The Chamber of Secrets: The Repudiation of the ISDS

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Towering stone pillars entwined with more serpents, rose to a ceiling lost in darkness, casting long black shadows through the odd, greenish gloom that filled the place.

J.K. Rowling 1

Abstract

The unlawfulness of the intra-EU BITs, the experiences of the new Member States unremittingly involved in investor-to-state disputes and the tumultuous debates during the T-TIP negotiations are first and foremost examined from a legal perspective underlining the clash between a system designed for preferential treatment and the EU legal order based on the prohibition of discrimination. The ISDS clause represents an attribute of procedural inequality, which is furthermore convoluted by the constitutional structure of the Union i.e. the strictly limited access of private persons to supranational courts.

This article enlarges the scope of the review of incompatibility by placing the accent on the equality of Member States as the only foundation that can support an ever closer Union in a global society. The conservative forces that oppose a more federalised Union, are in fact determined to defend their own hegemonic positions, which they bargained with the capital-importing states before the dawn of a larger Europe and an utterly globalised trade. A U-turn has been caused by the T-TIP negotiations, since the strategies applied in the old asymmetric BIT model must be discarded and replaced with a new form of tactic approach that eventually will describe a reformed institutional apparatus designed to protect investments, while still preserving the regulatory interests of the European states.

Keywords: intra-EU BIT, ISDS, equal treatment, T-TIP, constitutionalism.

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Rezumat

Caracterul de ilegalitate a tratatelor bilaterale de investiții încheiate în cadrul UE, experiențele noilor State Membre, care sunt în mod constant implicate în dispute arbitrale și dezbatările tumultuoase din jurul negocierilor T-TIP sunt în principal examinate din perspectiva doctrinelor juridice, care pun în evidență coliziunea dintre un sistem bazat pe tratamentul preferențial și ordinea juridică a UE întemeiată pe interdicția discriminării. Clauza ISDS reprezintă atributul inegalității procedurale, a cărei complexitate este intensificată de structura constituțională a UE, adică de stricta limitare a accesului particularilor la instanțele supranăționale.

Acest articol lărgește sfera de examinare a compatibilității plasând accentul pe egalitatea de tratament a Statelor Membre ca și fundație a unei Uniuni tot mai strânse într-o societate globală. Forțele conservatoare, care se opun unei uniuni mai federalizate, sunt de fapt decise să-şi apere poziția hegemonică, care a fost negociată cu statele importatoare de capital înainte de geneza unei Europe extinse și a comerțului global fără bariere. Un punct de refracție a fost generat de negocierile T-TIP, deoarece strategiile aplicate de vechiul model (de facto) asimetric al tratatelor bilaterale trebuie acum abandonat și înlocuit cu un nou demers tactic, care în cele din urmă va defini un aparat instituțional actualizat destinat protecției investițiilor, care să asigure nu mai puțin apărarea intereselor de a legisfera ale statelor europene.

Cuvinte cheie: intra-UE BIT, ISDS, egalitatea de tratament, T-TIP, constituționalism.
1. The memory of jurispathic duels enters the negotiation room.

One day after the European Commission had issued its negative state aid decision with recovery in Micula case, the Financial Times wrote that this apparently ordinary investor-state dispute ‘cuts to the heart of one of the most politically contentious issues surrounding both trade accords: the status of international investment tribunals’.

It must be reminded from the outset that according to the letter of Article 345 TFEU, Member States have not given up their sovereign right to regulate the national system of property ownership, hence they are free to nationalise private property and privatise public assets. Nationalisation is not an uncommon event in the old Member States, most recently, two financial institutions in the Netherlands, Fortis Nederland, and in the UK, Northern Rock, have been nationalised.

The short version of Micula dispute depicts an impoverished region in the North-Western Romania during the post-communist era, the establishment of a business owned by two Swedish citizens in the early nineties and the political decision in the late nineties to promote investments via public subsidies in the formerly mentioned economically disfavoured area. In 2003 a BIT between Romania and Sweden was ratified and two years later in 2005 the Romanian government cut the subsidies that initially had to run until 2009. The abolishment of the subsidies led in December 2013 to an ICSID award (ARB/05/20) in favour of the Swedish citizens, despite the fact that the withdrawal of public incentives came as a consequence of the duty to comply with EU common rules on state aid that Romania had to respect as an acceding state.

In March 2015, the European Commission deemed that the award of damages – more exactly, its enforcement – would result in a reinstatement of an unlawful state aid, thus Romania was required to recover the amount of damages that already had been paid to the investors. Subsequently, on 12 May 2015, an arbitral tribunal was constituted in annulment case under the ICSID convention, while the investors continued to struggle in order to obtain enforcement of the award (ARB/05/20).

