Acta Univ. Sapientiae, Legal Studies, **12**, 1 (2023) 5–21

DOI: 10.47745/AUSLEG.2023.12.1.01

The European Union's Investment Policy – The Effects of the *Achmea* Case and the 2020 Termination Agreement of Intra-EU BITs[1]

Erika BIHARI
PhD, Assistant Lecturer,
University of Debrecen (Debrecen, Hungary), Faculty of Law
e-mail: bihari.erika@unideb.hu

Veronika SZIKORA
PhD, University Professor
University of Debrecen (Debrecen, Hungary), Faculty of Law
e-mail: szikora.veronika@law.unideb.hu

Abstract. The increasing involvement of the European Union (EU) in the field of investment protection has been a source of several conflicts in the recent years. Also, this phenomenon has led to significant changes in international and EU investment protection regulations and related dispute settlement or even arbitration procedures. In this article, we briefly present what investment protection usually means and how investment protection law has developed. Later on, we cover the investment protection policy of the EU, including its regulations and reform efforts related to investment protection. Last but not least, we highlight the problems of investment protection litigation in the EU, based on a judgment of the CJEU and a multilateral agreement between Member States (Termination Agreement).

Keywords: investment protection, EU's judgment, *Achmea* case, bilateral investment treaties, Termination Agreement, investment protection policy of the EU, investment protection regulation, arbitration procedures

1. Introduction

The development of a new investment protection policy in the EU has begun a few years ago, which often seems to 'collide' with international investment protection based on international conventions, from the perspective of either regulation or

1 The research was carried out within the framework of the *Programs for Improving the Quality of Legal Training* supported by the Ministry of Justice.

dispute settlement or even arbitration. Collisions between these two dimensions included the issue of compatibility between the bilateral investment treaty (BIT) agreements concluded by the Member States and the EU law. In this case, the issue of compatibility concerned whether the Member States have the power to regulate investments between Member States through bilateral investment protection agreements or otherwise, with respect to, for example, the overlaps with the regulations on the freedom of establishment and the free movement of capital. The Court of Justice of the European Union (CJEU) has ruled on the issue, stating in its landmark Achmea judgement that the arbitration clauses of bilateral investor-to-state treaties within the EU (intra-EU BITs) are contrary to the EU Treaties and thus jeopardize the autonomy and direct effect of EU law. Several questions have been raised in this regard: for example, what will be the fate of intra-EU BITs and ongoing investment arbitration proceedings based on these treaties? Well, we already know the answer to some of these questions. However, there are some that are yet to be answered such as: how shall multilateral agreements (e.g. the Energy Charter Treaty) be interpreted by the Court?

2. Development of International Investment Protection

Before presenting the formation and evolution of EU investment regulations, we will briefly talk about international investment protection in general so that our readers can see that the investment protection system of the EU rests on a fundamentally different regulatory framework than international investment protection law.[2]

After the Second World War, in addition to international trade, foreign investments[3] played key roles in shaping the global economy. Liberal market economies emerging around the world and the technical breakthroughs that took place at the time further increased the flow of foreign direct investments. The operation of foreign investments faced several challenge such as the pursuit of maximizing advantages and minimizing disadvantages, expropriation trends, the treatment of foreign investors, and individual state investment support policies. In view of all this, the implementation of the protection of foreign investments within national borders required international regulation.[4]

2 Kende–Nagy–Sonnevend–Valki 2016.

3 The general characteristics of the investment are described in *Salini Construttori S.p.A. v. Morocco* (ICSID Case N ARB / 00/4), according to which 'an investment is to be considered as falling within the scope of Article 25 (1) of the ICSID Convention if it means a contribution of the investor, it includes a certain duration of performance and a participation in the risks of the transaction, also, it shall constitute a contribution to the economic development of the host State of the investment'.

4 Dimopoulos 2011. 11. See also: Somssich 2015. 317–332.

The last stage in the development of investment protection law can be traced back to the early 1990s. The two pillars of the resulting structure are the system of investment protection agreements (substantive rules) and the unique dispute settlement system and its rules.[5]

2.1. The System of Conventions

International legal protection for foreign investors is primarily provided by international investment agreements (*international investment agreement* – IIA). There are currently more than 2,200 bilateral investment treaties (BITs) in force worldwide, and more than 300 trade agreements include chapters that contain substantive rules on investment, arbitration (*treaty with investment provisions* – TIP)[6] such as the ICSID (International Centre for Settlement of Investment Disputes) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, also referred to as the Washington Convention),[7] the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), etc.

