Developments

Intra-EU Bilateral Investment Treaties and EU Law After *Achmea*: "*Know Well What Leads You Forward and What Holds You Back*"

By Csongor István Nagy[*]

Abstract

This paper analyzes the compatibility of intra-EU bilateral investment treaties—intra-EU BITs—with EU law. The status and validity of intra-EU BITs gave rise to a heated debate in Europe, which culminated in the CJEU's recent controversial judgment in *Achmea*. This Article demonstrates that although the CJEU approached intra-EU BITs from the angle of federalism—where they are both redundant and illegitimate—the reality is that EU law does not provide for the kind of protection afforded by BITs. The paper gives both a positivist and a critical assessment of the *Achmea* ruling. It argues that the judgment should be construed in the context of the underlying facts and, hence, notwithstanding the CJEU's apparently anti-arbitration attitude, its holding is rather narrow. It gives an alternative theory on intra-EU BITs' fit in the EU internal market—based on European reality—showing that the complete invalidation of intra-EU BITs is flawed because the overlap between BITs and EU law is merely partial: BITs address a subject EU law does not. This Article's central argument is that intra-EU BITs accelerate the internal market and, hence, their suppression does not lead the European integration further, but holds it back. Finally, this Article argues that the prevailing pattern of investment protection is a global scheme that cannot be arrested through regional unilateralism as essayed by the CJEU.

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A. Introduction

The status and validity of intra-EU bilateral investment treaties—intra-EU BITs—have given rise to a heated debate in Europe and entailed a good deal of uncertainty. The subject is the litmus paper of the present state of European integration. On the one hand, it is unimaginable to have domestic bilateral investment treaties—BITs—among the members of a federal system amalgamated through core values and principles. On the other hand, the EU is, at most, a half-made federation, which is, unfortunately, devoid of an effective protection of human rights, including the right to property.

Interestingly, for decades, the problem had been a time bomb in the EU constitutional architecture and was triggered by the accession of Central European countries—in 2004, 2007, and 2013.[1] Old Member States abstained from entering into intra-EU BITs and the very few they concluded were not applied. After the foundation of the European Economic Community (EEC)—apart from a couple of exceptions—Member States refrained from concluding BITs with sister states. There appears to have been a general agreement not to apply BITs concluded before enlargement:[2] Although Germany entered into such an agreement with Greece in 1961[3] and Portugal in 1980,[4] these treaties contained no investor-state but only inter-state arbitration clauses and have never given rise to arbitral proceedings after the accession of Greece in 1981 and of Portugal in 1985.[5] Hence, for a long time, the problem of intra-EU BITs had remained theoretical.

In contrast, BITs proliferated beyond the frontiers of the realm: Central European countries—which were not members of the EU at that time—concluded several BITs with the then Member States. During the half-century between the foundation of the EEC and the enlargements in 2004, 2007, and 2013, Central European countries concluded numerous

[1] *See* Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOKLYN J. INT'L L. 851, 864–65 (2010).

[2] *See* Eric Teynier, *L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne*, 1 PARIS J. INT'L ARB. 12 (2008).

[3] Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Treaty Between the Federal Republic of Germany and the Kingdom of Greece on the Promotion and Mutual Protection of Investments], Apr. 11, 1963, BGBL II at 216 (Ger.).

[4] Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Treaty Between the Federal Republic of Germany and the Portugues Republic on the Promotion and Protection of Capital Investments], Jan. 21, 1982, BGBL II at 56 (Ger.).

[5] *See* Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, 21(4) EUR. J. INT'L L. 1049, 1065 (2010); Dominik Moskvan, *The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A Bitter Pill to Swallow*, 22 COLUM. J. EUR. L. 101, 103 (2015).

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BITs with the then members of the EU. With the accession, these agreements turned into intra-EU treaties[6] and put a new subject on the table of international legal scholarship.[7]

Intra-EU BITs are of utmost relevance, not only because they concern one of the central questions of European integration, but also because the stakes are extremely high. These agreements lie at the heart of investor-state disputes involving Central European states: Approximately two-thirds of the cases in the region are intra-EU matters.[8] This means that if intra-EU BITs are rescinded, that would do away with the overwhelming majority of investment arbitration cases in the region.

Nevertheless, the biggest issue with sweeping out intra-EU BITs together with their investment protection regimes is that it would significantly impair—instead of furthering—the European integration. Investment protection stimulates the free movement of capital and the exercise of the freedom of establishment.[9] Eliminating this stimulus in a situation where EU law does not provide any—not even an imperfect—substitute does not lead the European project further, but holds it back.

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[6] *See* Eric Teynier, *L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne*, 1 PARIS J. INT'L ARB. 12 (2008).

[7] The enlargement of 2004 increased the number of intra-EU BITs to 150, the enlargement of 2007 increased the number to 191. Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, 21(4) EUR. J. INT'L L. 1049, 1065 (2010).

[8] CECILIA OLIVET, EU INVESTMENT POLICY AND INTRA-EU BITS: THE CASE OF CZECH REPUBLIC 2 (Transnational Institute 2012).

[9] Both intuition and empirical evidence suggest that BITs stimulate, to varying degrees, the cross-border movement of capital. *See, e.g.*, Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 3(1) WORLD DEV. 31 (2005) (using quantitative evidence to demonstrate that "a higher number of BITs raises the FDI that flows to a developing country."); Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) THE J. FOR DECISION MAKERS 275 (2016) (demonstrating the "the positive role of BITs in attracting FDI inflows into India."); Sarah Bauerle Danzman, *Contracting with Whom? The Differential Effects of Investment Treaties on FDI*, 42(3) INT'L INTERACTIONS 452 (2016) (noting that the effects of this stimulus depend on several circumstances. Investors may have "heterogeneous responses to ratification of investment treaties."). Danzman further points out that

> BITs are best equipped to increase FDI into activities that require a strong contract between governments and investors, such as infrastructure and utility service privatization. BITs, however, do not ameliorate investment risks related to private commercial contracts and are thus less able to overcome uncertainties that matter most to other foreign investors, such as manufacturers.

Id. See Also THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (providing an overview of the arguments for and against the significance of BITS in stimulating cross-border investments).

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Very recently, the Court of Justice of the European Union (CJEU) addressed the issue of intra-EU BITs' compatibility with EU law in *Achmea.* In the context of an investment dispute—that came under the scope of the internal market's rules on freedom of establishment and free movement of capital—the CJEU pronounced an all-embracing ad-hoc arbitration clause invalid. The ruling came as a shock for many and attracted a good deal a criticism.

This Article gives a criticism of the ruling and argues that the holding of *Achmea* is narrow and the investment-protection provisions of intra-EU BITs—along with the attached arbitration—should not be invalidated by EU law. The original function of BITs was to convert certain constitutional requirements—for example expropriation and protection of legitimate expectations—into unilaterally not recallable international obligations and to back them with an effective dispute settlement mechanism so as to guarantee them. Initially, these treaties were normally concluded between developed and developing countries, led by the concerns respecting the latter's legal system, though the obligations assumed were—as a matter of courtesy—reciprocal. These treaties, however, did not aim at establishing higher—or in any sense different—standards for investment protection than the ones already part of the constitutional traditions of western democracies.[10]

This guarantee function is certainly meaningless in a federal—or quasi federal—system, where the appropriate human rights standards are secured internally by the federal constitution. Unfortunately, this is not the case in the European Union, where the European "federal bill of rights"—the EU Charter of Fundamental Rights—does not apply to Member States, except when they act as the EU's agents. While the opponents of intra-EU BITs approach these treaties from the angle of federalism—where they are both redundant and illegitimate—the reality is that, when it comes to investment protection, EU law does not provide for the protection afforded by BITs. It is not argued here that EU law should afford the same level of protection as BITs do. It is argued, however, that the pertinent question is whether EU law and BITs cover the same subject matter. EU law—as far as human rights are concerned—appears not to afford meaningful protection against Member State action. Accordingly, it follows that the investment protection provisions of BITs—expropriation, protection of legitimate expectations under the principle of fair and equitable treatment, etc.—should not be irreconcilable with EU law, taking into account that they address a subject EU law does not, at least not effectively.

This Article is structured in the following way. First, it gives an account of the arbitration landscape. Second, it addresses the CJEU's ruling in *Achmea*, defining its holding and the issues left out of this holding. Third, it presents an alternative theory of intra-EU BITs' compatibility with EU law, addressing the individual substantive arguments for and against their validity. This section, in addition to the general criticism of the argument that intra-EU

[10] *See* Csongor István Nagy, *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty* 9 CZECH Y.B. OF INT'L L. (2018).

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BITs are incompatible with EU law, will also make suggestions as to the treatment of issues and cases left out of the holding of *Achmea*. While the Court's anti-arbitration attitude shows through the judgment, it cannot be ignored that the case was peculiar—in the sense that it centered around free-movement-of-capital and freedom-of-establishment issues. Within this section it will be demonstrated that BITs also regulate something EU law does not address. The consequences of this circumstance will be analyzed from the perspective of public international law and EU law. Namely, as explained below, the fact that intra-EU BITs regulate a subject EU law does not address does not necessarily mean that intra-EU BITs do not come under the scope of EU law, for instance, in relation to the application of the prohibition of discrimination based on nationality—Article 18 TFEU. The Article ends with the author's conclusions and proposals.

