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Aarhus University

A Study of the Compatibility Between Intra-EU Bilateral Investment Treaties and EU Law

Mette Dohn Borregaard

Student number: 201206538

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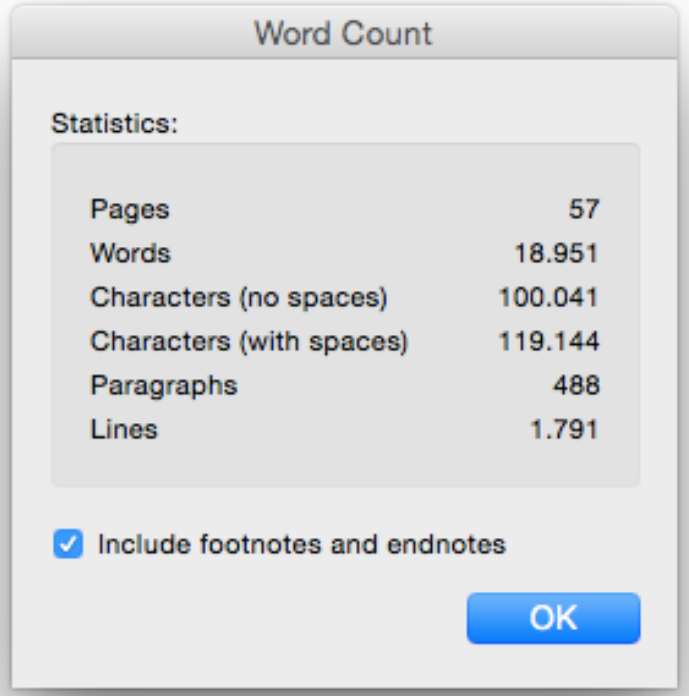
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ABBREVIATIONS

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CJEU	Court of Justice of the European Union
BGH	Bundesgerichtshof
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable treatment
FTA	Fair Trade Agreement
IIA	International Investment Agreement
ICSID	International Centre for Settlement of Investment
ICSID Convention	Convention on the Settlement of Investment disputes between States and Nationals of Other States 1965
ILC	International Law Commission
ISDS	Investor-state Dispute Settlement
MIT	Multilateral Investment Treaty
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA	Permanent Court of Arbitration
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UIC	Unified Investment Court
UNCITRAL	United Nations Commission on International Law
UNCITRAL Arbitration Rules	United Nations Commission on International Law Arbitration Rules
VCLT	Vienna Convention on the Law of Treaties 1996

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ABSTRACT

The purpose with this thesis is to examine the compatibility between intra-EU BITs and EU law, which the European Commission is disputing. The European Commission considers intra-EU BITs as incompatible with the EU legal order and takes the position that Member States are under an obligation to terminate their intra-EU BITs. In examining this matter the thesis will analyse the question on compatibility between intra-EU BITs and EU law from the different points of view of the European Commission and the arbitral tribunals. The lack of conformity between the European Commission and the arbitral tribunals has become evident in the *Micula* case, where Romania has to choose between breaching its EU law obligations or international law obligations, after being ordered by the European Commission not to pay an arbitral award since that would constitute illegal state-aid under EU law. Some clarification on the compatibility between intra-EU BITs and EU law might be forthcoming as the Court of Justice of the European Union recently by a preliminary reference due to the *Eureko* case has been asked to rule on the relationship between certain EU law provisions and intra-EU BITs. The conclusion in this thesis is that intra-EU BITs and EU law are in fact compatible with each other and should be applied in parallel.

1. INTRODUCTION

The question of compatibility between internal bilateral investment treaties (intra-EU BITs) and the European Union (EU) Member States (hereinafter Member States) and EU law is a highly debated topic among scholars and practitioners in international investment law. The European Commission (Commission) views intra-EU BITs as an *"anomaly within the EU internal market"*[1] because they violates the primacy of EU law and its uniform interpretation and EU law on non-discrimination on grounds of nationality. Thus, Member States are requested by the Commission to terminate their intra-EU BITs.[2]

In claiming these incompatibilities, the Commission has supported the respondent Member States by submitting *amicus curiae* briefs in a number of investor-state dispute settlements (ISDSs), most significantly requesting arbitral tribunals to give up jurisdiction and ultimately the denial of enforcement of the arbitral award within the EU. Nevertheless, none of the arbitral tribunals have been convinced by the Commission's arguments. In the *Micula* case, this has resulted in an arbitral tribunal ordering Romania to pay compensation to investors for breaching its BIT, but according to the Commission such compensation constitutes illegal state-aid under EU law so Romania has been ordered to suspend the payment of the award. This has left Romania in a situation where it will have to breach its international law obligations in order to comply with its EU law obligations, or the other way around.[3]

The current state of affairs is highly unsatisfactory for investors and Member States and their legitimate expectations concerning their legal rights and obligation under the concluded intra-EU BITs. However, a solution might be approaching as the Court of Justice of the European Union (CJEU) in a preliminary ruling has been asked to clarify the compatibility between certain EU law provisions and intra-EU BITs.[4]

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[1] *Eureko v The Slovak Republic,* PCA Case No. 2008-13, Award on jurisdiction, arbitrability and suspension, para. 177.
[2] See *infra* section 4.2
[3] See *infra* section 4.2 and 5.2.2
[4] See *infra* section 5.3.3

1.2 Research question

The purpose of this thesis is to examine the compatibility between intra-EU BITs and EU law. In doing so, I will present the different arguments put forward by the Commission, arbitral tribunals, investors and respondent states and analyse them according to the relevant provisions of EU law, public international law and case law.

1.3 Method

The thesis will apply the *legal dogmatic* method by means of describing, analysing, interpreting and systemizing the current state of law on intra-EU BITs and the compatibility with EU law according to the relevant sources of law *(de lege lata)*.[5] Furthermore, my discussion will have an element of *lege feranda* by describing how ISDS might be conducted in the future.[6]

Since the arguments by the CJEU, arbitral tribunals and respondent states have primarily been focused on the same provisions of EU law and public international law, I have analysed each of the relevant provisions according to its wording, its implied wording, context and the intention of the provision upon drafting. Hereafter, I have analysed rulings and opinions by the CJEU and awards rendered by arbitral tribunal, in order to examine how they have interpreted the provisions. In doing so, I have been cautious in selecting a broad variation of legal literature and scholars that are known for their expertise concerning international investment law and EU law.

When analysing EU law, the focus will be on primary EU legislation: The Treaty establishing the European Community (TEC) renamed as the Treaty on the Functioning of the European Union (TFEU)[7]. In order to provide the reader with how these treaties and their provisions are being integrated into the EU, I will analyse a number of secondary legislation, such as CJEU case law and opinions.[8] However, the influence of

[5] Evald and Schaumburg-Müller "Retsfilosofi, retsvidenskab og retskildelære" (Jurist- og Økonomforbundets Forlag 2004), p. 210
[6] Blume "Retssystemet og juridisk metode" (Jurist- og Økonomoforbundets Forlag 2009) p. 263
[7] Sources and Scope of European Union Law, Fact Sheets on the European Union, 2017, available at: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf
[8] Ibid.

the CJEU is not only that of interpreting the treaties. The CJEU is known for having a direct influence, meaning its interpretation of the treaties, resulting in rulings and case law. The CJEU's indirect influence is the indirect results of its rulings, e.g. putting pressure on the Commission to instigate legislation or discovering unclarified areas of law.[9] For instance the EU treaties where silence on the relationship between Union law and domestic law, thus the CJEU created the principle of direct effect that allows individuals to invoke EU law before national courts and the principle of supremacy, where Member States have a duty to give EU law precedence over domestic law and only the CJEU can invalid EU law.[10] All of these principles will also be applied in the thesis.

Concerning public international law the thesis will analyse the relevant provisions, particular the ones on interpretation of treaties and termination and suspension of the operation of treaties of the Vienna Convention on the Law of Treaties (VCLT). Here I will analyse case law by the arbitral tribunals in order to examine how arbitral tribunals has interpreted the VCLT when rendering an award.

1.4 Delimitation of the subject

The thesis will provide for a short introduction of international investment law, arbitration and the conclusion of BITs, here I will briefly mention the different kinds of international investment agreements, but the focus will be on BITs. More precisely on intra-EU BITs and not on BITs between Member States and a third state (extra-EU BITs), although extra-EU BITs will be mentioned shortly in relation to Regulation 1219/2012. The reason as to why extra-EU BITs are not included more in the thesis is because these are not causing the same legal debate on compatibility with EU law, thus not a part of the thesis.

Since the claims of the Commission in its *amicus curiae* briefs general has been the same, not all cases where the Commission has interfered as *amicus curiae* will be

[9] Dehousse, "The European Court of Justice" (St. Martin's Press Inc: New York 1998) p. 82
[10] Arnull, "Me and my shadow: The European Court of Justice and the Disintegration of European Union Law Fifty Years of European Community Law: Part I, (2007) Fordham International Law Journal, Volume 31, Issue 1, p. 1174

mentioned. Also, there are many different arbitral institutions, but the most sought for and relevant for the thesis is that of the International Centre for Settlement of Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL), which will be discussed. Lastly, the analysis of EU law will be in the light of the preliminary reference from the German Federal Supreme Court and their questions to the CJEU and the analysis of public international law will be based on the arguments provided for under the discussed arbitration cases. Other interesting arguments will be briefly mentioned under the sections "*commentaries"*.

1.5 Composition

Introductory, there will be a brief presentation of international investment arbitration. This presentation will introduce the reader to the different forms of international investment agreements, their purpose, history and the different arbitral tribunals (section 2). The next section will shortly touch upon extra-EU BITs and the rest will be EU focussed by introducing the EU legal order and the new EU competence on Foreign Direct Investment (FDI) (section 3). Then I will move on to the core of the thesis the issue on compatibility between intra-EU BITs and EU law, which has been discussed in a number of investment arbitration, here I will introduce the arbitral cases and the Commission's and tribunal's principal arguments and end each case with my commentaries on some of the main arguments/problems (section 4). The next part will have the similar structure as the previous one, but where the previous concerned the Commission's interference this part will be on the CJEU's intervention (section 5). Next is the beginning of the analysis, which will pick off where section 5 left by analysing the three provisions of the TFEU that the CJEU were asked to give a preliminary ruling on, afterwards I will analyse public international law under the VCLT and the relevant provisions. The section will draw connections to section 4 and 5, by analysing the tribunals' and Commission's argumentation in light of the relevant provisions (section 6). I will discuss the future of intra-EU BITs and suggest the alternatives to ISDS under intra-EU BITs (section 7). Lastly, I will conclude on the thesis and give my opinion as to the compatibility of intra-EU BITs and EU law (section 8).

2. INTRODUCTION TO INTERNATIONAL INVESTMENT ARBITRATION

2.1 International investment arbitration

International investment arbitration is a unique system where a private foreign investor is allowed to initiate ISDS against the recipient state of the investment.[11] The access to ISDS is due to the conclusion of international investment agreements (IIAs). The modern day IIAs can be divided into multilateral investment treaties (MITs) and bilateral investment treaties (BITs).[12] MITs can be treaties governing investments in a certain geographic area e.g. the North American Free Trade Agreement. They might also cover a specific type of investment, e.g. the Energy Charter Treaty (ECT) concerning the energy section. MITs and BITs can also be concluded as Free Trade Agreements (FTAs).[13]

2.2 Investment arbitral institutions

The majority of the 696 known ISDS cases in 2016 provided for arbitration under the jurisdiction of the ICSID.[14] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the ICSID Convention) is a multilateral treaty that was a part of a big ratification process in the 1980s and due to the accession of former communist and developing states in the 1990s the ICSID Convention became the leading arbitral institution.[15] Today the ICSID Convention has been ratified by 153 states, including all of the Member States except Poland.[16] By ratifying the ICSID Convention, the contracting states do not automatically agree to

[11] Giorgetti, "Who decides in international investment arbitration" (2013) University of Pennsylvania Journal of International Law, volume 35, issue 2, p. 438
[12] Wandahl, "International investment law and the right to regulate: a human rights perspective" (Routledge 2016), p. 10
[13] Ibid. p. 11
[14] Ibid. p. 104
[15] Van Harten, "Investment Treaty Arbitration and Public Law" (Oxford University Press 2007) p. 27
[16] ICSID annual report 2016, p. 8, available at: https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf

compulsory arbitration, but through the conclusion of their BITs the states give their binding consent to arbitration under the ICSID Convention.[17]

The significantly difference between the ICSID Convention and other investment institutions is the binding effect of ICSID awards in accordance with Article 53 and 54 of the ICSID Convention. All other awards arising out of a dispute involving BITs are subject to general national legislation and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) a convention that all of the Member States are a party to.[18]

