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Ion GÂLEA

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Influence of Jurisdictional Matters over the Substance of Investment Agreements: The Case-law of the European Court of Justice and the European Union Investment Policy

Ion GÂLEA*

Abstract: *The study observes two elements derived in well-known cases of the European Court of Justice, where substantial elements of investment law were essentially influenced by the interpretation to be given to jurisdictional matters. One element is represented by the intra-EU Bilateral Investment Treaties. Following the Achmea ruling of the European Court of Justice, that decided that the arbitration clause in the Bilateral Investment Treaties are incompatible with the exclusive jurisdiction of the Luxemburg Court, the Member States signed, on 5 May 2020, an agreement on the termination of the intra-EU Bilateral Investment Treaties. The agreement shall enter into force successfully, for the Member States that will ratify. However, it is the interpretative value and the object and purpose of this agreement that may represent the most important aspects. The second element is represented by the conditions foreseen by the European Court of Justice in order to accept the dispute settlement mechanism provided by the Comprehensive Economic and Trade Agreement with Canada (CETA) as compatible with EU law. Although the Court examined the dispute settlement system, the conditions it has identified – valid also for future agreements – relate to the substance of the document, mainly to the clauses concerning fair and equitable treatment and indirect expropriation.*

Key-words: *commercial policy; Bilateral Investment Treaties; European Court of Justice; fair and equitable treatment; indirect expropriation*

* *Ion Gâlea is Senior Lecturer in Public International Law and International Organizations at the University of Bucharest, Faculty of Law. He held the position of director general for legal affaris (legal advisor) within the Ministry of Foreign Affairs of Romania between 2010 and 2016. Between 2016 ans 2021, he was the Ambassador of Romania to the Republic of Bulgaria.* The opinions expressed in this paper are solely the author's and do not engage the institutions he belongs to.

1. Introduction

The year 2016 witnessed the adoption of the Global Strategy for European Union's Foreign and Security Policy, which relies on the common vision of a stronger Union on the global stage.[1] As the document points out, "*none of [the Member] countries has the strength nor the resources to address these threats and seize the opportunities of our time alone*".[2] Promotion of multilateralism and of rules based international trade remains among the priorities of the EU.[3] The European Union shows the ambition to continue negotiations on new trade agreements, which may be labelled as "ambitious": recent agreements included those with Canada and Japan, while negotiations are pursued with Mercosur, Mexico, Chile, Australia and New Zealand.[4]

The specificities of the trade agreements concluded after 2009 (the entry into force of the Treaty of Lisbon)[5] is represented by the fact that these agreements contain clauses concerning both trade and investment.[6] Practically, in certain cases, these treaties act as both "trade agreements" and "investment agreements", and thus they may replace the "traditional" Bilateral Investment Treaties (BITs) concluded by individual Member States.

On one side, the European Union is striving to promote trade and investment worldwide, though the "new type" of agreements it concludes, but, on the other side, such political willingness depends on certain peculiarities of the legal construction of the European Union: the competence of the Union to conclude treaties, the possibility of EU to conclude a treaty which might contain a dispute settlement system that would issue binding decisions, as well as the situation of similar agreements concluded between Member States. Even if it might represent an "internal" situation from the perspective of the EU, the latter may have a "mirroring" effect over the external dimension of concluding trade and investment agreements.

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[1] "Shared Vision, Common Action: A Stronger Europe", A Global Strategy for the European Union's Foreign And Security Policy, document available at https://eeas.europa.eu/sites/eeas/files/eugs_review_web_0.pdf (consulted 1 August 2020).

[2] *Ibid.*, p. 3.

[3] *Ibid.*, p. 4.

[4] "The European Union's Global Strategy. Three Years On, Looking Forward", Report, 2019, document available at https://eeas.europa.eu/sites/eeas/files/eu_global_strategy_2019.pdf (consulted 1 August 2020), p. 16.

[5] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *Official Journal of the European Union, Series C, no. 306, 17.12.2007,* pp. 1–271.

[6] Merijn Chamon, "Mixtity in the EU's post-Lisbon free trade agreements", in Isabelle Bosse-Platière, Cécile Rapaport (eds.), *The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges,* Edward Elgar Publishing, 2019, p. 39-57.

This study proposes to explore the consequences that recent case-law of the European Court of Justice might have – or already had – on the policy of the Union concerning international investments (either in the relations between Member States, or in relation to third partners). First, the study will focus, therefore, on the ”internal” aspect of investments – the treaties concluded between the Member States, and on the consequences that this ”internal” aspect may have, in the future, on the external side. The study will continue to explore the „external” aspect – mainly the criteria imposed by the European Court of Justice in its Opinion no. 1/17 of 30 April 2019 and their future consequences on agreements to be concluded by the Union.

In both ”aspects”, the point of departure that the European Court of Justice examined was related to jurisdictional matters – either the possibility of a Bilateral Investment Treaty to confer the competence to adjudicate a dispute to an Arbitral Tribunal (in case of the ”internal” aspect), or the possibility of a Trade and Investment Agreement concluded by the Union to create a ”Dispute Settlement Mechanism/System”, to adjudicate disputes between the Union and/or its Member States and investors of third Parties. The main purpose of the study is to observe how what appeared to be at a first glance a ”jurisdictional matter”, in reality had an important impact over the substantive aspects of the respective agreements and of the Union’s policies.