B. The Arbitration Landscape: The Global Context

Although the CJEU is unquestionably the master of EU law—including the question of intra-EU BITs' compatibility—arbitral tribunals have a significant role to play. While Member State courts and administrative agencies are certainly bound by CJEU rulings, the EU is only one—though significant—region of the global landscape; and the world outside the EU is much more impregnated by arbitration. The 1958 New York Convention enjoins the recognition and enforcement of arbitral awards and contains only a limited list of grounds of refusal.[11] Much more importantly, the 1965 Washington Convention makes the enforcement of the International Centre for Settlement of Investment Disputes—ICSID—awards mandatory without any possibility of refusal. Articles 53 and 54 of the ICSID Convention exclude the review of ICSID awards, which are not subject to any appeal and any public policy review.[12] Accordingly—at least under the ICSID Convention—recognition and enforcement cannot be rejected with reference to public policy.[13]

Arbitration is a multinational system showing little tolerance to unilateral solutions. As a matter of practice, EU law may, in one way or another, thwart the enforcement of intra-EU investment awards in the EU, but has very little chance to influence their fate outside that. This occurred in *Micula*, where, after the refusal to enforce the award in the EU,[14]

[11] U.N. COMM'N ON INT'L TRADE L., ARTICLES III–V OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) 9–10 (2015) (providing an overview of articles III through V of the 1958 Convention on the Recognition and enforcement of Foreign Arbitral Awards).

[12] It is to be noted that arbitral proceedings under the ICSID Additional Facility Rules do not benefit from this protection.

[13] *Cf.* Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MKT. L. REV. 383, 427–28 (2009).

[14] *See* Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. Arb/05/20 (Dec. 11, 2013); 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, 2015 O.J. (L. 232/43) [hereinafter EU Micula Decision]; European Commission Press Release IP/15/4725,

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enforcement was sought in the US. The European Commission established that the compensation paid for the termination of a scheme—that qualified as illegal state aid—was the equivalent of the illegal state aid it was to make up for.[15] Hence, the beneficiaries were ordered to refund the financial benefits received.[16] The investor, however, petitioned for the conversion of the ICSID award into a US judgment[17] and launched enforcement proceedings on the other side of the Atlantic.

The validity of intra-EU BITs has been addressed in a few arbitral awards.

In *Eastern Sugar v. Czech Republic*,[18] the dispute emerged before the Czech Republic's accession to the EU, though the arbitral award was rendered subsequently. Accordingly, the tribunal could have—conveniently—avoided the examination of the issue of intra-EU matter, with reference to EU law's temporal scope. Nevertheless, it penetrated into the

State Aid: Commission Orders Romania to Recover Incompatible State Aid Granted in Compensation for Abolished Investment Aid Scheme (March 30, 2015) [hereinafter EC Micula Press Release]; Case T-624/15, European Food and Others v. Comm'n; Case T-694/15, Micula v. Comm'n; Case T-704/15, Viorel Micula v. Comm'n (pending).

[15] *See* EU Micula Decision:

> Article 1: The payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Center for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 Micula a.o. v Romania . . . constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market. Article 2: 1. Romania shall not pay out any incompatible aid referred to in Article 1 and shall recover any incompatible aid referred to in Article 1 which has already been paid out . . . .

[16] *Id*.; EC Micula Press Release, *supra* note 14. The claimants—beneficiaries—appealed to the General Court, so the EU judiciary will sooner or later have to put an end to this headache-producing controversy. Case T-624/15, European Food and Others v Commission, Case T-694/15, Micula v Commission, Case T-704/15 Micula e.a. v Commission (pending).

[17] An ex parte petition was filed in the District of Columbia. *See* Micula v. Government of Romania, 104 F. Supp. 3d 42 (D.D.C. 2015) (dismissing voluntarily without prejudice). Afterwards, an ex parte petition was filed in the United States District Court for the Southern District of New York. *See* Micula, et al. v. Government of Romania, Case No. 15 Misc. 107(LGS), 2015 WL 4643180 (S.D.N.Y. Aug. 5, 2015) (resulting in an order and judgment recognizing the award). Romania appealed the decision and the United States Court of Appeals for the Second Circuit held that the Foreign Sovereign Immunities Act (FSIA) provided the only and exclusive means for the enforcement of an ICSID arbitration award against a sovereign and the summary ex parte proceeding utilized to convert the award into a judgment did not meet the requirements of the FSIA, including service of process on the sovereign; furthermore, New York was not an appropriate venue. *See* Micula, et al. v. Government of Romania, 714 F. App'x 18 (2d Cir. 2017). Accordingly, a petition to confirm the ICSID arbitration award and enter judgment was submitted to the US District Court for the District of Columbia (Civil Action No. 17-CV-2332).

[18] Arbitration Institute of the Stockholm Chamber of Commerce, Partial Award in the Matter of UNCITRAL Ad Hoc Arbitration in Paris SCC No. 088/2004 (Mar. 27, 2007).

analysis of the substantive issues and came to the conclusion that EU law did not exclude the application of intra-EU BITs for three reasons. First, the signatory states did not intend EU law to supersede them.[19] Second, EU law and BITs do not clash: They do not cover the same subject matter and the two regimes do not contain conflicting requirements. Third, as to the concern of discrimination, the tribunal held that, should there be unequal treatment, it is up to those other countries and investors to claim their equal rights—"the fact that these rights are unequal does not make them incompatible."[20]

In *Binder v. Czech Republic*, it was ascertainable that the act allegedly violating the BIT occurred before accession and, thus the tribunal seems to have held that the conflict between EU law and the BIT was excluded *ratione temporis*.[21] Nevertheless, the tribunal analyzed the relationship between the two regimes in detail. It established that the Czech Republic's accession to the EU had no impact on the BIT for two reasons. First, there was no conflict, not only as to the BIT's expropriation but also its "treatment" provisions—arbitrary or discriminatory treatment, full protection of investments and revenues, full protection and security of investments.[22] Second, it established that the Czech-German BIT entailed no discrimination. Though the tribunal admitted that the possibility to have recourse to investment arbitration is, in itself, a benefit, being "in practice the best guarantee that . . . [the] investment will be protected against undue infringements by this State," it came to the conclusion that this plight involved no discrimination.[23]

In *Achmea B.V. (formerly Eureko B.V.) v. the Slovak Republic*,[24] the tribunal held that BITs were not nullified under—and its jurisdiction was not impaired by—EU law. The tribunal asserted that issues of incompatibility may arise only if the BIT and EU law erect contradictory requirements; and if they do, "[a]ny such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction."[25] According to the tribunal, the only exception would be if investor-state arbitration were, in itself, contrary to EU law.[26] Nevertheless, notwithstanding the

[19] *Id.* at para. 167.

[20] *Id.* at para. 170.

[21] Award on Jurisdiction Rendered on June 6, 2007 on Issues of Jurisdiction (Binder v. Czech Republic), para. 62 (June 6, 2007).

[22] *Id.* at para. 63.

[23] *Id.* at para. 65.

[24] Eureko B.V. v. the Slovak Republic, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability, and Suspension (Oct. 26, 2010).

[25] *Id.* at paras 271–72, 283.

[26] *Id.* at para 273.

Commission's efforts and arguments—discrimination, deprivation of EU institutions of their exclusive competences, violation of the principle of mutual trust—the tribunal rejected this strand of interpretation downright.[27]

The intra-EU jurisdictional defense was also touched upon in *United Utilities (Tallinn) B.V. et al. v. Republic of Estonia*:[28] Though Estonia considered submitting it, in the end, it refrained from spelling it out—presumably because this defense had consistently failed before arbitral tribunals.

C. Intra-EU BITs Before EU Courts After *Achmea*: How to Play the Jig-saw Puzzle?

Contrary to the above arbitral practice, the European Commission—in its *amicus curiae* opinions—has been vigorously rejecting the validity of intra-EU BITs. On June 18, 2015, it launched a few pilot infringement proceedings against five Member States—Austria, the Netherlands, Romania, Slovakia, and Sweden—to have intra-EU BITs abolished. The European Commission also commenced consultation with the rest of the Member States to have intra-EU BITs terminated—aside from Ireland and Italy, which had already terminated all such treaties.[29]

The first occasion for the CJEU to speak authoritatively about the question was in *Achmea*, which was hoped to put an end to the controversy concerning intra-EU BITs. The case emerged from a German annulment procedure. The Higher Regional Court—Oberlandesgericht—of Frankfurt am Main approved an arbitral award rendered on the basis of an intra-EU BIT.[30] The German Federal Supreme Court—Bundesgerichtshof—made clear in its reference, with an unusually lengthy and detailed argument, that, as a general

[27] *Id.* at para. 274.

[28] P.O. No. 2, ICSID Case No. ARB/14/24.

[29] European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties (June 19, 2015):

> Since enlargement, such 'extra' reassurances [provided by BITs] should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: [I]n accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.

[30] Oberlandesegericht [OLG] Frankfurt am Main [Frankfurt am Main Higher Regional Court] Dec. 18, 2014, 26 SC 3/14, http://openjur.de/u/753594.html.

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principle, it did not consider intra-EU BITs to be irreconcilable with EU law,[31] a conclusion shared by AG Wathelet. At the end, however, the CJEU declared the BIT's arbitration clause to be incompatible with EU law.