According to Article 53 of the ICSID Convention, any issued award is binding and cannot be subject to any appeal, and the only way of reviewing an award is under Article 52 of the ICSID Convention, which allows the disputing parties the right to challenge the award in front of an *ad hoc* committee – appointed by the ICSID. This means that once an award has been rendered no national or international courts can examine the award, except if an ICSID tribunal without jurisdiction has rendered the award. In such cases the parties can bring the dispute before another court. Once an award has been rendered it is immediately recognized and enforced due to article 54(1) of the ICSID Convention. This means that all members of the ICSID Convention are obligated to enforce any pecuniary obligations within the ICSID award and cannot refuse to do so.[19]

Another common institution is the UNCITRAL, which were adopted in 1976 and revised in 2010. Unlike the ICSID Convention there is no dedicated institution linked with the administration of the arbitrations. In accordance with the UNCITRAL Arbitration Rules, the institution must be chosen by the tribunal or the parties, allowing the parties to choose for instance the institution of the ICSID to administer the *ad hoc* UNCITRAL arbitration.[20]

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[17] ICSID, Dispute Settlement, "2.3 Consent to Arbitration" (2003) p. 7. available at: http://unctad.org/en/docs/edmmisc232add2_en.pdf

[18] Born, "International Arbitration: Law and Practice" (Kluwer Law International 2015) p. 411-444, para. 8

[19] Schreuer, "Non-pecuniary remedies in ICSID arbitration" (2004) Arbitration International 20, no 4, p. 325

[20] IISD Report, Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes (2014) p. 3. Available at: http://www.iisd.org/pdf/2014/investment_treaty_arbitration.pdf

2.3 BITs

BITs are international treaties concluded between two states based on public international law.[21] After World War II many developing countries gradually started to liberalize the transfer of a free capital flow by relying on foreign countries' capital, technology and management skills.[22] This lead to the conclusion of the first BIT with compulsory arbitration in 1968 between The Netherlands and Indonesia[23] and later in 1969 the conclusion of BITs with compulsory arbitration between Italy and Chad[24] and Côte d'Ivoire.[25] Before this time BITs had been signed but with no mention of compulsory arbitration,[26] instead the dispute resolution was based on the mutual consent of the respondent state.[27] It was not until the 1990s that the rule on compulsory arbitration became a common rule when drafting BITs, meaning the origin of IIA as we know it today.[28] The new drafting technique led to the conclusion of a large scale of today's BITs, thus 2,000 BITs out of 3,304 agreements[29] were concluded in the 1990s.[30]

Post World War II, BITs were often concluded between a developed country (the exporting part) and a developing country (the importing part).[31] In doing so developed countries promoted investment by their nationals and developing countries attracted investment. The objective of these BITs was initially to secure legal protection for the foreign investments, whereas today's BITs are more designed at removing obstacles to the free trade and investment and liberalizing investment flows.[32] In reaching these objectives most BITs have similar structures and substance. For instance, most BITs

[21] Lavranos, "New Developments in the Interaction between International Investment Law and EU Law" (2010) The law and practice of international courts and tribunals, no. 9, p. 413
[22] Dolzer and Stevens, Bilateral Investment Treaties, (The Hague: Kluwer Law International 1995), p. 12
[23] Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment. (Indonesia-Netherlands BIT 1968)
[24] Chad-Italy BIT 1969 (only available in Italian)
[25] Côte d'Ivoire-Italy BIT 1969 (Not in force any longer and not available)
[26] Ex. Geselz zu dem Vertrag vom 25.November 1959 zwischen der Bundesrepublik Deutschland und Pakistan zur Forderung und zum Schutz von Kapitalanlagen (Germany-Pakistan BIT 1959)
[27] Van Harten (n 15) (2007), p. 30
[28] Sánchez-Ancochea and Shadlen, "The Political Economy of Hemispheric Integration, Responding to Globalization in the Americas" (Palgrave MacMillian 2008) p. 93
[29] 2,946 BITs and 358 other agreements in 2015.
[30] Van Harten (n 15) (2007) p. 26 and the ICSID annual report, (2016), p. 101
[31] Dimopoulos, "EU Foreign Investment Law" (Oxford University Press 2011), p. 12-13
[32] Sauvant and Sachs, "The Effect Of Treaties On Foreign Direct Investment" (Oxford University Press 2009), p. 13- 15

will contain a section on ISDS, protection against expropriation, discrimination and fair and equitable treatment (FET).[33]

2.4 Summary

International investment arbitration is a legal framework provided for by the conclusion of MITs and BITs. These BITs grant foreign investors legal protection when investing abroad and in return the host states attract foreign investment on their territory, thereby creating a capital flow. A BIT will contain a number of provisions safeguarding the foreign investor's investment and probably the most prominent one is the provision on compulsory arbitration presumably under the ICSID Convention or UNCITRAL Arbitration Rules.

[33] Böckstiegel, "Commercial and Investment Arbitration: How Different are they Today?" (2012) The Journal of the London Court of International Arbitration, p. 582

3. INVESTMENT ARBITRATION WITHIN THE EUROPEAN UNION

3.1 The EU legal order

The EU legal system consists of the 28 Member State courts and the courts of the Court of Justice of the European Union (CJEU).[34] To ensure a unique legal order the EU has developed a *"complete system of judicial remedies"* for individuals, Member States, EU institutions and its agencies and bodies[35]

One of these remedies is the power of the Member State courts to hear claims from individuals. If an individual from a Member State believes that his/her rights under EU law have been violated, this person cannot initiate proceedings against a public entity or private person directly at the CJEU this must be done through one's national court who then will apply EU law on the matter.[36] In securing that the Member State courts apply EU law correctly, Member State courts have the access to preliminary references by the CJEU under Article 267 of the TFEU. Such reference is voluntary for the Member State courts, but the Commission also has the opportunity to initiate infringement proceedings against Member States for not complying with EU-law.[37]

3.2 Intra-EU BITS

After the collapse of the Soviet Union and throughout the 1990s many EU Member States started to sign BITs with many Eastern European countries.[38] These were simply known as extra-EU BITs.

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[34] Ankersmit, "The compatibility of Investment Arbitration in the EU Trade Agreements with the EU judicial system" (2016) The Journal of World Investment & Trade, special issue, p. 49
[35] Opinion 1/09 (2011) Opinion 1/09 of the Court (Full Court) ECR I-01137 (European Court of Justice) para. 70
[36] Parish, " International Courts and the European Legal Order" (2012) The European Journal of International Law, volume 23, no. 1, p. 141
[37] Ibid. 141-142
[38] Strik, "Shaping the Single European Market in the Field of Foreign Direct Investment" (Hart Publishing 2014), p. 188

During the period of accession of Eastern European states into the EU, Europe Agreements were established between the Community and the Member States, in order to create an appropriate transition for the new Member States into the Community.[39] According to which Eastern European states were actually encouraged to conclude BITs with EU Member States, which meant that with the enlargement of the EU in 2004 and 2007, a big amount of these former extra-EU BITs became intra-EU BITs.[40] Before this time there only existed two intra-EU BITs.[41] However with the enlargement rounds the number grew to 190 intra-EU BITs.[42] These intra-EU BITs has resulted in European investors enforcing rights and protections granted under intra-EU BITs (and the ECT) in such a large scale that intra-EU cases today accounts for around three quarters of the 180 cases against EU Member States.[43]

3.3 EU Competence over Foreign Direct Investment

Before the entry into force of the Treaty of Lisbon matters on protection of investments was solely within the competence of each Member State, hereby allowing an extensive number of extra-EU BITs.[44] The EU's competence was restricted to Common Commercial Policy (CCP), but with the entry into force of the Treaty of Lisbon on December 1st 2009, the competence on FDI was shifted from the Member States to the scope of CCP in accordance with Articles 206 and 207 TFEU. Thus, if a Member State wants to conclude a new BIT such agreement will require a double ratification, since both the Council of the European Union (the Council) and the European Parliament will have to support the proposed agreement provided for by the Commission.[45]

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[39] Ibid. p. 189
[40] Ibid.
[41] Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Grichenland übder die Förderung und den gegenseitigen Schutc von Kapitalanlagen (Germany-Greece BIT 1963) and Gesetz zu dem Vertrag von 16. September 1980 zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (Germany-Portugal BIT 1980)
[42] Olík and Fyrbach "The competence of investment arbitration tribunals to seek preliminary rulings from European Courts" (2011) Czech Yearbook of International Law, para. 10.01
[43] Based on intra-EU BITs or the ECT. Bungenberg and Reinisch, "Legal problems of Intra-EU BITs" (2016) The journal of world investment & trade, volume 17, issue 6, p. 871
[44] Strik (n 38) 2014, p. 67
[45] Articles 218(5) and (6)(a) TFEU

With the newly acquired EU competence on FDI the discussion on the relationship between intra-EU BITs and EU law has emerged. Despite the fact that the scope of the FDI is not defined anywhere in the EU treaties, the Commission considers that all matters regulated in BITs are now integrated in the new EU exclusive competence, that includes most favoured nation treatment (MFN), FET, dispute settlement procedures and compensation for expropriation.[46] In clarifying the issue on the scope of the competence, the Commission in November 2015 requested an opinion from the CJEU on which provisions of the envisaged EU-Singapore FTA falls within the EU's exclusive or shared competence with Member States, which means that the CJEU is bound to give their final opinion concerning the scope of the new EU competence on FDI.[47]

3.4 Extra-EU BITs

3.4.1 Regulation 1219/2012

With the entry into force of the Lisbon Treaty and the competence on FDIs being exclusively managed by the EU, it created uncertainties in the area of extra-EU BITs, since there was no mention of their future status. To ensure investors and Member States the Council stressed that the new EU competence, would not affect the protection and guarantees that investors had been promised under existing extra-EU BITs.[48] Also, in December 2012, the EU passed Regulation 1219/2012, which allowed Member States to preserve existing extra-EU BITs, until the EU had renegotiated a new agreement between itself and the third state that would substitute the former.[49]

[46] Lavranos (n 21) (2010) p. 411-412 and presentation by the Commission, "EU investment policy state of play" (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150853.pdf
[47] Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore (2012/C363/22), OJ 2012 No. C363/18, 3. November 2015.
[48] Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council meeting, Luxembourg, 25. October 2010. Para. 9
[49] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ L351/40

One of the most significant provisions for the investors in Regulation 1219/2012 is Article 3 on EU authorization for the continuation of extra-EU BITs.[50] Even though the Council had stated in its Conclusions of 25 October 2010 that there was no need for such an authorization, since Article 351(1) TFEU already provided for such authorization, Article 3 was still incorporated into Regulation 1219/2012.[51] By concluding Regulation 1219/2012 some of the doubts that the investors had concerning extra-EU BITs and their further validity has been removed.

3.4.2 Article 351 TFEU and Extra-EU BITs

As mentioned by the Council, Article 351(1) TFEU provides for the future validity of extra-EU BITs by stating that if a BIT has been concluded prior to a state's accession to the EU or before January 1958, the rights and obligations that the BIT has created for the third party will be protected from the prevalence of EU-law-[52] This is also known as the principle of *pacta sunt servanda.*[53] This means that if a Member State is not complying with EU law due to its obligations under an earlier agreement such conduct will be permissible.[54]

While Article 351(1) TFEU suspends the prevalence of EU law over privileged pre-accession agreements for third states, Article 351(2) TFEU states that Member States must eliminate any incompatibilities between such privileged agreements concluded before the state's accession to the EU.[55]

The formulation of the provisions in Article 351 TFEU is bound to create conflicts in situation where Member States have concluded pre-accession agreements with third countries. This was the case in the 2004 infringement proceedings against Austria, Sweden, Denmark and Finland concerning inconsistencies between EU law and extra-

[50] Ibid. Article 3.
[51] Council meeting, Ibid. 54, 2010, para. 9
[52] Kokott and Sobotta, "Investment Arbitration and EU Law" (2016) Cambridge Yearbook of European Legal Studies, p. 12
[53] Brown and Alcover-Llubià, "The external investment policy of the European Union in the light of the entry into force of the Treaty of Lisbon" in Karl P Sauvant (ed), Yearbook on International Investment Law and policy 2010-2011(Oxford University Press 2012) p. 150
[54] Von Papp "Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited" (2015) Legal Issues of Economic Integration, volume 42, p. 5
[55] Kokott and Sobotta (n 52) (2016) p. 13

EU BITs.[56] The CJEU found that the three Member States had failed to comply with Article 351(2) TFEU because they had not taken the appropriate measures to amend their pre-accession BITs. In claiming this, the CJEU emphasized the principle of uniform application.[57] Thus it would appear that according to the CJEU Article 351 TFEU does not apply to extra-EU BITs when they are inconsistent with EU law.

