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BITs: is an end in sight**
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The turf war between the European Commission and intra-EU BITs: Is an end in sight?

The relationship between intra-EU BITs and the general body of European Union law (acquis communautaire) has deteriorated significantly over the past decade due to a number of contested investor-state arbitral decisions. These BITs were once a means of promoting investment in the Central and Eastern European countries, but following the enlargement of the European Union (EU), a number of these countries joined the single market and thus became subject a common legal framework on cross-border investment. A once theoretical problem of conflict between EU acquis and international law provisions in intra-EU BITs became a reality due to several investor-state cases, in the process challenging the principles of primacy and supremacy of EU acquis. The European Commission, often appearing as an amicus curiae before arbitral tribunals and courts, sought to reaffirm these fundamental principles, to the objection the arbitral tribunals. As a result, the European Commission decided to pursue the policy of compelling EU Member States to terminate their intra-EU BITs as well as challenging the enforcement of arbitral awards deemed to be in violation of EU acquis. This paper seeks to examine the uneasy relationship between intra-EU BITs and EU acquis to determine whether the European Commission's clampdown on these instruments is justified. With several appeal decisions still pending, the authors beg the question; would the call to terminate intra-EU BITs signal the end of a decade-long conflict?

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1. Conceptual underpinning

Once a desirable form of European international relations endorsed by the European Commission,¹ Bilateral Investment Treaties (BITs) became problematic after the accession of former socialist countries to the European Union (EU) in May 2004,² and with the emergence of the first intra-EU investment arbitration cases a few years later.³ However, the challenges posed by intra-EU BITs had been documented in academic literature decades before the enlargement of the EU by the predominantly Central and Eastern European (CEE) countries, bringing the total number of intra-EU BITs to approximately 190.⁴ Since 2004, the relationship between intra-EU BITs and *acquis communautaire* (EU acquis hereafter)⁵ has significantly deteriorated, creating another channel of hostility against the institutions of international investment law. Outside the EU, international investment law has become subject to immense criticism from civil society groups citing a lack of consistency in decision making and continued encroachment on national regulatory space.⁶ On the latter, developing States in Latin America (Bolivia, Ecuador and Venezuela), Africa (South Africa) and Asia (Indonesia) in particular, have opted to terminate their membership in international

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¹ Before the 2004 wave of accessions, the only intra-EU BITs in force were the Germany-Greece and Germany-Portugal BITs. Both agreements were concluded before Greece and Portugal acceded to the EU in 1981 and 1986, respectively.

² Cyprus, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia acceded in 2004, whilst Bulgaria and Romania joined the EU in 2007; for commentary see Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', 2009, 58(2) *International and Comparative Law Quarterly*, 297, p. 297; Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ', 2009, 8(2) *The Law & Practice of International Courts and Tribunals*, 225.

³ The conclusion of BITs was generally encouraged throughout the pre-accession period, see Article 76(2) Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part signed on 21.12.1993, OJ L 178/76, 12.7.1994; Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty', 2007, 24(5) *Journal of International Arbitration*, 455, p. 456; Marek Wierzbowski and Aleksander Gubrynowicz, 'Conflict of Norms Stemming From Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions' in Christina Binder and Christoph Schreuer (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), p. 544.

⁴ See Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', 2009, 58(2) *International and Comparative Law Quarterly*, 297, p. 297.

⁵ The accumulated legislation, legal acts, and court decisions which constitute the body of European Union law. In short; EU acquis.

⁶ See Suzanne A Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010)13 *Journal of International Economic Law* 1037, 1040; Aikaterini Titi, 'The Right to Regulate in International Investment Law' (Hart Publishing, 2014) Chapter VII; Lorenzo Cotula, 'Do Investment Treaties Unduly Constrain Regulatory Space?' (2014) *Questions of International Law* 9, 19; Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), 'Redefining Sovereignty in International Economic Law' (Hart Publishing, 2008) 225.

investment institutions and related agreements.⁷ However, this discontent has only recently started to permeate into the Western hemisphere, igniting withdrawals from the Energy Charter Treaty (ECT) by both Italy and Russia.⁸ In the EU, a power struggle between EU *acquis* and BIT protection rages on, the conclusion of which threatens to redefine the established system of international investment law.⁹ At the forefront of this power struggle stands the European Commission, which has championed for EU *acquis* by appearing as an *amicus curiae* before numerous courts and tribunals on behalf of EU Member States.¹⁰

However, both EU *acquis* and intra-EU BITs once operated in relative harmony. During the 1990s, many BITs were agreed between existing members of the EU and the “EU 13” States that accessed the single market following the enlargements of 2004, 2007 and 2013.¹¹ According to the European Commission, the BITs were aimed at “reassuring investors who wanted to invest in the future the ‘EU 13’ at a time when private investors, sometimes for historical political reasons, might have felt wary about investing in those countries.”¹² These BITs offered investors protection on matters such as expropriation without compensation, Fair and Equitable Treatment (FET), as well a dispute settlement mechanism mainly in the form of international arbitration. The European Commission argues that following the enlargements, “such extra reassurances [became] unnecessary” since all 28 Member States have the same EU rules on cross-border investments including freedom of establishment and the free movement of capital. Intra-EU BITs, on the other hand, confer rights on a bilateral basis, which in accordance to EU jurisprudence, amounts to discrimination and thus incompatible with EU *acquis*. The European Commission stepped up its campaign against intra-EU BITs in September 2015 by initiating an administrative dialogue with 21 EU Member States over the termination of their intra-EU BITs.¹³ Thus, the European Commission is firmly committed to finding a lasting solution to the challenges posed by intra-EU BITs.

The European Commission’s intentions towards intra-EU BITs were captured in a statement by Jonathan Hill, the former EU Commissioner for Financial Services, Financial Stability and Capital Markets Union, that: “[i]ntra-EU bilateral investment treaties are outdated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States. We must all act together to make sure that the regulatory framework for cross-border investment in the single market works effectively. In that context, the Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes.”¹⁴ Thus, this paper is a response to the European Commission’s continued intimation that existing intra-EU BITs are incompatible with EU *acquis* and therefore may need to be terminated, a view endorsed by several CEE

⁷ Louis T Wells, ‘Backlash to Investment Arbitration: Three Causes’, in: Claire Balchin, Liz K Chung, Asha Kaushal and Michael Waibel (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, (Kluwer Law International, 2010) pp. 341–352; Omar E. García-Bolívar, ‘Sovereignty vs. Investment Protection: Back to Calvo?’ (2009) ICSID Review 24 (2) 464–488; Republic of South Africa, “Bilateral Investment Treaty Policy Framework Review: Government Position Paper” (June 2009); Michael Ewing-Chow and Juniato Losari, ‘Indonesia is letting its bilateral treaties lapse so as to renegotiate better ones.’ *Financial Times*: 15 April 2014.

⁸ The *Energy Charter Treaty*. Concluded in Lisbon, December 17, 1994; Entered into force, April 16, 1998; Jarrod Hepburn and Luke Peterson. 2 June 2015. “Italy is the EU’s Model Citizen.” IAREporter; Amelia Hadfield & Adnan Amkhan-Banyo, ‘From Russia with Cold Feet: EU-Russia Energy Relations, and the Energy Charter Treaty’ (2013) 1 *International Journal of Energy Security and Environmental Research* 1.

⁹ They do not concern investment treaties Member States or the European Union may have with third countries for which different considerations apply.

¹⁰ See generally Maciej Zachariasiewicz, ‘Amicus curiae in international investment arbitration: can it enhance the transparency of investment dispute resolution?’, 2012, 29 J. Int. Arb., 2; Jorge E. Viñuales, ‘Amicus Intervention In Investor-State Arbitration’, 2007, 61 *Disp. Resol. J.*, 72.

¹¹ See Christer Söderlund, ‘Intra-EU BIT Investment Protection and the EC Treaty’, 2007, 24(5) *Journal of International Arbitration*, 455.

¹² European Commission - Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels, 18 June 2015.

¹³ The aim was to seek their views on the issue. The other five states were already subject to infringement proceedings and two, Ireland (2012) and Italy (2013), had already terminated their intra-EU BITs.

¹⁴ European Commission - Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels, 18 June 2015.

Member States and has been argued before several investment tribunals. The aim of this paper is to explore whether the European Commission's position is justified and its implications for the future of intra-EU BITs. First and foremost, the paper examines the uneasy relationship between EU *acquis* and international investment law. The goal is to determine where the line between the supremacy EU *acquis* and international law obligations under intra-EU BITs has been drawn by international arbitral tribunals. The second aim is to critically examine the implications of the on-going legal disputes and terminations of intra-EU BITs for both investors and the entire system of international investment law, before reaching a circumspect conclusion.