2. Exclusive Competence of the EU on Investments

After the entry into force of the Lisbon Treaty, article 207 of the Treaty on the Functioning of the European Union (“TFEU”) included the “foreign direct investments” within the common commercial policy of the EU. At the same time, the common commercial policy was expressly designated as exclusive competence of the Union (article 3 (1) e) of the TFEU).[1]

Nevertheless, the compatibility between Bilateral Investment Treaties concluded by Member States and EU law was not a new issue. Even from 2006, the European Commission started legal action against Austria, Finland and Sweden, for maintaining in force Bilateral Investment Treaties concluded with third countries which contained clauses that were ”incompatible” with EU law.[2] The Court held that only the transfer of capitals clause contained

[1] See also Federico Ortino, Piet Eeckhout, “Towards an EU Policy on Foreign Direct Investment” in Andrea Biondi, Piet Eeckhout, Stefanie Ripley (eds.), *EU Law after Lisbon,* Oxford University Press, 2012, p. 312-330.

[2] Article 351 paragraph 2 of the TFEU.

”incompatibilities” with EU law, but still held that the three Member States violated the TFEU by not eliminating these incompatibilities.[1]

Since the competence of the European Union over ”foreign direct investments” became exclusive after the Lisbon Treaty, the European Union needed a coherent policy on investments, balancing the ”investor exporting” and the ”investor importing” capacities. The practical consequence of such investment policy – which would have been included in the common commercial policy – was the fact that Member States would have the replacement of all Bilateral Investment Treaties concluded by the Member States with corresponding agreements concluded by the Union. Still, at the moment of the entry into force of the Lisbon Treaty, the number of Bilateral Investment Treaties concluded by Member States with third countries was significant (it was believed to have exceeded 1300).[2] Thus, ”replacing” these agreements on a short term would have been an almost impossible task. Even if certain scholars have argued that the exclusive competence of the EU was limited to ”direct” investment (and thus allowing ”shared” competence for other kinds of ”indirect” investments),[3] practice has shown pragmatism: on one hand, Member States did not insist for the shared character of the competence,[4] on the other hand, the Commission accepted the ”Grandfathering technique”,[5] by which the Council and the European Parliament ”delegated back” the competence to the Member States to maintain in force the existing Bilateral Investment Treaties, and, in certain cases, even to conclude new treaties, following a procedure of notification and approval from the Commission.[6]

Even if the Union did acquire exclusive competence over the substantive aspects of the investment policy, it was still not certain whether the dispute settlement mechanisms – specific to investment treaties – also fell under such

[1] Cases C-205/06, Commission v. Austria, 3 March 2009, ECLI:EU:C:2009:118, C-249/06, Commission v. Sweden, 3 March 2009, ECLI:EU:C:2009:119, C-118/07, Commission v. Finland, 19 November 2009, ECLI:EU:C:2009:715; Wenhua Shan, Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, European Journal of International Law Vol. 21, no. 4, (2010), p. 1049-1073, at 1052.

[2] Wenhua Shan, Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy, loc. cit.,* p. 1068.

[3] *Ibid.*, p. 1070.

[4] The Preamble of Regulation (EU) No 1219/2012 states: ”The TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union’s exclusive competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Chapter 4 of Title IV of Part Three TFEU” – paragraph 4 of the Preamble.

[5] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. *Official Journal of the European Union, Series L 351, 20.12.2012, p. 40–46.*

[6] *Ibid.*, articles 7-11.

competence[1]. The specificity of EU law is that its main implementation is done by the Member States.[2] Thus, in case of a hypothetical investment agreement between the EU and a third country, the potential investor-to-State dispute settlement system would be confronted with claims of investors related to ”measures” which may result from a „combined” action of EU and Member States (the EU enacts legislation, while the Member States implements it). The question that may arise is: who should be the defendant? This question is similar to the one that was raised in connection to the accession of the EU to the European Convention for Human Rights: the proposed agreement for accession envisaged a „co-respondent” mechanism which would have addressed this issue.[3] The proposed accession of the EU to the European Convention for Human Rights failed, as the European Court of Justice found that the proposed accession agreement breaches the fundamental Treaties. f the EU[4]. Nevertheless, the opinion 2/13 revealed important criteria for an ”exterior” or ”superior” dispute settlement mechanism to be accepted: the most important criterion is the preservation of the ”autonomy” of EU law and the need for the ”international” jurisdiction ”not to interpret” EU law.[5]

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3. ”Internal” Aspect: Intra-EU Bilateral Investment Treaties

Despite the willingness of EU institutions to pursue further a EU policy in the field of international investment,[6] these demarches were “affected from within”, by the situation of the Bilateral Investment Treaties concluded between EU Member States (the so-called “Intra-EU BITs”). Most of these “Intra-EU BITs” originated in the early 1990, when States from Central and Eastern Europe that went through democratic changes concluded an important number of Bilateral Investment Treaties with West-European States. In 2004, 2007 and 2013, 13 States acceded to the European Union – and the Bilateral Investment Treaties which had been concluded with ”the

[1] Davide Rovetta,” Investment Arbitration in the EU After Lisbon: Selected Procedural and Jurisdictional Issues ”, in Marc Bungenberg**,** Christoph Herrmann (eds.), *Common Commercial Policy after Lisbon,* Springer, 2013, p. 221-234.

[2] Article 4 (3) of the Treaty on the European Union (”TEU”); Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, 2010, p. 85.

[3] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, ECLI:EU:C:2014:2454, para. 215-235.