These conventions offer various international legal solutions to the investors that reduce the business risks that may arise from the unknown legal environment of the foreign state or include standard 'clauses' that set out, *inter alia*, the treatment of foreign investments, compensation for expropriation, and investor and state dispute resolution rules (e.g. non-expropriation principles, non-discrimination principles, right to adequate treatment, etc.).[8] In addition, they include investor–state dispute settlement rules (ISDS), thus allowing a foreign investor to bring proceedings before an institutional arbitral tribunal against the host state if it has violated any of its obligations under an international investment protection agreement concluded between the investor's home state and the host state.

2.2. Dispute Settlement Methods

As one of the options, ICSID dispute resolution shall be mentioned. The rules of this procedure are framed by the ICSID Convention itself, that is, the only legal source for the procedure. It is a self-regulating autonomous system, independent of any national legal implications. The rules of procedure provide for independence and neutrality, as well as flexibility, just as – in comparison – arbitration. It is

5 Katona 2015. 8.

6 Conventions currently in force are available through the *International Investment Agreements Navigator* at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (accessed: 18.07.2023).

7 Convention on the Settlement of Investment Disputes between Natural and Legal Persons of States and Other States (ICSID Convention) adopted in Washington on 18 March 1965.

8 Dolzer 2009. 220–221.

important to emphasize that the enforcement of an arbitration award made by ICSID is also provided by the ICSID Convention itself, and it is possible to review and – in some exceptional cases – annul the award before the institution's own forum.[9] Since its establishment, the vast majority of investment disputes have taken place before this forum.[10]

The other option is to use the procedure of other international investment arbitral tribunals, the enforceability of which is based on the New York Convention, as in the case of commercial arbitral tribunals.[11] The procedure is based on a regulation developed jointly by the parties (e.g. a BIT), which is based on the national law of the place of the procedure.[12]

3. Development of the Investment Policy of the European Union

The formation of the European Union and modern international investment protection legislation developed simultaneously, but the EU gained competence for foreign investment from the entry into force of the Lisbon Treaty[13] as it is stipulated in Articles 206 and 207 of the Treaty on the Functioning of the European Union (TFEU). Following the Lisbon Treaty, foreign direct investments became an exclusive EU competence, as confirmed by the CJEU in its Opinion No. 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore.[14]

The TFEU distinguishes between two forms of capital flows (maintaining and expanding capital stock): foreign direct investment and portfolio investment. It is important to note that there is not any uniform definition for the concept of foreign direct investment (FDI). According to the settled case law of the Court of Justice of the European Union, 'direct investment consists in investments of any kind made by natural or legal persons that serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'.[15] Thus, the aim of the investor is to exercise control and management rights over the company with the help of the acquired ownership. In addition

9 Schreuer 2009. 398.
10 Dimopoulos 2011. 14.
11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York on 10 June 1958 (New York Convention).
12 Katona 2014. 3.
13 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union, C 306 of 17 December 2007.
14 Opinion 2/15 of the Court of 16 May 2017 (EU:C:2017:376).
15 C-446/04 Test Claimants in the *FII Group Litigation v. Commissioners of Inland Revenue*, Judgment of the Court (Grand Chamber) of 12 December 2006.

to acquisitions, real estate investments and loan transactions are also included. However, the purchase (acquisition) of company shares for financial investment purposes without the intention to influence the management and control of the undertaking (so-called 'portfolio' investment) does not fall into this category.[16]

Based on this distinction, it shall be emphasized that direct investment falls within the exclusive competence of the EU, while portfolio investment remains within the competence of the Member States. In the case of portfolio investment agreements, the conclusion of mixed contracts is suggested that involves the Union and the Member States.[17]

Obviously, the aforementioned does not mean in any way that the Treaty of Lisbon was the first to introduce foreign investment into EU law. In the past, the EU has sought to establish its own investment policy, as the European Commission (the 'Commission') carried out additional services in the field of capital movements and investment promotion, but only in areas not covered by Member States' conventions. With the extension of the Common Commercial Policy, the EU investment policy has started to increasingly cover wider areas with its regulations and has played an important role in multilateral investment-related agreements. This process, however, has resulted in that the scope and exercise of Member States' powers is ambiguous. Therefore, a kind of power struggle has begun between the EU and the Member States over the regulation of foreign investment, and the Treaty of Lisbon has not resolved these differences without contradiction.[18]

4. The Relationship between Investment Protection Conventions of Member States and EU Law

In the 1990s, the countries of Central and Eastern Europe aspiring to EU membership concluded several BITs with Western European Member States. These conventions were not in the focus of attention until 2004, when, in the Commission's view, the BITs became from the category of tolerated exceptions to obstacles of the single market.[19] The Commission also kept in mind that BITs grant different rights to foreign investors, as Member States with an investment protection agreement may have an advantage over those who are not party to them. The Commission considered this to be a discriminatory advantage that was not in compliance with the single market approach. The Commission also found it harmful that BITs between Member States created parallel jurisdiction through