2. The European Commission's attack on intra-EU BITs

The controversy surrounding the supremacy of EU *acquis* over international investment law gained momentum in 2007 following an International Centre for the Settlement of Investment Disputes (ICSID) tribunal award in *Micula v. Romania*, ordering Romania to compensate a foreign investor, the enforcement of which amounting to illegal state aid under EU *acquis*.¹⁵ This was accompanied by several tribunal decisions challenging the argument that EU *acquis* superseded international law obligations under intra-EU BITs. For example, the arbitral tribunal in *AES v. Hungary* refused to give EU *acquis* supremacy over the Hungary-UK BIT;¹⁶ in *Eastern Sugar v. Czech Republic*, the arbitral tribunal rejected the argument that EU *acquis* takes priority over international law obligations in intra-EU BITs;¹⁷ and the arbitral tribunal in *Electrabel v. Hungary* upheld its jurisdiction based on the ECT provisions.¹⁸ Moreover, the issue of compatibility is currently pending before the Court of Justice of the EU (CJEU) on the setting aside proceedings against the United Nations Commission on International Trade Law (UNCITRAL) arbitral award rendered in the *Eureko v. the Slovak Republic*.¹⁹

The European Commission responded to the challenges posed by international investment law by putting pressure EU Member States to terminate their intra-EU BITs. This advice was taken on board by most CEE Member States but the major economic players within the EU, namely the Netherlands, France, Germany and the UK opposed the decision.²⁰ The CEE Member States maintain that corporations in Western Europe are suing them through a network of intra-EU BITs hence the decision to terminate these BITs.²¹ This argument is intertwined with a growing conservatory of literature on the relationship between the institutions of international investment law and national sovereignty thus pursuing it is somewhat expedient even though more academic attention is needed on the growing discontent over investor-state arbitration within the EU. Nonetheless, the European

¹⁵ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013). The majority of known cases are handled by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in Washington. The second most used rules are those of the United Nations Commission on International Trade Law (UNCITRAL). The Permanent Court of Arbitration (PCA) in The Hague, the London Court of International Arbitration (LCIA) as well as the Paris-based International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC), both business organisations, also regularly handle disputes.

¹⁶ *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22.

¹⁷ *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004.

¹⁸ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.

¹⁹ *Eureko v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13; see UNCITRAL Arbitration Rules (revised 2010) UN General Assembly Resolution (A/RES/31/98). Unlike ICSID and the ICSID Additional Facility, there is no dedicated institution associated with the administration of arbitrations pursuant to the UNCITRAL Arbitration Rules. However, the parties may agree that the services of an institution such as ICSID or the Permanent Court of Arbitration (PCA) will be responsible for administering an *ad hoc* UNCITRAL arbitration.

²⁰ See for example Council of the European Union "2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments" (ECOFIN 629 MDC 2, 17363/08) paragraph 17: "Most Member States did not share the Commission's concern in respect of arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements."

²¹ European Commission (2012) Monitoring activities and analysis, Bilateral Investment Treaties between EU Member States (intra-EU BITs); Tomáš Fecák (2011) Czech experience with Bilateral Investment Treaties: somewhat bitter taste of investment protection, CYIL 2, p233-267.

Commission advances the view that Member States cannot act in a manner that infringes their obligations under EU acquis and subject to Article 351 of the Treaty on the Functioning of the European Union (TFEU, also known as the Treaty of Lisbon),²² they have an obligation to remove any incompatibilities between agreements. However, Article 351 applies only to pre-accession thus excluding post-accession treaties. It is not surprising, therefore, that the CJEU in cases against Finland, Austria and Sweden found that these Member States had violated Article 351 by retaining provisions in their extra- EU BITs (BITs with non-EU states) that were incompatible with EU acquis.²³

However, the legal consequence of incompatibility in the cases against Finland, Austria and Sweden are the same for intra- EU BITs. For instance, BIT provisions could lead to discriminatory treatment amongst EU Member State nationals by according more favourable treatment to investors from a particular Member State. This is because BIT protections are granted exclusively to contracting parties thus excluding investors from other non-party States, which constitutes a violation of the non-discrimination prohibition under Article 18 TFEU and a hindrance to the harmonization of EU acquis.²⁴ The European Commission's decision to terminate intra-EU BITs was fuelled by the growing number of cases involving alleged breaches of investment treaties by CEE Member States in the process of conforming to EU acquis, with several cases touching on intra-EU legal developments.²⁵ These States were left in a position of either breaching EU acquis or their BIT obligations. As a result, the European Commission decided to intervene in these proceedings as an *amicus curiae* to support the respondent Member State and to promote its position that BIT provisions are in direct conflict with EU acquis.²⁶

However, the latter argument has been unanimously rejected by international arbitral tribunals by continuously accepting jurisdiction. For example, in *Eureko v. The Slovak Republic* (December 2012 – later *Achmea v. The Slovak Republic*)²⁷ and *Micula v. Romania* (December 2013),²⁸ the European Commission intervened but its arguments were deemed not compelling enough to discontinue the proceedings and hand jurisdiction to an EU court or even admit absolute primacy of EU acquis over other international obligation of the State. These setbacks forced the European Commission to employ the strategy of seeking to set aside international arbitral awards deemed to conflict with EU acquis. For example, *Eureko* went all the way to Germany's Federal Court of Justice (its highest civil and criminal jurisdiction) in Karlsruhe where Slovakia and the European Commission managed to obtain the suspension of the proceedings, currently awaiting preliminary ruling from the CJEU.²⁹ Similarly, in the *Micula* case, which was undergoing annulment proceedings at ICSID in Washington, the European Commission intervened by declaring the payment of award as amounting to illegal state aid.³⁰ Incompatibility proceedings are pending at the General Court of the European Union.

²² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 of 17 December 2007.

²³ Case C-205/06, *Commission v. Austria*; Case C-249/06 *Commission v. Sweden*; Case C 118/07, *Commission v. Finland*; See Freidl Weiss and Silke Steiner, 'The investment regime under Article 207 of the TFEU – a legal conundrum: the scope of 'foreign direct investment' and the future of intra-EU BITs in Beatens', Freya (ed), *Investment Law within International Law Integrationist Perspectives*, Cambridge University Press, 2013, pp. 367-368.

²⁴ See Christopher von Krause, 'The European Commission's Opposition to Intra-EU BITs and its Impact on Investment Arbitration', *Kluwer Law International Arbitration Blog*, 28 September 2010, at 18

²⁵ See part 4 below.

²⁶ See Maciej Zachariasiewicz, 'Amicus curiae in international investment arbitration: can it enhance the transparency of investment dispute resolution?', 2012, *Journal of Int. Arb.*, 29(2) pp. 2005-224.

²⁷ *Eureko v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*).

²⁸ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, ICSID Case No. ARB/05/20 (Sweden/Romania BIT), Decision on Jurisdiction and Admissibility (September 24, 2008).

²⁹ Case C-284/16, *Slovak Republic v. Achmea BV*.

³⁰ See the argument of the European Commission in *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) para 334.

As new ISDS cases based on intra-EU BITs mounted, the European Commission decided in June 2015 to begin infringement proceedings against five Member States: Austria, the Netherlands, Romania, Slovakia, and Sweden. The five infringing Member States were chosen because they had pending or had been involved in intra-EU BIT disputes. The European Commission reaffirmed that intra-EU BITs were outdated, unnecessary within a single market governed by EU *acquis* and not compatible with EU *acquis*. The European Commission also argued that BITs were originally conceived as a political commitment and reassurance to EU investors in non-EU European states, and with the accession of these States to the single market, they became subject to the entire legal framework that sufficiently protects cross-border investment.³¹ In view of the European Commission, it is unacceptable to permit a specific bilateral undertaking between member states to circumvent the entire legal framework. The European Commission therefore concluded that the existence of intra-EU BITs threatens the very fabric of EU *acquis* by creating contradictions and overlaps with mandatory provisions of EU treaties and secondary legislation.

The European Commission's attack on intra- EU BITs received divergent reactions. Denmark launched negotiations in 2016 with its contracting States to terminate its intra- EU BITs.³² This was the same position taken by the Czech Republic by terminating all its intra-EU BITs in 2016.³³ Poland went even further by announcing that it would terminate all its BITs including extra-EU BITs.³⁴ Romania and Sweden have been negotiating among themselves and the European Commission since 2015, with Romania passing a law in March 2017 to facilitate the outright termination of its intra-EU BITs.³⁵ Sweden, on the other hand, the home State in multiple ICSID proceedings against Germany and Poland, has been less forthcoming.³⁶ It calls for stronger evidence to support a direct violation of EU *acquis* by BIT provisions (in reference to the Sweden-Romania BIT) and in principle willing to terminate its BITs if a similar system of investment protection is provided within the EU.³⁷

Five infringing and non-infringing States (Austria, Finland, France, Germany and the Netherlands) made counterproposals in April 2016 through a 'Non-Paper'.³⁸ These States accept the idea of terminating intra-EU BITs, along with scrapping BIT sunset clauses, which prolong the protection granted to investors after the termination of the treaties.³⁹ However, similar to Sweden, this is conditional to the development of a replacement multilateral system for intra-EU investment protection and dispute settlement.⁴⁰ On the latter proposal, this leaves three alternative solution; i) extending the CJEU's mandate to include investor-state disputes; ii) creating an autonomous body with a competence limited to investor-state disputes (such as the proposed investment court under the EU-Canada Comprehensive Economic and Trade Agreement);⁴¹ iii) using the Permanent Court of Arbitration in The

³¹ European Commission - Press release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, Brussels, 18 June 2015.