The CJEU's ruling in *Achmea* features several oddities. The judgment is squarely opposed to AG Wathelet's opinion and the Budesgerichtshof's remarks. The reasoning is surprisingly laconic and contains no reference to the AG's opinion, hushing up the arguments lined up there. The tight text stands in sharp contrast with the intricacies of the subject and the fact that the judgment was rendered by the Grand Chamber and 16 out of the 28 Member States, as well as the Commission intervened.

Nevertheless, as explained below, the judgment's holding is rather narrow and leaves several questions open. While the CJEU's anti-arbitration attitude clearly manifested itself, the Court ruled only on a dispute settlement clause providing for ad-hoc arbitration in "all disputes . . . concerning an investment," and not the substantive provisions of intra-EU BITs. Furthermore, while the language of the operative part is general, it cannot be disregarded that the case was very specific. It was one of the few cases where the investor's claim centered around the BIT's free movement aspects instead of its investment protection rules, thus, the BIT's application clearly overlapped the EU internal market's regime on free movement of capital and freedom of establishment.

The case was based on the Netherlands-Czechoslovakia BIT, inherited by the Slovak Republic after the dissolution of Czechoslovakia. Article 8 of the BIT provided for ad-hoc arbitration according to the United Nations Commission of International Trade Law—UNCITRAL—rules. The controversy emerged from the Slovak Republic prohibiting the distribution of profits generated by private sickness insurance activities. After opening the sickness insurance market in 2004, the Slovak Republic reversed the liberalization in 2006, and in 2007 prohibited the distribution of profits. After the Slovak Constitutional Court pronounced the measure unconstitutional, the ban was lifted in 2011. While the prohibition on the repatriation of profits appeared to go counter to the free movement of capital and the freedom of establishment, the investor—for obvious reasons—decided to pursue its claim under the BIT and to demand compensation.[32]

The CJEU pronounced the BIT's dispute settlement clause incompatible with Articles 267 and 344 TFEU after a remarkably concise or even summary analysis, which may be compressed

[31] BGH Mar. 3, 2016, I ZB 2/15, http://juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74612&linked=bes&Blank=1&file=dokument.pdf. In its reference, the BGH posed questions as to the compatibility of BITs with Articles 344, 267 and 18 TFEU. Case C 284/16, Slowakische Republik v. Achmea BV, 2018 O.J. C 161, paras. 14–23 [hereinafter Achmea].

[32] Achmea, paras. 7–9.

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into one sentence: As some of the BIT's provisions overlap EU law, in particular the provisions on the free movement of capital and the freedom of establishment, the arbitral tribunal's jurisdiction encroaches on the CJEU's and Member State courts' monopoly to interpret EU law, thus endangering "the full effectiveness of EU law."

After establishing that Member States are forbidden to "submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties,"[33] the Court reached this conclusion in two steps.

First, it examined "whether the disputes which the arbitral tribunal mentioned in Article 8 of the BIT is called on to resolve are liable to relate to the interpretation or application of EU law."[34] The Court answered the question in the affirmative, primarily because of the overlap with EU internal market's freedom of establishment and free movement of capital.[35]

> Even if . . . that tribunal, despite the very broad wording of Article 8(1) of the BIT, is called on to rule only on possible infringements of the BIT, the fact remains that in order to do so it must, in accordance with Article 8(6) of the BIT, take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties.
>
> [T]hat law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States. It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, *particularly the provisions concerning the fundamental freedoms,*

[33] *Id.* at para. 32.

[34] *Id.* at para. 39.

[35] Carola Glinski, *Achmea and its Implications for Investor Dispute Settlement*, 21(1) ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 47, 60 (2018)

> Thus, the ruling can only be understood in such a way that every dispute settlement mechanism in an area which is already covered by EU law bears at least the hypothetical risk of an interpretation or application of EU law and is incompatible with the autonomy of EU law – which is particularly true for intra-EU economic relations.

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> *including freedom of establishment and free movement of capital*.[36]

This conclusion sealed the fate of the BIT's arbitration clause. In the second step, the CJEU was quick to establish—in line with its traditional approach—that the ad-hoc arbitration provided for by the BIT is not part of the EU's judicial system and the arbitral tribunal may make no preliminary references to the Court.[37] The CJEU underpinned this conclusion with a third factor: The arbitral awards rendered on the basis of Article 8 of the BIT are not subject to effective review by a Member State court. On the one hand, the review of arbitral awards is limited.[38] On the other hand, Article 8 of the BIT empowered the arbitral tribunal to choose its seat. The Court argued that if the arbitral tribunal selects a place outside the EU, no Member State court has power to review the award in the frame of an annulment procedure.[39]

Given that commercial arbitration may also involve the application of EU law—while it may take place outside the EU or be subject to an annulment procedure with fairly limited scope—the question puts itself forward why investment arbitration cannot enjoy the same treatment as commercial arbitration, which is not ruled out merely because it involves the application of EU law.[40] The CJEU tried to lift this inconsistency with a remarkably odd argumentation. According to the Court, the difference between investment and commercial arbitration is that:

> While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law . . . , disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations . . . relating to commercial arbitration cannot be applied to arbitration

[36] Achmea, at paras 40–2.

[37] *Id.* at paras 43–9.

[38] *Id.* at paras 53.

[39] *Id.* at paras 52.

[40] *Id.* at paras 54.

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> proceedings such as those referred to in Article 8 of the BIT.[41]

The above distinction—commercial arbitration is based on party autonomy, while investment arbitration on a treaty—is difficult to conceive. The treaty is based on the party autonomy of two sovereigns, and by the use of its dispute settlement mechanism the investor accepts it. It is painfully difficult to argue that arbitration between a state and an investor is not based on the "freely expressed wishes of the parties." The second circumstance referred to in the above excerpt may cause a similar headache: Commercial and investment arbitration may equally involve the application of EU law, let alone that investment arbitral tribunals quite often encounter purely contractual disputes, which could equally be subject to commercial arbitration.[42]

It is probably no exaggeration to say that the above ruling came at a huge surprise. Member States have concluded several BITs without any reasonable doubt about their validity and the CJEU's ruling went drastically counter to both the German Supreme Court's—the referring court—and AG Wathelet's analysis. The greatest surprise, however, was most likely caused by the Court's sweepingly laconic and, at times, odd argumentation. Although explained in AG Wathelet's opinion,[43] the ruling ignored that the overlap between BITs and EU law are slight, especially in terms of practice. While both BITs and EU law contain provisions on the free movement of capital and the freedom of establishment, these provisions are very rarely arbitrated. On the contrary, the BITs' investment protection rules—expropriation, fair and equitable treatment, etc.—serve as the basis of the vast majority of investment claims and have no counterpart—not even an imperfect one,—in EU

[41] *Id.* at para. 55.

[42] *See e.g.*, Csongor István Nagy, *Hungarian Cases Before ICSID Tribunals: The Hungarian Experience with Investment Arbitration*, 58(3) HUNGARIAN J. OF LEGAL STUD. 291, 306–08 (2017) (analyzing Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22).

[43] See the opinion of AG Wathelet in Case C-284/16 Achmea, para. 180:

> I do not know what the Commission means by 'full protection', but a comparison between the BIT and the EU and FEU Treaties shows that the protection afforded to investments by those Treaties is still a long way from being 'full'. In my view, intra-EU BITS, and more particularly the BIT at issue in the main proceedings, establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law.

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law. It seems that the Court acknowledged that the overlap is slight[44] and the chance that an Article 8 tribunal may encounter a claim covered by EU law is rather low.[45]

Nonetheless, if overcoming the surprise and taking a closer look at the ruling—a closer scrutiny reveals that it has a very limited purview—and, notwithstanding the Court's apparently anti-arbitration attitude, it does not fully put an end to the controversy on intra-EU BITs.

First, the language of the ruling's operative part refers solely to all embracing dispute settlement clauses providing for ad-hoc arbitration.

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[46]

Accordingly, the ruling does not touch at all upon the substantive provisions of BITs. Although these may be of little use without the possibility of an arbitral procedure, they seem to have remained valid. Furthermore, the dispute settlement clause embedded in Article 8 of the Netherlands-Czechoslovakia BIT submitted *"[a]ll disputes* between one Contracting Party and an investor of the other Contracting Party *concerning an investment*

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[44] *Id.* at para. 42 ("It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, *particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital*.") (emphasis added).

[45] The Court further provided that

> [I]t must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, *even though they might concern the interpretation or application of that law*.

Id. at paras. 56 (emphasis added).

[46] *Id.* at para. 60.

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of the latter," to ad-hoc arbitration. This implies that institutional—most notably ICSID—arbitration is not precluded, same as investment arbitration under the Energy Charter Treaty.[47] In the same vein, the ruling does not extend to arbitration clauses restricting jurisdiction to investment protection issues—expropriation, fair and equitable treatment, full protection and security, etc. Contrary to the rules on the freedom of investment—which have their counterparts in EU internal market law—these provisions do not overlap EU law. Hence, conferring jurisdiction on an arbitral tribunal as to these provisions may not encroach on the prerogatives of EU courts. Finally, a dispute settlement clause providing specifically for arbitration within the territory of the EU may also pass muster. The ruling suggests that the possibility of review by a Member State court might save an arbitration clause. Article 8 empowered the arbitral tribunal to select the place of the proceedings, and although it chose Germany, it could have equally chosen a place outside the EU.[48] In this case no Member State would have had power to carry out an annulment procedure.