16 Opinion 2/15 of the CJEU, paras 227–228.
17 Szabó–Láncos–Gyeney 2015. 81–82.
18 Dimopoulos 2011. 17.
19 Menczelesz 2017. 136.

arbitration, which could be a way to circumvent the CJEU's monopoly on the interpretation of EU law.[20]

Based on the aforementioned, it can be concluded that the conventions have generated significant political and legal debates, where the Commission has acted in a changing role, either as an *amicus curiae* or as a supervisory body. In order to ensure the supremacy of EU law, the Commission has intervened, handed in written submissions[21] or issued statements[22] in several international investment arbitration cases. However, the arbitral tribunals ruling in these cases did not find the BITs concerned to be in breach of EU law.[23] The Commission has initiated several infringement procedures against some Member States in relation to BITs concluded before the EU membership, and in 2009 three judgments were made by the CJEU on issues related to EU law between an EU Member State and third countries.[24]

The practice of the CJEU has developed a test to support these cases. According to the 'hypothetical conflict' test, if there is a conflict between EU law and the BIT, the BIT must be interpreted in conformity with the EU law or, if this is not possible, the application of the BIT must be refused. Beneath this reasoning lies the pursuit to maintain the monopoly of the interpretation of EU law by the CJEU.[25] In these cases, the Commission expressed that the SMP clause governing the free transferability of capital was contrary to EU law, as it did not allow the EU to restrict the movement of capital between Member States and third countries, thus infringing Article 227 TFEU. The CJEU agreed with the Commission's argument and therefore did not consider international public law instruments – such as renegotiation and suspension to which Austria and Sweden referred – to be adequate, as they did not sufficiently ensure the immediate and effective application of EU measures.[26]

However, not all of the Member States agreed with the Commission's position. On 3 March 2016, the German Federal Supreme Court (*Bundesgerichtshof*) referred a question to the CJEU regarding the compatibility of arbitration proceedings with EU law based on investment protection agreements between Member States, in particular Articles 18, 267 and 344 of the TFEU.[27] The German Federal Supreme

20 Grill–Lukic 2016. See also: Menczelesz 2017. 136.

21 E.g. *Eastern Sugar v Czech Republic* SCC case (No. 088/2004).

22 E.g. *AES vs. Hungary* (ICSID Case No. ARB/07/22.), *Achmea BV v The Slovak Republic* (UNCITRAL PCA Case No. 2008-13). In the latter case, the Commission described investment protection agreements as a 'single market anomaly'.

23 See: *Achmea BV v The Slovak Republic*.

24 C-205/06 *Commission v Austria* (2009), C-249/06 *Commission v Sweden* (2009), C-118/07 *Commission v Finland* (2009). See also: Menczelesz 2017. 136.

25 Lavranos 2011. 282.

26 Lavranos 2011. 4. See also: Menczelesz 2017. 137.

27 C-284/16: Judgment of the Court (Grand Chamber) of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – *Slovak Republik v Achmea BV*.

Court has taken the opposite view to the Commission's approach in relation to Article 344, stating that the article in question applies only to disputes between Member States and shall not be applied to disputes between a Member State and an investor.[28] Also, Article 267 does not constitute an obstacle to intra-EU BITs either, as the CJEU expressed in the Eco Swiss China Time Ltd. v Benetton International EV case that Member States can review judgments and refer a matter of EU law to the CJEU in a preliminary ruling procedure.[29] However, this possibility is limited, as judgments can only be reviewed in the event of a breach of public policy.[30] As far as Article 18 of the TFEU is concerned, the German Federal Supreme Court was in favour of arbitration. In its view, the possibility of discrimination can be eliminated by providing all investors the option of arbitration, so intra-EU BITs remain applicable.

5. The *Achmea* Judgement: A Landmark Decision

A comprehensive court decision on the issue described above has been long overdue, but on 6 March 2018 the CJEU made a landmark decision on BITs and dispute settlement between Member States (Achmea judgment).

The procedure was based on a BIT between a Dutch financial service provider, Achmea BV (formerly Eureko BV), and the Slovak Republic. Achmea established a subsidiary in Slovakia, to which it contributed capital and through which it offered private health insurance services. As Achmea considered that the legislation of the Slovak Republic infringed the provisions of the BIT, Achmea initiated arbitration proceedings against the Slovak Republic under Article 8 of the BIT in October 2008 and sought compensation. In its final judgment of 7 December 2012, the arbitral tribunal found that some of the measures taken by the Slovak Republic infringed the provisions of the BIT and ordered the Slovak Republic to pay Achmea the amount of EUR 22.1 million in damages and to bear the full costs of the proceedings including Achmea's legal fees and expenses. The place of arbitration was in Frankfurt am Main, and the Slovak Republic appealed to the Bundesgerichtshof in Germany. In its appeal, the Slovak Republic claimed that the final judgment should be set aside on the grounds that it was contrary to public policy and that the arbitration clause under which it was given is void, also contrary to public policy, therefore it was contrary to the provisions of the TFEU.