³² Nokos Lavranos 'The end of intra-EU BITs is nearing' Practical Arbitration Blog, Thomas Reuters, May 13, 2016.

³³ Angeline Welsh 'Grappling with jurisdictional issues under the UK-Czech Republic BIT' The law of nations, May 8, 2017.

³⁴ Markus Burgstaller, Recognition and Enforcement of ICSID Awards: The ICSID Convention and the European Union, in Crina Baltag (ed.), ICSID Convention After 50 Years: Unsettled Issues, 2017, Wolters Kluwer, p. 412.

³⁵ Crina Baltag, Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties, Kluwer Arbitration Blog, 14 March 2017.

³⁶ Nokos Lavranos 'The end of intra-EU BITs is nearing' Practical Arbitration Blog, Thomas Reuters, May 13, 2016.

³⁷ Joel Dahlquist Cullborg, Hannes Lenk, Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden' Swedish Institute for European Policy Studies, Issue 2016:4.

³⁸ Non-Paper 'Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands' dated 7 April 2016. For commentary, see Vanessa Naish & Elizabeth Reeves 'The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement' Herbert Smith Freehills LLP, 31 May 2016.

³⁹ Non-Paper 'Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands' dated 7 April 2016, p3-5.

⁴⁰ Non-Paper 'Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands' dated 7 April 2016, p.2.

⁴¹ European Commission, EU-Canada CETA <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter> (Accessed 10 May 2017); See Vanessa Naish & Elizabeth Reeves 'The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement' Herbert Smith Freehills LLP, 31 May 2016.

Hague through a custom-made procedural framework. Thus, these States are willing to retain the investment protection regime but with a dispute settlement mechanism that recognises the supremacy of EU *acquis*. However, the ‘Non-Paper’ failed to create the intended unifying effect across the EU and the European Commission maintained that EU *acquis* already offered sufficient investment protection. The arbitration community was also critical of the proposal to forgo with sunset clauses in an attempt to speedily abrogate BIT protection, which goes against the spirit of international law and established norms.⁴²

Despite that, the European Commission is empowered to bring infringement provisions against nonconforming Member States in a bid to remove intra-EU BITs. The European Commission’s authority over BITs entered into by EU Member States stems largely from the Treaty of Lisbon (the TFEU), which came into force on 1 December 2009, granting the EU exclusive competence over Foreign Direct Investment (FDI) as part of its Common Commercial Policy.⁴³ This meant the power to negotiate and conclude extra-EU BITs shifted from Member States to the EU (mainly the European Commission).⁴⁴ Thus, Member States need authorisation from the European Commission for any new extra-EU BITs.⁴⁵ This was followed by Regulation 1219/2012⁴⁶ establishing transitional arrangements for existing extra-EU BITs, enabling them to remain in force until they are replaced by treaties concluded by the European Commission.⁴⁷ The Council of the European Union assured EU investors that the new legal framework would not affect the commitments and protections they enjoy under existing extra-EU BITs.⁴⁸

However, the scope of the EU’s competence over FDI remains in a balance; with the European Commission interpreting it as not limited to access and admission questions but also pre-establishment requirements and post-establishment investment protection, including the mode of dispute settlement whether state-to-state or investor-to-state.⁴⁹ The scope of EU’s competence over investment has also divided opinion amongst academics, particularly in relation to the future of EU BITs. On one hand, academics interpret the EU’s competence on existing extra-EU BITs to extend to the termination and introduction of new progressive

⁴² Agnieszka Zarowna, ‘Termination of BITs and Sunset Clauses- What can investors in Poland expect?’ Kluwer Arbitration Blog, February 28, 2017.

⁴³ Articles 206 and 207 of the TFEU on EU’s new competence to conclude agreements with third states with respect to trade and FDI. After the Lisbon Treaty, Article 206 TFEU read as follows: “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on *foreign direct investment*, and the lowering of customs and other barriers. [emphasis added]” Article 207(1): “The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.”

⁴⁴ August Reinisch, ‘The EU on the Investment Path – Quo vadis Europe? The Future of EU BITs and other Investment Agreements’, (2014) *Santa Clara Journal of International Law*, Volume 12(1), p. 114; Ahmad Ghouri, ‘Interaction and Conflict of Treaties in Investment arbitration’, International Arbitration Law Library, Kluwer Law International, 2015, p. 149.

⁴⁵ Ana Stanič, ‘Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction’, in Gerold Zeiler, Irene Welser, et al. (eds), *Austrian Yearbook on International Arbitration* 2015, p. 33.

⁴⁶ Regulation (EU) No 1219/2012 (2012) OJ L 351, of the European Parliament and of the Council of December 12 2012, establishing arrangements for bilateral investment agreements between Member States and third countries.

⁴⁷ Stephan Wilske, Lars Markert & Laura Bräuninger, ‘Chapter IV: Investment Arbitration, Pertinent Issues in Investment Arbitration against Romania: A Case Study in Challenges and Pitfalls of Investment Disputes in Central and Eastern Europe’, in Zeiler, Gerold, Welser, Irene, et al. (eds), *Austrian Yearbook on International Arbitration*, 2015, p. 499.

⁴⁸ Council of the European Union, ‘Conclusions on a Comprehensive European International Investment Policy’, 2041st Foreign Affairs Council Meeting, Luxembourg, 25 October 2010, paragraph 9; Freidl Weiss and Silke Steiner, ‘The investment regime under Article 207 of the TFEU – a legal conundrum: the scope of ‘foreign direct investment’ and the future of intra-EU BITs in Beatens’, Freya (ed), *Investment Law within International Law Integrationist Perspectives*, Cambridge University Press, 2013, p. 366.

⁴⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, ‘Towards a Comprehensive European International Investment Policy’, COM (2010) 343 final, p. 2; August Reinisch, ‘The EU on the Investment Path – Quo vadis Europe? The Future of EU BITs and other Investment Agreements’, (2014) *Santa Clara Journal of International Law*, Volume 12(1), p. 118.

agreements relating to the same subject matter.⁵⁰ This view is supported by a number of EU Member States that have intimated on terminating their BITs.⁵¹ On the other hand, academic commentators argue that the purpose of the EU's competence is to create a uniform foreign investment regime, limited to new agreements only thus not empowering the European Commission to renegotiate or terminate existing Member State BITs.⁵² This view was reflected in a 2008 Annual Economic and Financial Committee Report, stating that a majority of Member States were against the termination of intra-EU BITs.⁵³ Despite that, the European Commission has been actively exercising and defending this authority in numerous court and arbitral proceedings.

3. Two captains on the same ship: CJEU verses international arbitral tribunals

Most interestingly, for the purposes of understanding the controversy surrounding intra-EU BITs, is the relationship between the CJEU and international arbitral tribunals. Most BITs expressly refer to international arbitration as the main dispute resolution method available to foreign investors. In intra-EU BITs, this may constitute a violation of Article 344 TFEU which states that: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." In that vein, international arbitral tribunals constitute a threat to the exclusive competence of the CJEU and their inclusion in intra-EU BITs goes against the explicit prohibition in Article 344 against Member States to choosing other forums to settle their EU-based disputes. These issues came before the CJEU following infringement proceedings brought by European Commission against Ireland (*MOX plant* case) for initiating international arbitral proceedings against the United Kingdom under the United Nations Law of the Sea Convention.⁵⁴ The CJEU found that the issues fell within its exclusive jurisdiction because it involved the interpretation and application of EU *acquis*.⁵⁵ It therefore held that: "an international agreement cannot affect the allocation of responsibilities defined in the treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures... The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligation imposed on the Member States pursuant to Community law."⁵⁶ This means that international arbitral tribunals are denied jurisdiction to rule on questions on application and interpretation of EU *acquis*, in particular, if and to what extent, EU *acquis* should be applied.⁵⁷

The CJEU's decision in *MOX Plant* was in reference to inter-state disputes (between two Member States) and subject to Article 344, Member States as opposed to investors are permitted to submit a dispute to the CJEU. However, the mere fact Article 344 does not

⁵⁰ Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser, et al. (eds), *Austrian Yearbook on International Arbitration* 2015, p. 33; See also Recital 5 to the Regulation (EU) No. 1219/2012 (2012) OJ L 351.

⁵¹ Freidl Weiss and Silke Steiner, 'The investment regime under Article 207 of the TFEU – a legal conundrum: the scope of 'foreign direct investment' and the future of intra-EU BITs in Beatens', Freya (ed), *Investment Law within International Law Integrationist Perspectives*, Cambridge University Press, 2013, p. 372.