3 On October 3, 2008 the Benelux governments made the decision to nationalise Fortis in its entirety. The Dutch government bought the Dutch businesses of Fortis Bank, the insurance arm of Fortis and the Fortis share in ABN AMRO for EUR 16.8 billion.
6 Idem, supra note 5.
Solicitations for the recognition of the award – making it enforceable, as if it were a domestic judicial decision – were submitted to the federal courts in Washington D.C.\textsuperscript{7} and South District of New York\textsuperscript{8} and an appeal of last resort against the ruling of the Court of Appeal Bucharest of 30 March 2015 – that affirmed the suspension of the enforcement requested by a bailiff according to Romanian law – is currently pending before the Supreme Court of Cassation\textsuperscript{9}.

During the period May-July 2015 the Constitutional Court of Romania received a number of four applications for ex-post review of the statutory provisions concerning the suspension of state measures subject to formal examination before the European Commission and the recovery of unlawful state aid as a result of a negative state aid decision\textsuperscript{10}. I cite from the text of the contested legislative act.

\begin{quote}
When the European Commission decides to open a formal of a state measure that aims to put into effect an arbitration award or decision, the enforcement shall not start, or if it started, shall be from the date the Commission announces that it has commenced investigations\textsuperscript{11}.
\end{quote}

Since the EU state aid provisions do not require implementation \textit{via} legislative measures and knowing that the Constitutional Court of Romania inclines to avoid a confrontation with the CJEU on this level, it may be anticipated that the exception of non-constitutionality will not be affirmed. State aid control constitutes an area of EU law, where the Member States do not enjoy margins of discretion allowing them to adjust the obligations imposed by supranational law, e.g. the duty to notify and suspend any measure that allegedly may amount to state aid does not need any implementation into national legislation. Anyhow, the Constitutional Court of Romania considered in a previous similar case that the ordinary court seized with the dispute should refer for a preliminary ruling, if the accurate interpretation of related EU law provisions, in particular of Article 107 TFEU was not resolutely clear.

\textsuperscript{7} Micula v Government of Romania, Case 1:2014cv00600, 14 April 2014 (D.D.C.).
\textsuperscript{9} Government of Romania v Micula, Case No. 15755/3/2014/a1, 23 October 2014 (Court of Appeal Bucharest). The decision of Court of Appeal Bucharest of 30 March 2015 has been challenged before the national court of last instance. Micula v Government of Romania, Case No. 378/35/2014 (pending appeal), 09 July 2015 (Supreme Court of Cassation Romania).
\textsuperscript{11} Statutory Act no. 20/2015 ratifying the Government Decree no 77/2014 and amending the Competition Act no. 21/1996.
The Court held that “the application of an interposed norm of EU law as to a constitutional review performed under art. 148 (2) and (4) of the Constitution, shall respect a cumulative conditionality: firstly, the interposed norm must be sufficiently clear, precise and unequivocal or its meaning already established by precise and unambiguous interpretation provided by the CJEU and secondly, the norm should be enclosed within a level of constitutional relevance, so its own normative content would interfere with the provisions of the Constitution, which creates the exclusive legal basis for a constitutional review”\textsuperscript{12}.

The possibly unexpected effect of the Micula award refers to the internal disagreement between the DG Competition and the DG Trade, the latter being almost unreservedly in favour of including an arbitration clause in the FTAs negotiated by the Commission pursuant to the coming into force of the Treaty of Lisbon, which is the edict that empowered the Commission with such attributions. The first reaction of the EU institutions was to consider the Micula situation as an anomaly emerging in the aftermath of an intricate acceding process in conjunction with the confusion generated by a BIT being ratified during the same period. It was tempting to presume that such a predicament could not be repeated. However, from the investors’ perspective, the EU law displaced perfectly sound treaties including the preferential access to justice that they should be able to benefit from. The window of the Romanian government illustrates contrariwise a landscape, where an odd and expensive legal experiment is still going on.

The ICSID-award of 11 December 2013 and the Commission State aid decision of 30 March 2015 interact with each other in such a way that the later decree annihilates the former. This kind of duels give expression to jurispathic tendencies among legal authorities that uphold their own jurisdiction in manners that incline to ignore, or even threaten the identity of the antagonist failing to identify any complementarity that could be used to bridge the two constituencies. The Commission does neither aim to deter foreign investments in the EU nor to obstruct the signing of a new FTA, while the foreign investors – as a non-state constituency – would have no interest in the annihilation of competition laws that generally speaking are designed to ensure free trade and open access to new markets.