On 6 March 2018, in a relatively briefly reasoned but historically significant decision, the CJEU made it clear that there was a fundamental contradiction between the dispute settlement clauses of certain BITs in the Union and certain

28 Menczelesz 2017. 138.

29 C-126/97 *Eco Swiss China Time Ltd. v Benetton International EV* (1999).

30 C-126/97 *Eco Swiss China Time Ltd. v Benetton International EV* (1999). 40–41.

provisions and principles of EU law. In order to ensure that the specific features and autonomy of the EU law and order are preserved, a judicial system has been created to secure coherence and consistency in the interpretation of EU law. By its very nature, the BIT may jeopardize the preservation of the specific nature of EU law, in addition to the principle of mutual trust between Member States. EU law precludes a provision in the BIT according to which an investor of one of the Contracting Member States may bring an action before an arbitral tribunal against the host Member State in the event of a dispute concerning investments made and where the jurisdiction of the tribunal is mandatory.[31]

We agree with the academic views expressed following the publication of the judgment, stating that the Achmea decision of the CEJU has left many questions unanswered. Among other things, the following issue was raised: how can the ruling of the CJEU be interpreted for multilateral agreements such as ECT? Furthermore, it also concerns a significant issue as to whether the ICSID procedure for investment protection matters within the EU is compatible the EU law if it is based on a multilateral agreement. The CJEU has not taken a position on these issues yet, so it is ultimately up to ICSID to attribute any relevance to the judgment in such a case. [32]

The Achmea judgment made it clear from the point of view of EU law that an arbitration clause based on BITs within the European Union is not supported, has no *raison d'être*.

6. The Gates Are Closed for ISDS within the EU

As a direct result of the CJEU ruling in Achmea, on 5 May 2020, twenty-three Member States of the European Union, with the exception of Ireland, Finland, Austria, and Sweden,[33] signed an agreement terminating bilateral investment agreements between EU Member States (hereinafter referred to as the 'Termination Agreement'),[34] which entered into force on 29 August 2020. All of a sudden, more than 270 bilateral investment treaties within the EU have been terminated,[35] including termination (sunset) clauses,[36] so the arbitration clauses in the BITs

31 C-284/16 *Achmea v Slovak Republic*.

32 See also: Katona–Kende 2018. 27–35.

33 Ireland has not signed or ratified an intra-EU BIT since its denunciation, only a single intra-EU BIT in 2011 with the Czech Republic.

34 Termination Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT., OJ L 169, 29.5.2020. 1. (henceforth: Termination Agreement).

35 Termination Agreement, articles 1–2.

36 The sunset clause guarantees that all investments made before the termination of the BIT will continue to be protected for a certain period of time, i.e. in the event of a dispute between the investor, it may assert its rights against the host state.

within the EU can no longer serve as a legal basis for initiating new arbitration proceedings against Member States. The Termination Agreement declares that a BIT between two Member States shall be repealed when both parties confirm the text of the Termination Agreement. Therefore, the mere drafting of the Termination Agreement did not automatically result in repealing any Member State's BIT, an additional condition for which was the declaration of approval made by the participating states.[37]

It is worth noting that the Energy Charter Treaty falls outside the scope of the Agreement and that this 'exclusion' could be significant in the context of EU reform efforts, as almost half of intra-EU arbitration proceedings are initiated on the basis of the ECT.

Austria and Sweden have not signed the Termination Agreement but have committed themselves to terminate their bilateral agreements with all EU Member States. The Commission has initiated infringement proceedings against Finland and called on the Member States to take all necessary measures to eliminate BITs within the EU as a matter of urgency, as they are not in compliance with EU law.

6.1. The Termination Agreement and Pending Intra-EU Arbitration Proceedings

The Termination Agreement distinguishes between three categories of proceedings but lays down detailed rules only for ongoing and new arbitration proceedings; for closed proceedings, it only provides a conceptual definition.

'Pending Arbitration Proceedings means any Arbitration Proceedings initiated prior to 6 March 2018 and not qualifying as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement.'[38] Article 7 of the Termination Agreement requires the Contracting Parties to inform the arbitral tribunal of the legal consequences of the Achmea judgement in ongoing or new proceedings and to request the competent national court (including the courts of any third country) to participate in the arbitration proceedings under the BIT, to set the arbitral award aside, annul it or to refrain from recognizing and enforcing it.