⁵² Ahmad Ghouri, *Interaction and Conflict of Treaties in Investment arbitration*, International Arbitration Law Library, Kluwer Law International, 2015, p. 151.

⁵³ Council of the European Union "2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments" (ECOFIN 629 MDC 2, 17363/08) paragraph 17 "Most Member States did not share the Commission's concern in respect of arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements."

⁵⁴ Case C-459/03, *Commission v. Ireland (MOX plant)*, [2006] ECR I-4657.

⁵⁵ August Reinisch, 'The EU on the Investment Path – Quo vadis Europe? The Future of EU BITs and other Investment Agreements', (2014) *Santa Clara Journal of International Law*, Volume 12(1), p. 152-153.

⁵⁶ *Commission v. Ireland (MOX plant)*, para. 177.

⁵⁷ Freidl Weiss and Silke Steiner, 'The investment regime under Article 207 of the TFEU – a legal conundrum: the scope of 'foreign direct investment' and the future of intra-EU BITs in Beatens', Freya (ed), *Investment Law within International Law Integrationist Perspectives*, Cambridge University Press, 2013, p. 368.

apply to disputes between private parties does not exclude it from a dispute between a private party and a Member State party.⁵⁸ Thus, the CJEU might find international arbitral proceedings incompatible if they concern questions of EU *acquis*. Furthermore, investor-state arbitral tribunals convened under intra-EU BITs deprive Member States of their right under Article 267 TFEU to request preliminary rulings from the CJEU, and they cannot exercise public authority on behalf of Member States, again encumbering the exclusive jurisdiction of the court. Clearly, the CJEU is threatened by international dispute settlement mechanisms that could interpret EU *acquis* without referring the questions to it for interpretation.

However, upholding the principles of primacy and supremacy of EU *acquis*, without any qualification, could limit or even take away investors rights under a BIT, by allowing a Member State to breach its obligations under international law and justify it with reference to EU obligations. This would constitute a breach of party intentions, and it is especially the case for new EU Member States, who amend their laws in order to accede to the EU. Viewed in a different light; if an African Union (AU) Member State decides to justify breach of BIT obligations with reference to AU law, against the interests of a foreign investor from an EU Member State, would such a decision be well received or enforced within the EU? Most likely not. Despite that, the European Commission has argued for the termination of intra-EU BITs citing principles of primacy and supremacy of EU *acquis*.

To determine which system of law has priority, it is imperative to examine the customary international law position on termination of treaties found under Articles 59 and 30 of the Vienna Convention on Law of Treaties.⁵⁹ As aforementioned, investment tribunals have rejected the argument that intra-EU BITs have become ineffective due to the EU's competence over FDI, thus maintaining their BIT-based jurisdiction which could lead to conflict with EU *acquis*. Article 59 states that: “[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.” In order for Article 59 VCLT to apply, both the TFEU and BIT must be incompatible and relate to the same subject matter. Thus, BITs are not automatically terminated by a state's accession to the TFEU, and tribunals have been consistent in rejecting the view that BITs and EU *acquis* relate to the same subject matter despite the similarities in the some of the provisions. This is because the protection under EU *acquis* is regarded as not as far-reaching as that under BITs since the TFEU does not provide for the FET standard, an expropriation provision or investor-state arbitration.

Even though BITs provide more protection than EU *acquis*, that does not make them incompatible. As stated by the tribunal in *Eureko*, “the later treaty must have more than a minor or incidental overlap with the earlier treaty” thus, substantive similarity is required.⁶⁰ However, the overlap could be considered as more than minor as most BIT protections such as non-discrimination, prohibition against expropriation without compensation, promotion of investment and general FET treatment can be found in EU *acquis*, but less than substantive. This is because there is a difference in the purpose of the treaties as EU protection primarily

⁵⁸ Mark Clodfelter, ‘The Future Direction of Investment Agreements in the European Union’, *Santa Clara Journal of International Law*, Volume 12(1), 2014, p. 179.

⁵⁹ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; VCLT hereafter) The VCLT applies only to treaties between States. Agreements involving international organizations are governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543. The first 72 Articles of the 1986 VCLT—regarded as reflecting customary international law—address the same subjects as Articles 1- 72 of the original VCLT, which this the focus of this paper.

⁶⁰ *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, Oct. 26, 2010, para. 242.

covers the pre-establishment stage of investment, as in access to other Member State markets, as opposed to BIT protections which mainly cover post-investment protection such as expropriation protection and investor-state arbitration.⁶¹ Article 59 also requires intention to terminate the BITs or be superseded by EU acquis, expressed either in the BIT or the TFEU, thus mere accession does not constitute intent. On that background, the mere fact a BIT provides differential treatment does not make it incompatible; intra-EU BITs and EU acquis can co-exist and the differences can be overcome by offering the same protection in all Member States throughout the EU.⁶²

If a treaty is not terminated then Article 30 VCLT on the priority between an earlier and later treaty would apply: “1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.” Thus, if an earlier treaty (a pre-accession BIT) is not terminated pursuant to Article 59 VCLT, then its provisions are applicable insofar as they conform with the later treaty (TFEU). It means individual BIT provisions would become inapplicable if they are incompatible with the TFEU. This renders investor-state arbitration provisions in intra-EU BITs inapplicable since they are incompatible with EU acquis.

However, this argument has been rejected by tribunals (*Eureko* and *Eastern Sugar*), stating that no incompatibility could arise if the obligations under the earlier BIT could be fulfilled without violating the later EU acquis. Furthermore, the tribunals argued that the incompatibility and inapplicability arguments lacked merit since there is no norm of EU acquis prohibiting investor-state arbitration and since EU acquis does not provide a dispute settlement provision that allows investors to bring proceedings against Member States before the CJEU or arbitral tribunals, then investor-state arbitration in BITs can be invoked by investors without breaching EU acquis.⁶³ Thus, despite the overlap, BIT protection is more extensive as compared to EU acquis, hence supporting their parallel application. The relationship between EU acquis and intra-EU BITs was explored in landmark cases against Hungary, the Czech Republic and Romania, with the latter two countries thereafter deciding to terminate their BITs.

4. A counterattack from the arbitral tribunals

⁶¹ August Reisch, ‘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’, *Legal Issues of Economic Integration*, (2012) Kluwer Law International, 39(2), p. 167.

⁶² Member States are not prevented – through national law or international agreements – from enacting more favourable provisions for investors than those available under EU law. August Reisch, ‘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’, *Legal Issues of Economic Integration*, (2012) Kluwer Law International, 39(2), p. 78; Hanno Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’ (2009) 58 ICLQ 297, 310.

⁶³ EU law does, however, provide rules to protect property rights of EU nationals from interference by EU measures. Angelos Dimopoulos, ‘The Validity and Applicability of International Investment Agreements Between EU Member States under EU and International Law’, 2011, *Common Market Law Review*, 63, p. 64–65; Indeed, the CJEU in *Kadi* (Joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paras. 354 and 355), and before that in *Bosphorus* (Case C-84/95, EU:C:1996:312, paras. 19 and 20), acknowledged the recognition of a right to respect for property in EU law, which also finds expression in Article 17 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83/02).

The relationship between EU acquis and intra-EU BITs was first debated in investor-state arbitral proceedings involving *Eastern Sugar v Czech Republic*.⁶⁴ A Dutch foreign investor claimed that Czech Republic had breached the FET standard under the Czech-Netherlands BIT by enacting three pricing decrees. The respondent State argued that; i) the enactment of the decrees was a mandatory requirement under EU acquis; ii) they were necessary to meet the non-discrimination requirement under Article 18 TFEU; iii) EU acquis obligations superseded those under international investment treaties.⁶⁵ The respondent State also referred to Article 59 VCLT, arguing that both treaties address the same subject matter, and since the Czech Republic's accession to the EU in 2004, the relevant BIT became inapplicable.⁶⁶ The Czech Republic quoted a January 2006 letter from the European Commission stating: "where the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions.... Community legislation will automatically prevail over the nonconforming BIT provisions" and "intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence."⁶⁷ In other words, dispute settlement provisions under the BIT could be utilised by Member States, after their accession to the EU, if the claim fell within EU competence. As a result, the respondent State argued that the claim should be resolved under EU acquis based on the principle that EU acquis takes precedence from a Member State's date of accession. And although the arbitral clause under the BIT would still be in force, it would only apply to disputes that occurred before the Member State's accession to the EU.⁶⁸

Furthermore, the Czech republic referred to a note by the European Commission to the Economic and Financial Committee that the dispute settlement provisions in BITs could lead to arbitration taking place without relevant questions of [EU] law being submitted to the [CJEU], with unequal treatment of investors among Member States as a possible outcome" and urged Member States to "formally rescind such agreements."⁶⁹ Based on these submissions, the Czech Republic argued that its obligations under the BIT were superseded by obligations under EU acquis on the date of its accession to the TFEU.⁷⁰ The Czech Republic added that "a member state may not exercise rights granted under an earlier agreement to the extent that such exercise conflicts with obligations under [TFEU] treaty". In summary, the respondent State claimed that the tribunal lacked jurisdiction in the matter which, based on the evidence submitted, belonged to the CJEU and the BIT was inapplicable.⁷¹

However, each of the respondent State's submissions were rejected by the arbitral tribunal. First, the tribunal found one of the three decrees to amount to a breach the FET standard and rejected the view that the non-discrimination principle under Article 18 TFEU could be used to justify breach of the BIT. Secondly, the tribunal stipulated that for Article 59 VCLT to apply, the treaties must deal with the same subject matter and be incompatible. The tribunal found that despite a number of similarities, the most fundamental provisions provided under the BIT such as the FET, compensated expropriation and a dispute settlement mechanism were not reflected under EU acquis on cross-border investment protection.⁷² According to the tribunal, the fact that BIT rights to Dutch investors were not available to

⁶⁴ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial award, Stockholm Chamber of Commerce (SCC) no. 088/2004 (Mar. 27, 2007). The arbitration was conducted under the UNCITRAL Rules.