Second, if subjecting the ruling to a case-law analysis, the inquiry narrows the holding—*ratio decidendi*—even further. Albeit that the language of the operative part is unqualified, it cannot be disregarded that the arbitral award in *Achmea* rested on considerations that, in fact, closely paralleled the EU internal market's rules on freedom of establishment and free movement of capital. It was one of the rare investment cases, which, instead of issues of protection, dealt significantly with freedom of payments—repatriation of profits. According to the CJEU's jurisprudence—profiting from economic activities pursued in another Member State, what necessarily embraces the distribution and repatriation of profits—is an integral part of the concept of freedom of establishment.

> The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin *and to profit therefrom.*[49]

Although the Slovak measure was also judged under the free and equitable treatment standard, the key issue was a Member State measure that under EU law may be conceived as a restriction of free movement. This implies that—contrary to the very general language of the ruling's operative part—the Court in fact addressed one of the very rare cases where a BIT and EU internal market law actually overlapped. While the CJEU's rulings evidently

[47] *See* Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, paras. 678–83 (distinguishing Achmea from cases based on the Energy Charter Treaty).

[48] Achmea, para. 52.

[49] Case C-55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-04165, para. 25.

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have an impact beyond the case at stake,[50] the scope of this binding authority is not settled in EU law. There is no clear indication as to what is binding from the ruling: The operative part or the whole ruling?

Preliminary rulings interpret EU law in the context of a flesh and blood case,[51] and the operative parts are, at times, incomprehensible if read in isolation from the rest of the ruling. All these suggest that the operative part needs to be read in the context of the reasoning.

It is not rare that the CJEU distinguishes earlier rulings on the basis of the fact pattern.[52]

In *Express Dairy Foods Limited*, the referring national court asked the court to clarify whether an earlier judgment also applied to the facts before the bench. The CJEU indicated that the question whether an earlier ruling governs the case at stake could be established only by means of the reasons it was based on.[53]

AG Warner in *Manzoni* advocated a similar approach.

> It means that all Courts throughout the Community, with the exception of this Court itself, are bound by the ratio decidendi of a Judgment of this Court. (*I refer to the ratio decidendi of such a Judgment rather than to its operative part, because one must allow for cases to which the ruling in the operative part at first sight applies, but which are in reality distinguishable from the case in which that ruling was given*).[54]

[50] Case 283/81Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, ECR 03415; *See* Tamás Szabados, *'Precedents' in EU Law — The Problem of Overruling*, 3(1) ELTE L. J. 125, 131–33 (2015).

[51] Case C-112/00, Schmidberger, 2003 E.C.R. I-5659, para. 32; Joined Cases C-94/04 and C-202/04, Cipolla and Others, 2006 E.C.R. I-11421; Case C-478/07, Budějovický Budvar, 2009 E.C.R. I-7721, para. 64; Joined Cases C‑570/07 and C‑571/07, Blanco Pérez and Chao Gómez, 2010 ECR I-0000, para. 36; Case C-384/08 Attanasio Group, 2010 E.C.R. I-2055, para. 28; Case C-197/10, Unió de Pagesos de Catalunya v Administración del Estado, 2011 E.C.R. I-08495.

[52] Case C-144/96. ONP v. Maria Cirotti, 1997 E.C.R. I-05349, paras. 21, 25–8.

[53] Case 130/79, Express Dairy Foods Limited v. Intervention Board for Agricultural Produce, 1980 E.C.R. 1887, paras. 5-8.

[54] Joined opinion of AG Warner in Case 112-76, Renato Manzoni v. Fonds national de retraite des ouvriers mineurs, Case 22-77, Fonds national de retraite des ouvriers mineurs v. Giovanni Mura, Case 37-77, Fernando Greco v. Fonds national de retraite des ouvriers mineurs, Case 32-77, Antonio Giuliani v. Landesversicherungsanstalt Schwaben, 1997 E.C.R. 1647, at 1662.

All in all, it seems that while *Achmea* features an anti-arbitration attitude—which may guide future cases—the ruling's holding is very narrow. It rules out all-embracing ad-hoc arbitration—covering all disputes concerning an investment—without any indication as to substantive provisions. Furthermore, its precedential value is questionable as to cases centering around a BIT's investment-protection provisions having no counter-part in EU law. As demonstrated below, it would be most contradictory to suppress such cases, as they in fact foster—instead of thwarting—the European integration. They represent a free-movement-stimulating device that EU law currently does not dispose of and, hence, cannot replace.

The above considerations showcase that the *Achmea* ruling's scope is much narrower than the echo it is generating. Hence, although the CJEU's anti-arbitration attitude revealed itself, the status of intra-EU BITs is not fully settled. As a corollary, the following section's criticism against the CJEU's attitude in *Achmea* is not only a general criticism of the ruling, but also a proposal for the missing elements of intra-EU BITs' European treatment.

D. An Alternative Theory of Intra-EU BITs: The Rebellion of Facts

EU law—at least in matters coming under its purview—does not tolerate bilateralism in intra-EU matters and overrules agreements concluded by two or more Member States.[55] Hence, it is tempting to argue that intra-EU BITs violate EU law[56] and, thus, were implicitly abolished with accession. The crucial question is, however, whether the subject matter of BITs and EU law fully overlap and whether they are in real conflict with each other?[57] As noted above, this overlap is merely partial and does not extend to the most intensively arbitrated rules: The investment-protection provisions.

Before going into the intricacies of the subject, it is worth referring briefly to the fact that intra-EU BITs—like all bilateral investment treaties—are hybrid agreements, conferring benefits both on contracting states and investors. The scholarship is not devoid of theories trying to conceptualize this hybrid nature.[58] Whatever the correct conceptualization is, thus

[55] Case 10/61, Comm'n v. Italy, ECR 1 (Feb. 27, 1962); Case 235/87, Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, 1988 E.C.R. 05589; Case C-3/91, Exportur SA v. LOR SA and Confiserie du Tech SA, 1992 E.C.R. I-05529.

[56] *See e.g.*, Julie A. Maupin, *Where should Europe's investment path lead? Reflections on August Reinisch, "Quo vadis Europe?"*, 12 SANTA CLARA J. INT'L L. 183, 217 (2013) (stating that intra-EU BITs violate the fundamental principles of the common market; they discriminate on the basis of nationality.).

[57] At first glance, the question may appear to be strange, because under Article 207 TFEU the EU has the competence to conclude BITs with third countries.

[58] *See, e.g.*, Zachary Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, 74 BRITISH Y.B. INT'L L. 182 (2003); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEININGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 61.2 (2007); MARTIN PAPARINSKIS, INVESTMENT TREATY INTERPRETATION AND CUSTOMARY INVESTMENT LAW: PRELIMINARY REMARKS, IN EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 81–5 (Chester Brown

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much is certain: Protective rights accrue to investors. Of course, this does not imply that the termination of BITs would require the assent of the investors covered, who are beneficiaries of—but not parties to—these treaties. Nonetheless, this does imply that investors who made investments in reliance on the BIT's protective rules have legitimate expectations that do merit legal protection. It is not a coincidence that BITs contain survival clauses, providing for the persistence of the legal protection as to investments made before the termination.[59] These legitimate expectations would be frustrated if, at the time of accession, EU law divested investors of this shelter without replacing it with any meaningful protection against Member State action—apart from the case when Member States implement EU law. This circumstance appears to be of utmost importance, given that the protection of legitimate expectations is one of the core principles of EU law[60] and it is submitted that it should guide EU law's reaction concerning intra-EU BITs.

Below, the individual arguments for and against the validity of intra-EU BITs will be examined. The starting point of this analysis is the demonstration that BITs regulate a subject that is not addressed by EU law. Afterwards, the relevance of this circumstance will be analyzed through the pertinent questions of public international law—for example implicit termination—and EU law—for example discrimination based on nationality, and encroachment on the exclusive jurisdiction of EU courts. As noted above, the purpose of this section is both to give a critical analysis of the CJEU's approach in *Achmea* and to make proposals for the missing elements of intra-EU BITs' European treatment.

I. BITs Regulate Something EU Law Does Not Address

The most important benefit of BITs is the rules on the protection of investments—property—such as expropriation[61] and other treatment standards—for example fair and

& Kate Miles eds., 2011); Anthea Roberts, Clash of Paradigms: *Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013); Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55(1) HARV. INT'L L. J. 1 (2014); Tania S. Voon, Andrew D. Mitchell & James Munro, *The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 9(2) ICSID REV. - FOREIGN INV. L. J. 455 (2014).

[59] *See* James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. WORLD INV. TRADE 935 (2008); Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 386–88 (2015); Giovanni Zarra, *The Arbitrability of Disputes Arising from Intra-EU BITs*, 25 AM. REV. INT'L ARB. 573, 585 (2014); Tania S. Voon, Andrew D. Mitchell & James Munro, *The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 9(2) ICSID REV. - FOREIGN INV. L. J. 455, 465 (2014).