The Termination Agreement introduces the possibility of a so-called 'structured dialogue' in the event of ongoing arbitration proceedings. Depending on the stage of the proceedings, the investor party may ask the Contracting Party involved in those proceedings to enter into a settlement procedure. In the event that a decision has not yet been made on the matter, the investor may request the suspension of the proceedings and initiate conciliation proceedings. However, if an award has already been issued in the pending arbitration proceedings, but not yet definitively enforced or executed, the investor undertakes not to start proceedings for its recognition,

37 Termination Agreement, Article 16.
38 Termination Agreement, Article 1 (5).

execution, enforcement, or payment in a Member State or in a third country or, if such proceedings have already started, to request that they are suspended.

The investor has six months from the date of the formal termination or expiry of the BIT to initiate the settlement procedure. The settlement procedure is complicated by the fact that the CJEU or a national court must first establish in a final judgment that a State measure complained of in a given procedure infringes EU law.[39] The settlement procedure shall be facilitated by an impartial mediator in accordance with a carefully designed protocol so that the parties can settle their dispute outside of court litigation or arbitration, amicably, and to their best interest.

The option of the 'structured dialogue' described above can be interpreted towards investors as a kind of pressure in order not to use their power in terms of procedure or enforcement of the decision. However, that was not well received by investors.[40]

As far as new arbitration proceedings – that are defined in Article 1 of the Termination Agreement as 'Arbitration Proceedings initiated on or after 6 March 2018' – are concerned, it is the explicit will of the Member States that the investors shall not initiate new arbitration but rather to recourse to a national court and to exhaust domestic remedies even after the expiry of the national limitation periods. In this case, the investor is bound by the terms specified in the Termination Agreement. Thus, the investor withdraws from the pending arbitration proceedings and waives all rights and claims and commits to refrain from instituting new arbitration proceedings.[41]

In the light of the above, it can be said that the Termination Agreement is essentially a 'complex set of transitional procedures'. Investors can suddenly find themselves at a crossroads where they have to decide which way to go. They may choose to continue with the arbitration proceedings and bear the (increased) risk of not being enforced at the end of their journey. Or they may opt for the settlement procedure, which, however, undoubtedly provides very limited opportunities for successful claims.[42]

The Termination Agreement chose a quite radical path to ensure that intra-EU investment arbitration conforms to the requirements of the EU legal order.[43]

The provisions of the Termination Agreement are of concern, as they affect the procedures and their judgments that were pending at the time of the Achmea decision, whereas the agreement itself was concluded only in the spring of 2020.[44]

39 Termination Agreement, Article 9 (3).
40 Korom 2022. 112.
41 Termination Agreement, Article 10 (1) a.
42 Fermeglia–Mistura 2020.
43 Sándor 2022. 183.
44 The provision thus also affects the Sodexo case, for example, even though the decision related to it had already been announced before the Termination Agreement was drafted. See case details below.

It is also important to point out that the BITs repeal of the ratification of the provisions contained in the Termination Agreement by the party states means that the BITs were considered to be still in effect beforehand – certainly from the point of view of international law. Therefore, it can be argued whether the Termination Agreement could legally deprive arbitral tribunals of their jurisdiction if they base their proceedings on BITs still in force in the given period. It also raises concerns that the countries that have concluded BITs terminate interstate contracts with retroactive effects by their own acts, depriving individual investors of rights and guarantees that they have built on in the long term. The situation is made even worse by the fact that most BITs contain sunset clauses, typically regarding the right to refer cases to arbitration. All of this might have constitutional implications.

After the termination agreement, investors and arbitral tribunals expressed that unless the protection guaranteed by BITs is somehow replaced, the decline of investments within the Union may begin. Member State companies may also be at a disadvantage compared to investors from third countries, or companies may resort to 'forum shopping'.[45]

6.2. Raison d'être – Reason for Being of the Sunset Clause

The Termination Agreement dealt a 'decisive blow' to BITs and to ISDS within the EU. The abolition of sunset clauses can be exemplary in this respect, as they expire under the Termination Agreement and thus have no further legal effect. This change is somewhat contrary from what is stipulated in Article 70 (1) of the 1969 Vienna Convention on the Law of Treaties, where paragraph (a) states that: 'Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention releases the parties from any obligation further to perform the treaty.'

However, the abolition of the termination clause could even be a concern, as the Termination Agreement deprives investors of their rights under the BIT.