\textsuperscript{12} Act no. 157 of 19 March 2014 regarding the examination of alleged unconstitutionality of the Statutory Act for the ratification of the GEO no. 57/2013, which adopted an amendment of the Statutory Act no. 220/2008 on the establishment of a framework for the promotion of energy from renewable sources, File no. 147AI/2014 (Constitutional Court of Romania), Official Journal No. 296 of 23 April 2014, paras. 61-2.
The main culprit for this – at least apparently – irrational conflict is the formalism or exclusive positivism vis-à-vis the law of the antagonist. Micula case left behind a feeling of perplexity that filled the space of the T-TIP negotiations, engendered institutional distrust and eventually led to the disavowal of the ISDS-clause by the European Parliament. On 8 July 2015 Bernd Lange – chair of the INTA Committee – declared that arbitral tribunals had been dispatched to the dustbin of history. However, in reality, the Micula case is not in any sense unique or divergent, but the intra-EU BITs and the ECT generated during the post-accession period a series of similar disputes.


The European Commission requires any acceding state to comply with EU law as a condition for a completed accession. Hungary, for instance joined the European Union in 2004 and in connection to its accession, the subsidy programmes granted to private electricity producers had to be terminated. These companies claimed that the abolishment of state aid led to a loss of expected future profits, while the European Commission contended that the state aid was unlawful and therefore Hungary did not breach the ECT, as it was obliged to comply with EU state aid law. In such disputes, the European Commission intervened as amicus curiae arguing that new member states did not breach their obligations under international law, since their previous aid policy had to be amended in order to comply with EU law. In an informal note from 2006 addressed to the Economic and Financial Committee of the Council of the EU, the European Commission expressed substantial opposition against the maintaining in force of the intra-EU BITs.

There appears to be no need for agreements of this kind in the single market and their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State. [...] investors could try to practice forum shopping by submitting claims to BIT arbitration instead of—or additionally to—national courts. This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome.

15 Note from the DG Internal Market and Services to the Economic and Financial Committee, quoted in Eastern Sugar see infra, note 16.
Since then, the European Commission has frequently maintained that the intra-EU BITs are not compatible with EU law. This line of argumentation is supported by the fact that the intra-EU BITs differentiate between investors, those who have a right to sue host states before an arbitral tribunal and others, who don’t enjoy access to such alternative remedies. A second and even stronger argument refers to the lack of judicial review and the impossibility of a preliminary ruling for the interpretation of relevant EU law provisions in conflict with Article 344 TFEU. Hence, the European Commission specified that “Eventually, all intra-EU BITs will have to be terminated”.

The great majority of Member States aimed nevertheless to keep in force their existent BITs, despite the fact that the Commission argued in so many cases, either that the BIT in question was integrally immaterial or that specific provisions of the BIT were inapplicable. Under EU law the Member States are allowed to restrict the economic freedoms of investors, but the interpretation of necessity of restrictions and their proportionality as to the attainment of an objective of public interest falls inside the scope of the exclusive judicial competence of the CJEU.

An example of incompatibility of substantive nature relates to the special treatment rules establishing inequality between different EU investors. If the Member States had made a different choice and built a European BIT model based on the minimum standard of protection derived from customary international law, they would have not encountered so many disputes in the noughties and they would have partially avoided situations of incompatibility with EU law. Another example is the direct access to arbitral tribunals, which is only granted to foreign investors under a specific BIT. Any other investor in a similar situation – domestic or foreign alike –would have to use the national system of remedies.

The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection, and dispense with the conditions for the exercise of diplomatic protection.

17 Calvo doctrine states that foreigners should not be entitled to any rights or privileges not accorded to nationals, hence, they should not be entitled to seek redress for their grievances before authorities other than local authorities.
The accession of a BIT-signatory state to the European Union implies that a new treaty has been concluded, though it does not entail that the same subject matter is covered by both treaties. Moreover, the common intention of the states to terminate their BIT by replacing it with EU law has to be proven. Concerning the specific matter under examination in each case, the BIT and the EU primary law should be utterly incompatible with each other, so they could not be simultaneously applicable. The general inapplicability of intra-EU BITs has been discussed by the arbitral tribunal in Eastern Sugar case. Article 59 of the Vienna Convention on the Law of Treaties (VCLT) enunciates these three cumulative conditions for the termination of a former treaty.

The defendant in Eastern Sugar case stated that the BIT had been automatically terminated and the Dutch investments on the Czech territory were governed exclusively by EU law since 2004. This argument was nonetheless rejected by the arbitral tribunal that sustained the idea that the treaties in question did not provide explicitly that the BIT would have been terminated. The presence of an ISDS mechanism, which allows investors to bypass national courts by directly filing complaints before arbitral tribunals brings about an element of inequality disfavouring investors from countries that did not signed a BIT with the host country. The three cumulative criteria established by Article 59 VCLT cannot be straightforwardly fulfilled.