[60] *See e.g.*, Case 17/67, Firma Max Neumann v. Hauptzollamt Hof/Saale, 1967 E.C.R. 441; Case 98/78, Racke, 1979 E.C.R. 69; Case 14/81, Alpha Steel Ltd. v Commission, 1982 E.C.R. 749; Case C-248/89, Cargill BV v. Comm'n, 1991 E.C.R. I-2987; Case C-365/89, Cargill BV v. Produktschap voor Margarine, Vetten en Olien, 1991 E.C.R. I-3045.

[61] For a concise summary on compensation for taken property see ZOLTÁN VÍG & SLOBODAN DOKLESTIĆ, REQUIREMENTS OF LAWFUL TAKING OF FOREIGN PROPERTY IN INTERNATIONAL LAW 41–70 (2016).

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equitable treatment—and the very effective dispute settlement mechanism.[62] While it could be argued that notwithstanding its enormous practical significance, procedure is accessory to substantive protection, these substantive standards are not reproduced in EU law.[63] Although fundamental human rights are one of the cornerstones of the EU,[64] EU law contains no effective mechanism of general application to compel Member States to respect them.[65] While the EU Charter of Fundamental Rights—the EU federal "bill of rights"—among others, does provide for the protection of property,[66] it is, in principle, applicable to the institutions and bodies of the EU and applies to Member States only when, and to the extent they are implementing EU law.[67] Likewise, the general principles of law recognized by the CJEU—the precursors of the Charter—established requirements that were applicable to EU actors, but not to Member States.[68] The rationale behind this approach is that the Charter was not meant to control Member States, but to limit the power of the "federal" government: As in a democratic society no public authority may exist without human rights limits, the CJEU established very early that the EU has to respect human rights even if they are not explicitly

[62] *See* Timothy G. Nelson, *Human Rights Law and BIT Protection: Areas of cCnvergence*, 12(1) J. WORLD INV. & TRADE 27 (2011) (analyzing the convergence between human rights protection and BITs).

[63] *See* Moskvan, *supra* note 5, at 106 ("EU law and intra-EU BITs clearly do not offer the same substantive rules in the area of private property rights, specifically with regards to expropriation should the owner's property be frustrated.").

[64] The respect of human rights is a precondition of membership—Copenhagen criteria—established by the European Council in Copenhagen on June 21 through 22, 1993 (Conclusions of the Presidency), and is listed among the core values of the Union; according to Article 2 TEU, the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

[65] *See, e.g.*, ANDRÁS JAKAB, APPLICATION OF THE EU CHARTER BY NATIONAL COURTS IN PURELY DOMESTIC CASES (October 21, 2014); Michael Dougan, *Judicial Review of Member State Action Under The General Principles and the Charter: Defining the "Scope Of Union Law*," 52 COMMON MKT. L. REV. 1201 (2015).

[66] Charter of Fundamental Rights of the European Union art. 17, 2010 O.J. C 83/02 [hereinafter Charter of Fundamental Rights].

[67] The scope of the Charter is based on the principle that the federal bill of rights applies to the federal government and the national bill of rights applies to the national government. According to Article 51(1) of the Charter, "[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." *Id.* art. 51(1). Article 51(2) emphasizes that the "Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." *Id.* art. 51(2). *See also* Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8(3) EUR. CONST. L. REV. 375, 377 (2012) ("However, from the fact that the Charter is now legally binding it does not follow that the EU has become a 'human rights organi[z]ation' or that the ECJ has become 'a second European Court on Human Rights' (ECtHR).").

[68] *See* Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT L. REV. 945, 958–69 (2002).

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provided for in EU law; this culminated in the Charter, which, likewise, was not meant to be a general human rights watchdog but a clog on the EU's "federal" government.[69]

Although the CJEU has interpreted the term "implementing Union law" fairly widely,[70] the core principle of the EU's constitutional architecture was not called into question.[71] It is worth referring to the CJEU's judgment in *Siragusa*,[72] where the Court encountered a genuine investment protection case: Mr. Siragusa made alternations to his property in a landscape conservation area and was ordered to restore the site to its former state. He argued that the acts of Italy impaired his right to property enshrined in Article 17 of the Charter. It is easy to parallel this fact pattern with the archetype of investment protection cases.

The CJEU came to the conclusion that the Italian authorities were not implementing EU law[73] and confirmed that the purpose of the Charter is to ensure the protection of fundamental rights in the sphere of EU activity, that is, it is not meant to shelter fundamental rights from Member States in general.[74]

Taking the above constitutional architecture into account, it is easily understandable that investors are hesitant to accept the argument that intra-EU BITs were superseded by EU law, where, as far as Member State action is concerned, EU law provides for no substantive protection of property, and perceive the revocation of the BITs as an impairment of their legitimate expectations. In this sense, intra-EU BITs are an element of the EU's big human rights question and, hence, the predicament should be solved as part of that.

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[69] *See* Filippo Fontanelli, *The Implementation of European Union law by Member States Under Article 5 1(1) of the Charter of Fundamental Rights*, 20(2) COLUMBIA J. EUR. L. 193, 197-198 (2014).

[70] *See, e.g.*, Case C‑617/10, *Åkerberg Fransson* 2013 E.C.R. 105.

[71] Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law*, 48 COMMON MKT. L. REV. 63, 66 (2011):

> As a result, the only area covered by intra-EU BITs and the investment chapter of the ECT where EU law does not provide relevant substantive rules appears to be the protection of private property rights against expropriation and other political risks which result from purely national measures. However, even in such cases, the Court of Justice has ruled that national law on property protection must be compatible with the Treaty provisions, and more specifically that it shall be applied in a non-discriminatory manner.

[72] Case C-206/13, *Siragusa,* 2014 E.C.R. 126.

[73] *See id.* para. 30.

[74] *See id.* paras. 31–3.

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An alternative way of making intra-EU BITs redundant would be the creation of an EU-wide investment protection system.[75] Such a regional duplicate could indeed do away with the problem, but it would also confirm that fundamental rights are not protected effectively in the EU and may also interfere with the endeavors to find the proper arrangement for protecting human rights against Member States.

II. Public International Law

Under public international law, the issue of compatibility centers chiefly around the question of subject-matter: Do the subject-matters of intra-EU BITs and of EU law overlap?[76] Obviously, the answer to the question relies in EU law: No questions of international law may emerge if the two regimes do not have the same subject matter or if there is no conflict between them. If they do, for various reasons, EU law would suppress intra-EU BITs. If the subject matter of investment treaties does not come under the scope of EU law, obviously, no conflict may emerge.

According to Article 59 of the Vienna Convention on the Law of Treaties (VCLT), an earlier treaty is considered to be terminated if the parties conclude a later treaty covering the same subject matter and the provisions of the two instruments are irreconcilable, or the parties' intention to terminate the earlier agreement is ascertainable.[77]

One arrives to a roughly similar—though not identical—conclusion under Article 30 of the VCLT, which deals with successive treaties and follows the principle that later treaties abrogate earlier treaties—*lex posterior derogate legi priori*. In fact, the standard of Article 30 is even stricter and requires more than the sameness of the subject matters: It

[75] *See* Nikos Lavranos, *Member States' Bilateral Investment Treaties (BITs): Lost in Transition?*, HAGUE Y.B. INT'L L. 281, 305 (2012).

[76] Giovanni Zarra, *The Arbitrability of Disputes Arising From Intra-EU BITs*, 25 AMERICAN REV. INT'L ARB. 573, 580–81 (2014).

[77] Article 59 of the Vienna Convention on the Law of Treaties (VCLT) states:

> 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.

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

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presupposes a conflict of norms.[78] If "all the parties to the earlier treaty are parties also to the later treaty"—as in case of intra-EU BITs—and the later treaty does not specify otherwise and Article 59 does not apply, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

Taking into account that the essence of intra-EU BITs is the protection of the investors' property against Member State action and, notwithstanding some interfaces, this subject is not addressed by EU law effectively. It seems to be convincing that the two regimes' subject matters do not fully overlap.[79] Although from afar, it may seem that the two regimes deal with the same issue—cross-border investment[80]—a closer look reveals that the intersection,

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[78] Giovanni Zarra, *The Arbitrability of Disputes Arising from Intra-EU BITs*, 25 AMERICAN REV. INT'L ARB. 573, 583 (2014).

[79] August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39 LEGAL ISSUES OF ECON. INTEGRATION 157, 167–72 (2012):

> In fact, the intra-EU BITs and the EU accession treaties of new members do not relate to the 'same subject matter'. The EU accession treaty made EU law applicable to them. It provides for a highly integrated economic union based on a customs union and is enriched by a vast set of additional common policies, whereas the BITs provide for a limited number of very specific investment protection standards, which may be enforced, among others, but most importantly, by direct investor-state arbitration. While there may be some partial overlap between BITs and EU law, this cannot change the fact that they are addressing different subject matters.

Id.

[80] For arguments that the two regimes have the same subject-matter, see Mark A. Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12 SANTA CLARA J. INT'L L. 159, 178 (2013):

> Both the BITs and the EU legal order govern the free movement of capital under uniform principles of non-discrimination and treatment, with a constant recognition of rights in property. Thus, they address the same subject matter, even if the scope of EU law is much wider, and thus qualify for the threshold application of tests of incompatibility found in the international law principles reflected in Articles 59 and 30(3)78 of the Vienna Convention on the Law of Treaties.