[4] *Ibid.*, para. 258.

[5] *Ibid.*, para. 181, 183, 184.

[6] See, for example:” Trade for All: Towards a more responsible trade and investment policy”, Communication from the Commission to the European Parliament, the Council, the Committee of Regions and the Economic and Social Committee, Brussels, 14.10.2015 COM(2015) 497 final, p. 3-26.

other" EU Member States remained in force. In certain situation, situations which may be labelled as "bizarre" occurred: investors challenged measures which have been taken by the respondent State in order to comply with EU law or in order to harmonize its legislation with EU law – as it was the case *Micula v Romania.*[1] In most cases, arbitral tribunals established under the International Center for Settlement of Investment Disputes ("ICSID") or under the UNCITRAL rules, were to adjudge on alleged breaches of investor rights caused by the application of EU law – when the investor was also a national of an EU Member State – as it was the case of *Austrian Airlines v Slovakia, Eureko (Achmea) v. Slovakia* and *Eastern Sugar v. Czech Republic.*[2]

One of the main lines of defence invoked by the respondent States, as well as by the European Commission, was based on the partial or total termination of the Intra-EU BITs, as a result of subsequent application *inter partes* of the fundamental treaties of the European Union (the TEU and the TFEU).[3] This line of argument relied on three different possible grounds:

i) the rule contained by Article 59 (1) b) of the 1969 Vienna Convention on the Law of Treaties between States[4], which provides 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: […] 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.*"[5]

ii) alternatively, the rule contained by Article 30 (3) of the said Convention, according to which "*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 later treaty*".[6] In this sense, it might have been argued, also, that article 344 of the TFEU (which states that: "*Member States undertake not to submit a dispute*

[1] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 130-136.

[2] For example: *Austrian Airlines v. Slovak Republic*, UNCITRAL, (Austria/Slovak BIT), Final Award of 9 October 2009; *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010; *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007.

[3] Szilárd Gáspár-Szilágyi, *It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV,* European Papers, vol. 3, 2018, no. 1., p. 357-373, 360.

[4] United Nations Treaty Series, vol. 1155, p. 331.

[5] *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010, para. 63-64; *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 100.

[6] *Ioan Micula et al v. Romania,* ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 316-317, related to the position of the European Commission.

concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"), which is a "later treaty" in relation to the BIT, makes impossible that a dispute concerning the treatment of investors be submitted to an arbitral tribunal, and not to the European Court of Justice.

iii) in a "simple" manner, the priority of the European Union law – a principle which has been recognized at the level of the European Union, as derived from the case-law of the European Court of Justice.[1]

The Arbitral Tribunals have rejected such arguments. Mainly, the arbitral tribunals relied on the fact that articles 59 and 30 (3) of the Vienna Convention are not applicable because the Bilateral Investment Treaty and the fundamental treaties of the EU are not "*treaties covering the same matter".*[2]

The question of the "Intra-BITs" might have been solved from the early stages by a common agreement between the Member States (and the Commission) related to the simultaneous termination of these treaties. Nevertheless, in the initial stages, such agreement lacked: on one side, the "investor importing States" within the European Union (such as Slovakia, the Czech Republic or Romania – which were respondents in arbitral proceedings), were interested to terminate the BITs and supported the proposals of the Commission; on the other side, "investor exporting States", like the Netherlands or Sweden, were interested in the maintenance of the BITs, as supplementary legal safeguards for their investors. An illustration of such disagreement was represented by the initiation, in 2015, of infringement procedures according to article 258 TFEU, by the European Commission, against the parties to those BITs that generated arbitration proceedings – Romania, Slovakia, Austria, Sweden, Netherlands.[3]

4. The *Achmea* Ruling and Its Follow-up

[1] Declaration no. 17 concerning primacy, attached to the Treaty on the European Union and the Treaty on the Functioning of the European Union; case *Costa/ENEL*, 15 July 1964, Case 6/641; Letter of the European Commission, January 13, 2006, quoted in *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 119.

[2] *Eastern Sugar BV v. Czech Republic*, UNCITRAL Ad-hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, para. 159; *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010, para. 239.

[3] Press Release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties", 18 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198 (consulted 1 August 2020).

On this background, the *Achmea* decision of the European Court of Justice[1] offered the Court the opportunity to the examine itself the relation between an Bilateral Investment Treaty concluded between the Netherlands and Slovakia and the fundamental Treaties of the EU. On the basis of the above mentioned Bilateral Investment Treaty, the company Achmea (formerly named Eureko) initiated arbitration proceedings according to UNCITRAL rules against Slovakia, and the arbitral tribunal held that the BIT had been violated and obliged the respondent State to compensation.[2] As the seat of arbitration was Frankfurt, Germany, Slovakia asked the German Courts to annul the arbitral award. As one of the grounds requested by Slovakia was violation of EU law, the German Court asked for a preliminary ruling of the European Court of Justice.[3] It could be reminded that before the arbitration tribunal constituted according to UNCITRAL rules, Slovakia invoked the lack of competence of the arbitral tribunal for the reason of the cessation of the validity of the BIT, but the tribunal rejected this argument.[4] It has to be underlined that the main element of ”incompatibility” related to the compromisory clause – thus to the competence of the arbitral tribunal: article 8 of the BIT (the arbitration clause) was alleged to be incompatible with article 344 of the TFEU.[5]

Two important element could be outlined with respect to the *Achmea* ruling. First, the Court expressed its opinion on the ”general” possibility for an international agreement to create a dispute settlement system, other than the Court itself:

> *”It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their*

[1] C-284/16, *Slovak Republic v. Achmea,* 6 March 2018, ECLI:EU:C:2018:158.