Some arbitration courts in the EU have addressed this issue. In Magyar Farming v Hungary, the arbitral tribunal noted that the purpose of the termination clause was to 'respect the long-term interests of investors, who have invested in the host State on the basis of contractual guarantees'.[46] Considering that the essence of the termination clause is precisely to extend the international protection afforded to the investor under the BIT, after its termination, the investor may argue that the termination of the termination clause in the EU BIT violates its legitimate expectations, as the termination clause results in acquired rights for investors

45 Korom 2020. 72.

46 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No. ARB/17/27, Award of 13 November 2019, para. 223.

that shall survive the termination of the contract.[47] This ‘tension’ has led to some debate as to whether ISDS courts should take full account of the abolition of termination clauses in BITs within the EU.

Other arbitral tribunals expressed that regardless of the benefits and legitimate expectations that investors derive from the BIT, parties to a contract may terminate sunset clauses like any other contractual clause by terminating these clauses at the same time when they agree to terminate all the other parts of the contract with mutual consent.[48]

Thus, the sunset clauses have particular importance if one of the contracting parties wishes to withdraw from the BIT unilaterally. The debate suggests that investors are likely to continue to rely on termination clauses in expired BITs within the EU. If this tension is to be resolved within the framework of EU law, the involvement of the CJEU will be particularly necessary.

The Termination Agreement continues to contribute to the collision between EU law and intra-EU investment arbitration, as EU law – as a superior legal system – clearly takes precedence over the ISDS system.

In our opinion, one of the shortcomings of the Termination Agreement is that the regulation of the ECT, that is the largest multilateral investment agreement covering a wide range of investments in the energy sector, was not included. About 45% of the claims before ISDS in the EU are based on the ECT (Electrabel S.A. v Hungary, Vattenfall v Germany, Uniper v Netherlands, etc.).

However, despite the shortcomings of the Termination Agreement, it also shows its importance in broadening the way for the modernization of the EU investment law system, which includes the promotion of the establishment of an EU investment court system.

6.3. The Constitutional Dilemmas of the Termination Agreement

It is worth exploring the constitutional dilemmas raised by the Termination Agreement in the light of a concrete case brought before the Constitutional Court of Hungary (hereinafter referred to as the ‘Court’), focusing on three questions.

Firstly, it is worth analysing how strongly the rights guaranteed under intra-EU BITs as inter-state treaties relate to individual investors and the leeway State Parties have in modifying or terminating those treaties. Secondly, considering that the Termination Agreement is based on EU law obligations, how much leeway do national constitutional courts of Member States have in deciding such claims? Thirdly, what constitutional aspects should be taken into account when

47 Article 37 (2) VCLT.

48 Voon–Mitchell 2016. 413, 430.

assessing whether the Termination Agreement conforms to the non-retroactivity (non-*ex post facto* law) principle?[49]

One exceptional case has recently arisen before the Constitutional Court of Hungary. The constitutional case has its roots in the investment dispute between the French company Sodexo and Hungary.[50] Sodexo made investments in the social vouchers market in Hungary. Sodexo initiated the arbitration procedure before the ICSID in 2014 because of the enactment of legislation in 2011 granting the Hungarian Government a monopoly over the prepaid corporate vouchers industry, which thus restructured this social voucher market. The French company alleged that as the new legislation introduced a state-run voucher system with conditions more favourable than those granted to private operators, based on the intra-EU BIT, it amounted to an indirect expropriation with regard to their investment in the social voucher market.[51]

After the date of the Achmea decision, the ICSID tribunal sided with the French investor company in its award rendered in 2019. The arbitration panel declared that the introduced Hungarian reforms amounted to an indirect expropriation,[52] and thus Hungary breached the provisions of the investment treaty. Therefore, Hungary was obliged to pay more than 70 million euros as compensation to Sodexo.[53] Hungary requested the annulment of the award and a stay of the enforcement before the Secretary-General. However, in the annulment procedure, the ICSID upheld the judgement, which is in favour of the French investor company, in May 2021.[54]

Then Sodexo sought enforcement before the regular national courts of Hungary in 2019. The Hungarian courts denied the French claimant's request for enforcement in both instances. The first instance court, the Municipal Court of Budapest, referred primarily to the legal consequences of the Achmea decision of the CJEU as the ultimate reason for the denial of the enforcement of the ICSID award.[55] The Budapest Court of Appeal, as the second instance court, relied on the Termination Agreement as the basis for denying the enforcement, but it also noted that, as a Member State court, it is obliged to take into account the statements of the Achmea decision.[56] However, the decisions have in common that they directly or indirectly enforce EU law against international legal obligations. Sodexo initiated a constitutional complaint procedure in the fall of 2020 against this decision, before