3.5 Article 351 TFEU and intra-EU BITs

In relation to intra-EU BITs the CJEU concluded in *Commission v Italy*, concerning pre-existing obligations between Member States under the General Agreement on Tariffs and Trade, that Article 351(1) TFEU did not apply to agreements containing elements that at a later stage had become EU competence and that Article 351(1) TFEU could not be relied on to enforce obligations against other Member States.[58] Lastly, in matters governed by EU law the EU treaties prevailed over agreements made between Member States before the EU treaties went into force.[59] Thus when the Member States acceded into the EU they lost their right to comply with other prior obligations *inter se* which would violate EU law.[60]

According to Von Papp, not including earlier intra-EU BITs is an over inclusive approach taken by the CJEU.[61] Von Papp believes that the CJEU in applying the *lex posterior* rule in *Commission v Italy* [62] disregards that according to public international law the *lex prior* agreement must be incompatible with the *lex posterior* agreement, meaning in relation to intra-EU BITs that the intra-EU BITs must be incompatible with the EU law before EU law will prevail.[63] In Von Papp's opinion, instead of deciding

[56] Case C-205/06, *Commission v. Austria* (2009), Case C-249/06, *Commission v. Sweden* (2009), Case C 118/07, *Commission v. Finland.* (2009) The Commission closed its case against Denmark after Denmark notified the Commission that it had terminated the offending BIT.
[57] Terhecte, Bungenberg and Hobe "Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties" European Yearbook of International Economic Law (Springer 2015) p. 87
[58] Case 10/61 *Commission v Italy* (1961)
[59] Ibid.
[60] Strik (n 38) (2014) p. 216
[61] Von Papp (n 54) (2015) p. 12
[62] *Commission v Italy* (n 58) para. 26
[63] Von Papp (n 54) (2015) p. 12

that Article 351(1) TFEU does not apply to intra-EU BITs, rules should be drafted on when there is an incompatibility between an earlier agreement and EU-law.[64]

From a textual perspective Article 351 TFEU applies to agreements between Member States and third countries, which none of the parties in relation to intra-EU BITs are. The new Member States might have been third countries when they concluded the BITs with the old Member State, but when they acceded to the EU they lost their status as third countries and became EU Member States, accordingly not enjoying the protecting under Article 351(1) TFEU. After accession to the EU agreements concluded between two Member States are only possible in areas that are not the competence of EU. Once an area becomes EU competence, the principle on EU law supremacy applies, whether the agreement is intra-EU or national, thus obligations that violate EU law cannot be applied.[65] Meaning that intra-EU BITs do not fall under Article 351 TFEU.

3.6 Summary

With the accession of Eastern European states to the EU a great number of former extra-EU BITs suddenly became intra-EU BITs and with the entry into force of the Lisbon Treaty in 2009 the EU acquired competence on concluding such BITs. This created a situation where foreign investors feared for the protection of their investments under previously concluded BITs. To reassure the investors and the Member States Regulation 1219/2012 was passed allowing the continual application of extra-EU BITs until a new agreement between the EU and the third states had been concluded. Article 351(1) TFEU contains the *pacta sunt servanda* principle but according to the CJEU extra-EU BITs cannot be inconsistent with EU law under Article 351(2) TFEU. Intra-EU BITs on the other hand are in its entirety not included under Article 351(1) TFEU.

[64] Ibid.
[65] Klamert, "The Principle of loyalty in EU Law" (Oxford University Press 2014) p. 280-281

4. INTERFERENCE BY THE EUROPEAN COMMISSION

4.1 The term *"amicus curiae"*

An *amicus curiae* is described as *"a person with strong interest in or views on the subject matter of an action, (who) may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of broad public interest; e.g. civil rights cases*"[66] First and foremost the Commission has invoked its right to participate as amicus curiae under the ICSID Convention Article 37(2) and the UNCITRAL Rules on transparency.[67] Another justification is that the Commission as the "Guardian of the Treaties" has to ensure that Member States are aware of their obligations under EU law when facing ISDS.[68] The first time the Commission was granted submission as *amicus curiae* was in 2008 in the ICSID case AES v. Hungary.[69] Before this case is was not certain whether or not a regional organisation could intervene as *amicus curiae* in ICSID arbitrations.[70]

4.2 The Commission as *amicus curiae*

Before a third party can participate in an arbitral proceeding the party will have to submit a request to the tribunal explaining its reason to participate, or be requested by

[66] Mourre, "Are Amici Curiae The Proper Response To The Public's Concerns On Transparency In Investment Arbitration?" (2006) 5 The Law & Practice of International Courts and Tribunals, volume 5, issue 2, p. 257
[67] 68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, para.graph 4, as adopted in 2013)
[68] Knahr, "The new rules on participation of non-disputing parties in ICSID arbitration: Blessing or course?" In Brown and Miles (Eds.) Evolution in Investment Treaty Law and Arbitration (Cambridge University Press 2011)
[69] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, Case No. ARB/07/22, Award of 23 September 2010
[70] Gonzáles-Bueno and Lozano "More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration" (2015), available at: http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/

the tribunal or by one of the disputing parties to do so.[71] In most of the cases discussed below, it has been the Commission requesting participation, all though in some case it has been by request of the respondent state.[72] The submissions by the Commission have generally been limited by the arbitral tribunals to approximately 25 pages.[73] Traditionally an *amicus curiae* submission is limited to the merits, excluding the procedure such as issues on jurisdiction.[74] Nevertheless the Commission has acquired a quite irregular role as *amicus curiae* by never being denied challenging the jurisdiction together with the disputing parties, and has even allowed to do so without any of the disputing parties claiming it in *Electrabel v. Hungary.*[75]

As mentioned above intra-EU cases account for a vast majority of IIA disputes within the Union.[76] Before the Commission intervened as *amicus curiae* the Commission's Directorate General responsible for the Internal Market and Services prepared a note in 2006 that stated that *"most of the provisions of such BITs have been replaced by previsions of Community law..(..)"* and that this could result in arbitration taking place *"without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome."*[77]

According to the Commission, intra-EU BITs are an *"anomaly within the EU internal market."*[78] Some of the arguments put forward by the Commission in its *amicus curiae* briefs, is that the provisions on ISDS within the intra-EU BITs circumvent the exclusive jurisdiction of the CJEU under Article 344 TFEU and its uniform interpretation and since not all EU investors have been granted ISDS under an intra-EU BIT, this will in

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[71] Levine, "Amicus Curiae In International Investment Arbitration: The Implications Of An Increase In Third-Party Participation" (2011) Berkeley Journal of International Law, volume 29, issue 1, p. 200
[72] See European American Investment Bank AG (Austria) v. The Slovak Republic.; PCA Case No. 2010-17 and Eureko B.V. v. The Slovak Republic; PCA Case No.2008-13; Award on Jurisdiction and Eastern Sugar B.V. (Netherlands) v. The Czech Republic, Partial award, Stockholm Chamber of Commerce, SCC Case No. 088/2004
[73] Except in *Eureko B.V. v. The Slovak Republic;* PCA Case No.2008-13; Award on Jurisdiction and *Electrabel S.A. v. Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012,
[74] Graham "Amicus Curiae & Investment Arbitrations" Advocates for International Development, 2012, p. 8
[75] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 2.23
[76] (n 43)
[77] The Free Movement of Capital, Note for the Economic and Financial Committee, prepared by the European Commission, Internal Market and Services DG, 27
[78] *Eureko B.V. v. The Slovak Republic;* PCA Case No.2008-13; Award on Jurisdiction, Ibid. 80, para. 177.

the Commission's opinion lead to discrimination violating Article 18 TFEU on non-discrimination on the grounds of nationality.[79]

4.3 The Commission as *amicus curiae* in *Eastern Sugar v. Czech Republic*

The first time the Commission expressed its disapproval on intra-EU BITs was via two letters[80] to the tribunal in the case *Eastern Sugar B.V. (Netherlands) v. The Czech Republic* in 2006 (*Eastern Sugar*).[81] The dispute was initiated by the Dutch claimant who argued that a regulatory sugar regime based on EU's agricultural quota system and applied by the Czech Republic in 2000 breached the Czech-Dutch BIT.[82]

Firstly, the Commission and the respondent state both claimed that the tribunal lacked jurisdiction due to the exclusive jurisdiction of the CJEU, in accordance with Article 344 TFEU.[83] Secondly, the Commission argued that the BIT provision on ISDS would lead to a more favourable treatment of the parties covered by the BIT, thereby breaching Article 12 of the TEC (now Article 18 TFEU) on non-discrimination.[84] The respondent state argued by referring to Article 59 of the VCLT on termination of an earlier treaty covering the same subject matter as a later one, that the BIT had been terminated when the Czech Republic acceded to the EU and its treaties in 2004.[85]

The tribunal noted that there was no discrimination of other EU citizens who were not a part of the BIT instead these EU citizens should just be offered the same protection.[86] The fact that the respondent state accented to the EU did not mean the automatic termination of the BIT in accordance with Article 59 VCLT. Termination had to be

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[79] Lavranos (n 21) (2010) p. 423
[80] It is not clear whether the Commission formally participated as *amicus* in the case, noting that the *Eureko* tribunal invited the Commission to update the views it had expressed in the *Eastern Sugar* case. Knahr (n 68) (2011) p. 312
[81] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* Partial award, Stockholm Chamber of Commerce, SCC Case No. 088/2004
[82] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands-Slovakia BIT 1975)
[83] *Eastern Sugar* (n 81) paras. 110 and 186
[84] Ibid. para. 119
[85] Ibid. paras. 100-101
[86] Ibid. para. 170

done through the application of the VCLT.[87] With regards, to the argument on the BIT and EU law covering the same subject matter, the tribunal stated that both treaties might cover intra-EU cross border investments, but where EU law on free movement of capital guaranteed protection *outwards* by allowing investors to redraw the investment from the host state and still be protected under EU-law, the BIT provided for protection *during* the investment like FET, prohibition of expropriation, guarantees for full protection and security and ISDS.[88] Since the BIT did not cover the same subject matter as EU law and had not been terminated, the Tribunal accepted its own jurisdiction.[89]

4.3.1 Commentaries on *Eastern Sugar v. Czech Republic*

The tribunal reasoning in *Eastern Sugar* provides for an interesting insight as to how one can interpret the issue on termination and the same subject matter under Article 59 VCLT. The tribunal concluded that the BIT and EU law did in fact cover the same overall subject (being intra-EU cross boarder investments) but the intra-EU BIT had different provisions on FET, full protection and security than the ones provided for under EU law, thus making Article 59 VCLT inapplicable.[90] When interpreting whether the BIT and EU law covered the same subject matter, the tribunal also looked at the objective behind each treaty and concluded that they were not the same.[91]

4.4 The Commission as *amicus curiae* in the two Hungarian cases

In November 2008, the Commission was granted permission to submit an *amicus curiae* brief under the ICSID Arbitration Rules in *AES v. Hungary (AES)*.[92] However the tribunal ruled that the Commission was only allowed to intervene in the proceeding with regards to legal arguments, but was denied access to the parties' submission.[93] The denial of access to the parties' submission meant that the Commission could not

[87] Ibid. paras. 157 and 172
[88] Ibid. paras. 160, 163, 164
[89] Ibid. para. 181
[90] Ibid. para. 150
[91] Ibid. para. 164
[92] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, Case No. ARB/07/22, Award of 23 September 2010
[93] Ibid. para. 3.22

challenge the tribunal's jurisdiction, since the parties had not raised such questions on jurisdiction. The tribunal came to the conclusion that Hungary and the implemented preferential pricing scheme under power purchase agreements did not constitute illegal state aid under EU competition laws.[94]

In the same vein, the Commission also intervened by filling another *amicus curia* brief in *Electrabel v. Hungary (Electrabel).*[95] The proceedings was initiated by the Belgian energy company Electrabel against Hungary for breaching the investor's FET under the ECT when terminating a power purchase agreement between the parties, a termination that was required by the Commission due to the agreement's violation of EU state-aid rules under Article 107 TFEU.[96]

Remarkably enough, the Commission was allowed to challenge the jurisdiction even though the question had not been raised by any of the disputing parties:

"(…) the Tribunal found it necessary to consider certain legal materials which were not cited by the Parties themselves, particularly as regards matters relating to the Tribunal's jurisdiction (disputed by the Commission but no the Parties) and the law(s) potentially applicable to this arbitration."[97]

Firstly the Commission objected to the jurisdiction of the tribunal by referring to the exclusive jurisdiction of the CJEU within Article 292 of the TEC (now Article 344 TFEU).[98] In doing so the Commission referred to the *Mox Plant* case,[99] where Ireland had initiated proceedings against the UK under the United Nations Convention on the Law of the Sea Dispute Settlement system, which the CJEU ruled as a violation of its own exclusive competence.[100]

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[94] *AES* (n 92) para. 10.3.17
[95] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012
[96] Ibid. paras. 6.4-6.7
[97] Ibid. para. 2.3
[98] Ibid. para. 5.20
[99] Case C-459/03, *Commission v Ireland* (Mox Plant) 2006
[100] *Electrabel* (n 95) para. 65