[2] *Achmea BV (formerly Eureko BV) v. Slovakia*, PCA Case no. 2008-13, Final Award, 7 December 2012.

[3] Bundesgerichthof, Beschluss, III ZB 37/12 vom 19. September 2013.

[4] *Eureko BV v. Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No. 2008-13, 26 October 2010; C-284/16, *Slovak Republic v. Achmea,* 6 March 2018, ECLI:EU:C:2018:158 (hereinafter ”C-284/16, Achmea”), para. 11.

[5] As mentioned above, article 344 of the TFEU states: ”*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*”.

provisions, provided that the autonomy of the EU and its legal order is respected".[1]

It can be noted that the main criterion – "autonomy of EU law" was reiterated.[2] Nevertheless, the European Court of Justice underlined that the arbitration established by the compromisory clause under the BIT was different from a commercial arbitration procedure, because it results from a treaty, by which States agreed to extract certain elements from the competence of their own jurisdictions – thus, the tribunal created by the BIT did represented neither a "part of the judicial system of the Netherlands or Slovakia",[3] nor a commercial arbitration tribunal.[4]

Second, the European Court of Justice held that maintaining in force article 8 of the Bilateral Investment Treaty, by which an arbitration tribunal could be seized with respect to a dispute between an investor of one Party and the other Party, represents a violation of articles 267 and 344 of the TFEU, which confer exclusive jurisdiction to the European Court of Justice. The main argument was the autonomy of EU law:

> *" Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".*[5]

The consequences of the *Achmea* ruling overpassed the relations between the Member States, for the reason that the above statement had to be invoked

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[1] C-284/16, *Achmea*, para. 57.

[2] The Court also quoted its earlier case-law: Opinion 1/91 (EEA Agreement — I) of 14 December 1991, EU:C:1991:490, paragraphs 40 and 70; Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraphs 74 and 76; and Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 182 and 183.

[3] C-284/16, *Achmea*, para. 45.

[4] *Ibid.*, para. 55; see also Burkhard Hess, *A European Law Reading of Achmea,* 8 March 2018, https://conflictoflaws.net/2018/a-european-law-reading-of-achmea/ (consulted 1 August 2020); Francesco Munari, Chiara Cellerino, *The EU Law is Live and Healthy: the Achmea Case and a Happy Good-Bye to the Intra-EU Bilateral Investment Treaties,* 17 April 2018, http://www.sidiblog.org/2018/04/17/eu-law-is-alive-and-healthy-the-achmea-case-and-a-happy-good-bye-to-intra-eu-bilateral-investment-treaties/ (consulted 1 August 2020); Harm Schepel, *From Conflicts-Rules to Field Preemption: Achmea and the Relationship Between EU Law and International Investment Law and Arbitration*, 23 March 2018, https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/ (consulted 1 August 2020).

[5] C-284/16, *Achmea,* para. 60.

before arbitral tribunals – some of them constituted within international fora, like the ICSID. Moreover, in certain cases, the execution of awards issued on the basis of an Intra-EU BIT was asked by the claimant with respect to assets situated in a third country.[1] One of the essential questions was whether the above quoted paragraph 60 of the *Achmea* ruling could by itself be invoked by a responding State, in front of an ICSID arbitral tribunal, in a future case, in order to contest the lack of jurisdiction of such arbitral tribunal. Could the ruling of the European Court of Justice have authoritative nature before an ICSID tribunal?

In order to overcome such difficulties, the first step was represented by the signature, on 15 and 16 January 2020, of a Declaration,[2] by which the Member States declared in a "formal" manner the consequences of the *Achmea* ruling. The declaration was designed to be addressed to the arbitral tribunals (either ad-hoc, or constituted under "non-EU" fora, such as ICSID), in order to inform about the position of the Parties to the BITs about the precedence of EU law. The Declaration stated:

> *"Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty".*[3]

The declaration, invoked a mixture of EU law and public international law arguments that would represent the basis for this priority. Thus, even if the Declaration invoked the case-law of the European Court of Justice which acknowledges the principle of primacy, which is peculiar to EU law,[4] the text

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[1] See, for example, United States Court of Appeals, District of Columbia Circuit, Ioan Micula et al v. Government of Romania, Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-02332), Judgment, No. 19-7127, 19 May 2020.

[2] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (consulted 1 September 2020); 22 States signed on 15 January, 5 on 16 January, and Hungary signed through a different document.

[3] *Ibid.*, preamble, para. 2.

[4] The Declaration quotes: *Matteucci,* 235/87, EU:C:1988:460, paragraph 21; and C-478/07, *Budějovický Budvar,* EU:C:2009:521, paragraphs 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law.

mentions that "*the same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of the Treaties and customary international law (lex posterior)*".[1] Practically, the Member States confirm that articles 30 and 59 of the Vienna Convention lead to the same result and might be "easier to accept" by arbitral fora.