Id.; *see also* Dimopoulos, *supra* note 71, at 73–4 (2011):

> Adopting a broad definition of the notion of the 'same subject matter', in the sense that two treaties have the same subject matter to the extent that 'the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another', then it can certainly be argued that intra-EU BITs cover the same subject matter as the EU Treaties, to the extent that such conflicts occur. However, even if a narrow definition of 'same subject matter' were adopted, intra-EU

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as a matter of practice, is narrow. The internal market centers around free movement, while BITs also deal with the protection of investments that have already entered the market. It is true that the treatment of foreign investors is relevant from the perspective of the internal market, since, according to the CJEU's jurisprudence, state measures discouraging investors from investing in another Member State may easily qualify as a restriction of free movement.[81] This does not mean, however, that investors could hope for the comprehensive protection of their individual property rights. In this regard, it is worth referring to the CJEU's judgment in *Texdata Software GmbH*,[82] where the Court suggested that a human rights violation may not be regarded as a deterrent to free movement.[83]

Be the answer to the question of subject matter as it may, the application of Articles 30 and 59 of VCLT also requires that the two regimes clash. Accordingly, the next step is to establish whether there are overlaps in terms of subject matter and whether there are specific conflicts between intra-EU BITs and EU law.[84]

III. EU Law

Obviously, there can be no conflict between intra-EU BITs and EU law as to those points where their subject matters do not overlap.[85] While Article 351 TFEU addresses the question

> BITs can still be considered as having the same subject matter as EU law. . . . EU law provides rules for the post-establishment treatment and operation of foreign investment, the transfer of assets and the imposition of limitations on the rights of individuals resulting from EU or Member States' measures. Hence, both intra-EU BITs and the EU Treaties deal with foreign investment activity, and provide rules for the same aspects of foreign investment regulation, namely their post-establishment treatment and operation, capital movements/ transfers and limitations on private property rights.

Id.

[81] *See, e.g.*, C-367/98, Comm'n v. Portugal, 2002 E.C.R. I- 4731, para. 45; Case C-483/99, Comm'n v. France, 2002 E.C.R. I-4781, para. 41; Case C-463/00, Comm'n v. Spain, 2003 E.C.R. I 4581, para. 61; Case C-98/01, Comm'n v. United Kingdom, 2003 E.C.R. I 4641, para. 47; Case C-174/04, Comm'n v. Italy, 2005 E.C.R. I-4933, paras. 30–1; Case C-112/05, Comm'n v. Germany, 2007 E.C.R. I-08995, para. 19; Joined Cases C 105/12 to C 107/12, Staat der Nederlanden v. Essent NV et al., ECLI:EU:C:2013:677, para 41.

[82] C-418/11 *Texdata Software GmbH* (not published yet).

[83] *See id.* paras. 64–9.

[84] Dimopoulos, *supra* note 71, at 78 ("Using different tools and based on different legal principles, both EU law and international law require the determination of the specific incompatibilities between EU law and intra-EU IIAs in order to assess whether and to what extent the latter are valid and/or applicable.").

[85] Case 10/61, Comm'n v. Italy, 1962 E.C.R. 1 ("[I]n matters governed by the EEC treaty, that treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT."); Case 235/87, Annunziata Matteucci v Communauté

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of treaties concluded with third countries before accession,[86] it is hard to find a specific provision on intra-EU treaties. Nonetheless, the CJEU's jurisprudence makes it clear that—in matters where it applies—EU law has supremacy over pre-existing inter-Member-State treaties and, hence, the latter cannot be maintained if they conflict with EU law.[87] "The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community."[88] And, at first glance, intra-EU BITs may infringe EU law in numerous regards: They may entail discrimination among EU investors on the basis of nationality, violating Article 18 TFEU, they may encroach on the exclusive jurisdiction of the CJEU, violating Articles 267 and 344 TFEU, they may go counter to the principle of mutual trust and sincere cooperation between EU Member States, as embedded in Article 4(3) TEU, and they may create opportunities for forum shopping.[89]

The last of these two objections—mutual trust and forum shopping—seem to be political in nature. While mutual trust is a core principle of EU law, arguably, it operates as part of specific rules, such as the free movement provisions. Likewise, forum shopping may—or may not—be a reprehensible phenomenon, but it is not generally prohibited.

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française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, 1988 E.C.R. 05589 ("22. Moreover, the Court has consistently held (see in particular the judgment of 27 February 1962 in Case 10/61 Commission v Italy ((1962)) ECR 1) that, in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force.").

[86] Consolidated Version of the treaty on the Functioning of the European Union art. 351, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

Id. at 196.

[87] Case 10/61, Comm'n v. Italy, 1962 E.C.R. 1; Case 235/87, Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, 1988 E.C.R. 05589, para. 22.

[88] Opinion of AG Poiares Maduro in Case C‑402/05 P Yassin Abdullah Kadi v Council and Commission, 2008 E.C.R. I-06351, para. 24.

[89] *See* Lavranos, *supra* note 75, at 299–300.

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The first two objections lead us back to our starting point: Does EU law's scope extend to investment protection cases, or put it inversely, do these cases come under EU law's subject matter? The prohibition of discrimination on the basis of nationality—Article 18 TFEU—operates only "[w]ithin the scope of application of the Treaties." Arbitral proceedings may encroach on the CJEU's exclusive jurisdiction only if the CJEU does have jurisdiction to judge the claim. While it is easy to see that intra-EU BITs are, by their very nature, discriminatory, since they confer benefits, substantive standards, and an effective dispute settlement mechanism on to the investors of a particular Member State, but not on the investors of the rest, it is more difficult to establish that the subject matters of the BITs and EU law completely overlap. It is also difficult to prove that the CJEU has the power to award compensation in cases where national governments expropriate the investors' assets.

Above, it was demonstrated that intra-EU BITs regulate a subject that is not addressed in EU law—at least not effectively. Below, the relevance of this circumstance will be analyzed in respect of the above two legal objections—discrimination based on nationality and encroachment on the jurisdiction of the CJEU.

The above analysis suggests that it is difficult to argue that intra-EU BITs' investment protection provisions encroach on the jurisdiction of the CJEU[90]—thus violating Articles 267 and 344 TFEU—given that they deal with questions that do not come under the jurisdiction of the Court, at least in matters where Member States do not act as the agents of the EU.

In the scholarship—in support of intra-EU BITs' invalidity—mention is made of cases where the CJEU quashed institutional schemes aiming to vest bodies outside the EU institutional framework with the power to apply and interpret EU law.[91] These cases, however, had a distinguishing feature, which is not present in case of intra-EU BITs: The institutions concerned were supposed to acquire mandatory jurisdiction over the application of certain elements of EU law. This implies that arbitral proceedings concerning subjects not covered by EU law should be in conformity with Articles 267 and 344 TFEU.

In *Opinion 1/09*, the CJEU examined the European and Community Patents Court, which was supposed to deal with European and Community patents under the proposed international treaty and EU legislation. The Court held that this system would not be compatible with EU

[90] *Contra* Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, 39 LEGAL ISSUES OF ECON. INTEGRATION 179, 196–99, 205–06 (2012) (arguing that arbitral tribunals may encounter questions of EU law and if the tribunal is not able to submit a preliminary question, Article 267 TFEU is violated).

[91] *See, e.g.*, Clodfelter, *supra* note 80, at 180–81 (2013); Moskvan, *supra* note 5, at 124–25.

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law,[92] because it would deprive national courts of their competence to apply EU law,[93] eliminate the possibility to claim damages from Member States for violation of EU law,[94] and to launch infringement proceedings against Member States.[95]

It should be underlined, however, that the European and Community Patents Court was to be vested with the exclusive and mandatory jurisdiction to apply and interpret certain provisions of EU law and it was the involvement of EU law that triggered the Court's condemnation.[96] The Court established that an international agreement might create "a court responsible for the interpretation of its [own] provisions."[97] The problem emerged from the fact that the treaty under scrutiny envisaged establishing an international court that was called upon "to interpret and apply not only the provisions of that agreement but also the future regulation on the Community patent and other instruments of European Union law."[98]

In *Opinion 2/13*, the CJEU examined the EU's draft accession agreement to the European Convention of Human Rights (ECHR) and found, due to various reasons, that it was incompatible with EU law. One of these reasons was Article 267 TFEU. The problem was entailed by Protocol No 16, which permits the Member States' highest courts and tribunals to request advisory opinions from the European Court of Human Rights (ECtHR) on the ECHR or its protocols. The CJEU held that the draft agreement failed to settle the relationship

[92] Opinion 1/09, 2011 E.C.R. I-01137, para. 89.

[93] The CJEU noted that

> The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order . . . [and] the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties.

Id. paras. 84–5.

[94] *See id.* para. 86.

[95] *See id.* paras 87–8.

[96] *Cf.* Clodfelter, *supra* note 80, at 180 ("The CJEU observed that the envisaged patent court system would be called upon, inter alia, to interpret and apply provisions of EU law, effectively stripping Member States courts of their jurisdiction over the same disputes").

[97] *See* Opinion 1/09, 2011 E.C.R. I-01137, para. 74.

[98] *Id.* para. 78.