The tribunal rejected the objection, since unlike the *Mox Plant* case this was not a dispute between two Member States, but a Member State and a private party, which were not included under Article 292 TFEU (now Article 344 TFEU).[101] The tribunal also argued that arbitration between private parties previously had been acknowledged by the CJEU before in the *Eco Swiss* case.[102] But the tribunal was well aware that the only reason why the CJEU had not objected to the tribunal's jurisdiction in the *Eco Swiss* case, was because the award was subject to control by the Dutch courts, and the Dutch courts were allowed to ask for a preliminary ruling by the CJEU, under Article 234 TFEU (now Article 267 TFEU), but the CJEU would not allow for such referral right for the *Electrabel* tribunal[103]

Secondly the Commission also stated that any conflict between the ECT and EU law should be sought by a harmonious interpretation of the two treaties.[104] But if any direct incompatibilities should occur, EU law would prevail over the ECT and any award stating otherwise by providing for compensation would not be enforceable, equivalent to an incompatible ruling from a Member State court.[105]

The tribunal did not find any incompatibilities between the ECT and EU law but acknowledged that if there were any incompatibilities, because of the special relationship between the two treaties, the two texts should be reconciled.[106] This special relationship was due to the fact that the EU had been the determining actor in the creation of the ECT, thus it would have made no sense for the EU to promote and subscribe to the ECT if that had meant taken on obligations inconsistent with EU law and.[107] Even though the ECT had been implemented in 1978 before the EC treaty in 2004, the Member States were already signatories to the Rome Treaty, which according to Article 32 of the VCLT on interpretation, had to be taken into account, thus is had to be presumed that the conclusion of the ECT by the EU and its Member States should

[101] *Electrabel* (n 95) para. 4.151
[102] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, (1999) para. 40.
[103] *Electrabel* (n 95) para. 4.153
[104] Ibid. para. 4.109
[105] Ibid. paras. 4.107 and 4.110
[106] Ibid. para. 4.133
[107] Ibid.

have been in conformity with EU law.[108] Because of this special relationship between the ECT and EU law, the tribunal noted that investors in the Member States, could not have any legitimate expectations that the ECT would protect their investment if the investments where incompatible with EU competition rules.[109]

4.4.1 Commentaries on *Electrabel v. Hungary*

According to the Commission and tribunal it seems that they both favour a harmonious interpretation, but if there were any incompatibilities between the ECT and EU competition rules, EU law would prevail between Member States. The Commission bases this on the primacy of EU law and the tribunal on the special relationship between the ECT and EU law. The argumentation of the tribunal has received a lot of criticism from non-EU investors, because this harmonious interpretation would mean that Member States in investment arbitrations would be allowed to claim that they amended their laws due to the prevalence of EU law, without breaching their obligations under the ECT.[110] This would mean that all Member States could violate the ECT, thereby making it ineffective.

What is also interesting to note is the Commission's view on the enforcement of an award that is incompatible with EU law. According to the Commission such awards are not to be enforced within the EU. However, since non-ICSID awards are subject to the New York Convention and signatories of the ICSID Convention are unconditionally obliged to enforce an award under 54 of the ICSID Convention, such denial of enforcement by the Commission would mean that Member States were to breach its obligations under international law. Unless, domestic courts were to justify any refusal of enforcement of non-ICSID awards with the public policy exception under Article V(2)(b) of the New York Convention or ICSID awards with Article 54(3) of the ICSID Convention stating that: *"execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought."* Meaning that if Member States' courts were to apply EU law,

[108] Ibid. para. 4.134
[109] Ibid. para. 4.141
[110] Stanic "The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction" (2015) Austrian Yearbook on International Arbitration, p. 44

since EU takes precedence over national law, the award would not be enforceable under EU law, since the EU itself is not a signatory to the ICSID Convention.[111]

4.5 Summary

The Commission considers intra-EU BITs as treaties that violates the primacy of EU law by infringing on the exclusive jurisdiction of the CJEU as the sole interpreter of EU law and by breaching Article 18 TFEU on non-discrimination on grounds of nationality. In claiming this, the Commission has been submitting *amicus* curiae briefs to arbitral tribunal and as it has been shown in the above cases the Commission's role as *amicus curiae* is quite irregular. Not only is the Commission claiming the above violations, but is also arguing in that any award violating EU law will not be enforced within the EU, thereby disregarding the Member States obligations under international law.

[111] Wehland "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle? (2009) International and Compara.tive Law Quarterly, volume 58, Issue 2, p. 308.

5. INVOLVEMENT BY THE COURT OF JUSTICE OF THE EUROPEAN UNION

5.1 Introduction

The Commission has not only interfered by submitting *amicus curiae* briefs, some of the Member States (the Netherlands, Romania, Austria, Sweden and Slovakia) that have been involved in the *amicus curiae* cases, have also been targeted with infringement proceedings by the Commission in 2015.[112] This comes at a time where Swedish investors have been granted compensation from Romania in the *Micula* case, but where the Commission has issued an injunction prohibiting Romania to pay the award granted by an ICSID tribunal, thus the Swedish investors have initiated annulment proceedings against the Commission's decision at the CJEU. The *Micula* case and the five infringement cases against Member States are currently pending before the CJEU and were joined in March 2016 by a preliminary reference from the German Federal Supreme Court due to the *Eureko* case.[113]

5.2 *Micula and others v. Romania*

Micula and other v. Romania (Micula) was initiated in 2005 by the two Swedish Micula brothers, who on the bases of a BIT had invested in a less-developed region in Romania.[114][115] Romania had implemented several state-aid laws and regulations to attract foreign investment in this economically challenged region, the most significant one being EGO 24, offering investors incentives for a period of 10 years. The Micula brothers received their license for the EGO 24 regulation in the beginning of the 2000's that then would be valid for 10 years.[116]

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[112] European Commission press release on 18th of June 2015, available at: http://europa.eu/rapid/press-release_IP-15-5198_en.htm
[113] German Federal Supreme Court Decision I ZB 2/15 of 3 March 2016. Available at: http://www.allenovery.com/SiteCollectionDocuments/Translation_German_decision_
[114] *Micula and others v. Romania,* ICSID Case No. ARB/05/20, Final Award Dec. 11 2012
[115] Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (Sweden-Romania BIT 2002)
[116] Micula (n 114) para. 201 a

Meanwhile Romania was applying towards EU membership accession in 1995. During this accession period, the Commission requested Romania to bring its state-aid regulations in accordance with EU law, which lead to Romania repealing EGO 24 in 2005 before accessing to the EU in 2007.[117]

Subsequently the Micula brothers initiated ICSID proceedings in 2005 against Romania, claiming that the repealing of EGO 24 had violated the provision on FET and their legitimate expectations under the BIT.[118] Romania did not deny repealing EGO 24, but claimed that it did not breach of the BIT, since it was necessary in order to comply with EU law on illegal state-aid under Article 107 TFEU.[119] Meaning that yet again there was a situation where the obligations under EU law and an intra-EU BIT created contradictory commitments.

5.2.1 The Commission as amicus curiae in *Micula and others v Romania*

In 2009, The ICSID tribunal invited the Commission as an *amicus* in the case. In its brief the Commission argued that the tribunal should apply EU law on state-aid instead of the incompatible BIT, in accordance with the *lex posterior* rule in Article 30(3) VCLT, under which the later treaty prevails if in conflict with an earlier one.[120] The Commission claimed that Romania should not pay any damages, since it would constitute illegal state-aid under EU law and therefore be enforceable within the EU.[121] While acknowledging Article 54(1) of the ICSID Convention concerning the recognition of ICSID awards by a contracting state, the Commission also noted that the EU itself was not a contracting state to the ICSID Convention and therefore not bound by it provisions.[122] In the Commission's opinion this meant that if any Member States were obliged under the Article 54(1) to enforce an award against Romania, that Member State would have to refer the case to the CJEU under Article 267 TFEU and thereby

[117] Ibid. para. 178
[118] Ibid. para. 254
[119] Ibid. para. 132
[120] Ibid. para. 317
[121] Ibid. para. 336
[122] Ibid. para. 336

stay proceedings.[123] Thus, the Commission claimed that EU law took primacy over the ICSID Convention.[124]

The tribunal recognized that the general context of EU law had to be considered when interpreting the BIT, as provided for under Article 31 VCLT.[125] But since Romania was not a Member State during the signing of the BIT there was no legitimate expectation and therefore EU law was not directly applicable to the dispute and so there were no conflict between the BIT and EU law.[126] In relation to recognition, the tribunal did not go into a long discussion, but simply quoted Articles 53 and 54 of the ICSID Convention, as if to remind the Commission of the parties' international obligations.[127] In conclusion the tribunal reached the decision that Romania had violated the FET standards in the BIT and had to pay damages to the Micula brothers.[128]

5.2.2 Further developments in *Micula and others v. Romania*

In the beginning of 2014, Romania offset taxes owed by the Micula brothers, for an amount of 80 million EURO.[129] Also in accordance with Article 54 of the ICSID Convention, a Bucharest court executed the award and seized 10 million EUR from the Romanian Ministry of Finance.[130] Due to these developments, in May 2014 the Commission issued an injunction against Romania ordering Romania to suspend the payments, until the Commission had examined the compatibility of such payments with the internal market.[131] By letter in October 2014, the Commission initiated formal state-aid proceedings against Romania.[132]

On March 2015, the Commission issued its decision, which stated that any payments under the award would be considerd as illegal state-aid within the meaning of Article

[123] Ibid. para. 336
[124] Avidan "The EU Commission and the fragmentation of International Law: Speaking European in a foreign land" (2016) Goettingen Journal of International law, 2016 volume 7, issue 2, p. 17
[125] *Micula* (n 114) para. 322-323
[126] Ibid. para. 319
[127] Avidan (n 124) (2016) p. 17
[128] *Micula* (n 114) para. 874
[129] Wehland (n 111) (2016) p. 946.
[130] Ibid.
[131] 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. 6
[132] European Commission Letter to Romania on state aid investigation, 01.10.2014, para. 72.

107(1) TFEU and that Romania had to stop the payments and recover already paid amounts.[133] Shortly after in November 2015, the Micula brothers initiated proceedings before the CJEU to have the Commission's decision annulled.[134]

Meanwhile in April 2014, Romania applied for annulment of the award and also requested for a stay of the enforcement before the ICSID.[135] Yet again the Commission participated as *amicus curiae.*[136] However the ICSID *ad hoc* committee denied such annulment in February 2016.[137]

In April 2015, petitioners other than the Micula brothers had the ICSID award converted into a judgement at the US District Court for the Southern District of New York.[138] One of the Micula brothers intervened in the case, while Romania moved to vacate or stay the ruling along side with the Commission who submitted an *amicus curiae* brief. Romania claimed that the judgement was void due to its violation of the Foreign Sovereign Immunities Act and the Commission stated that even if the judgement was not void under the Foreign Sovereign Immunities Act, the court should abstain from exercising jurisdiction.[139]

The court denied the request of Romania by referring to its obligations as a signatory to the ICSID Convention, whereby the court could not review the award and had to confirm it.[140] The Commission claim was also denied, since the Commission's proceedings in Europe was not sufficiently parallel to those in the US and also because of its obligations under Article 54 of the ICSID Convention on recognition and enforcement.[141] Romania appealed the decision to the US Court of Appeals for the

[133] (n 131)
[134] Case T-694/15 *Micula v. Commission* (2016) The Micula brothers redrew case T-646/14 *Micula and others v Commission* (2016)
[135] *Micula* (n 114) 26 Feb. 2016, Decision on annulment
[136] Ibid. para. 53
[137] Ibid. para. 355
[138] *Micula V. Government of Romania,* Case No. 15 MISC 107 (Part I), 2015 WL 4643 180 (SDNY 5 August 2015)
[139] Ibid. p. 4-5
[140] Ibid. p. 6-7
[141] Ibid. p. 13

Second Circuit, which the Commission again has intervened in via *amicus curiae* brief.[142]

Recently in January 2017, the English High Court rejected Romania's request to set aside the Court's registering of the arbitral award in 2014, yet again the Commission intervened as *amicus curiae* in the case supporting Romania.[143] Instead the English High Court decided to stay proceedings until the CJEU had ruled on the legality of the enforcement.[144] An action that is contrary to the courts obligations on enforcement under Article 54 of the ICSID Convention.

On 27 March 2017, the Romanian Parliament adopted law 18/2017 concerning the termination of all of Romania's 22 intra-EU BITs.[145] The fact that Romania is now in the process of negotiating the termination of all of its intra-EU BITs, could be seen as a direct consequence of the *Micula* case and the below mentioned infringement proceeding commenced in 2015 by the Commission.