⁶⁵ George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) *Arbitration International*, 28(3), p. 429.

⁶⁶ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, paras. 100-101.

⁶⁷ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para. 119.

⁶⁸ Markus Burgstaller, 'European Law and Investment Treaties', *Journal of International Arbitration*, (2009) Kluwer Law International, 26(2), p. 185; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para 119.

⁶⁹ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para. 126.

⁷⁰ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para. 126.

⁷¹ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, paras. 186; 109; 130-139.

⁷² George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) *Arbitration International*, 28(3), p. 433; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, paras. 159-160; 164-165 & 167-168.

other EU investors did not make the rights incompatible with EU acquis, as other countries and investors are entitled to also claim their rights.⁷³ Second, the tribunal argued that the BIT was not superseded by EU acquis, because neither the BIT nor TFEU explicitly mentions it thus failing to meet the requirements under Article 59 VCLT.⁷⁴ Thus, the Czech Republic's mere accession to the EU did not automatically mean the BIT was superseded and by virtue of it being in force, jurisdiction remained with the arbitral tribunals.⁷⁵ The tribunal did not address Article 30 VCLT which looks at the application of treaties relating to the same subject matter and inconsistent obligations because it had already established that the BIT was still in force and not terminated as required under Article 59 VCLT.⁷⁶ Last but not least, the tribunal rejected the argument that the CJEU held a monopoly over the interpretation of EU acquis by virtue of having jurisdiction as conferred by the BIT.⁷⁷

The tribunal in *Eastern Sugar* rejected the argument that EU acquis has primacy over international law obligations under BIT thus setting a precedent for future tribunals. The next landmark case involved *Eureko*, a Dutch foreign investor, who commenced arbitral proceedings under the Netherlands-Czechoslovakia BIT claiming that Slovakia had indirectly expropriated its assets and denied it FET.⁷⁸ The European Commission joined Slovakia through its *amicus curiae*⁷⁹ to express objection to the jurisdiction of the tribunal and advance the argument that the BIT and TFEU governed the same subject matter thus it should have been made inapplicable by virtue of Articles 30 and 59 VCLT or terminated when Slovakia accessed the EU in 2004. Furthermore, the respondent State claimed that since its accession to the EU, the CJEU obtained exclusive jurisdiction over the investor's claim.⁸⁰ The respondent State also challenged the parallel application of EU acquis and intra-EU BITs citing supremacy of EU acquis, which "enables EU law to supersede the legal systems of its Member States, including bilateral treaties concluded between Member States."⁸¹ The European Commission agreed with Slovakia's arguments, stating that: "as a result of the supremacy of EU acquis vis-à-vis pre-accession treaties between Member States, conflicts between BIT provisions and EU acquis cannot be resolved by interpreting and applying the relevant EU acquis provisions in the light of the BIT."⁸² In essence, the European Commission was arguing that international law cannot be used to justify breach of EU acquis. Thus, as with national law which is incompatible with EU acquis, intra-EU BIT provisions that are incompatible with EU acquis would not be invalid but simply inapplicable.⁸³

The tribunal rejected the challenge to its jurisdiction presented by the respondent State and the European Commission in relation to the displacement of BIT provisions with EU acquis. First, the tribunal argued that the BIT provisions still applied because it had not been disapplied by EU acquis pursuant to Article 30 VCLT. The tribunal therefore concluded that "the VCLT does not provide for the automatic termination of treaties by operation of law."⁸⁴ Second, the tribunal did not find any incompatibilities between the BIT and EU acquis prohibiting investor-state arbitration, thereby holding that it cannot be assumed that all arbitration that involve any question of EU acquis are conducted in violation of EU acquis.

⁷³ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para. 170.

⁷⁴ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, paras. 143-175.

⁷⁵ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, paras. 172 and 181.

⁷⁶ Markus Burgstaller, 'European Law and Investment Treaties', *Journal of International Arbitration*, (2009) Kluwer Law International, 26(2), p. 187-188.

⁷⁷ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, para. 134.

⁷⁸ *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No. 2008-13, Oct. 26, 2010.

⁷⁹ European Commission Observations, dated July 7, 2010, cited in *Eureko B.V. v. The Slovak Republic*, para. 180.

⁸⁰ *Eureko B.V. v. The Slovak Republic*, para. 19 and 59.

⁸¹ *Eureko B.V. v. The Slovak Republic*, para. 135.

⁸² European Commission Observations, dated 7 July 2010, cited in *Eureko B.V. v. The Slovak Republic*, para. 180.

⁸³ European Commission Observations, dated 7 July 2010, cited in *Eureko B.V. v. The Slovak Republic*, para. 193.

⁸⁴ *Eureko B.V. v. The Slovak Republic*, para. 235.

Furthermore, the tribunal observed that if a BIT obligation could be carried out without breaching EU acquis this invalidates the incompatibility argument. On the issue of access to dispute settlement being discriminatory, the tribunal argued that it could be easily avoided by affording the same rights to all Member States rather than terminating them.⁸⁵

Thirdly, the tribunal did not regard the BIT and TFEU as covering the same subject matter because the protection under the BIT was deemed to be “at least potentially, broader than those available under EU acquis (or, indeed, under the laws of any EU Member State)” hence the inapplicability of Article 59 VCLT on treaty termination.⁸⁶ This is because no specific FET standard was established in EU acquis and expropriation protection not covered in the freedom of establishment.⁸⁷ Furthermore, there was no evidence of intention from the parties that the BIT or its provisions should be displaced with the later treaty, the TFEU. Thus, the tribunal found that the BIT and TFEU dealt with different subject matters, despite a number of overlaps which were not relevant to the claim, thereby upholding the validity of the BIT and justifying its jurisdiction in the matter.

However, the tribunal recognised that BITs tend to grant broader protection as compared to that under EU treaties which could lead to more favourable treatment of some Member State investors thereby violating the prohibition on discrimination under EU acquis.⁸⁸ However, this does not invalidate the investors’ rights under the BIT since the parties had consented to arbitration via the treaty and consent was obtained before their accession to the EU. Despite that, the tribunal accepted that EU acquis could influence the scope of the rights and obligations under the BIT as applicable law. Furthermore, the tribunal asserted that its jurisdiction was limited to alleged breach of BIT provisions not breach of EU acquis.⁸⁹ The tribunal, however, rejected the argument that the CJEU has exclusive right to interpret EU acquis since courts and arbitral tribunals through the EU had such a right. Rather, the tribunal observed that the CJEU had “monopoly on the final and authoritative interpretation of EU acquis” and not even Member State final courts are obligated to refer all questions of interpretation of EU acquis to the CJEU.⁹⁰ In addition, the tribunal rejected the position in *MOX Plant* as relevant to disputes between two contracting parties rather than a contracting State and an investor thus limiting the CJEU’s jurisdiction over all such disputes.⁹¹ The State accompanied by the European Commission challenged the award, and currently awaiting the outcome in *Slovak Republic v. Achmea (Eureko)* before the German Federal court of justice.

Another landmark dispute over the relationship between EU acquis and intra-EU BITs surfaced in the case of *Electrabel S.A v. Republic of Hungary* following the privatisation of the country’s energy power sector.⁹² A foreign investor in Hungary brought arbitral proceedings under the ECT claiming breach of the FET standard and expropriation for terminating the power purchase agreement (PPA) between the parties. The decision to terminate the PAA was a result of a resolution by the European Commission in 2008 advising Hungary that it was violating Article 107 TFEU by providing illegal state aid to its power companies.⁹³ In

⁸⁵ *Eureko B.V. v. The Slovak Republic*, para. 274.

⁸⁶ Ahmad Ghouri, ‘Interaction and Conflict of Treaties in Investment arbitration’, International Arbitration Law Library, Kluwer Law International, 2015, p. 165-166; *Eureko B.V. v. The Slovak Republic*, para. 245.