In Eureko v Slovakia, the Commission argued that "even where it appears the BIT is not rendered invalid or terminated as a whole, those provisions of a BIT that are inconsistent with EU law cannot be applied". Individual provisions of the intra-EU BIT can become inapplicable, if they are deemed incompatible with a subsequently concluded treaty according to Article 30(3) VCLT. The issue of inapplicability of specific BITs provisions relies on the prohibition of discrimination and the disregard of the exclusive jurisdictional competence of the CJEU.

Moreover, the network of BITs is characterised by an asymmetric approach according to which old Member States may preserve a preferential regime for their nationals. This approach embraced by the German constitutional court does not resonate harmoniously with the principle of equality of Member States enshrined by Article 4(2) TEU. Referring to the equality of the Member States, the German Constitutional Court asserted that the European Union on the whole suffers from “excessive federalisation” by that inferring that the equal representation of the Member States in the Council of the EU was deemed undemocratic from the German – political and constitutional – point of view.

19 Idem supra, note 16.
20 A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or 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. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.
21 Achmea B.V. (formerly Eureko B.V.) v The Slovak Republic, Award on Jurisdiction of 26 October 2010, UNCITRAL, PCA Case No. 2008-13, para 188.
23 Supra, note 22, para. 288.
It is indeed remarkable that the pursuit of a more federal Europe has been indirectly defined by the German Constitutional Court as an underwriter of equality and that the value of equality of Member States could henceforward be interpreted to constitute a violation of human dignity. There is no better guarantee for human dignity than equality between peoples. The fact that fundamental values, which are universally accepted can be converted into ultimate antagonists says a lot about the European political playground. A Union of European governments is obviously regarded as a device for maintaining the benefits of the old Member States, even if de jure equality constitutes a pillar of the legal order of the Union. This duality may explain the clash between the interests served by the web of BITs, most of them concluded during the nineties and the federalisation of the Union consolidated by the Treaty of Lisbon.

[The general principles of law] are the very foundation of [European [European Union] and compliance with them means –as is now provided for expressly, in Article 4(2) TEU– that the new Member States are to be be treated on the basis of equality with the old Member States.

The question of the incompatibility of specific BIT provisions was dealt with in Eureko case, where the arbitral tribunal rejected the defendant claim on this point and disregarded the Commission amicus curiae argumentation. Thomas Eilmansberger supported the idea of a disjunctive solution according to which, the preferential treatment would either be extended to all investors within the EU or it should be completely removed. This view implies that the preferential access to arbitral tribunals should either be extended or denied to all investors. However, this solution does not solve the main problem, which is an imminent encroachment upon the constitutional structure of the EU and the breach of autonomy of the EU legal system.

[The Draft International Agreement for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms] is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the ECtHR.

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24 Supra, note 22, paras. 211, 217.
26 Supra, note 21.
28 See also CJEU Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454 for a recent interpretation of the relevant law.
29 Supra, note 28, paras. 240-3, 258.
The Opinion 2/13 clarifies that the possibility to circumvent the scrutiny of the CJEU in any disputes that concern the interpretation of EU law must be entirely precluded. In other words it does not matter that the courts of the Member States dealing with the enforcement of the award may have a choice to refer for preliminary ruling, or that the Commission may bring an infringement case under Article 258 TFEU, thus giving the CJEU the opportunity to interpret the relevant provisions of EU law.

The Court of Appeal in Frankfurt (OLG) ruled in Eureko that the EU accession did not displace the ISDS clause in the meaning of Article 30(3) of the VCLT, hence it has been verified that the EU principle of sincere cooperation cannot offer sufficient assurance that the EU law will be consistently applied within all fora under the current conditions. According to the OLG ruling in Eureko, a potential breach of EU law by an arbitral tribunal would not give rise to implicit jurisdiction of the CJEU, due to the fact that the German court interprets the Article 344 TFEU as only being applicable to state-to-state arbitration, thus inapplicable for the case of investor-to-state disputes. Moreover, the arbitral tribunals in a series of cases underlined the fact that the European Commission had not yet brought an infringement case claiming failure to comply with obligations of EU law. On 18 June 2015, the Commission decided to move forward its positions and started infringement proceedings against five Member States: Austria, Netherlands, Romania, Slovak Republic and Sweden.