In our opinion, the Declaration is not *per se* an agreement to terminate the Bilateral Investment Treaties, but an *interpretative agreement*, in the sense of article 31 paragraph 3) letter a) of the 1969 Vienna Convention on the Law of Treaties).[2] Practically, the States have provided an interpretation concerning the cumulative effect of the two legal instruments that applied at the same time – the fundamental treaties of the EU (the TEU and the TFEU) and the Bilateral Investment Treaties. This combined effect results in the non-applicability of the arbitration clauses – leading thus to the lack of jurisdiction of future arbitral cases. The declaration also contains a "commitment" to terminate the Bilateral Investment treaties, "by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally". This appears to be a rather political commitment, as the legal effect will be governed by the agreement to be concluded.

This agreement was signed on 5 May 2020 by 23 Member States of the European Union.[3] Nevertheless, the disagreement continued – the European Commission started infringement procedures against those five EU Member States that refused to sign the agreement.[4] The agreement is not so simple as it seems.[5] First, the preamble of the Agreement is rather complex: it makes reference to the "customary law codified in the Vienna Convention on the

[1] Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection, available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (consulted 1 September 2020), footnote 1.

[2] On interpretative agreements – Georg Nolte, "Subsequent Agreements and Subsequent Practice", in Georg Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, p. 309; Anthony Aust, *Mordern Treaty Law and Practice,* 2nd Ed., Oxford University Press, p. 239; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* Judgment, I.C.J. Reports 2014, p. 226, para. 46.

[3] The States that signed the agreement are: Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain; Press release – EU Member States sign an agreement for the termination of intra-EU bilateral investment agreements, 5 May 2020 https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en (consulted 1 August 2020).

[4] Press release, Commission asks EU Member States to terminate their intra-EU bilateral investment agreements, 18 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198 (consulted 1 August 2020).

[5] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed in Brussels, on 5 May 2020 (not yet in force), the text of the agreement is available in the Official Journal of the European Union, L 169, 29 May 2020, p. 1-41.

Law of Treaties"[1] and and it reiterates the interpretation elements contained by the Declaration of 15 and 16 January 2019:

> *"Considering that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union,*
>
> *Sharing the common understanding expressed in this Agreement between the parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings".*[2]

Not only the preamble, but also the text of the Agreement expresses very clearly that:

> *"The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings".*[3]

Second, the Agreement provides not only for the termination of the BITs in the Annex, but also for the termination of the "sunset clauses".[4] Third, the Agreement contains detailed procedures concerning pending and new arbitration proceedings.[5]

The entry into force provisions have been subject to debate. Practically, two solutions might have been possible: i) the agreement to enter into force "for all signatories at the same time", with the consequence that all the BITs would be terminated simultaneously; ii) the agreement to enter into force successively for the States that ratify, with the consequences that the BITs will terminate also „successfully", on a "bilateral basis". The second option was preferred, even if its disadvantage is represented by „fragmentation".

[1] *Ibid.*, preamble, para. 2.
[2] *Ibid.*, preamble, para. 5 and 6.
[3] *Ibid.*, article 4.
[4] *Ibid.*, article 1.
[5] *Ibid.*, article 6-9.

Nevertheless, the advantage of this option is represented by excluding the possibility for one State to block the process of terminating the BITs.[1]

Two legal aspects could be mentioned in relation to the Agreement signed on 5 May 2020. First, in our opinion, it maintains – at least before its entry into force, the status of "interpretative agreement" that the Declaration of 15 and 16 January 2020 had. Practically, the Agreement does not regulate an element „for the future", but reflects the understanding of the Parties concerning a legal situation that occurred when the last of the parties to a BIT joined the European Union. Second, it may be reasonably argued that the statement concerning the inapplicability of the arbitration clauses (contained both in the preamble and in the article 4 entitled "Common provisions") are part of the *object and purpose of the treaty.* The legal consequence would be represented by the obligation of the signatories to refrain from any act that would defeat the object and purpose of the treaty – according to the customary rule provided by article 18 of the Vienna Convention on the Law of Treaties.[2]

5. The exterior aspect of investment policy – can the European Union be a party to a dispute settlement mechanism?

As it has been pointed out, the *Achmea* ruling "touched" upon the exterior aspects of commercial and investment policy, especially on the possibility for the Union to be submitted to a dispute settlement system (*according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law).*[3]

At the same time, after the entry into force of the Lisbon Treaty, legal debates continued with respect to the enlargement of the competencies of the European Union with respect to concluding international agreements. It is not our purpose to discuss in detail the trend of enlarging the exclusive competences, to the detriment of the shared competences between the Union and the States: nevertheless, an example may be relevant: whether in 1994, the European Court of Justice decided that the competence to conclude the GATS and the TRIPS agreements within the WTO is shared between the

[1] As it has been seen, five States did not sign, with the consequence that the Commission initiated infringement procedures against them.

[2] On article 18 of the Vienna Convention – Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Martinus Nijhoff, 2009, p. 169; Anthony Aust, *Modern Treaty Law and Practice, op. cit.*, p. 117.

[3] C-284/16, *Achmea,* para. 57.

Union and the Member States,[1] in 2013 it decided that an agreement on trade in services falls within the exclusive competence of the Union.[2]

This "emerging trend" towards consolidating the exclusive competences of the EU overlapped with the emergence of the new type of agreement – as an instrument of EU common commercial policy, covering both trade and investment issues. Nevertheless, the above mentioned trend towards exclusive competences was halted by *Opinion 2/15* on the Free Trade Agreement with Singapore.[3] The Court decided that this agreement was to reveal of the shared competence between the Member States and the Union. The main argument was linked to the dispute settlement system: an Investor-State Dispute Settlement System, which is specific to Investment Agreements, cannot be established without the consent of the Member States.[4] The opinion had an important aspect for the future, because all similar agreements will be concluded as "mixed" agreements, having both the Union and the Member States as parties.[5] Thus, following Opinion 2/15, the Commission readjusted the practice of the agreements concluded with Singapore and Vietnam: two agreements were concluded – one covering only trade, falling under EU exclusive competence and one covering the investment protection, falling within the shared competences.