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between the advisory opinion and the preliminary ruling procedures.[99] This was viewed as a significant shortcoming: This parallelism would "affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU," because,

> it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented.[100]

Nonetheless, the above concerns were entailed by the very fact that the "the ECHR would form an integral part of EU law," that is, it would qualify as EU law. The CJEU should be given the chance to lift the eventual tensions between the ECHR and EU law internally, in particular "where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR," and the CJEU should not be by-passed through the national courts' submitting questions to the ECtHR concerning EU law's compatibility.[101]

In sum, taking the above case law into account, intra-EU BITs should not violate Articles 267 and 344 TFEU, unless they parallel the provisions of EU law—what they only partially do—or the case centers around the compatibility of EU law with investment protection standards.

The argument of discrimination based on nationality, a question not addressed in *Achmea*, requires a closer look, taking into account the CJEU's overly wide interpretation of the scope of EU law in the context of Article 18 TFEU.

Although the CJEU has been interpreting the scope of EU law rather widely, not all issues connected to—cross-border—economic activity come under the scope of EU law, at least not automatically. Though it is hard to define the CJEU's approach in a comprehensive manner, some rules of thumb can be established.

First, as a general rule it is normally not the nature of the substantive law question, but the characteristics of the fact pattern and its relation to the internal market that determines

[99] *Id. p*ara. 198.

[100] *Id. p*aras. 197–98.

[101] *Id.* para. 197. *See* Christoph Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*, 16(1) GERMAN L. J. 147, 155–56 (2015).

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whether Article 18 TFEU applies or not.[102] This implies that the scope of EU law can be established only on a case-by-case basis. For instance, in the cases dealing with national procedural laws requiring a foreign plaintiff to provide a security to guarantee the payment of legal costs in case of loss, the CJEU noted that even though its scope is very wide, Article 18 TFEU applies only "in so far as it has an effect, even though indirect, on trade in goods and services between Member States."[103] In *Ian William Cowan v. Trésor public*,[104] the CJEU established that,

> Community law guarantees a natural person the freedom to go to another Member State the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement. It follows that the prohibition of discrimination is applicable to recipients of services within the meaning of the Treaty as regards protection against the risk of assault and the right to obtain financial compensation provided for by national law when that risk materializes.[105]

Here again, it was not the field of law concerned, but the situation where it emerged—and its connection to the internal market—that determined the applicability of Article 18 TFEU.[106]

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[102] *Cf.* Astrid Epiney, *The Scope of Article 12 EC*, 13 EUR. L. J. 611, 616–17 (2007):

> [The CJEU] rather bases itself significantly on the effect, the reference or the connection of the particular regularisation of the Member State with the fundamental freedoms. In other words, it does not matter whether the particular regulation itself falls within the scope of application of the Treaty, but it is decisive that the exercise of the right of free movement is regulated by the Community.

Id. Furthermore, "[a]ccording to case-law, there has to be a connection to the fundamental freedoms or the right of free movement of Union citizens." *Id.* It does not hinder the application of Article 18 TFEU that the matter comes under by exclusive national legislative competence. Case C-73/08, Bressol & Chaverot, 2009 E.C.R. I-2735, paras. 28–9.

[103] Case C-43/95, Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd., 1996 E.C.R. I-04661, para. 15; Case C-323/95, David Charles Hayes and Jeannette Karen Hayes v. Kronenberger GmbH, 1997 E.C.R. I-01711, para. 17.

[104] Case 186/87, 1989 E.C.R. 00195.

[105] *Id.* at paras. 17, 20.

[106] *Id.* at para. 19.

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Second, in *Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG*,[107] the CJEU seems to have suggested that Article 18 TFEU applies to matters where the EU has power to legislate, even if that power was not used.[108]

Notwithstanding the above jurisprudence, the CJEU had no scruples about exempting double taxation treaties from the rigor of the prohibition of discrimination.[109]

In *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*,[110] the CJEU held—in the context of free movement of capital—that double taxation treaties are not discriminatory, albeit they confer benefits on the residents of specific Member States with the exclusion of others.

> Similar treatment . . . presupposes that those two taxable persons are regarded as being in the same situation . . . .
>
> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.
> A rule such as that laid down in Article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the

[107] Case C-122/96, Stephen Austin Saldanha and MTS Securities Corporation v. Hiross Holding AG, 1997 E.C.R. I-05325.

[108] *See id.* at para. 23.

[109] *See* Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58(2) INT'L COMP. L. Q. 297, 315–17 (2009); EUROPEAN PARLIAMENT, THE IMPACT OF THE RULINGS OF THE EUROPEAN COURT OF JUSTICE IN THE AREA OF DIRECT TAXATION 2010 89–90 (2011), http://www.europarl.europa.eu/document/activities/cont/201203/20120313ATT40640/20120313ATT40640EN.pdf. For an analysis of the pros and cons of a comparison to double taxation treaties *see* Glinski, *supra* note 35, at 53–4.

[110] Case C-376/03, D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, 2005 E.C.R. I-05821.

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> Convention, but is an integral part thereof and contributes to its overall balance.[111]

It is difficult to conceptualize the CJEU's statements in the context of equal treatment and to answer the question why double taxation treaties were not considered to be discriminatory: Because they do not come under the scope of EU law or because they provide no disparate treatment. The language of the preliminary ruling may appear to be referring to the second option: Disparate treatment is "an inherent consequence of bilateral double taxation conventions." It appears to be self-contradictory to argue that double taxation treaties are not discriminatory because they are inherently discriminatory. The same contradiction is entailed by the argument that taxpayers covered by treaty "A" and other taxpayers are not similarly situated because the latter are not covered by treaty "A."

On the contrary, this wording suggests—at least, this is the only way to construct the Court's holding in a conceptually consistent way—that double taxation treaties are not discriminatory because, for some reason, in this regard they are not covered by the prohibition of discrimination.

As an interesting element for intra-EU BITs, the CJEU suggested that even if double taxation treaties were discriminatory, this would not imply that they need to be abolished. Quite the contrary, the benefits secured by them should be extended to the citizens of all other Member States.[112]

The above ruling was endorsed in *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*.[113]

> Even where such provisions extend to the situation of a company which is not resident in one of the contracting Member States, they apply only to persons resident in one of those Member States and, by contributing to the overall balance of the DTCs in question, are an integral part of them.
>
> The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence

[111] *Id.*

[112] *See id.* paras. 54–5.

[113] Case C-374/04, Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue, 2006 E.C.R. I-11673.

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> of bilateral double taxation conventions. It follows, as regards the taxation of dividends paid by a company resident in the United Kingdom, that a company resident in a Member State which has concluded a DTC with the United Kingdom which does not provide for such a tax credit is not in the same situation as a company resident in a Member State which has concluded a DTC which does provide for one . . . .
>
> It follows that the Treaty provisions on freedom of establishment do not preclude a situation in which the entitlement to a tax credit laid down in a DTC concluded by a Member State with another Member State for companies resident in the second State which receive dividends from a company resident in the first State does not extend to companies resident in a third Member State with which the first State has concluded a DTC which does not provide for such an entitlement.
> 93 Since such a situation does not discriminate against non-resident companies receiving dividends from a resident company, the conclusion drawn in the preceding paragraph also applies to the Treaty provisions relating to free movement of capital.[114]

Having said the above, the next question is whether—and how—can conclusions be drawn from the above case law for intra-EU BITs. Unfortunately, a conceptual analysis seems to deliver little guidance for cases outside the domain of double taxation. As suggested by AG Colomer in *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, the CJEU—if remaining doctrinally consistent and following its general case law—should have established that double taxation treaties were discriminatory.[115] Nevertheless, for policy reasons, the Court decided otherwise. Unfortunately, the CJEU did not disclose the policy considerations that inflected its interpretation.[116] One may only speculate on these, but, if looking into the context of double taxation agreements and the possible policy arguments, the Court's wisdom reveals itself. Double taxation treaties are extremely good

[114] *Id.* at paras 90-92.

[115] The CJEU departed from the AG's Opinion, who argued that double taxation treaties were discriminatory. Opinion OF AG Ruiz-Jarabo Colomer in Case C-376/03, Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, 2005 E.C.R. I-05821, paras. 90–106.

[116] Ruth Masona, *Flunking the ECJ's Tax Discrimination Test*, 46 COLUMBIA J. TRANSNAT'L L. 72, 107 (2007) (noting that the CJEU "managed to dispose of the tax treaty most-favored nation question without any substantive discussion of whether the EC Treaty implies a most-favored nation entitlement.").

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for the internal market: They do something EU law has no competence to do and the application of the principle of non-discrimination would ruin these schemes which are otherwise very beneficial to free movement.[117]

The scholarly arguments for and against the discriminatory nature of intra-EU double taxation treaties antedating the CJEU's judgment in *D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* also reveal the close parallelisms between the two issues, especially because in both cases the alleged discrimination occurs between the nationals of two other Member States—most-favored nation principle[118]—and not between a foreigner and an own national. It is very interesting to take a look at the views that emerged in the scholarship concerning intra-EU double taxation treaties and to see that these pros and cons resemble very nearly the arguments that have emerged in respect to intra-EU BITs.[119]

As a corollary, it seems that intra-EU BITs and EU law do not violate Article 18 TFEU.[120] Although cases having a cross-border element are likely to come under the scope of Article

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[117] *Cf.* Hanno Wehland, *supra* note 109, at 317.