The Commission interference in the *Micula* case seems to have been a customary action. The Commission's efforts did not have any effect on the US District Court for the Southern District of New York that relied on its obligations under the ICSID Convention, whereas the English High Court decided to stay proceedings until the CJEU has made a decision on the Micula brothers' annulment claim. In the mean time Romania is in the process of terminating its intra-EU BITs so even though the US District Court for the Southern District of New York might not have acted as desired by the Commission, the Commission is still succeeding in having intra-EU BITs terminated.

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[142] *Micula* (n 114) 4 Feb 2016, Brief for Amicus Curiae by the Commission of the European Union in Support of Defendant-Appellant before the US Court of Appeals. (still pending)
[143] Ibid. para. 8
[144] *Micula & Ors v Romania & Anor* (2017) EWHC 31 (Comm) (20 January 2017)
[145] See article at http://www.lexology.com/library/detail.aspx?g=9616fe69-dc21-4476-8ea9-b2deb760b86e

5.3. *Eureko B.V. v. The Slovak Republic*

The second case which has required the involvement of the CJEU is *Eureko B.V. v. The Slovak Republic (Eureko).*[146] In 1991, the Netherlands and Czechoslovakia signed a BIT, which Slovakia later became a part of.[147] The Dutch insurer Eureko initiated in 2008 an investment treaty claim under the UNCITRAL Arbitration Rules against Slovakia claiming that Slovakia had indirectly expropriated its investments in the insurance sector by re-nationalising the Slovakian health system, thereby denying Eureko FET and violating the BIT provisions on non-discriminatory treatment, free transfer of funds and full protection and security.[148]

The respondent state objected to the jurisdiction of the tribunal due to CJEU's exclusive jurisdiction under Article 344 TFEU.[149] Furthermore, in relation to public international law, the respondent state argued that on the basis of its accession to the EU in 2004 and the fact that EU law and the BIT covered the same subject matter, the BIT had been terminated according to Articles 30 and 59 VCLT.[150]

5.3.1 The Commission as *amicus curiae* in *Eureko B.V. v. Slovakia*

At the respondent state's request in 2010 the tribunal invited the Commission to submit its views, in a manner that stipulates *amicus* participation.[151] Concerning the same subject matter under Article 30 VCLT, the Commission argued that the *Eastern Sugar* tribunal was wrong in claiming that the BIT and EU law did not cover the same subject matter under Article 30 VCLT.[152] In the Commission's opinion, the treaties did not have to be identical but only similar, which then could lead to incompatible results by parallel operation.[153] Concerning incompatibility within the meaning of Article 30(3)

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[146] *Eureko v The Slovak Republic,* Award on jurisdiction, arbitrability and suspension, PCA Case No. 2008-13, Oct. 26 2010.
[147] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic. (Netherlands-Slovakia BIT 1975)
[148] *Eureko* (n 146) paras. 6-7
[149] Ibid. para. 113
[150] Ibid. paras. 19 and 65
[151] Knahr (n 68) (2011) p. 313
[152] *Eureko* (n 146) para. 191
[153] Ibid.

VCLT, the Commission claimed that the BIT provision on ISDS was incompatible with the exclusive competence of the CJEU.[154]

The tribunal rejected the claims brought forward by the respondent state and the Commission and claimed jurisdiction over the merits, arguing that Article 344 TFEU did not apply to investor-state disputes.[155] The tribunal responded with many of the same arguments on the VCLT as presented by the tribunal in the *Eastern Sugar* case. In the tribunal's opinion, there was no intent in the Slovak-EU Accession Treaty that indicated that the Netherlands-Slovakia BIT should be governed by EU-law therefore Article 59 VCLT on termination of the earlier treaty did not apply. Also, the tribunal did not consider there to be any incompatibilities in accordance with Article 59 VCLT, since the BIT granted the investor a broader protection because of the lack of FET standards in EU law and the procedural protection was not the same. [156]

Regarding Article 30 VCLT the Tribunal denied the Commission's argument on ISDS being incompatible with EU-law, as long as EU law was not violated.[157] Even if offering ISDS to only the parties of the BIT would violate EU law on non-discrimination, extending the right to all EU nationals could solve this.[158] Consequently, the respondent state was ordered to pay damages to Eureko, due to its violation of the BIT.[159]

5.3.2 Further developments in *Eureko B.V. v. Slovakia*

Shortly after being asked to pay damages to Eureko, Slovakia actively supported by the Commission, applied for annulment of the jurisdictional award at the Higher Regional Court in Frankfurt, the seat of the proceedings.[160] The Higher Regional Court decided to uphold the enforceability of the award and denied referring the case to the CJEU under Article 267 TFEU due to the principle of *acte clair.*

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[154] Ibid. para. 193
[155] Ibid. para. 276
[156] Ibid. para. 250
[157] *Eureko* (n 146) para. 271
[158] Ibid. para. 274
[159] *Achema B.V. (formerly Eureko B.V.) v. The Slovak Republic,* (formerly *Eureko B.V. v. The Slovak Republic*), Final Award, PCA Case No. 2008-13, 7 Dec. 2012, para. 352.
[160] Ibid. 10 May 2012, Decision of the Frankfurt Higher Regional Court (in German)

Slovakia then decided to appeal the judgement of the Higher Regional Court to the German Federal Supreme Court (Bundesgerichtshof, BGH). Here the BGH in March 2016, in accordance with Article 267 TFEU but inconsistent with the New York Convention on enforcement of arbitral awards, referred the question of the compatibility of intra-EU BITs with EU law to the CJEU, particularly Articles 344, 267 and 18 TFEU.[161] The BGH accompanied its reference with its own reasoning where the BGH argued that Article 344 TFEU did not apply to investor-state disputes.[162] With regards to Article 267 TFEU, the BGH found that it did not pose an obstacle to intra-EU BITs. In doing so the BGH referred to a previous ruling by the CJEU, in which the CJEU had held that Member State courts had the chance to review tribunal awards and refer any questions to the CJEU under Article 267 TFEU.[163] Therefor awards rendered by tribunals under intra-EU BITs did not allow tribunals to interpret EU law without the control of the CJEU.[164] In relation to Article 18 TFEU, the BGH argued that no discrimination would take place, if only the protection was granted to investors from all Member States.[165]

5.4. Infringement proceedings

In a press release on 18 June 2015, the Commission announced, by referring to the *Micula* case, that it had decided to initiate the first stage of infringement proceedings against five Member States to terminate their intra-EU BITs.[166] As earlier discussed, all of the five Member States (the Netherlands, Romania, Austria, Sweden and Slovakia) had also within the last decade been targeted with *amicus curiae* briefs in their investment arbitrations. Beside these five Member States, the Commission also began pilot proceedings against the remaining 21 Member States.[167] In its press release the Commission declared that intra-EU BITs were incompatible with EU-law, because they

[161] German Federal Supreme Court Decision I ZB 2/15 of 3 March 2016 in the procedure for the annulment of a domestic arbitral award (hereinafter the preliminary reference by the BGH) Available at: http://www.allenovery.com/SiteCollectionDocuments/Translation_German_decision_BGH_(final).pdf
[162] Ibid. para. 30
[163] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, (1999)
[164] The preliminary reference by the BGH (n 161) para. 31
[165] The preliminary reference by the BGH (n 161) para. 57
[166] European Commission press release on 18th of June 2015 (n 112)
[167] Ibid.. Italy and Ireland has already terminated their intra-EU BITS in 2012 and 2013

fragmented the internal market by granting greater rights to some EU investors thereby violating Article 18 TFEU.[168]

Member States like the Czech Republic, Denmark and Poland simply complied with the Commission's order and started the procedure of terminating their intra-EU BITs, Poland even announced that it would terminate all of its 60 BITs.[169] Sweden, being involved in the *Micula* case and being home state to many ICSID proceedings, took a more unwilling position. Sweden claimed that intra-EU BITs did not violate EU-law, but that it would be willing to terminate its intra-EU BITs if a similar system protecting investors within the EU was ensured.[170] So while Romania initiated steps to terminate their BIT with Sweden, Sweden refused termination until a joint EU solution had been made.[171]

The actions taken from the Member States in response to the Commission's infringement proceedings may appear very different. Nevertheless none of the Member States have directly denied the Commission's request of termination, but a Member State such as Sweden wants to make sure that the investors rights are protected during and after this process of termination of intra-EU BITs. From Sweden's response it would appear that Sweden is engaging the Commission to come up with a common EU practice for the termination of intra-EU BITs.

5.5 Summary

In affirming the primacy of EU law the Commission has now in the *Micula* case acted on its previous threats by prohibiting Romania in complying with a rendered ICSID award, which the Commission believes constitutes illegal state-aid under EU law. This has created a situation where the awarded investors are seeking annulment of the Commission's decision while requesting enforcement of the award outside the Union, and Romania is breaching its obligations under the ICSID Convention in order to

[168] Ibid.
[169] Lavranos, "The end of intra-EU BITs is nearing" (13 May 2016) http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing
[170] Borovikov, Evtimov and Crevon-Tarassova, "European Union" (2016) The International Arbitration, review, 7th edition, p. 189.
[171] Ibid.

comply with its obligations under EU law. The annulment proceeding is currently pending before the CJEU together with a preliminary reference from the German BGH due to the *Eureko* case. The BGH is asking the CJEU about the compatibility of intra-EU BITs with EU law, more particular Articles 344, 267 and 18 TFEU. Meanwhile Member States are starting to terminate their intra-EU BITs. This has to be seen in the light of the infringement proceedings by the Commission against five Member States, ordering them to terminate their intra-EU BITs. It appears that because of these recent developments in the area of intra-EU BITs, the CJEU will finally have to take a stand on the compatibility between intra-EU BITs and EU law.

6. ANALYSIS

6.1 Introduction

From the above discussed arbitration cases one can conclude that the dissimilar application and interpretation of treaties by the Commission and tribunals has led to different conclusions concerning compatibility between intra-EU BITs and EU law. The Commission has relied on the EU treaties and CJEU case law in confirming the primacy of EU law, in general arguing that intra-EU BITs are violating provisions in EU law, in particularly Articles 344 and 18 TFEU and the general principle of the CJEU as the final interpreter of EU-law and that BITs have been terminated under public international law, in particular Articles 59 and 30 of VCLT on conflicting treaties governing the same subject matter concerning. [172] The arbitration tribunals have denied any violations of EU law and have also denied the fact that the BITs have been terminated under the VCLT.[173]

6.2. EU law

According to the CJEU and the Commission, EU law has primacy in the relationship between intra-EU BITs and EU-law. This means that if there are conflicting obligations and rights between the two treaties EU law prevails. In claiming this supremacy, the CJEU and Commission have relied on some of the founding principles of EU law by claiming that intra-EU BITs violate Article 344 TFEU, 18 TFEU and the CJEU's monopoly to give final interpretations of EU-law.

[172] see *infra* section 4.3, 4.4, 5.2.1 and 5.3.1
[173] see *infra* section 4.3, 4.4, 5.2.1, and 5.3.1

6.2.1 CJEU's exclusive jurisdiction

Article 344 TFEU:
"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"

In *Electrabel* the Commission and the respondent state based the tribunal's lack of jurisdiction on the *Mox Plant* case and its principles under Article 344 TFEU where Member States are required not to submit a dispute concerning the interpretation or application of EU law to any method of settlement not mentioned in the EU treaties.[174] However according to the wording of Article 344 TFEU, the provision only refers to Member State disputes and not investor-state disputes, which has also been pointed out by tribunals and the BGH.[175] This assumption also corresponds with the fact that Article 344 TFEU is only addressed to the Member States and does not obligate private individuals.

If one were to look at the case law of the CJEU they seem to interpret Article 344 TFEU in a narrower way. In the *Mox Plant* case, the violation of Article 344 TFEU was the submitting of a dispute to an arbitral tribunal concerning areas of EU law. This was also confirmed in the European Patent Court opinion where the CJEU stated: *"That Article 344 TFEU merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties"*[176] This seems to be in line with the ruling in the *Mox Plant* case. However, the CJEU limited its assessment with the following statement: *"The jurisdiction, which the draft agreement intends to grant to the Patent Court relates only to disputes between individuals in the field of patents"*[177] If one where to

[174] *Electrabel* (n 95) para. 65
[175] Ibid. para. 4.151 and the preliminary reference by the BGH (n 161) paras. 30–39
[176] Opinion 1/09, European and Community Patents Courts, (2011) para. 63
[177] Ibid. para. 63

conclude on the following statement it would seem that Article 344 TFEU does not put restrictions on individuals, concerning patents, but it may restrict in the field of BITs.[178]

The reason as to why the area of patents does not fall under Article 344 TFEU could be because the claim is initiated by a private individual against a Member State under private law. The situation might be different with arbitration, if you were to look at it from a public international law perspective, where a violation of an investor's property in the host state could be viewed as a violation of ones obligation under international law between the two signatory Member States.[179] Thus, the investor is only seen as the nominal claimant invoking rights on behalf of the investor's home state. Another argument is that the substantive rights and obligations under a BIT are only addressed to these two signatory Member States, and the procedural rights under ISDS are only there to support the substantial ones.[180]

However, if one were to open up for the interpretation of ISDS really being disputes between two Member States, it could create a scenario where each claim brought by an individual in reality would be a claim between two states, thus putting an end to private cross boarder litigation in the EU. This would be an undesirable situation. In conclusion, it would seem that ISDS initiated by individual investors does not violate the exclusive jurisdiction of the CJEU under Article 344 TFEU.