⁸⁷ Ana Stanič, ‘Chapter I: The Arbitration Agreement and Arbitrability’, EU Law: Deterring Energy Investments and a Source of Friction’, in Gerold Zeiler, Irene Welser, et al. (eds), *Austrian Yearbook on International Arbitration* 2015, p. 37; *Eureko B.V. v. The Slovak Republic*, para. 259-260.

⁸⁸ Ahmad Ghouri, ‘Interaction and Conflict of Treaties in Investment arbitration’, International Arbitration Law Library, Kluwer Law International, 2015, p. 165; *Eureko B.V. v. The Slovak Republic*, para. 266-267.

⁸⁹ *Eureko B.V. v. The Slovak Republic*, paras. 287 – 290.

⁹⁰ Philip Strik, ‘Shaping the Single European Market in the Field of Foreign Direct Investment’, Hart Publishing, London, 2014, p. 246; *Eureko B.V. v. The Slovak Republic*, paras. 282-283

⁹¹ *Eureko B.V. v. The Slovak Republic*, para. 276.

⁹² *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov 30 2012.

⁹³ *Electrabel S.A. v. Republic of Hungary*, paras 6.4 - 6.7.

its defence, Hungary terminated the PAA in order to conform to EU acquis. As in *Eureko* and *Eastern Sugar*, the jurisdiction of the tribunal was questioned with the European Commission intervening as *amicus curiae* to uphold the exclusive jurisdiction of the CJEU with reference to the *MOX Plant* case.⁹⁴ However, the jurisdiction argument was rejected by the tribunal pursuant to a valid arbitration agreement in the ECT.⁹⁵

Furthermore, the European Commission argued that in the case of incompatibility, EU acquis obligations should take priority over the ECT.⁹⁶ The tribunal did not find any incompatibilities and argued that if any had arisen, there would be no justification for treating international rules and principles in arbitration as less important than EU acquis. However, unlike in *Eureko* and *Eastern Sugar*, the tribunal recognised that EU acquis is considered as “facts” by the respondent State because of its supremacy in national legal systems of the Member states, thus where possible, “the ECT should be interpreted... in harmony with EU acquis.”⁹⁷ The tribunal therefore concluded that “foreign investors in EU Member States, including Hungary, cannot have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU acquis as regards anti-competitive conduct.”⁹⁸ Furthermore, the tribunal stated that “from whatever perspective the relationship between the ECT and EU acquis is examined... EU acquis would prevail over the ECT in case of any material inconsistency” between two EU Member States.⁹⁹ Although it was in reference to the ECT, the tribunal’s reasoning on the relationship between the ECT and EU acquis could arguably be applied to intra-EU BITs, to determine rights *in rem* and the interpretation of the investment agreement.¹⁰⁰ However, interpreting the ECT in harmony in EU acquis could limit the protection provided under the ECT by allowing Member States to justify breaching international obligations under BITs by referring to the obligation to change their domestic law, as in *Electrabel*, emanating from EU acquis.

The EU commission’s inability to defend the supremacy of EU acquis in international arbitral tribunals forced it to embark on its second strategy of challenging the enforcement of awards deemed to be in violation of EU acquis.

5. EU acquis and the enforcement of intra-EU BIT-based arbitral awards

The relationship between EU acquis and intra-EU BITs is also complicated in regard to enforcement of the final award. The fundamental provisions of the Washington Convention on the Settlement of Investment Disputes between investors and states (ICSID Convention), namely Articles 53 and 54, require immediate and unconditional recognition and enforcement of ICSID awards amongst all its Contracting Parties.¹⁰¹ However, what if the recognition and enforcement of an ICSID tribunal award or any rendered by other arbitral tribunals such as the International Chamber of Commerce, constitutes a breach of a Member State’s obligations under EU acquis? Based on EU acquis and its principles of primacy and supremacy, the enforcement would not be permissible thus creating a standoff between EU acquis and an international convention.

⁹⁴ *Electrabel S.A. v. Republic of Hungary*, para. 5.20, the Commission’s submission paras. 65–68.

⁹⁵ *Electrabel S.A. v. Republic of Hungary*, para. 5.60.

⁹⁶ Philip Strik, ‘*Shaping the Single European Market in the Field of Foreign Direct Investment*’, Hart Publishing, London, 2014, p. 238; *Electrabel S.A. v. Republic of Hungary*, paras. 4.89 – 4.110; Dahlquist, 2014/15, p. 193.

⁹⁷ Philip Strik, ‘*Shaping the Single European Market in the Field of Foreign Direct Investment*’, Hart Publishing, London, 2014, p. 246; *Electrabel S.A. v. Republic of Hungary*, paras. 4.195 & 4.127; *Electrabel S.A. v. Republic of Hungary*, para. 4.130.

⁹⁸ Ana Stanič, ‘Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction’, in Gerold Zeiler, Irene Welser, et al. (eds), *Austrian Yearbook on International Arbitration* 2015, p. 44; *Electrabel S.A. v. Republic of Hungary*, para. 4.141.

⁹⁹ *Electrabel S.A. v. Republic of Hungary*, paras. 4.191.

¹⁰⁰ Philip Strik, ‘*Shaping the Single European Market in the Field of Foreign Direct Investment*’, Hart Publishing, London, 2014, 2014, p. 247.

¹⁰¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 Mar. 1965, (1965) 4 ILM 524. As of May 2017, 161 States have signed and 153 have ratified the ICSID Convention.

There are two schools of thought on the issue of enforcement of intra-EU BITs with compelling arguments that make compromise illusive. On one hand, advocates of BIT supremacy argue that an arbitral tribunal's jurisdiction is established on the basis of an intra-EU BITs provisions rather than EU *acquis*, thus there is no fundamental conflict over jurisdiction. This is why investors have been successful in suing EU Member States for breach of BIT provisions.¹⁰² On the other hand, the European Commission along with a number EU Member States advance the thesis that intra-EU BITs are irreconcilable with EU *acquis* thus investors should be denied their treaty-based right of bringing investor-state arbitral claims.¹⁰³ According to the principle of primacy, EU *acquis* supersedes national law that is inconsistent with it meaning that national courts and legislators are prohibited from applying laws that are inconsistent with EU *acquis*.¹⁰⁴

However, these conflicting interpretations are not healthy for the growth international investment law, a system still in its infancy and one that has recently come under a wave of criticism. Thus, the EU's detachment from international investment law threatens to create two systems of interpretation, in the process adding a further layer of complexity and confusion. For instance, if there is a conflict between EU *acquis* and an intra-EU BIT, the courts of an EU Member State and the CJEU would assess the conflict from a different perspective to the arbitral tribunals.¹⁰⁵ They would treat EU *acquis* as a supreme and autonomous legal order thus taking precedence over both national and international law between EU Member States.¹⁰⁶ This means the conflict between a BIT and EU *acquis* would be resolved in accordance with EU *acquis* rather than international law as prescribed in the BIT.¹⁰⁷ Conversely, an arbitral tribunal would first apply the BIT provisions invoked by the investor, then it would deal with the conflict of norms between the BIT and EU treaties, in accordance with the relevant principles of international law.¹⁰⁸ This limits the relevance of EU *acquis* to treaty-based tribunals to instances where international law so provides, and potentially as part of the domestic law of the host State, for instance, on the question of property rights, and as the law of the *lex loci arbitri*, if the seat of arbitration is in an EU Member State.¹⁰⁹ Thus, a conflict between EU *acquis* and an intra-EU BIT might not be assessed in a similar manner by EU judicial institutions and international arbitral tribunals.

This difference in interpretation could lead to a situation where an EU Member State resists payment of an international arbitral award on the basis that EU *acquis* prevents payment of such an award. Even the European Commission could step in to stop a Member State from

¹⁰² See *Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction (6 June 2007), para 63; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) para 87.

¹⁰³ See European Commission Decision 2015/1470 (30 March 2015), para 128. In June 2015, the European Commission started infringement proceedings under Article 258 TFEU against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) for not having terminated their intra-EU BITs.

¹⁰⁴ Bruno de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in Craig, Paul and de Búrca, Grainne, *The evolution of EU law*, 2nd eds, Oxford University press, 2011, p. 340-341.

¹⁰⁵ See also *Electrabel SA v Republic of Hungary*, paras 4.112, 4.117; Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards' (2015) 16 *Journal of World Investment & Trade* 205, 207.

¹⁰⁶ See Case C-6/64 *Costa v ENEL* [1964] ECR 585.

¹⁰⁷ See the argument of the European Commission in *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013) para 334.

¹⁰⁸ See also *European American Investment Bank AG (EURAM) v Slovak Republic*, UNCITRAL, Award on Jurisdiction (22 October 2012) para 73. Some tribunals have limited themselves to consider EU *acquis* 'as a fact', see *AES Summit Generation Limited and AES-Tisza Erömü Kft v Republic of Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010) para 7.6.6: "Regarding the Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as facts. Both parties having pleading that the Community competition law regime should be considered as a fact, it will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations."