> While some aspects of these cases may have been specific to the field of direct taxation, the ECJ's main line of argumentation should also apply to BITs. There is no question that the facilitation of investment between the Member States is as much in line with the objectives of the TEC as is the avoidance of double taxation and that there are no harmonization measures at the Community level in this regard. True, the scope of application of BITs is typically defined by nationality rather than residency – but would that be relevant for the ECJ's assessment? After all, the ECJ's reliance on the inherent incomparability of the situation of residents of a contracting state with that of the residents of a non-contracting state was not much more than an expression of the Court's unwillingness to adopt the MFN approach suggested by the Advocate-General. If this reading is correct, the ECJ could also be expected to treat the limitation of scope to a Member State's own nationals as 'an inherent consequence' of BITs. As a consequence, the fact that BITs grant advantages only to investors from selected Member States would not appear to be incompatible with EC law.

Id.

[118] As to the operation and limits of the most-favored nation principle in EU law, see Georg W. Kofler, *Most-Favoured-nation Treatment in Direct Taxation: Does EC Law Provide for Community MFN in Bilateral Double Taxation Treaties?*, 5 HOUSTON BUS. TAX L. J. 1, 31–87 (2005).

[119] *See* Masona, *supra* note 116, at 104-05.

[120] *See* Dimopoulos, *supra* note 71, at 82.

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18 TFEU,[121] this can be established only on a case-by-case basis. More importantly, the CJEU's treatment of double taxation treaties provides a strong analogy supporting the view that Article 18 TFEU does not suppress intra-EU BITs.[122] And even if intra-EU BITs were deemed discriminatory, the legal consequence of this finding would not be the abolition of intra-EU BITs, but the extension of its benefits to the nationals of other Member States.[123]

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[121] *Cf.* Epiney, *supra* note 102, at 618–19:

> [I]n cases where the freedom to move is concerned, the scope of application of the Treaty is already engaged if the regulation in question relates to the residence. This is valid in as much as the regulation concerns the basic conditions of this stay or in as much as the regulation facilitates or complicates the management of the stay, even if it is only indirectly. An indirect or potential reference is hereby sufficient.

Id. Furthermore, it is thus "clear that the requirement of a connection with the (legal) stay can hardly limit the scope of application of the Treaty in terms of Article 12 EC, since a very broad palette of state regulations have a direct or indirect effect." *Id.*

[122] *See contra* Steffen Hindelang, *Member State BITs--There's Still (Some) Life in the Old Dog Yet,* Y.B. INT'L INV. L. POL'Y 217, 223 (2011).

[123] *See* Dimopoulos, *supra* note 71, at 82:

> Considering firstly the substantive provisions of intra-EU IIAs, any incompatibilities that arise can be remedied without affecting the validity or applicability of intra-EU IIAs . . . . [G]iven that this incompatibility can be remedied by extending unilaterally these rights to all other EU nationals, the incompatibility of substantive intra-EU BITs provisions with the EU law principle of equal treatment can be resolved without affecting the applicability of such intra-EU BITs provisions.

Id.; *Cf.* Moskvan, *supra* note, at 118 ("To remedy this conflict, one option would be European-level legislation which extends the benefits of the free transfer of funds, FET, and other privileges contained in BITs to all European investors."); *Contra* Clodfelter, *supra* note 80, at 181–82:

> In the view of some, this conclusion does not mean the BITs' arbitration provisions should be considered inoperative, since these discriminatory effects can be cured by each offending State by extending the obligations it owes to the other State and to its investors to all Member States and their investors. However, quite apart from the practical and legal obstacles to unilateral extension—which, as established in the jurisprudence of the ECJ, would not undo the incompatibility in the meantime—the extension of dispute settlement mechanisms would certainly aggravate the concerns regarding the preservation of the nature of EU law.

Id.

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E. Conclusions

The accession of Central European countries to the EU brought to light the problem of intra-EU BITs. While investment tribunals have consistently followed the approach that EU law does not overrule intra-EU BITs, the European Commission launched infringement proceedings with the aim of uprooting bilateral investment protection from European domestic matters. Finally, a preliminary reference concerning an intra-EU BIT reached the CJEU in *Achmea*, where the Court pronounced an all-embracing ad-hoc arbitration clause invalid. The scope of the judgment's holding is, however, uncertain. Notwithstanding the apparently anti-arbitration attitude reflecting from the judgment, the ruling's scope has significant limitations. First, the operative part refers solely to all embracing dispute settlement clauses providing for ad-hoc arbitration without touching upon the substantive provisions of BITs—which, in principle, may also be applied by Member State courts—, institutional arbitration—such as ICSID—Energy Charter Treaty arbitration and arbitration clauses providing for arbitration within the EU or limiting the arbitral tribunal's jurisdiction to investment-protection provisions. Second, the ruling dealt with a controversy that also came under the EU internal market's rules on freedom of establishment and free movement of capital. In this sense, the arbitral award's considerations closely paralleled EU law. This limitation appears less specifically in the judgment, but may be reasonably deduced, taking into account that a preliminary ruling always interprets EU law in the context of a genuine legal dispute and the CJEU—at times—distinguished cases from each other with reference to the underlying facts. This warrants a narrow reading of *Achmea* and suggests that this way still has to be gone along.

As a general consideration, it has to be noted that investment arbitration is a global regime and it is inevitable to take this framework into account. Not surprisingly, arbitral tribunals have started down-reading Achmea, what foreshadows a rather narrow reading for the ruling in the arbitral practice.[124] A rejective approach may be feasible only if it found reflection also outside the EU—especially in the judicial practice of recognition and enforcement. In the ICSID Convention, however, there is no room for public policy review. It is expected that European regionalism may triumph over investment arbitration's globalism at a significant cost.

Although, at first glance, intra-EU BITs may appear to be only a technical issue, in fact, they go to the heart of European integration. The effective cause of the controversy is the lack of an effective EU mechanism for the protection of human rights, including the right to property. While the effective protection of investments lies at the heart of BITs, this is not effectively reproduced in EU law. Taking this into account, it is difficult to argue that as a matter of practice, the subject matters of BITs and EU law considerably overlap. It is

[124] *See* Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, paras. 678–83.

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submitted that the problem of intra-EU BITs should be solved as part of the EU's general human rights question.

It has to be noted that the application of EU law to intra-EU BITs should be informed by the principle of legitimate expectations. BITs are hybrid agreements and confer benefits both on contracting states and investors. This implies that investors—who made investments in reliance on the BIT's protective rules—have legitimate expectations that have to be protected by EU law.

This Article argued—both as a criticism of *Achmea* and as a proposal for the missing elements of intra-EU BITs' European treatment—that intra-EU BITs' investment protection measures should not be irreconcilable with EU law, simply because they address a subject EU law does not, at least not effectively. The core of BITs is the rules on the protection of investment, rules on expropriation and the treatment of investments and investors, and these guarantees are, for the most part, missing in EU law as to Member State action: Most notably, the EU Charter of Fundamental Rights, including its provisions on the protection of property, applies to Member States only when they implement EU law.

It is submitted that this constitutional architecture should have both policy and legal implications. On the one hand, it is difficult to argue that the protection afforded by BITs is not needed in intra-EU matters. The EU—though it does have certain means—has no comprehensive competence to protect investors from Member State action. On the other hand, as far as legal considerations are concerned—although BITs and EU law might appear to clash at various points—the subject matters of BITs and EU law do not seem to sufficiently overlap. Although the CJEU conceives the ambit of the prohibition of discrimination based on nationality—embedded in Article 18 TFEU—very widely, it had no scruples about exempting intra-EU double taxation treaties from the rigor of this prohibition. This Article argued that intra-EU double taxation treaties are similarly situated to intra-EU BITs and it is warranted to apply their treatment to intra-EU BITs. The Article's final conclusion is that intra-EU BITs reveal the fundamental shortcomings of the EU's constitutional architecture and the problems raised by them should be grasped as part of the EU's big human rights question. Intra-EU BITs should be abolished once EU law affords comprehensive human rights—or at least property—protection against Member State action.

Taking the above circumstances into account, it has to be said that in intra-EU BITs—maybe counter-intuitively—in terms of integration, less is more. Notably, the investment protection provided by BITs considerably stimulates the free movement of capital and the exercise of the freedom of establishment. Its suppression does not lead the European integration further, but holds it back. Eliminating this stimulus in a situation where EU law provides no alternative mechanism—not even an imperfect one—impairs the European project painfully.

Accordingly, it is submitted that *Achmea* should be construed in the context of the fact pattern it reacted to. This confirms that the judgment's holding embraces only investment claims that are also covered by EU law, in particular the internal market's rules on the free movement of capital and the freedom of establishment. The status of the investment protection aspects of intra-EU BITs is, in terms of precedential determination, still not settled. It is argued that arbitral dispositions enforcing freedom-of-investment principles—as these may be equated with the freedom of establishment and free movement of capital—should be considered absorbed by EU law. On the contrary, awards enforcing a BIT's investment—that is, property protection principles—should not be invalidated, irrespective of whether it is ad-hoc or institutional arbitration, as they foster the European integration without encroaching on the prerogative of EU courts. A contrary solution would not only be inconsistent, but would also impair the internal market through eliminating a major stimulus to cross-border investments. "Know well what leads you forward and what holds you back, and choose the path that leads to wisdom."

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