Nevertheless, the conclusion of two different agreements is not always the appropriate solution. This was the case of the Comprehensive Economic and Trade Agreement between the EU and Canada ("CETA"), which applies provisionally since 21 September 2017,[6] which was drawn as a single instrument, falling under shared competence of EU and its Member States.

The most sensitive question related to the CETA was the establishment of a jurisdictional system by which disputes between investors and the Parties (which can be either the European Union or a Member State – or both). As it was shown above, the European Court of Justice proved rather reluctant in the past (although did not prohibit in an absolute manner), to accept that the

[1] Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and Protection of Intellectual Property, WTO, 1994, ECR I-5267.

[2] C-137/12, *Parliament v. Council (European Convention on the legal protection of services based on, or consisting of, conditional access),* ECLI:EU:C:2013:675, para. 76. On the exclusive competences, see also B. Van Vooren, R.A. Wessel, *EU External Relations law. Text Cases and Materials,* Cambridge University Press, 2014, p. 75.

[3] Opinon 2/15, Free Trade Agreement with Singapore, 16 May 2017, ECLI:EU:C:2017:376.

[4] *Ibid.*, para. 292.

[5] On mixed agreements, see M. Maresceau, "Typology of Mixed Agreements", in C. Hillion, P. Koutrakos (ed.), *Mixed Agreements Revisited. The EU and its Member States in the World*, Hart Publishing, Oxford, 2010, p. 11.

[6] The text of CETA is available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (consulted 1 August 2020).

EU law system, including its jurisdictions, to be submitted to an external dispute settlement mechanism. Thus, in Opinions 1/91 and 1/92, the European Court of Justice ruled that a proposed "Court of the European Economic Area" (composed by the EU and the European Free Trade Association) would affect the autonomy of EU law, but accepted that requests for preliminary ruling be referred to the European Court of Justice by domestic courts of other EFTA States.[1] In Opinion 1/09, the European Court of Justice accepted the creation of a European Patent Court[2] (comprising 38 States, including all the members of the European Union). However, the "reluctance" of the European Court towards "external control" was again evident in the Opinion 2/13 concerning the accession to the European Convention on Human Rights.[3]

On this background, the Opinion 1/17 of 30 April 2019[4] on the compatibility of CETA with the fundamental Treaties of the EU represented a cornerstone for the shaping of the future agreements of the EU and of the future commercial policy itself. The fundamental question was whether EU law permitted the establishment, through an international agreement, of a dispute settlement system between investors, on one side, and the Union and/or its Member States, on the other side.

This was exactly the question raised by the Kingdom of Belgium, who requested the opinion of the Court: more exactly, Belgium raised three questions: first concerned the compatibility with the "principle of the autonomy of the legal order of the European Union", while the second and the third concerned the compatibility of the dispute settlement mechanism with the principles of equal treatment and access to an independent tribunal.[5]

The question linked to the autonomy of EU law was, indeed, the most important. The Court recalled that "*an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the European Union, is, in principle, compatible with EU law*"[6] and that the most important condition is that such

[1] Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR *1991 I-0607; Opinion 1/92* Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR *1992 I-02821.*

[2] Opinion 1/09, Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties, ECR *2011 I-01137.*

[3] Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454.

[4] Opinion 1/17, 30 Aprilie 2019, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA), ECLI:EU:C:2019:341.

[5] *Ibid.*, para. 46-69.

[6] *Ibid.*, para. 106.

dispute settlement mechanism would not bring "*an adverse effect to the autonomy of the EU legal order*".[1]

The Court brought details to these requirements and established two conditions to be fulfilled: i) that the dispute settlement mechanism should not "*confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law*" and ii) that the tribunals of the dispute settlement mechanism should not "a*wards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework*".[2]

The first condition was an essential element in the reasoning of the Court to refuse the accession of the European Union to the European Convention on Human Rights.[3] In the Opinion no. 1/17 the Court adopted a different reasoning, relying on the express provisions of the CETA concerning the applicable law. Thus, Section F, chapter 8 of CETA provided that the tribunals will have the power to apply "this Agreement as interpreted in accordance with the [Vienna Convention], and other rules and principles of international law applicable between the Parties' and that it will not have jurisdiction 'to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party'.[4] At the same time, the CETA stated that „*in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact."*[5] Indeed, it appears that it has been necessary that the agreement would provide expressly such statement, which reflects a general rule of public international law – that domestic law represents a merely fact before an international jurisdiction – as it has been recalled by the Permanent Court of International Justice in the case concerning *German Interests in Polish Upper Silesia.*[6]

The second criterion, namely that the dispute settlement mechanism should have *"no effect on the operation of the EU institutions in accordance with the EU constitutional framework"* triggered an evaluation of the European Court of Justice of the provisions concerning fair and equitable treatment, indirect expropriation and capital flows. Practically, the Court verified whether these

[1] *Ibid.*, para. 109.
[2] *Ibid.*, para. 119.
[3] *Supra,* footnote 19.
[4] Opinion 1/17, para. 121.
[5] *Ibid.*, para. 130.
[6] *German Interests in Polish Upper Silesia,* PCIJ, 1926, ser. A, no. 7, p. 19.