Czech Republic on the other hand, has already terminated its intra-EU BITs with Denmark, Estonia, Slovak Republic, Slovenia, Italy and Malta and it required in several disputes that the arbitral tribunal should refuse jurisdiction. It must be reminded that following the Lisbon Treaty the competence to conclude FTAs concerning the protection of investors inside the EU is reserved to the supranational level of governance, hence a new intra-EU BIT can no longer be established. Likewise, the existent intra-EU BITs constitute a relatively recent phenomenon, a trend emerged in the aftermath of the Eastern Europe transition to capitalism in the post-Cold War era and the worldwide liberalisation of trade.

32 http://investmentpolicyhub.unctad.org/IIA/CountryBits/55
3. **Disavowal of the ISDS mirrors old European unsettlements.**

The history of the T-TIP negotiations starts in 2013 and most probably, it will stretch beyond the horizon of 2017. The right to regulate and fears concerning a so-called race to the bottom have been expressed on both sides of the Ocean, though the remarking difference until present days remains the tougher opposition against the arbitral tribunals in the EU. The United States – in contrast – has never lost any ICSID-dispute until present time and the lack of unsuccessful experiences could have fostered a higher level of confidence. The Report of 1st June 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership gave the opportunity to different committees to express own opinions. The Committee on the Environment, Public Health and Food Safety, the Committee on Petitions and the Committee on Constitutional Affairs opposed the inclusion of ISDS regarded as a threat to the sovereign rights of the EU, its Member States and regional and local authorities. The Committee on Legal Affairs stated that there is in fact no need for an ISDS, since judicial systems both in the European Union and in the United States function well and it reminded that Regulation No 912/2014 requires the replacement of existing bilateral investment agreements signed by some Member States with the U.S. The replacement should be done by adopting such procedural rules for the investor protection in the appropriate chapter of the T-TIP.

Inversely, the Committee on Agriculture and Rural Development has pronounced an opinion in favour of an upgraded mechanism of Investor-State Dispute Settlement that would provide a fair chance for foreign investors to seek and obtain redress of grievances. Unsurprisingly, the Committees that advocate the rebuff of the ISDS-clause consider that such a chance may be ensured by the system of domestic remedies. The Committee on Civil Liberties, Justice and Home Affairs aimed to make sure that an adjudication on legal issues involving fundamental rights would be provided only by competent ordinary courts and an eventual ISDS-clause would not impede equal access to justice or undermine democracy.

Seemingly inspired by the 2012 U.S. Model BIT, the Committee on Legal Affairs asserted that foreign and domestic investors shall benefit from equal rights. The 2012 U.S. Model BIT states that "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations” and the model merely provides guarantees for the minimum standard of treatment, hereby, no additional substantive rights are created in comparison with the rights granted under customary international law.
The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

The ISDS-clause is no longer part of the Commission’s negotiation mandate and a different adjudication mechanism should be considered. The great majority of the EP Committees favour the use of domestic courts, but three of them – Committee on Legal Affairs, Committee on Constitutional Affairs and Committee on Employment and Social Affairs – affirm that a state-to-state dispute settlement may be used as an appropriate tool for solving conflicts.

In the U.S. as well many politicians, lawyers and economists expressed concerns vis-à-vis the so-called fast-track enactment that would accelerate the implementation of a trade agreement, which includes a clause of investor-state arbitration. However, generally speaking the U.S. shows a preference for the use of substantive provisions instead of procedural limitations of the scope of investor protection in relation to trade agreements.

In the U.S. Senate, the majority rejected the amendment proposed by Sen. Warren on 22 May 2015 and the bill passed with an adjustment favourable to a system of international trade and investment disciplines and procedures, including the ISDS-clause. A strong accent is nevertheless placed on full transparency and a symmetric construction of investor rights and obligations. The U.S. trade remedy laws preparing the setting for the T-TIP negotiations aim to address and correct market distortions that set in motion state interventions such as subsidies and antidumping measures. Hence, most objectives of public interest including consumer and antitrust laws could be placed at the same level with the foreign investor protection and be guaranteed by the same ISDS mechanism.

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34 Available at http://www.state.gov/documents/organization/188371.pdf. Article 5 – Minimum Standard of Treatment – prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.

35 H.R. 1314 (Ms. Warren) in the Senate of the United States 114th Cong., First sess., 2015-05-18. Purpose: To prohibit the application of the trade authorities’ procedures to an implementing bill submitted with respect to a trade agreement that includes investor-state dispute settlement.


37 The bill from the House of Representatives (H.R. 1314) has been passed with the following amendment, text available at https://www.congress.gov/114/bills/hr1314/BILLS-114hr1314eas.pdf.
...the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice....