49 Sándor 2022. 191–192.
50 ICSID Case No. ARB/14/20 *Sodexo Pass International SAS v Hungary*.
51 Sándor 2022. 184.
52 Article 5. para. 2 of the intra-EU BIT between France and Hungary, ICSID Case No. ARB/14/20 Sodexo Pass International *SAS v Hungary* Award para. 362.
53 ICSID Case No. ARB/14/20 *Sodexo Pass International SAS v Hungary Award* para. 519.
54 Sándor 2022. 184.
55 See decision no. 32.Vh.400.043/2020/6 of the Budapest Municipal Court.
56 See decision no. 2201-3.Pkf.25.414./2020/4. of the Budapest Court of Appeal.

both the Curia[57] and the Court. The Court suspended its own procedure until the Curia rendered its final decisions in the case.[58] Regardless of the outcomes of the procedure before the Curia though, the claimant company raised abstract and theoretically sound constitutional dilemmas with regard to the relation between the Termination Agreement and the constitutional guarantees enshrined both in national constitutions like the Fundamental Law of Hungary and in the EU legal order. These dilemmas had wider implications with regard to the nature of rights conferred upon investors by BITs as well as the deeper questions of the compatibility of obligations stemming from intra-EU BITs with EU law and the obligation to which national courts of Member States should comply.[59]

Accordingly, the main argument of the claimant company was that regarding the pending arbitration procedure, the Termination Agreement's judicial interpretation in the particular case is in contrast with the principle of non-retroactive (non-*ex post facto*) legislation. In principle, the Hungarian Fundamental Law prohibits the adoption of *ex post facto* laws. In the case law of the Court, the requirements of the Fundamental Law, which declare Hungary as an independent, democratic rule-of-law state, implicitly contain the principle of the settled expectation of the law, which, in principle, prohibits retroactive regulation.

In the reading of the claimant investor company, the Termination Agreement deprived them of substantive rights that are provided in the intra-EU BITs and procedural rights that are guaranteed by the ICSID Convention. These are a set of rights (international standards included in BITs) for investors such as compensation for indirect expropriation, fair and equitable treatment, legitimate expectations, and providing a venue that is isolated from the court system of the host state. Furthermore, the 'sunset clauses' provide that those rights shall be in effect for a longer time, spanning as much as 20 years after the BIT is terminated. However, the Termination Agreement prevents these rights from being exercised in pending arbitration procedures, and therefore it violates the principle of non-retroactivity.[60]

Sodexo finally withdrew its constitutional complaint on 3 January 2022, and with that the Court procedure itself was terminated, so we do not know what the Court would have said in its argument, how it would have resolved the contradiction between EU and international law in relation to Hungarian law.[61]

We agree with Lénárd Sándor's comment that 'although it is hard to provide one single straightforward solution for the constitutional dilemma of the Termination

57 The Curia is the Supreme Court of Hungary.

58 See decision no. 3209/2021. (V. 19.) of the Constitutional Court of Hungary.

59 Sándor 2022. 185.

60 Sándor 2022. 185–186.

61 See decision no. 3126/2022. (III. 23.) of the Hungarian Constitutional Court, decision no. 3127/2022. (III. 23.) of the Hungarian Constitutional Court.

Agreement, it seems certain that national judicial forums alone cannot address it, and that is true that the European judicial dialogue is unavoidable'.[62]

7. Reform Efforts – Strengthening the Position of the European Union's Investment Court System

Several experts have expressed their criticisms of investment protection arbitration in previous years. Critics of the current system of dispute resolution between a foreign investor and the host state generally complain that the case law is unpredictable and inconsistent, the procedure is indistinct, and the substantive review of arbitration awards is not possible.

Hence, the European Union established itself the goal of setting up an investment dispute settlement court. As a first step, the establishment of a bilateral Investment Court System (ICS) is being planned, which would be institutionalized in trade and investment agreements concluded with third countries (e.g. in a Comprehensive Economic and Trade Agreement between Canada of the one part and the European Union and its Member States of the other part, hereinafter referred to as: CETA). However, due to its 'bilateral' nature, the ICS is not able to remedy all the issues of investment arbitration; therefore, as a second step, the Union is working to establish a Multilateral Investment Court (MIC).[63]

Regarding the implementation of the European Union reform, issues may arise. For example, on 6 September 2017, the Kingdom of Belgium submitted a request for an opinion to the Court of Justice of the European Union under Article 218 (11) of the TFEU regarding the compatibility of the Treaties of the European Union with the new investment protection dispute settlement mechanism contained in CETA.[64] On 30 April 2019, the Court ruled that: 'Section F of Chapter Eight of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, is compatible with EU primary law.'[65]

8. Final Thoughts

As we expressed, the EU investment protection system follows fundamentally different trends from the international system of investment protection. In the

62 Sándor 2022. 191.
63 European Council 2017.
64 Official Journal of the European Union, C 369/2l, 30 October 2017.
65 Official Journal of the European Union, C 1/17. Opinion 1/17 of the Court (Full Court), 30 April 2019 https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=ecli:ECLI%3AEU%3AC%3A2019%3A341 (accessed on: 18.07.2023).

context of an increasingly evolving and changing investment protection policy, the European Union is creating a state of reform through the exercise of its competences and existing and future investment protection agreements with third countries. With the abolition or cancellation of BITs between Member States, the guarantee system they provide has become fragmented.