6.2.2 CJEU's exclusive competence to give binding interpretations of EU law

Besides violating the exclusive jurisdiction of the CJEU, the Commission argues that arbitral tribunals also bypass the preliminary ruling proceedings in Article 267 TFEU under the EU legal order.[181] By doing so arbitral tribunals might interpret and apply EU law as they see suited, thereby causing fragmentation of EU law. This is why the CJEU

[178] Von Papp, "Clash of "autonomous legal orders": Can EU Member State courts bridge the jurisdictional divide between investment tribunals and the ECJ? A plea for direct referral from investment tribunals to the ECJ" (2013) 50 Common Market Law Review, Issue 4, p. 1053-1054
[179] Hindelang, "Circumventing Primacy of EU law and CJEU's Judical Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration" (2012) Legal Issues of Economic Integration, volume 39, No. 2, p. 200
[180] Ibid.
[181] See *supra* section 3.1

has reserved itself the monopoly to provide the final and binding interpretation of EU law. In claiming this monopoly and thereby prohibiting alternative dispute mechanisms in ruling on EU matters, the CJEU noted in *Opinion 1/09* on the European Patent Court, that by allowing the proposed patent court to have exclusive jurisdiction on patent issues, it would deprive the CJEU of making preliminary rulings from requests by Member States, thereby threating the uniform interpretation and application of EU-law.[182]

6.2.2.1 Preliminary references from investment arbitral tribunals to the CJEU

In its opinion, it seems that the CJEU is concerned with the lack of access to preliminary ruling reference by Member States courts in accordance with Article 267 TFEU, which the access to arbitral tribunals could deprive them of. One solution could be to offer such reference of preliminary ruling to the Patent Court and investment arbitral tribunals. At the same time the CJEU concluded in the *Nordsee* case, which the tribunal in the *Electrabel* also repeated,[183] that commercial arbitral tribunals do not fall within the scope of Article 267 TFEU as *"courts or tribunals of a Member State"* due to the tribunal's lack of mandatory jurisdiction and therefore are not entitled to preliminary references.[184] The CJEU later elaborated when a tribunal could make such preliminary references in the *European Schools* case.[185] In this case the CJEU listed some factors under which a Complaints Board could be counted as a *"court or tribunal of a Member State":*

"(...) Whether the body is established by law, whether is it permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether is applies rule of law and whether it is independent.[186]"

As to the first criterion *"established by law"* is would seem that the criteria, according to CJEU case law, is easily fulfilled as long as the jurisdiction of the tribunal is based on

[182] Opinion 1/09 (n 176) para. 89
[183] *Electrabel* (n 95) para. 4.151
[184] Case C-102/81, *Nordsee v. Reederei Mond*, (1982) ECR 1095, paras. 9–13
[185] C-196/09, *Paul Miles and others v European Schools,* (2011)
[186] Ibid. para. 37

statuary law.[187] This is usually the case with investment arbitral tribunals that are established under international public law and rarely under private agreements between the parties.[188] The second condition *"permanency"* is difficult to oblige with since most tribunals by nature are established as *ad hoc* tribunals.[189] However, in the *Danfoss* case it was discussed that when there was an ordinary jurisdiction with adequate rules on the composition of the tribunal, this would be considered as a permanent tribunal.[190] Investment arbitral tribunals could therefore be considered as permanent.

Concerning the *"compulsory jurisdiction"* criteria the jurisdiction of the tribunals are mandatory for the Member States who cannot chose domestic courts over tribunals. The last criteria about the body's *"independency"* seems to be more of an issue between two private parties than in investment arbitration, where the parties are given equal rights when selecting arbitrators.

Returning to the *European Schools* case, the CJEU concluded that the Complaints Board did in fact qualify as a *"court or tribunal"* in accordance with Article 267 TFEU and the above listed criterions. But it did not qualify as a *"court or tribunal of a Member State"* because it lacked a link with the judicial systems of the Member States.[191] In conclusion the Complaints Board did not have access to a preliminary ruling reference. The CJEU came to another conclusion in the *Danfoss* case.[192] In this case, the CJEU stated that the board fulfilled the requirements on being mandatory because the board's decisions were final and did not depend on the parties' agreement.[193]

The combination of *Opinion 1/09* and the *European Schools* case creates some high standards that must be fulfilled before investment arbitral tribunals are to be seen as *"courts and tribunals of a Member State"* allowing them to ask the CJEU for

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[187] Joined Cases C-110/98 and C-147/98, *Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria (AEAT) and Others*, (2000), para., 34
[188] Olík and Fyrbach (n 42) (2011) para. 10.28
[189] Von Papp (n 178) (2013) p. 1072
[190] See Opinion of A.G. Lenz in Case 109/88, Handels- og Kontorfunktionærrernes Forbund I Danmark v. Dansk Arbejdsgiverforening (on behalf of Danfoss), (1989) Para., 21.
[191] *European Schools* (n 185) para. 41
[192] *Danfoss* (n 190)
[193] Ibid. para. 7

preliminary rulings under Article 267 TFEU. It would appear very unlikely that such referral right was to be granted to investment arbitral tribunals.

6.2.2.2 Request Member State courts to submit preliminary rulings

Another possibility of ensuring a non-fragmented application of EU law would be if tribunals could request preliminary rulings through the Member State courts. This was a matter that was discussed and even recommend by the CJEU in the *Nordsee* case corning commercial arbitration.[194]

In *Roda Golf* the CJEU clarified when Article 267 TFEU could be applied.[195] The CJEU stated that a Member State court refer a preliminary question to the CJEU when it had a pending case that it had to give a judgement on and the case was a legal dispute and not an administrative decision.[196] According to Olík and Fyrbach, a preliminary ruling submitted on the behalf of an arbitral tribunal does not fulfill the requirements in Article 267 TFEU, because the court does not need the ruling for its own judgment. In their opinion, the CJEU is unlikely to accept a preliminary ruling request by a tribunal made through a Member State court, since such Member State court does not rule in the case between the parties. [197] Nevertheless, the question is still unanswered by the CJEU.

It appears that before arbitral tribunals may be granted the right to ask for a preliminary ruling by the CJEU under Article 267 TFEU, such arbitral tribunals must be *"courts or tribunals of a Member State",* which requires some strict criteria to be fulfilled. In conclusion, it would appear that the possibility of tribunals to gain access to preliminary rulings is small. Instead Member State courts can ask on behalf of the tribunals, however at the moment it is not certain whether this is an opportunity for investment arbitral tribunals.

[194] *Nordsee* (n 184) para. 14
[195] Case C-14/08, *Roda Golf & Beach Resort SL* (2009)
[196] Ibid. para. 34
[197] Olík and Fyrbach (n 188) (2011) para. 10.34

6.2.3 Non-discrimination on grounds of nationality

Article 18 TFEU:
"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

The Commission in *Eastern Sugar* and the respondent state in *Eureko* argued that by offering only some investors access to arbitration, this would constitute a breach of the non-discrimination on grounds of nationality rule under Article 18 TFEU, because other EU investors were not offered the same rights.[198]

In *Eureko,* the tribunal responded by stating that the discriminatory effects of the BIT could be removed by concluding similar BITs with other Member States.[199] However it is not certain whether EU law on discrimination requires rights, such as those granted in BITs to be granted to all nationals of Member States in order to avoid discrimination. Insofar as the nationals of the host state it does not create an issue, as discrimination against a state's own nationals in favour of EU citizens is allowed under EU law.[200]

The issue was discussed concerning intra-EU conventions on double taxation. Here the CJEU had to decide whether a tax allowance under the Belgium-Netherlands Convention was discrimination of other EU nationals.[201] The CJEU came to the conclusion that the rights that some EU nationals were given from these conventions did not apply to all EU nationals, if it was not expressed in the convention.[202] Such argumentation could also be used in regard to intra-EU BITs, which shares some of the same characteristics as the double taxation conventions, like the element of

[198] *Eastern Sugar* (n 81) para. 119 and *Eureko* (n 146) para., 113
[199] *Eureko* (n 146) para. 118
[200] Tryfonidou "Reverse discrimination in Purely Internal Situations: An Incongruity in a Citizens Europe" (2008) Legal Issues of Economic Integration, volume 35, Issue 1, p. 44
[201] Case C-376/03, *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen,* (2005)
[202] Ibid. para. 52

reciprocity.[203] However it is important to note that the ruling on the double taxation conventions was delivered at a time where such conventions were welcomed because of the absence in EU law to prevent double taxation. Intra-EU BITs on the other hand, were never really welcomed since the protection that they grant to some degree can be found in EU law.[204]

Another argument is that the CJEU has confirmed that the general principle on non-discrimination on grounds of nationality requires comparable situations to be treated alike while different situations should be treated differently, unless not doing so is justified due to proportionality.[205] If one where to apply this principle to intra-EU BITs, it would be a question as to whether or not investors protected under a BIT are in a comparable or different situation than the investors who are not protected under a BIT. When the investor started to invest in the host state the investor expected to be granted the protection under the BIT, contrary to the investor who was not protected by a BIT and who then had no legitimate expectations of such protection. Thus the two situations are not comparable but different so according to CJEU case law, there is no requirement of equal treatment (on the base of nationality) between EU investors.[206]

Even if one were to conclude that the two situations were not different, another way to solve the problem could be to extend these rights bilateral to all EU nationals, which has also been recommended by the CJEU[207] and the *Eastern Sugar* and *Eureko* tribunals.[208] However this would require an amendment of the entire EU legal framework and as noted by the tribunal in *Eureko* it could promote competing judicial and arbitral mechanisms and increase forum shopping throughout the EU.[209]

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[203] Dimopoulos (n 31) (2011) p. 81
[204] Kokott and Sobotta (n 52) (2016) p. 7
[205] Case C-106/83 *Sermide SpA v. Cassa Conguaglio Zucchero,* (1984) para., 28
[206] Zarra, "The Arbitrability Of Disputes Arising From Intra-EU Bits" (2014) The American Review of International Arbitration. volume 25, pp. 590
[207] Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)* (2002) para., 34
[208] *Eureko* (n 146) paras., 266-267 and *Eastern Suga* (n 81) para. 170.
[209] *Eureko* (n 146) para. 185

In conclusion, it would appear that when interpreting EU law BIT provisions providing for investment arbitration do in fact not violate the prohibition on discrimination on grounds of nationality provided for in Article 18 TFEU.

6.2.4 Summary

In affirming the incompatibility of intra-EU BITs and EU law, respondent states and the Commission rely on EU law. In their opinion, investment arbitral tribunals lacks jurisdiction due to the exclusive jurisdiction of the CJEU under Article 344 TFEU. But the wording of the Article does not include private individuals, only the Member States. The Commission also claims that the CJEU's exclusive competence on interpreting EU law is violated, since the arbitral tribunals are not obligated to confer with the CJEU on matters of EU law. Offering investment arbitral tribunals, the right to submit a preliminary ruling to the CJEU in accordance with Article 267 TFEU could solve this problem. Before being granted this right, arbitral tribunals would have to be classified as *"courts and tribunals of a Member State"* as specified in CJEU case law. However, the standards are very high, so it would seem unlikely if investment arbitral tribunals ever were to be granted access to preliminary rulings under Article 267 TFEU. Another possible solution would be if Member State courts could ask a preliminary reference to the CJEU on the behalf of the arbitral tribunals, however such access has not been formerly denied nor recognized by the CJEU. The Commission also claims that the granting of investment arbitration to investors protected under a BIT violates Article 18 TFEU on non-discrimination. Yet the CJEU has previously ruled that under certain conditions discrimination between EU citizens can be allowed. Thus, when analysing the relationship between intra-EU BITs and EU law under EU law, one discovers that the two treaties are compatible.

6.3 Public international law

When one is to analyse the relationship between EU law and intra-EU BITs under public international law it becomes relevant to discuss Articles 59 and 30 VCLT. These Articles contain the *lex posterior* rules, which regulate the relationship between incompatible international treaties concerning the same subject matter. Article 59 VCLT addresses the termination of an entire treaty, whereas Article 30 VCLT concerns the termination of particular provisions. Article 30 VCLT is closely linked with Article 59

VCLT. Thus, if a treaty has been terminated under Article 59 VCLT, there will be no treaty provisions that can conflict with provisions from a later treaty under Article 30 VCLT. Therefore, it seems correct to analyse Article 59 VCLT first.