The consequences for the European Economic Area would be an extended internal market for services, companies, goods and capital and an increased level of diversification and specialisation of trade. Previous trade liberalisation programmes brought about a decrease of labour demand in certain highly competitive fields that should have been followed by a reorientation of the disposed labour force towards different other sectors. The ability to change-over from one field of activity to another – ease of substitutability – tends to be nevertheless limited. If other economic sectors cannot absorb the residual labour offer, an increase of unemployment can be expected especially among disfavoured categories that have no good prospects of obtaining a secure employment.

A larger “internal market” including the U.S. and Canada would lead to the disbanding of the initial European integration project, if the constitutional structure of the EU were not sufficiently consolidated as to resist all kinds of economic predicaments or recurrent depressions. The main problem of the EU in the context of an advanced trade agreement, which would cover more than half of the U.S. external trade is the EU itself, namely its fear of “excessive federalisation”.

4. The outlawing of intra-EU BITs states the obvious.

The global web of Bilateral Investment Treaties constitutes a central pillar of investment protection. The first BIT ever was signed in the late 1950s and the emergent network of BITs has gradually substituted the function of the old Friendship, Commerce, and Navigation Treaties. Today, there are more than 2,500 BITs in force38, each of them containing around 15 articles. BITs are concluded on the basis of negotiations conducted by two states, so in theory, they could differ significantly, though in practice, most BITs enclose numerous matching clauses. Many BITs contain an ISDS-clause stating that disputes shall be solved through conciliation or arbitration by the International Centre for Settlement of Investment Disputes (ICSID).

As of 2015, 151 countries have ratified the ICSID-Convention becoming Contracting States\(^{39}\). The intra-EU BITs overlap partially with treaty provisions on economic freedoms, EU fundamental rights and human rights and fundamental freedoms enshrined by the ECHR. Currently, there are circa 150 BITs signed among EU Member States, only two of them signed between old member states\(^{40}\).

National treatment (NT), fair and equitable treatment (FET), compensation in the event of a direct or indirect expropriation, most-favoured nation (MFN) are the most usual protection provisions and they are formulated in a vague manner allowing the investors to sue the governments of the host states in a wide range of situations. NT and FET cover the same scope as the principle of non-discrimination, protection of legitimate expectations, transparency, precautionary principle as well as protection against abuse of power in national law and supranational law. Moreover, Article 63(1) TFEU rules out all restrictions on the free movement of capital inside the EU jurisdiction. Expropriation without compensation is outlawed by the ECHR Protocol 1 and the Charter of Fundamental Rights of the EU in Article 17 thereby.

On 18 June 2015 the European Commission initiated infringement procedures against Austria, Romania, Netherlands, Slovak Republic and Sweden seeking the termination of their intra-EU BITs. However, this is not the first time when the Commission expressed criticism vis-à-vis the incompatibility of these agreements. Besides their clash with the principles of non-discrimination and equality between Member States, the intra-EU BITs can be regarded as redundant and anachronistic in the context of a quasi-federal structure.

A deliberate and consensual termination of the intra-EU BITs cannot be applied retrospectively, therefore the termination would not have any effect on ongoing investor-state disputes as provided for by Article 70(b) VCLT. While the termination of a treaty “releases the parties from any obligation further to perform the treaty”, it has no say on “any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination”. BIT claims referring to investments made before the termination of a BIT would not be ultimately blocked, especially because most of the intra-EU BITs contain “survival clauses”, also called “sunset clauses” preserving the rights of investors and liability of Contracting States for a considerable length of time, even after their termination.

The fragmentation phenomenon that complemented the process of specialisation in international law interferes now with a core field of EU law, which constitutes the main engine of European integration through law. The choice to bring proceedings now subsequent to the continuing Micula feuilleton may engender certain speculations on the causality relation between the wave of disputes relying on the remaining intra-EU BITs and the Commission decision of 18 June 2015. The Romania-Sweden BIT was meant to remain in force until the 1\(^{st}\) April 2023, but also to protect prior investments for a further period of twenty years from a notice of termination. Thus, if Romania notifies in 2015, the BIT remains enforceable until 2035.


In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 9 shall remain in force for a further period of twenty years from that date.

Hence, it is clear that the termination would not have immediate effect, if the purpose were to stop the litigation flood. Moreover, as already suggested, even in the case of overlapping consensus between the investor protection and the EU law – such is the case of Energy Charter Treaty – the interpretation given by the arbitral tribunals departs from the fundamentals of EU law. The termination of the BITs would not lead to a reduced number of intra-EU investor-state disputes, but it could send a political message to the arbitral tribunals prompting a deeper level of consideration for the particularities of EU law and its multileveled constitutional structure. The Commission argumentation in several ICSID-disputes, where it acted as amicus curiae supported the idea that the tribunal should restraint its jurisdiction and discard intra-EU BITs disputes on formal grounds.