The case law of recent years clearly foreshadows the perspectives of the EU regarding foreign direct investment. It should be noted that the EU intends to lay the current system of international investment arbitration on completely new foundations. However, it is questionable whether the new system will be able to fulfil the role that, for example, the 'traditional' arbitration procedure based on the BITs between the Member States previously fulfilled.

In our view, the EU's investment protection policy is facing many challenges, and the law-making activities of the Commission, the CJEU, and the Member States are determining factors in it.

References

DIMOPOULOS, A. 2011. *EU Foreign Investment Law*. Oxford.

DOLZER, R.–SCHREUER, C. H. 2009. *Principles of International Investment Law*. Oxford.

EUROPEAN COUNCIL. 2017. *Recommendation for a Council Decision Authorising the Opening of Negotiations for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes COM/2017/0493 Final*. Brussels.

FERMEGLIA, M.–MISTURA, A. 2020. Killing All Birds with One Stone: Is This the End of Intra-EU BITs (As We Know Them). *EJIL: Talk!* 26.05.2020. https://www.ejiltalk.org/killing-all-birds-with-one-stone-is-this-the-end-of-intra-eu-bits-as-we-know-them/ (accessed: 18.07.2023).

GRILL, A. K.–LUKIC, S. 2016. The End of Intra-EU BITs: Fait Accompli or Another Way Out? *Kluwer Arbitration Blog*. https://arbitrationblog.kluwerarbitration.com/2016/11/16/the-end-of-intra-eu-bits-fait-accompli-or-another-way-out/ (accessed: 18.07.2023).

KATONA, J. 2014. Nemzetközi beruházásvédelem – alkotmányossági kételyek [International Investment Protection – Constitutional Concerns]. *Európai Jog* 14(1): 1–13.

2015. A beruházásvédelem reformja és az EU formálódó beruházásvédelmi politikája – pillanatkép [Investment Protection Reform and the Emerging EU Investment Protection Policy – A Snapshot]. *Európai Jog* 15(4): 8–18.

KATONA, J.–KENDE, T. 2018. Több kérdés, mint válasz: számvetés az Európai Bíróság Achmea döntése után [More Questions Than Answers: Evaluation

Following the Achmea Ruling of the European Court of Justice]. *Európai Jog* 19(4): 27–35.
KENDE, T.–NAGY, B.–SONNEVEND, P.–VALKI, L. (eds). 2016. *Nemzetközi jog* [International Law]. Budapest.
KOROM, V. 2020. The Impact of the Achmea Ruling on Intra-EU BIT Investment Arbitration. *Hungarian Yearbook of International Law and European Law* 8: 72.
2022. Intra-EU BITs in Light of the Achmea Decision. *Central European Journal of Comparative Law* 3(1): 112.
LAVRANOS, N. 2011. Member States' Bilateral Investment Treaties: Lost in Transition? In: *Hague Yearbook of International Law*. Hague. 282.
MENCZELESZ, A. 2017. Nemzetközi beruházásvédelem kontra az Európai Unió beruházáspoltikája: nemzetközi gazdasági jogi kollízió és ami mögötte van [International Investment Protection versus European Union Investment Policy: The Conflict of International Economic Law and What Is Behind It]. *Külgazdaság* (11–12): 136.
SÁNDOR, L. 2022. The Constitutional Dilemmas of Terminating Intra-EU BITs. *Central European Journal of Comparative Law* 3(1): 177–193.
SCHREUER, C. H. (ed.). 2009. *The ICSID Convention: A Commentary*. Cambridge.
SOMSSICH, R. 2015. A beruházásvédelem mint új Uniós kompetencia – az előzmények [Investment Protection as a New EU Competence – The Precursors]. In: Szabó, S. (ed.), *Bonas iuris margaritas quaerens: emlékkötet a 85 éve született Bánrévy Gábor tiszteletére*. Budapest. 317–332.
SZABÓ, M.–LÁNCOS, P. L.–GYENEY, L. 2015. *Uniós szakpolitikák* [Policies of the EU]. Budapest.
VOON, T.–MITCHELL, A. D. 2016. Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law. *ICSID Review* 31(2): 430.
*** *International Investment Agreements Navigator* https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last accessed on: 18.07.2023).
*** *World Investment Report 2019 – Special Economic Zones*. https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (last accessed on: 20.04.2021).