move/ (Accessed: 27 January 2022).
- Lavranos, N. (2019) 'The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One', *Kluwer Arbitration Blog* [online]. Available at: http://arbitrationblog.kluwerarbitration.com/2019/12/01/the-eu-plurilateral-draft-termination-agreement-for-all-intra-eu-

bits-an-end-of-the-post-achmea-saga-and-the-beginning-of-a-new-one/ (Accessed: 27 January 2022).

- Lukic, S., Grill, A. (2016) 'The End of Intra-EU BITs: Fait Accompli or Another Way Out?', *Kluwer Arbitration Blog* [online]. Available at: http://arbitrationblog.kluwerarbitration.com/2016/11/16/the-end-of-intra-eu-bits-fait-accompli-or-another-way-out/ (Accessed: 27 January 2022).
- McCloskey, M. (2021) 'Safe Haven for Investors in (and Through) the UK Post-Brexit?', *ASIL Insights*, 25(3).
- Orecki, M. (2017) 'Bye-Bye BITs? Poland Reviews Its Investment Policy', *Kluwer Arbitration Blog* [online]. Available at: http://arbitrationblog.kluwerarbitration.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/ (Accessed: 27 January 2022).
- Orecki, M. (2017) 'Let the Show Begin: Poland Has Commenced the Process of BITs' Termination', *Kluwer Arbitration Blog* [online]. Available at: http://arbitrationblog.kluwerarbitration.com/2017/08/08/let-show-begin-poland-commenced-process-bits-termination/ (Accessed: 27 January 2022).
- Peterson, L. E. (2009) 'Denmark and Czech Rep to terminate BIT, but not all EU Members agree with Czech view that intra-EU BITs are unnecessary', *IAReporter* [online]. Available at: https://www.iareporter.com/articles/denmark-and-czech-rep-to-terminate-bit-but-not-all-eu-members-agree-with-czech-view-that-intra-eu-bits-are-unnecessary/ (Accessed: 27 January 2022).
- Peterson, L. E. (2011) 'Czech Republic terminated investment treaties in such a way as to cast doubt on residual legal protection for existing investments', *IAReporter* [online]. Available at: https://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/ (Accessed: 27 January 2022).
- Peterson, L. E. (2014) 'Investigation: Intervention by EU Commission – and Expression of Doubts on Enforceability – Preceded Investor's Decision to Drop Intra-EU BIT Claim', *IAReporter* [online]. Available at: https://www.iareporter.com/articles/investigation-intervention-by-eu-commission-and-expression-of-doubts-on-enforceability-preceded-investors-decision-to-drop-intra-eu-bit-claim/ (Accessed: 27 January 2022).
- Sornarajah, M. (2017) *The International Law on Foreign Investment*. 4th edn. Cambridge: Cambridge University Press.
- UNCTAD (2009), 'Recent developments in International Investment Agreements (2008-June 2009)', *IIA MONITOR*, No. 3, p. 5
- UNCTAD (2009), 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries', *UNCTAD Series on International Investment Policies for Development*.
- UNCTAD (2018), 'Fact Sheet on Intra-European Union Investor-State Arbitration Cases' *IIA Issues Note – International Investment Agreements*.
- UNCTAD (2021), 'Investor–State Dispute Settlement Cases: Facts and Figures 2020', *IIA Issues Note – International Investment Agreements*.
- Wierzbowski, M., Gubrynowicz, A. (2009) 'Conflict of Norms stemming from intra-EU BITs and EU Legal Obligations: Some Remarks and Possible Solutions', in Binder, C., Kriebaum, U., Reinisch, A., Wittich, S. (eds.) *International Investment Law for the 21st Century, Essays in honour of Christoph Schreuer*. Oxford: Oxford University Press.