It is clear that these disputes may touch upon questions of EU law. If such questions had emerged from a case before a domestic court, the latter would have been ultimately obliged to obtain clarification from the CJEU according to the provisions of Article 267 TFEU. However, this reality does not exclude the possibility that arbitral tribunals may have a residual jurisdiction for all other aspects excepting the EU law questions.

What remains to be seen is whether some new sort of mechanism is going to replace the investor-state arbitration in the EU, especially having in mind the fact that at the T-TIP negotiations the MEPs expressed a strong preference for a public judicial form of adjudication of investor protection disputes. Another not yet elucidated question is the one of forum shopping knowing that many of the transnational investors are multinational corporations with subsidiaries outside the EU. The termination of the intra-EU BITs appears not to deliver good forecasts as regards the prevention of ICSID-arbitration on short and medium term.

5. Overlapping consensus turns into a different form of jurispathic duel.

The termination of the intra-EU BITs represents a genuine test of solidarity for Europe, since a clash between the interests of the EU15 and the duties of the newer Member States to adopt the acquis communautaire seems to have been emerging since the beginning of the new millennium. There is no doubt that the presence of the system of ISDS resonates badly with the exclusivity conferred to the CJEU to interpret the treaties in order to ensure their consistent and accurate application across the Union. A method to bring a BIT in line with EU law could be offered by the introduction of a firm obligation in the BIT to refer for preliminary ruling with the occasion of any judicial procedure for the recognition or enforcement of an award.
Not so long ago – in 2008 – most Member States did not share the anxiety surrounding the ISDS-clause and the discriminatory treatment of EU investors, thus a great majority of Member States aimed to maintain the existing web of intra-EU BITs. Sergey Ripinsky, legal expert at the British Institute of International and Comparative Law asserted that "Governments are likely to believe that BITs give their investors a higher level of protection abroad, compared to domestic laws of an EU host state or even EC law. For example, neither domestic systems nor European law include an obligation as broad or comprehensive as the Fair and Equitable Treatment obligation in BITs. Even more traditional provisions, such as the ones concerning expropriation, may be expressed in BITs in a stricter manner, leaving less discretion or margin of appreciation to host state governments."\(^{42}\)

Belgium, Germany, the Netherlands and the United Kingdom opposed categorically the termination of BITs, they defended their validity and expressed the opinion that “an international arbitral tribunal, independent from the host state is the best guarantee” for an efficient investor protection. An alternative method would be offered by an amended configuration of the current BIT models in order to bring them in line with EU law.

Within the wide scope of the FET standard, the protection of legitimate expectations has emerged as a distinct category\(^{43}\). A proportionality test should be completed in order to decide a proper balance between the legitimate expectations and the regulatory interests of the state. To what extent could a state be obliged to maintain a pre-accession regulatory regime despite the fact that such an obligation would entail a breach of EU law? The protection of the right to property is broader under the current BIT model compared to EU law, where indirect or de facto expropriation cannot easily lead to compensation, since the regulatory interests of states and sub-states enjoy higher priority.

A problem not yet properly displayed is nevertheless the definition of foreign investor according to the BIT terms in comparison with EU law provisions. The BIT embraces a formal definition, while EU law applies an objective examination of the situation and avoids to discriminate between investors with similar economic positions. Nationality is not the only factor considered by EU law, an EU investor of a different nationality would still be covered by the economic freedoms enshrined in Article 49 TFEU or Article 63 TFEU. The BIT does not have the same philosophy, but it aims to distinguish between nationals and non-nationals. Another key issue is whether or not the MFN covers also procedural rights\(^{44}\).

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42 Damon Vis-Dunbar, ‘EU Member States reject the call to terminate intra-EU bilateral investment treaties’, Investment Treaty News, March 2009, p. 3. November 2006,
44 Supra, note 27, p. 402.
Steffen Hindelang considers that the Member States could maintain the network of intra-EU BITs, if they involved the Commission in the creation of a form of judicial institution with no more than one stage of appeal being allowed to refer for preliminary rulings. Exactly as in the case of public procurement disputes, the set of procedures should permit an expedite process. The denunciation of intra-EU BITs, no matter if it is done consensually or unilaterally, should not leave behind a void space that creates political panic among capital-exporting countries. On the other hand, Steffen Hindelang does not believe in a common regime of investor protection that could replace the network of BITs arguing that the Member States would not be able to compromise, since they have different experiences as regards investor-state dispute settlements.