clauses of CETA (fair and equitable treatment,[1] indirect expropriation[2] and capital flows)[3] affect the competences of the institutions of the Union to regulate, in order to uphold the public interest: in our opinion, the ”decisive” criterion established by the European Court of Justice is that the jurisdiction of the tribunals must not be

> *”structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators who invest in the commercial or industrial sector at issue of the internal market”.*[4]

Briefly, the criterion can be translated into the requirement that the dispute settlement mechanism must not affect the ”level of protection of a public interest established by the EU institutions”.[5]

The Court decided that the CETA satisfied this condition and relied its finding on the following substantial clauses of the agreement: a) a general exception (resembling article XX of the GATT);[6] b) the express recognition, by article 8.9.1. of CETA, of the ”*right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*” and the express mention of the fact that „*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation*”;[7] c) the Joint Interpretative Instrument, that reaffirmed that the Agreement will not lower standards related to ”*food safety, product safety, consumer protection, health, environment or labour protection*”, that the imported goods and services ”*must continue to respect domestic requirements, including rules and regulations*” and that the CETA ”*preserves the ability of the European Union*

[1] CETA, article 8.10
[2] CETA, article 8.12.
[3] CETA, article 8.13.
[4] Opinion 1/17, para. 148.
[5] *Ibid.*, para. 149.
[6] According to article 28.3.2 CETA, the provisions of Section C ”cannot be interpreted in such a way as to prevent a Party from adopting and applying measures necessary to protect public security or public morals or to maintain public order or to protect human, animal or plant life or health, subject only to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade between the Parties”; Opinion 1/17, para. 152.
[7] Article 8.9.2. of CETA; Opinion 1/17, para. 154.

and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest";[1] d) the details provided for the notion of indirect expropriation: "for greater certainty, except in the rare circumstances when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations".[2]

The Opinion 1/17 analyzed also other two questions raised by Belgium: the compatibility of the dispute settlement mechanism with the *"general principle of equal treatment and with the requirement of effectiveness"*[3] and with the right to access to an independent tribunal[4]. Indeed, the Court decided that the CETA dispute settlement mechanism satisfies these conditions. Nevertheless, within the overall structure of the Opinion, it is our belief that the key element is represented by the analysis of the "level of protection of a public interest", because of the mere fact that the analysis *did not concern the functioning of the dispute settlement mechanism but the substance of the agreement.*

6. Consequences of Opinion 1/17 for future agreements

While Opinion 2/13 did not allow a green light to the accession of the EU to the European Convention for Human Rights, it is a very important development that the European Court of Justice *did* offer such a green light to the conclusion of a trade and investment agreement, creating a dispute settlement system. As the *Achmea* ruling represented a "blow" to the settlement of investment disputes on the basis of Intra-EU BITs, the Opinion 1/17 provided an impetus to trade and investment agreements that would create dispute settlement systems. The creation of a dispute settlement system was *a sine qua non condition* for a future EU policy in the field of investment, as the „extra-EU BITs", concluded by the Member States and maintained with the approval of the Commission (on the basis of the so-called" granfathering regulation") cannot be" replaced" with EU investment agreements, without including a dispute settlement mechanism.

Nevertheless, the most significant development of the Opinion 1/17 is, in our view, the connection between the dispute settlement mechanism and the

[1] Points 1 d) and 2) of the Joint Interpretative Instrument; Opinion 1/17, para. 155.
[2] Annex 8-A, point 3, Opinion 1/17, para. 157.
[3] Opinion 1/17, para. 162-188.
[4] *Ibid.*, para. 189-244.

substance of the agreement. Indeed, CETA attempted to create a" new type" of dispute settlement system: the Tribunal shall be constituted of 15 members, appointed for a 5 years period (not for a particular dispute), and and Appelate Tribunal shall be established, in order to review on points of law the rulings "first instance" Tribunal.[1] However, the European Court of Justice did not analyses these novelties. The Court focused on the substantial clauses, mainly on indirect expropriation and fair and equitable treatment. Practically, *the Court has set limits on how an investment agreement of the EU may be drawn and thus created a precedent for future agreements.*

In case of the fair and equitable treatment, case-law of arbitral tribunals adopted different lines: on one hand, fair and equitable treatment was considered as being limited to what customary international law prescribes,[2] but, on the other hand, was interpreted also as exceeding this standard and incorporating he protection of" legitimate expectations" of investors.[3] By relying on article 8.9.2. of the CETA,[4] the European Court of Justice took a clear stance in the direction of promoting the idea that the sole" legitimate expectations" cannot represent the sole criterion for assessing the fair and equitable treatment.

It is known that the indirect expropriation clause in investment agreements has generated different interpretations. On one hand, the so-called "sole effects" theory leads to the result that an indirect expropriation may occur when the effect of a certain "measure" has the effect of diminishing the value of an investment (in a similar manner to a "direct" expropriation), even if the "measure" is a non-discriminatory piece of legislation that imposes new requirements for all operators in a certain branch[5] (for example, a piece of legislation in the field of environment that has the consequences that investors in a certain field are obliged to spend on new technologies).[6] On the other hand, the so-called „police powers" or "right to regulate" theory, according

[1] CETA, articles 8.27, 8.28; moreover, the CETA envisages the possible creation, in the future, of a „of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes" – article 8.29.