6.3.1 Article 59 VCLT

Article 59 VCLT:

"Termination or suspension of the operation of a treaty implied by conclusion of a later treaty
1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

6.3.1.1 Automatic termination

The respondent states in the *Eastern Sugar* case and *Eureko* case both claimed that termination of the older treaty would happen automatically.[210] From a textual interpretation of Article 59 VCLT it could indeed be read as if in the event that the substantive criteria under Article 59(1)(a)(b) VCLT were fulfilled the earlier treaty would automatically be terminated.

This assumption could also be concluded from a textual comparison with the other Articles on termination under the VCLT e.g. Article 60(1) VCLT refers to a state's need to *"invoke"* termination. In relation Article 65(1) VCLT, stipulates the procedure that a party must follow before termination of a treaty can occur, after which a party must notify the other party if it wants to *"invoke"* termination. The word *"invoke"* is not

[210] *Eureko* (n 146) para. 94 and *Eastern Sugar* (n 81) para. 117

included in Article 59 VCLT, instead the provisions use expressions as *"shall be considered"* or *"it appears"* which could mean that since there is no obligation to *"invoke"* termination, termination might be automatic.

The legal scholars dealing with the VCLT have not been able to provide for any clear solutions as to when a treaty can be automatically terminated. However, some ground rules can be established. When the parties to a treaty have agreed by mutual consent that a treaty shall be terminated, this will occur automatically. Conversely, there will be non-automaticity in situations where a party wishes to terminate the treaty due to error, fraud, corruption, violation of internal norms on treaty-making power, breach of the treaty by the other party, fundamental changes of circumstances or impossibility to perform.[211]

In *Eureko* the respondent state did not claim that the BIT had been automatically terminated due to mutual consent, instead it claimed that Article 59 VCLT did not require notification to the other party.[212] Even though the respondent state is correct in concluding that Article 59 VCLT in its wording does not require any notification with the other party, this is only due to a mere oversight.

Contrary to Article 59 VCLT, Article 54(b) VCLT requires consultation with the other party of the earlier treaty before termination. The requirement of consultation in Article 54(b) VCLT was introduced only at the Conference stage when reviewing Article 54(b) VCLT whereby the coordination with Article 59 VCLT was simply forgotten.[213] It therefore seems obligatory to include the consultation requirement in Article 59 VCLT as well.

Under certain limited conditions it is possible to explicitly or implicitly exclude the notification requirement in Article 54(b) VCLT. This could for instance be if the parties had agreed that their contractual relationship should not be governed by international

[211] Conforti and Labella "Invalidity and Termination of Treaties: The role of national courts" (1990) European Journal of International Law, issue 1, Voume 1, p. 47
[212] *Eureko* (n 146) para. 94
[213] Dörr and Schmalenbach, "Vienna Convention on the Law of Treaties a Commentary" (Springer 2012) p. 1019-1020

law like the VCLT, which is often the case when independent states unite in a new federal state. By joining a federal state, the states establish a constitutional relation instead of an international one among each other. The EU has some resemblances to a federal state, since the process of European Integration has created a semi-federal institution with a *sui generis* character.[214] Thus the respondent state in *Eureko* is correct in claiming that an earlier treaty is automatically terminated, due to the non-requirement of notification in Article 59 VCLT, when the consultant requirement is implicit excluded by the joining of the EU.

Lastly it must be noted that even though none of the respondent states have claimed termination due to Article 62 VCLT on fundamental changes of circumstances, the Article might be applicable. One could imagine that respondent states would argue that the enlargement of the EU created a fundamental change since extra-EU BITs now became intra-EU BITs and states had to juggle between its obligations under the BIT and EU law, whereby the earlier treaty is deemed terminated. However, before a change is fundamental, the change has to be substantial. This could include: armed conflicts, revolution or state succession. According to Article 73 VCLT there are different kinds of state succession, e.g. cession, dismemberment, incorporation, merger of existing states and decolonization.[215] One could argue that states by joining the EU undergoes a fundamental change due to the incorporation to the EU or merger with existing states in a semi-federal body. Therefore, Article 62 VCLT could stipulate a ground for termination, but as discussed above termination due to Article 62 VCLT is not automatic, but would have to follow the procedure in Article 65 VCLT.

6.3.1.2 The same subject matter

According to Article 59 VCLT, before an earlier treaty can be terminated the later treaty must *"relate to the same subject-matter"*. This tends to be an issue that the respondent states and the tribunals look differently on.

The tribunal in *Eureko* established a test, whereby the sameness criterion under Article 59 VCLT had to be interpreted in a different manner than under Article 30 VCLT.

[214] Ibid. p. 961-962
[215] Ibid. p. 1243

Where the application of Article 59 VCLT would terminate the entire treaty, the application of Article 30 VCLT would only terminate single provisions. Consequently, the test under Article 59 VCLT would be whether the two treaties would not be able to be applied together, and the test under Article 30 VCLT was whether the later treaty's provisions was compatible.[216] Thus Article 30 VCLT could be applied by the slightest incompatibility, whereas Article 59 VCLT required a broader incompatibility.[217] The rational behind suggesting different tests seems fitting, since the outcome of the application of each treaty is different.

The Tribunal in *Eureko* rejected the respondent state's claim on the BIT and EU law covering the same subject matter. They did conclude that there was some partial overlaps between the BIT and EU law, but that they were not incompatible with EU law, since the protection under the BIT was broader than under EU law.[218] The tribunal is correct in establishing that the BIT and EU do not cover the entire same subject matter, they might overlap on some provisions, but they are not identical. However, the tribunal cannot reject the application of Article 59 VCLT by referring to broader protection under the BIT.

When comparing the level of sameness between intra-EU BITs and EU law it is essential to take into account the rationale behind each treaty. The reason why BITs grant a broader protection than EU law is that they are only drafted at securing private investments. Tribunals do not have to balance private and public interests, such as provided for in the EU legal order[219] and its judicial review.[220] EU law also offers investor protection, but with the goal of establishing the Internal Market such protection are deemed to have a wider context and protection than the one under a BIT, but the wider protection under EU law does not mean that the subject matter is not the same, it is the interests behind each treaty that are different. The interests under a BIT is protecting and providing for investment, but the interests under EU law is that of the general public, thus under EU law: *"Not everybody should have a full glass of water.*

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[216] *Eureko* (n 146) paras. 240-241
[217] Ibid. para. 241
[218] Ibid. para. 263
[219] See *supra* section 3.1
[220] Kleinheisterkamp, "Investment protection and EU law: The intra-and extra-EU dimension of the energy charter treaty" (2015) Journal of International Economic Law, volume 15, issue 1, p. 100

There is a reason why the investor's glass is only half-full under EU law protecting investments"[221] Also, where the treaties of EU have an objective of accessing the Member State markets, as a way of pre-establishment, BITs are designed at securing rights once the investment has been made, a post-establishment stage.

In general both EU law and the BIT have a purpose of promoting and protecting investments, thus parts of intra-EU BITs and EU law govern the same subject matter, but not in its entirety, for instance EU law does not provide for ISDS, meaning the sameness criterion is not met. In addition, Article 59(1)(a)(b) VCLT on incompatibility and the parties' intention also needs to be fulfilled.

6.3.1.3 The intention of the parties

The respondent state in *Eureko* noted that the Commission was wrong in only focussing on the explicit statements concerning termination, instead the focus should also be on the states' implicit intention when acceding to the EU and its treaties

The title of Article 59 VCLT refers to *"implied"* termination which could indicate that intention of the parties does not need to be explicit but can be *"implied"*. Also if the intent had to be explicit under Article 59 VCLT, the Article would have mentioned termination by *"consent"* like Article 54(b) VCLT.

Articles 31 and 32 VCLT provides with other tools of interpretation as to were the intention for termination could be found. This includes tools such as the treaties' preamble and annexes. The tribunal in *Eureko* claimed that there was no such intention or at least it was not *"clear"*.[222] However, again one must not forget that according to the title of the provision for termination under Article 59 termination shall only be *"implied",* meaning the tribunal is wrong when arguing that the intention to terminate is not *"clear",* when such an intention can be implicit.

When analysing Article 59 VCLT, one finds that the respondent state in *Eureko* was correct in noticing that not only does explicit statements needs to be taken into account,

[221] Ibid.
[222] *Eureko* (n 146) para. 244

but also the parties' implicit intentions. Consequently, Article 59(1)(a) applies to the relationship between intra-EU BITs and EU law.

6.3.1.4 Incompatibility between the intra-EU BIT and EU law

The wording of Article 59(1)(b) VCLT states that the later treaty's provisions must be so far incompatible with the earlier treaty's provisions that they are impossible to apply at the same time.

In interpreting this, the tribunal in *Eureko* suggested a parallel application of the two treaties, whereby the better protection under the BIT should be granted in extension with the protection under EU law.[223] This suggestion finds support in the VCLT Drafting Committee, which found that a slight difference between the treaties could not stipulate an incompatibility and if broader rights were given under the earlier treaty than under the later treaty, these rights should be applied:

"If a small number of States concluded a consular convention granting wide privileges and immunities, and those some States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted regime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force."[224]

Taking into account the wording of Article 59(1)(b) VCLT it appears correct that the *Eureko* tribunal and the VCLT Drafting Committee suggest a system of parallel application of the two treaties where any broader rights under a BIT, which are not included under EU law, should be granted as well and therefore is not incompatible but complementary.

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[223] Ibid. para. 263

[224] Drafting Committee, Official records (1969), 2nd session, 91st meeting, 253, para. 37, available at: https://www.ilsa.org/jessup/jessup15/VCLT%20Second%20Session.pdf

In conclusion, it appears that an earlier treaty can be terminated automatically without prior notification to the other party. Furthermore, certain provisions of intra-EU BITs and EU law covers the same subject matter, but the two treaties do not always cover the entirely same subject matter. Insofar as the intention of the parties to terminate the earlier treaty, this intention can be implied. Lastly, intra-EU BIT and EU law is not incompatible with each other instead the rights under intra-EU should be granted complementary with the ones under EU law. Accordingly, Article 59 VCLT in its entirety does not apply in the relationship between intra-EU BITs and EU law.

6.3.2 Article 30 VCLT

The relevant parts of Article 30 VCLT to this analysis states:

"*Application of successive treaties relating to the same subject-matter*
1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty."

6.3.2.1 The same subject matter

In its *amicus curiae* brief in the *Eureko* case the Commission tried a different approach by stating that if the BIT was not incompatible under Article 59 VCLT, certain provisions of the BIT were incompatible within the meaning of Article 30 VCLT.[225] The Commission also gave their interpretation of the standards of same subject matter under Article 30 VCLT by referring to the standards set by the International Law Commission

[225] *Eureko* (n 146) paras. 192-193

(ILC) whereby two treaties only needed to have a "similar or comparable degree of generality"[226]

In response the *Eureko* tribunal argued that the sameness standards under Articles 59 and 30 VCLT were different due to their different objectives in relation to the termination of the entire treaty or single provisions, thus the issue under Article 30 VCLT was not whether two treaties covered the same subject matter, but whether the alike provision was compatible.[227]

The reasoning of the *Eureko* tribunal finds support by the ILC, since the title of the provision *"relating to the same subject"* was deliberately chosen by the ILC in order to provide for a broad description.[228] Accordingly, two treaties relating to the same subject matter are not consequently incompatible with each other. They can be complementary to each other or be applied under different scenarios. However, determining whether or not two treaties are relating to the same subject matter is not of great importance, since the real test under Article 30 VCLT is whether they are incompatible. Because if they are compatible, questions of priority between two treaties relating to the same subject matter will not be of any relevance.

6.3.2.2 Conflict clauses

Article 30(2) VCLT states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevails. This would mean that if a treaty has a subordination clause determining the priority between to a treaty, the other provisions in Article 30 VCLT do not apply. Article 351 TFEU is such a clause.[229] If an earlier treaty falls under Article 351 TFEU, that earlier treaty prevails over any later treaty. As discussed, when the two states who concluded the BIT both became EU Member States they agreed to submit themselves under EU law and its primacy, meaning the subordination clause provided for in Article 351 TFEU, does not apply to intra-EU BITs.[230]

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[226] Ibid. para. 191
[227] See *infra* section 6.3.1.2
[228] Dörr and Schmalenbach (n 213) (2012) p. 510
[229] Ibid. p. 512
[230] See *supra* section 3.5

6.3.2.3 Incompatibility between intra-EU BIT provisions and EU law provisions

Lastly, Article 30(3) VCLT regulates the *lex posterior* rule by stating that if two treaties' provisions are incompatible the later treaty prevails.[231] Here the BITs were concluded before the new Member States acceded to the EU and its treaties, meaning EU law prevails if there is incompatibility.