If this lack of capability to compromise politically had been real, the European Union would not have existed in the first place. Until now the Union has proven to be a melting pot for politically divergent positions and distinct national interests. Furthermore, if the Member States were not able to agree on a substitute for the current web of BITs, how could they ever concur as regards the conclusion of the T-TIP? Europe is in fact the part of the world, where the first BIT has been conceived, so it would not be unanticipated to point Europe as the place, where a new type of protection mechanism would turn up.

As the T-TIP negotiations have already shown, the ISDS-clause, which traditionally allows access to arbitral tribunals, constitutes the neuralgic point of an imminent conflict between the special treatment of foreign investors in international law and the non-discrimination credo of the EU. In relation to intra-EU BITs, it can be deduced that by concluding a BIT Member States derogate from their obligations under EU law and facilitate the circumvention of Article 344 TFEU, thus jeopardizing the attainment of the Union objectives in the meaning of Article 4(3) TEU. In this light the reaction from the Commission ordering the Member States to terminate their intra-EU BITs seems to occur somewhat tardily.

Either the arbitral tribunals refuse to apply the EU law, or they apply it without being able to obtain a preliminary ruling, the autonomy of the EU legal system would be endangered. The biggest problem of all is that the ICSID-convention does not allow a substantive review of an award, so a preliminary ruling issued by the CJEU following a referral from a domestic court for purposes of recognition and enforcement would not be useful for the revision of an award.

45 Supra, note 43, p. 225.
46 Directive No. 2007/66/EC, so called Remedies Directive coordinates national review systems by imposing some common standards intended to ensure that rapid and effective means of redress is available in all EU countries in cases where bidders consider that contracts have been awarded unfairly.
47 Idem, supra, note 45.
6. Best time of Europe has yet to come.

Latterly, in many other topical issues – Greece’s bailout, common migration policy, and Schengen reform – we have been witnessing a conflict between the legal and the politics. This tension constitutes the very proof that the old methods of perpetual political procrastination leaving behind a lot of potentially explosive setups do no longer serve well the common interests of the European Union. Exactly like a living organism, the European Union has reached a point of maturity, a stage, where political ideals must be confronted with economic realities and generate a more tangible definition of common European interests, something to fall back on and confidently lean on.

Complementarity and interdependence must be the bridging substance of a better Europe, not an array of symbols emptied of any emancipatory relevance. Endeavouring to reach stability does not mean to exercise opposition to changes, but to create proper conditions for continuous reassessment and recalibration of goals and internal means taking into account the external conditions. So, why is the idea of a united Europe defied by a huge wave of conservative forces? Exactly because a change of the regulatory landscape is not only predictable or necessary, but it is also absolutely inevitable.

It has been clearly established that the intra-EU BITs displace fundamental principles and rules of EU law. In conformity with the interpretation given by the arbitral tribunals, the Dutch BIT model – the most usually employed in Europe – offered the chance to successfully obtain entitlement to substantive rights that exceed the minimum standard of treatment. It would be reasonable to affirm that investors – defined as a non-state constituency – have an interest in maintaining the European status-quo. Strangely enough, the legality of the intra-EU BITs has not been scrutinised during the accession procedure, when the application of the acquis communautaire was discussed. However the Article 4(3) TEU requires the removal of any kind of obstructions against the fulfilment of common EU objectives.

The exclusive positivism vis-à-vis the law of the antagonist can be revealed by the jurispathic interpretation of the principle of legitimate expectations. An overlapping consensus exists between the two systems of investor protection and it generates a complex set of incompatibilities justifying the Commission decision to order the termination of the intra-EU BITs. The conflict is partially engendered by the lack of communication between the two systems, the only bridging tool between the two constituencies relies on the institution of amicus curiae.

Snaking around the “towering stone pillars entwined with more serpents”, the political discourse keeps silent about one tremendously important aspect, which is the relation between the economic hegemony and the legal notion of equality of Member States. Stability is a code name for the preservation of an institutional configuration designed to preserve the standard of special treatment of investors originating in old Member States.
The capital importing states had to prove that they were ready to join a community governed by law and liberal economic doctrines and some of them are still pursuing the goal of becoming fully accepted members of this exclusive European community. Arbitration may lead to unequal treatment of investors among Member States, argued the European Commission in its amicus curiae briefs. This assertion states the obvious, but it does not recognise the actuality that the unequal treatment in question is an inheritance from a gone time, which is still animated by sustained and coordinated efforts to resist the “excessive federalisation” of the Union. The network of intra-EU BITs is part of the mosaic structure reflected symbolically by the motto “United in Diversity”, united by law, diverted by politics.