[2] *SD Myers v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408, para. 263; *Monev v. USA*, ICSID Case no. ARB (AF)/99/2, Award of 11 October 2002; A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties. Standards of Treatment,* Wolters Kluwer, 2009, p. 264-266.

[3] *CMS Gas Transmission v. Argentina*, ICSID Case no. ARB/01/8, Award, 12 May 2008, 44 ILM 1205; *LG&E v. Argentina,* ICSID Case no. ARB/02/1, Decision, 3 October 2006.

[4] It can be recalled that article 8.9.2. provided that "*the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation".*

[5] *Pope & Talbot v. Canada,* UNCITRAL (NAFTA), Interim Award, 26 June 2000, 22 ILR 316; *SD Mayers v. Canada*, Partial Award, 12 November 2000, 40 ILM 1408; *Marvin Feldman v. Mexico*, ICSID Case no. ARB (AF)/99/1, Award of 16 December 2002.

[6] For example *Metalclad v. Mexico,* ICSID Case no. ARB (AF)/97/1, Award of 30 August 2000.

to which a measure would not represent indirect expropriation, if its purpose is to uphold the public interest (for example, in the field of environment, health, consumer protection etc.) and is applied in good faith and in a non-discriminatory manner.[1] A balance between the theories was long searched by arbitral tribunals.[2] In many cases the line between ”loss” generated to an investor by complex legislative measures and the consequences of improper management were difficult to draw. The consequence of the Opinion 1/17 was the clear stance of the European Union in favour of the” right to regulate” doctrine. In the case of CETA, the view of supporting the „right to regulate”, in the case of clarifications to be brought to the notion of” indirect expropriation” represented a point of coincidence between EU and Canada – as for many years already, Canada was introducing such clarifications in its Bilateral Investment Treaties, including those concluded with EU Member States.

What the European Court of Justice has done through Opinion 1/17 was” to give a binding mandate” to the negotiators of the Union to embrace – in the text of the future agreements – the ”right to regulate” theory. Thus, future agreements of the Union will have to contain sufficiently precise clauses in the case of fair and equitable treatment and, especially, indirect expropriation, so that the agreement might not be interpreted (by the dispute settlement mechanism) in the sense of limiting this right to regulate” in the public interest”. Any clauses in future agreements that would leave” too much” flexibility to these notions (fair and equitable treatment or indirect expropriation) would trigger the agreement to be declared by the European Court of Justice ”incompatible with the fundamental Treaties of the EU”.

Important future agreements will follow this line: important agreements are likely to follow, such as Australia, Japan, Mexico, MERCOSUR and, as a matter of perspective, the United States of America.[3]

7. Conclusion

The *Achmea* ruling and the Opinion 1/17 represented landmark decisions for the shaping of the future investment agreements of, or within, the EU. In order to became an active actor in the world investment policy, the EU needed

[1] *TECMED v. Mexico*, ICSID Case no. ARB (AF)/002, Award of 29 May 2003, para. 50; see also OECD, *”Indirect Expropriation” and the ”Right to Regulate” in International Investment Law,* Working Papers on International Investment, no. 2004/4, p. 10-20.

[2] *El Paso v. Argentina*, ICSID Case no. ARB/03/15, Award of 31 October 2011.

[3] European Commission, Negotiations and agreements - https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ (consulted 1 August 2020).

”order inside the house”, meaning a solution to be offered to the question of Intra-EU BITs. The *Achmea* solution represented only starting point of such „order”. The entry into force for *all* Member States of the Agreement for the termination of Intra-EU BITs, signed on 5 May 2020, shall represent the final point of such „order”. Nevertheless, this moment will not be close in time, because of the *successive* technique used for the entry into force of the Agreement. Thus, it is our view that the” great value” of the 5 May 2020 Agreement is its *interpretative value* and *its object and purpose*, as it reflects the understanding of the signatories that the combined effect of the BITs and of the fundamental Treaties of the EU leads to the non-application of the arbitration clauses contained by the BITs, and thus to the lack of competence for the arbitral tribunals. The withdrawal of consent to arbitrate can also be seen as part of the *object and purpose* of the Agreement, with legal consequences from the moment of signature. Even if the BITs in their have been regarded by the European Commission as incompatible with the EU law in their entirety, it was the jurisdiction clauses that represented the triggering point of the whole process.

Opinion 1/17 offered a more complex perspective: the main question which was asked referred to the possibility of the European Union to be submitted to an investment dispute settlement system. The European Court of Justice provided a ”green light” to such possibility, which is a wise and forward-looking approach (and a quite different one than in the case of the accession of the European Union to the European Court for Human Rights). Nevertheless, the Court took the opportunity to establish the limits of the future participation of the EU to a dispute settlement system and created the connection between jurisdiction and substance: a dispute settlement mechanism will be compatible with EU law only if the substance of the agreement will comply with certain parameters.

These parameters are linked mainly to the clauses concerning the fair and equitable treatment and the indirect expropriation – key provisions of the investment agreements. The European Court of Justice imposed limits on how these notions might be defined, so that the ”right to regulate” of the EU institutions in order to uphold the ”public interest” must not be affected. Thus, Opinion 1/17 is important because it will not be only the Council who will shape the mandate of the Commission for future agreements, but this opinion itself. The European Union will act, departing from this opinion, in order to support ”one side” – favorable to the „right to regulate” – of the two possible interpretations to be given to fair and equitable treatment and indirect expropriation.

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