¹⁰⁹ *Eureka B.V. v. The Slovak Republic*, para 225: "The Tribunal cannot derive any part of its jurisdiction or authority from EU *acquis* as such: its jurisdiction is derived from the consent of the Parties to the dispute, in accordance with the BIT and German law. Although EU *acquis*, as between the EU and member States of the EU (including Respondent and the Netherlands, but not Claimant), operates at the level of international law, EU *acquis* operates, as between the Parties, as part of German law as the *lex loci arbitri*."

paying an award which constitutes a violation of EU acquis. And if the award is not paid voluntarily, the investor could pursue its enforcement either in the respondent State, in a third State or even in another EU Member State (see *Micula v. Romania* below). If one would apply the EU acquis approach, a national court faced with the issue of enforcing an intra-EU arbitral award that is not in conformity with EU acquis would be obligated to give precedence to EU acquis and not enforce the conflicting award. Furthermore, Article 351 TFEU obligates Member States to remove provisions from their agreements with third States that are inconsistent with EU acquis. This has been reaffirmed by the CJEU with regards to Member State extra-EU BITs concluded before their accession to the EU.

The procedural difficulties that could arise from enforcement of arbitral awards that may be deemed in violation of EU acquis were considered in *Micula v Romania*, another landmark case.¹¹⁰ A dispute arose out of investment in Romania's food production sector made by three Swedish companies in the 1990s.¹¹¹ At a time of investing, they relied on legislative incentives (legitimate expectation) in the form of custom duties and profit tax exemptions granted to investors as means of attracting foreign investment.¹¹² Romania had committed itself to continuing with the incentives until 2009.¹¹³ In 2004, Romania revoked these incentives in order to conform to EU acquis requirements on State aid in its preparation to join the EU.¹¹⁴ In 2005, the investors commenced ICSID proceedings under the Romania- Sweden BIT for breach of their treaty rights.¹¹⁵ The European Commission intervened as *amicus curiae* to support the argument that the revocation of the incentives was an EU acquis requirement and any award for damages given to the claimant would constitute illegal state aid under Article 107(1) of the TFEU and thus unenforceable.¹¹⁶ Despite the European Commission's argument, the tribunal held that the withdrawal of the incentives amounted to breach of the FET provision in the BIT and awarded the investor damages of approximately 180 million Euros.¹¹⁷

Romania challenged the final award leading to several new proceedings involving the European Commission on the payment, enforcement and annulment of the award.¹¹⁸ First, in 2014 Romania offset taxes owed by one of the claimants to an amount approximately 80 million euros against part of the award.¹¹⁹ In the same year, other claimants sought to enforce the award against Romania by applying to a Bucharest court of first instance for a decision on the execution of the award pursuant to Article 54 of the ICSID Convention.¹²⁰

¹¹⁰ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

¹¹¹ *Micula v Romania*, para 133.

¹¹² *Micula v Romania*, paras 137-172.

¹¹³ *Micula v Romania*, para 253.

¹¹⁴ *Micula v Romania*, para 241 & 255.

¹¹⁵ *Micula v Romania*, para 256.

¹¹⁶ *Micula v Romania*, para 335. Article 107(1) TFEU states: 'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

¹¹⁷ *Micula v Romania*, para 1329.

¹¹⁸ The European Commission's *amicus* submission before the United States Court of Appeals for the Second Circuit suggested that, in addition to the enforcement proceedings in Romania, the claimants "have sought recognition of the Award in Belgium, France, Luxembourg, Romania and the United Kingdom", but that "[o]nly in Belgium and Romania have enforcement proceedings been commenced, with a Belgian court refusing enforcement in deference to the Final Decision", see European Commission, Brief for Amicus Curiae in United States Court of Appeals for the Second Circuit (4 February 2016) <www.italaw.com/sites/default/files/case-documents/italaw7096.pdf> accessed 10 May 2017.

¹¹⁹ See European Commission, Letter to Romania (1 October 2014) <www.italaw.com/sites/default/files/case-documents/italaw4066.pdf> accessed 10 May 2017, para 3; European Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013, para 3.

¹²⁰ European Commission Decision 2015/1470, para 32. See also *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016) para 70. Romania challenged this decision and the European Commission intervened in the proceedings, suggesting that the decision to execute the award be annulled or, in the alternative, the matter be referred to the ECJ for a preliminary ruling under Article 267 of the TFEU. The challenge and the suggestion to seek a preliminary ruling were rejected, and an appeal against that decision was lodged in January 2015, see European Commission Decision 2015/1470, para 36.

Subsequently, an executor was appointed and assets worth approximately 10 million Euros were seized for distribution to the claimants from the Romanian Ministry of Finance.¹²¹ The Bucharest Court of Appeal subsequently stayed the enforcement proceedings, and Romania passed a law suspending all enforcement action and paid the remaining amount into an escrow account in the name of the claimants. The claimants could only withdraw the money if the European Commission decided that doing so would be compatible with the internal market rules.¹²² In response, the European Commission invoked Article 11(1) of Council Regulation (EC) No 659/1999 in May 2014 by issuing an injunction against Romania ordering them to suspend payment of the award until it had made a final decision on the compatibility of the payments with EU acquis.¹²³ This decision was challenged by the claimants before the European General Court but the proceedings were subsequently discontinued at the claimants' request in February 2016.¹²⁴ Following the formal state aid proceedings against Romania brought by the European Commission, in March 2015 it reached a final decision that payment of the award would amount to illegal state aid and for Romania recover sums already paid.¹²⁵ The claimants have challenged the decision before the General Court and the decision is pending.¹²⁶

Parallel to these proceedings, Romania commended annulment proceedings at ICSID under Article 52 of the ICSID Convention in April 2014 and requested that the enforcement of the award should be stayed pending the outcome of the proceedings before the General Court of the EU.¹²⁷ The ICSID *ad hoc* annulment committee indicated to Romania that it would only stay the enforcement if the State unconditionally commits to paying the award if the annulment application was not successful.¹²⁸ Following the decision from the European Commission that the payments would constitute illegal state aid in March 2015,¹²⁹ Romania informed the annulment committee that it would not make a commitment towards paying the award,¹³⁰ and the *ad hoc* committee proceeded to make a decision.¹³¹ Subsequently, the claimants approached the US District Court for the Southern District of New York to enforce the award. In April 2015, a decision granting *ex parte* confirmation and conversion of the award into a US judgment was rendered.¹³² Romania was unable to convince the District court to overturn its ruling and opted instead to launch an appeal before the US Court of Appeals for the Second Circuit.¹³³ The European Commission intervened as an *amicus curiae* in both the District Court and Court of Appeals proceedings, with the latter decision still pending.¹³⁴ On the whole, this case highlights the complexities surrounding enforcement where an international arbitral decision conflicts with EU acquis. In wake of this protracted enforcement dispute, it is worth asking; is there is a future for intra-EU BITs?

¹²¹ See European Commission Decision 2015/1470, paras 11, 37.

¹²² See European Commission Decision 2015/1470 (n 4) paras 11, 35, 37; Micula v Romania (n 22) para 73.

¹²³ European Commission Injunction, Case NO SA38517, *Micula v Romania (ICSID arbitration award)*. Official Journal of the European Union (OJ), C 393, 7 November 2014.

¹²⁴ Case T-646/14, *Micula and Others v. Commission, Order on Removal from Register* (2 September 2014).

¹²⁵ See European Commission Decision 2015/1470, Article 2(1). The Commission also decided that the claimants would be liable to repay any amounts received, see European Commission Decision 2015/1470, Article 2(2).

¹²⁶ See Case T-624/15, *European Food and Others v Commission*; Case T-694/15, *Micula v Commission*; Case T-704/15, *Micula and Others v Commission*.

¹²⁷ See European Commission Decision 2015/1470, para 28.

¹²⁸ See European Commission Decision 2015/1470, para 28; *Micula v Romania*, para 32.

¹²⁹ The European Commission submitted an *amicus curiae* brief in the annulment proceedings in early 2015, see European Commission Decision 2015/1470, para 30; *Micula v Romania*, para 64.

¹³⁰ See European Commission Decision 2015/1470, para 29.

¹³¹ See *Micula v. Romania*, paras 37 & 52. A decision was rendered by the *ad hoc* committee in February 2016, rejecting the request for annulment.

¹³² By contrast, the US District Court for the District of Columbia rejected the parallel effort of Viorel Micula to have the judgment confirmed there in a fast-track process, proposing a slower route to confirmation instead, see Luke Eric Peterson and Jarrod Hepburn, 'Recent post-award developments in the *Micula v Romania I* case' IAreporter (10 September 2015).

¹³³ The judge declined to vacate her earlier *ex parte* confirmation (see United States District Court of the Southern District of New York, *Ioan Micula and Others v. Romania*, Opinion and Order (5 August 2015), and later declined Romania's request to 'reconsider' that ruling, see United States District Court of the Southern District of New York, *Ioan Micula and Others v. Romania*, Opinion (9 September 2015).

¹³⁴ On 4 February 2016, the European Commission submitted an *amicus curiae* submission in those proceedings.