Unlike Article 59 VCLT the application of Article 30 VCLT will not lead to termination of the incompatible provisions. The application of Article 30(3) VCLT does not invalidate the incompatible provisions of the earlier treaty, but only makes them inapplicable. Meaning that even though some provisions of the intra-EU BIT are inapplicable the BIT itself is still valid.

Article 30 VCLT itself is silent on the level of incompatibility that is required and the ILC have neither specified the issue. In *Eureko* the Commission claimed that the BIT provision on investment arbitration was incompatible with the exclusive jurisdiction of the CJEU, therefor it violated EU law.[232] The tribunal responded by saying that EU law was not violated, since the BIT provision on investment arbitration and the exclusive jurisdiction of the CJEU was not incompatibility because EU law did not provide for investment arbitration.[233]

The tribunal also claimed that as long as EU law was not violated, then there was no reason why rights under a BIT that were not provided for under EU law should not be granted complementary to EU law. The suggested approach by the *Eureko* tribunal follows the approach taken by the VCLT Drafting Committee, which state that the broader protection under an earlier treaty should be applied in cases where the later treaty has more restrictive protection.[234] In conclusion, one must reject the Commission's argument on incompatibility between the BIT provision on ISDS and EU law because of violation of the exclusive jurisdiction of the CJEU.

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[231] Dörr and Schmalenbach (n 213) (2012) p. 514.
[232] *Eureko* (n 146) para. 193
[233] Ibid. para. 274
[234] Drafting Committee (n 224) para. 37

Before Article 30 VCLT can apply to the relationship between intra-EU BITs and EU law the two treaties need to govern by the same subject matter. According to the ILC this has to be read in a broad manner, since the focus of Article 30 VCLT is whether the two treaties are incompatible, and not if they cover the same subject matter. With regards to incompatibilities such is not found as long as the BIT does not violate EU law, instead the VCLT Drafting Committee acknowledges a system whereby the better protection under the earlier BIT complements the later treaty. In conclusion, it appears that Article 30 VCLT does not apply to the relationship between intra-EU BITs and EU law.

6.4 Summary

When applying public international law to the conflict between intra-EU BITs and EU law, one discovers that even though the result of applying each Article is different, Article 59 VCLT leading to the entire treaty being terminated and Article 30 VCLT leading to single provisions being invalidated - the outcome is the same. Under Article 59 VCLT, a slight difference between the two treaties is not enough to determine incompatibility, instead the broader rights under the BIT should be applied complementarily to those provided under EU law. This is also the approach under Article 30 VCLT and as long EU law is not violated there is no incompatibility between intra-EU BITs and EU law.

7. DISCUSSION

7.1 The future of intra-EU BITs

The issue as to whether or not intra-EU BITs are compatible with the EU legal order has not yet been resolved by the CJEU. However, is seems as though clarification is within reach due to the preliminary ruling to the CJEU on the compatibility of intra-EU BITs with EU law, by the BGH in March 2016.[235] The outcome can basically go in the following directions: The CJEU follows the reasoning of arbitral tribunals and the BGH and declines any incompatibilities between the two legal frameworks, or the CJEU follows the Commission's reasoning and pronounces that intra-EU BITs are incompatible with EU law.[236]

A third option and a more the diplomatic way of handling the issue would be by applying the *solange* principle. The *solange* principle provides that a court will withhold from reviewing rulings from another court under a different legal order as long as that other court respects fundamental human rights, however such withholding can be rebutted if the level of human rights protection has been manifestly deficient.[237] If the CJEU were to apply the *solange* principle to investment arbitration, it would mean that the CJEU would only intervene in ISDS when EU law was applied "manifestly deficient". While this approach is certainly more of a diplomatic one it still collides with the CJEU's position on arbitral tribunals not being *"courts and tribunals of a Member State"* and it would require the CJEU to adjust its views on arbitral tribunals before it will intervene in ISDSs.[238] Another important factor is the binding element of arbitral awards, e.g. the ICSID Convention does not allow for review by another court once an award has been rendered.[239]

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[235] See the preliminary reference by the BGH (n 161)
[236] Andersen and Hindelang, "The day after: Alternatives to intra-EU BITs" (2017) The Journal of World Investment & Trade, special issue, 2017, p. 986
[237] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, Application* No. 45036/98, Judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1. Paras. 155-156
[238] See *supra* section 6.2.2.1
[239] See *supra* section 2.2

On the other hand if the CJEU where to rule that there is no incompatibilities between intra-EU BITs and EU law it would only put an end to a long legal discussion but it would not resolve the uncertainties involved in investment protection under the EU legal framework that is not covered by the preliminary ruling.[240] On the other hand if CJEU were to rule that intra-EU BITs are incompatible with EU law, the outcome will probably be that Member States will start to terminate their intra-EU BITs in a much larger scale than previously seen.[241] This will be a lengthy process, since most BITs contains so-called "survival clauses" providing for a minimum of 10 years of protection after the termination of the BIT.[242] What Member States could do to fasten the process of termination is to follow the approach taken by Denmark and the Czech Republic in 2011, were they first removed the "survival clause" before terminating the BIT.[243] However, since the rationale behind "survival clauses" is to provide protection and certainty for long-time foreign investments, the termination of them will likely attract more claims from aggravated investors.[244]

On May 16th 2017, after being requested for an opinion from the Commission,[245] the CJEU delivered Opinion 2/15 on the EU's powers to conclude the EU-Singapore FTA.[246] In its opinion, the CJEU concluded that the EU had exclusive competence over most parts of the FTA, but since ISDS "*removes disputes from the jurisdiction of the courts of the Member States"*[247] this competence was shared with the Member States. Mauro Pettriccione, the head of the Comprehensive Economic and Trade Agreement negotiations, argued in a hearing before the European Parliament, that if the CJEU is examining who is competent regarding ISDS, the CJEU must be thinking that ISDS is compatible with EU law if not the CJEU would have stopped the proceeding because it would not have been worth examining who is competent if nobody was allowed to be

[240] Miron, "The late bite of the BITs – supremacy of EU law versus investment treaty arbitration" (2014) European Law Journal, volume 20, No. 3, p. 344
[241] Ibid.
[242]Lavranos (n 169) (2016)
[243]Ibid.
[244] Voon and Mitchell "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law! (2016) ICSID Review, volume 31, Issue 2, p. 433
[245] Request for Opinion (n 47)
[246] Opinion 2/15, Free Trade Agreement between the European Union and the Republic of Singapore (2017)
[247] Ibid. para. 292

competent.[248] Even though one can follow the logic behind Mr Pettriccione's argument, the CJEU also noted that its opinion had nothing to do with the compatibility with ISDS and EU law, but was only a question of who had the competence to establish ISDS.[249]

7.2 Protection left for the investors

If the CJEU were to decide in favour of the Commission and rule intra-EU BITs incompatible with EU law and Member States were to start the termination process, it could create a situation where investors would have to claim compensation at Member State courts. However, in a Union where the perceived independence of Member State courts ranks between number 2 (Finland) and number 125 (Slovakia) in the world, this would not be a satisfactory solution for the investors.[250] Also unsatisfactory is if European investors as a consequence were to look for alternatives, e.g. restructure their investment via Switzerland under a Swiss BIT[251] or create subsidiaries in non-EU Member States.[252]

7.3 Alternatives to ISDS under intra-EU BITs

A leaked non-paper on April 2016 from five Member States (Austria, France, Finland, Germany and the Netherlands) noted that: *"the current situation is highly detrimental to both EU Member States and European investors, and more generally to the internal market as a whole"*[253] and proposed a coordinated termination of all intra-EU BITs and replacement by a multilateral agreement between all Member states.[254]

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[248] See Committee on International Trade – meeting 10/11/2016 AM, available at 22:24: http://www.europarl.europa.eu/news/en/news-room/20161026IPR49225/committee-on-international-trade-meeting-10112016-(am)
[249] Opinion 2/15 (n 246) para. 30 and 290-293
[250] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM (2016) 199 final, figure 48 (the ranking is based on 140 participating countries) Available at: http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf
[251] Lavranos (n 169) (2016)
[252] Miron (n 240) (2014) p. 342
[253] 'Non-paper from Austria, Finland, France, Germany and the Netherlands on intra-EU investment treaties', Council of the European Union, Trade Policy Committee (Services and Investment) (7 April 2016) para. 2, available at: <https://www.tni.org/files/article-downloads/intra-eu-bits2-18-05_0.pdf> (hereinafter the non-paper)
[254] Ibid. para. 8

In the non-paper the five Member States suggest how disputes under the proposed multilateral agreement would be enforced. The five Member States have three proposals.[255] The first proposal relates to jurisdiction under the CJEU via Article 273 TFEU, however like Article 344 TFEU the Article only refers to Member States and not private parties. The second option would be to establish a Unified Investment Court (UIC) a joint court of the Member States, that would be a part of the EU legal order and therefore be able to request preliminary rulings under Article 267 TFEU. Nevertheless, due to time pressure the five Member States preferred a third option where investment disputes took place under the Permanent Court of Arbitration (PCA).[256] The PCA is an intergovernmental institution providing for the framework of arbitration, thus the five Member States were aware that the PCA would have to be shaped in a certain way so it complies with the EU legal order.[257]

Previous alleged incompatibilities such as violation of Article 18 TFEU, would be avoided by granting all EU investors access to ISDS.[258] By referring to the *Danfoss* case the five Member States suggested developing a system that allows for preliminary rulings to the CJEU by a tribunal in an EU-compatible manner.[259] Unlike the case with arbitral tribunals under intra-EU BITs.[260]

As discussed the PCA would need to be a *'court or tribunal of a Member State'* in accordance with Article 267 TFEU before the PCA can request for a preliminary ruling at the CJEU.[261] This requires that the PCA is *"established by law"* which the multilateral agreement between the Member State and the investor would constitute when it has been implemented in domestic law.[262] Secondly, the tribunal must be *"permanent"* this could be obtained by providing for permanent arbitrators at the tribunal.[263] Lastly, the tribunal must have *"compulsory jurisdiction"* which can be achieved by setting up the tribunal in the same manner as in the *Danfoss* case, wherein

[255] Ibid. para. 12
[256] Ibid. para. 12
[257] Ibid. para. 14
[258] Andersen and Hindelang (n 236) (2017) p. 1008
[259] Non-paper (n 253) para. 14
[260] See *supra* section 6.2.2.1
[261] *European Schools*, Ibid. 204
[262] Andersen and Hindelang (n 236) (2017) p. 1009
[263] Ibid. p. 1009

jurisdiction was compulsory and the tribunal's decisions were final.[264] Thus a tribunal under the PCA could very well comply with the standards required under Article 267 TFEU and CJEU case law.[265]

7.4 Summary

Whatever the outcome of the preliminary ruling on the compatibility of intra-EU BITs and certain EU law provisions from the CJEU might provide, it seems that intra-EU BITs are coming to an end. Pressured by the Commission Member States are in the process of terminating their intra-EU BITs and some Member States have proposed to replace intra-EU BITs with a new multilateral agreement between all Member States. Such multilateral agreement under the PCA regime could be a suitable solution in securing for EU investors' future rights.

[264] *Danfoss* (n 190) para. 7
[265] Andersen and Hindelang (n 236) (2017) p. 1010

8. CONCLUSION

In the Commission's view, intra-EU BITs are an *"anomaly within the EU internal market."* In claiming this, the Commission has intervened as a quite irregular *amicus curiae* in a number of investment arbitrations. One of the arguments put forward by the Commission is that the investment arbitration provision provided for under intra-EU BITs violates the exclusive jurisdiction of the CJEU to interpret EU law under Article 344 TFEU and that granting some investors certain rights under a BIT is a violation of the non-discrimination rule in Article 18 TFEU. The arbitral tribunals have dismissed all if the allegations. The question of compatibility of intra-EU BITs and EU law has now reached the CJEU and in the meantime the Commission continues on trying to have all intra-EU BITs terminated.

When analysing the issue under EU law one discovers that intra-EU BITs and EU law are two compatible legal regimes, and that even under public international law the relevant provisions leads to a parallel application of the two treaties and any violation of EU law should be solved by extending rights under intra-EU BITs to all EU citizens. Nevertheless, it is not certain whether such extension and parallel application of the two treaties is necessary, since some Member State are already in the process of terminating their intra-EU BITs. Other Member States have suggested a multilateral agreement between all Member States where disputes concerning investment should be governed by the PCA. In the author's opinion, this will very likely be the solution since the days of intra-EU BITs are coming to an end. The author also considers that intra-EU BITs and EU law are not two incompatible legal regimes and believes that the CJEU in its preliminary reference from the BGH should come to the same conclusion.

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