6. Is there a future for intra-EU BITs?

The short answer is yes; if a compromise could be reached. However, recent trends show a general unwillingness to reach a compromise from both the European Commission and arbitral tribunals. In return, the European Commission has systematically supported Member States in seeking to set-aside arbitral awards and encouraged the continued termination of intra-EU BITs. This has not however stopped investors from invoking their BIT rights. For example, decisions on four investor-state arbitral disputes under an intra-EU BIT have been recently rendered against the Czech Republic; *Anglia Auto Accessories, Busta, WNC Factoring* (all March 2017) and *A11Y* (February 2017) and the European Commission appeared as *amicus curiae* to question the issue of jurisdiction.¹³⁵ Although *Anglia Auto* and *Busta* cases were dismissed on merits, the Stockholm Chamber of Commerce arbitral tribunals rejected the argument that the UK-Czech Republic BIT did not apply following the latter's accession to the EU. Furthermore, the tribunals argued that EU *acquis* does not offer most protections found in BITs therefore the intra-EU BITs could not have been superseded by virtue of having similar subject matter. Nonetheless, the tribunals referred to the 15 year sunset clause in the UK-Czech Republic BIT, stating that even if the treaty had been terminated on Czech Republic's accession to the single market, it would not invalidate the 15 year extension thus making the treaty valid and applicable in the present dispute.

Similarly, in 2015 *A11Y* filed its claim accusing the Czech Republic of breaching the expropriation provisions of the UK-Czech Republic BIT and the arbitral tribunal subsequently upheld its jurisdiction over the matter despite objection from the respondent State.¹³⁶ In addition, the final award in a claim by *WNC Factoring*, another British company, against the Czech Republic was rendered by a Permanent Court of Arbitration arbitral tribunal on 22 February 2017 (eventually rejected on merits). In dismissing the Czech Republic's objection to its jurisdiction, the tribunal noted that other tribunals have considered and consistently rejected the argument that intra-EU BITs constitute a violation of EU *acquis* arguing that both systems of law are not in conflict and do not offer the same procedural and substantive protections to investors. The tribunal however recognised that conflict is not the final resolve rather the European Commission may reconsider its inflexible position the future. Overall, these four recent decisions show a consistent effort by the tribunals to uphold BIT protection over EU *acquis*; which is rather remarkable for an area of law often criticised for its lack of consistency.

The future of intra-EU BITs appears even bleaker in light of the recent intimations by EU Member States on adhering to the European Commission's calls to terminate their intra-EU BITs. For example, on 24 March 2017, Law No. 18/2017 approving the termination of BITs between Romania and other EU Member States came into force. The law targets 22 BITs entered with Austria, Bulgaria, Czech Republic, Cyprus, Croatia, Denmark, Greece, Finland, France, Germany, Lithuania, Latvia, Luxembourg, Poland, UK, Portugal, Netherlands, Slovakia, Slovenia, Spain, Sweden and Hungary. These terminations will be achieved either by consent through agreements with contracting States or unilaterally through denunciations.¹³⁷ Based on the accompanying explanatory notes, Romania took this decision

¹³⁵ *Anglia Auto Accessories Ltd v The Czech Republic* (SCC Case No. V 2014/181) 10 March 2017; *IP Busta and another v The Czech Republic* (SCC Case No. (SCC V 2015/014) 10 March 2017; *WNC Factoring Ltd v The Czech Republic* (PCA Case No. 2014-34) 22 February 2017.

¹³⁶ *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction (9 February 2017). The arbitral tribunal will now proceed to decide on the merits of the case. The decision is pending.

¹³⁷ The law does not address extra-EU BITs and the ECT

because of the infringement proceedings brought by the European Commission in June 2015 and in a bid to avoid future investor-state proceedings like those brought by Micula.

On that background, it appears that the European Commission has sowed the seeds for the termination of intra-EU BITs and a number of events in the next two years could determine the fate of these BITs. First, although little has progressed in the five infringement cases that included Romania, the European Commission may consider taking the next step by bringing the cases formally before the CJEU, if investor-state arbitral claims continue. Secondly, the European Commission remains silent on counter proposals in the Non-Paper, which includes the creation of a separate court for intra-EU investment disputes. If taken forward, this could offer a pathway from international arbitral tribunals without the destruction the BIT regime in the EU. Thirdly, most BITs contain sunset clauses; twenty years in the case of Romania's BITs with Germany, the UK, and France and Sweden, and fifteen years with Bulgaria, Finland, Netherlands and Luxembourg. Although Romania, and other terminating states may shorten the length of the post-termination investment protection, it cannot be done unilaterally as consent of the other contracting party is needed. Thus, an immediate end to the intra-EU BIT saga is unlikely.

Fourthly, the ICSID award against Romania which the European Commission ordered the respondent State not to pay for conflicting with EU state aid law remains unsettled. The investor has challenged the decision before the CJEU's first instance, this judgement and subsequent appeals will offer more clarity on the enforcement of ICSID awards within the EU. The first instance judgment is expected sometime in 2018. Similarly, the European Commission is awaiting the outcome of the *Achmea (Eureko)* case which the German Bundesgerichtshof (Federal Court of Justice) requested a preliminary ruling from the CJEU on whether or not *Achmea* could rely on the Netherlands-Slovakia BIT and enforce an award of 20 million Euros. The judgment is also expected in 2018. The CJEU's preliminary ruling is likely to end the legal uncertainty European investors currently face over their intra-EU BITs. If the CJEU confirms the European Commission's position, the policy on intra-EU BIT would need to be reconsidered in order to create a dispute settlement procedure that serves investors' interests without breaching their EU obligations. It is expected that arbitral tribunals will thoroughly scrutinise the CJEU's decision and from there determine a more harmonious way forward. However, after a decade of war against intra-EU BITs, it is very unlikely that the European Commission would abandon its intra-EU BIT termination stance in favour of dialogue. Thus, a grand finale is on the horizon.

7. Conclusion and final remarks

In September 2016, the European Commission issued its reasoned opinion to the five infringing states. If the mentioned states fail to comply with the trajectory recommended by the European Commission, cases could be brought before the CJEU, forcing the non-abiding members into judicial submission. This marked nearly a decade since the European Commission began its clampdown on intra-EU BITs due to concerns over their applicability and conformity with EU acquis. By March 2017, Romania joining several other States such as Poland and Czech Republic, commenced with the termination of their intra-EU BITs. These trends raise two questions: i) what are the implications for international investment law on a whole, especially at a time when its mandate is under increased scrutiny? Although highly relevant, this question was not addressed in this paper, rather the paper focused on the implications of the termination for EU investors; ii) what factors are hampering the relationship between EU acquis and BITs, and what does the future hold for intra-EU BITs in light of the increased terminations? In answering the second question, it emerged that although intra-EU BITs were not widely used in the first years of enlargement, since 2007,

there has been a renewed impetus from investors to invoke their treaty rights under the BIT. This made the once theoretical problems of incompatibility very practical indeed as evidenced in cases such as *Eureko*, *Eastern Sugar*, and *Electrabel*. For example, the *Micula* final award produced an outcome that the European Commission considers to be incompatible with EU acquis because it constitutes illegal state aid. As a result, the European Commission argues that intra-EU BITs undermine the single market by sometimes operating contrary to EU acquis and creating an environment of differential rights that favours some investors which is tantamount to discrimination. On those grounds, the European Commission believes intra-EU BITs should be terminated insofar as the matters under the BITs fall within EU competence. Although the European Commission accepts that BITs are applicable to disputes whose facts arose before a Member State's accession to the EU, they still expect tribunals to respect the primacy of EU acquis in such cases. Similarly, if the facts of the dispute took place after the State's accession, the European Commission expects the BIT to have no effect, as the matter falls within EU competence. Essentially, the European Commission narrowly recognises the jurisdiction of international tribunals over intra-EU BITs.

However, arbitral tribunals have consistently dismissed the arguments made by the European Commission. First, that BITs are automatically terminated by the prevalence of EU acquis. The tribunals responded that the BIT were not terminated thus Member States have to follow the relevant procedure of terminating them under the VCLT. Secondly, tribunals have consistently rejected the argument that the TFEU and BITs govern the same subject matter, this in accordance with Article 59 VCLT. They further argue that even though there are overlaps between the protections provided, there is no reason not to apply them parallel. Thirdly, tribunals have rejected the argument that an arbitration clause is not compatible with EU acquis in accordance with Article 30 VCLT. The tribunals responded that EU acquis does not prohibit investment arbitration this is why BITs are not incompatible under Article 30 VCLT. Thus, the provisions in the BIT could be applied without breaching EU acquis. Some tribunals recognised that although BIT provisions such as investor-state arbitration could amount to a breach of the non-discrimination provisions under EU acquis, a state should not be permitted to justify breaching its BIT rights in order to uphold its EU obligations. Thus, we are faced with a stalemate which threatens the future of intra-EU BITs.