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LEGAL ISSUES WITHIN THE EU AND MEMBER STATES CONCERNING BILATERAL INVESTMENTS TREATIES

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Abstract: *The article's aim is to analyse the legal issues concerning the compatibility with the EU law of Bilateral Investments Treaties concluded between Member States themselves (intra-EU BITs), on the one hand, and Member State and Third State on the other hand (extra-EU BITs). The questions arise as a consequence of the shift of competence for Foreign Direct Investments from the Member States to the EU, so it is approached as a problem of compatibility between sources of law that belong to different legal systems: international law and European Union law. The author's conclusion is that the EU has, despite several difficulties, succeeded in preserving the autonomy and the primacy of its legal order.*

Key words: *intra-EU BITs; extra-EU BITs; Termination Agreement; Regulation (EU) No. 1219/2012*

1. Introduction

Pursuant to the article 207 TFEU, entered into force with the Lisbon Treaty in 2009, the European Union has the explicit and exclusive external trade competence on foreign direct investment (FDI, defined as "any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity", in: the European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy, COM/2010/0343 final, p. 3).

This means, specifically, that the EU has the exclusive competence to negotiate and conclude agreements concerning FDI (see: Karl Joachim, The Competence for Foreign Direct Investment – New Powers for the European Union?, in The Journal of World Investment & Trade: law, economics, politics, 5(3), 2004, p. 413-448; August Reinisch,

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The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements, in Santa Clara Journal of International Law, 2014, (12)1, p. 111-157). However, until the Lisbon Treaty came into force, this competence belonged to Member States which, over the years, concluded a large amount of Bilateral Investment Treaties (BITs) between themselves (intra-EU BITs), on the one hand, and with third States (extra-EU BITs) on the other hand (according to official data, they would have been around 1200, see UNCTAD, World Investment Report 2012, p.119).

As a results, the shift of competence created some uncertainty on the status of these international agreements (see: Angelos Dimopoulos, The validity and applicability of international investment agreements between EU Member States under EU and international law, in: Common Market Law Review, in: Common Market Law Review, (48)1, 2011, p. 63-93;Maria Paola Mariani,The future of BITs between EU Member States: Are intra-EU BITs compatible with the internal market? In Pia Acconci, Mara Valenti, &Anna De Luca(Authors) &Giorgio Sacerdoti (Ed.), General Interests of Host States in International Investment Law, in Cambridge International Trade and Economic Law, 2014, p. 265-286).

Firstly, from the international law's point of view, the principle of succession of treaties −according to the "lex posterior derogat priori" principle (art. 59 and 30, par. 3 of the Vienna Convention on the Law of Treaties of 1969)− did not apply to the intra-EU BITs, as long as the accession of a State to the EU could not imply the intention to terminate international agreements concluded and still in force with other States already members of the EU (see e.g. Eastern Sugar B.V. (Netherlands) v. Czech Republic, SCC Case No. 088/2004). Anyway, if the principle of succession of treaties were applied to extra-EU BITs, Member States would violate art. 27 of the Vienna Convention which prohibits a State from invoking the provisions of its internal legislation (article 207 TFEU in this case) to justify the non-execution of another binding treaty (as extra-EU BITs are).

Secondly, in the light of the EU law, the question was a problem of compatibility between different legal system: both intra-EU BITs and extra-EU BITs were international law sources which were still binding on the Member States, but they must comply with EU law or, if not, they must be automatically disapplied in accordance with the principle of its primacy.

According to the EU Commission, intra-EU BITs were incompatible with EU law as they could create: a)discriminatory treatment between Member State's investors in the internal market (depending on whether they operated on the basis of the international source constituted by the intra-EU BITs or on the basis of EU law)and b) an arbitral dispute settlement system parallel to the jurisdictional system provided for by the EU law. For these reasons, the EU Commission considered that, as a result of the accession of a State to the EU, the intra-EU BITs were to be considered automatically extinguished, or that some clauses were to be considered no longer applicable because of their incompatibility to the EU law (see e.g. Eastern Sugar B.V; Achmea B.V. v. The Slovak Republic, (known as Eureko B.V. v. The Slovak Republic), UNCITRAL, PCA Case No. 2008-13; Commission Staff Working Document, Capital Movements and Investments in the EU, Commission Services' Paper on Market Monitoring, February the 3th, 2012, SWD 6

final, pp. 3 and 13.).

It also opened several infringement proceedings against Member States in order to encourage them to terminate intra-EU BITs and to prevent the execution of the arbitration awards established on the basis of the latter (see Press Release of the European Commission dated 18 June 2015, "The Commission ask Member States to terminate their bilateral investment treaties", where the EU Commission declares that it has initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden, and that they have not taken any action to put an end to the BITs).

As regards the extra-EU BITs, both the Commission and the European Parliament recognised that, in accordance with the international law, they were fully valid and effective, but in the light of EU law, it was necessary to define the conditions for their maintaining in force through an internal regulatory act.

According to this point of view, the legal basis for the maintaining in force of the extra-EU BITs was art. 2, par. 1 TFEU, under which the EU can allow Member States to legislate and adopt legally binding acts in the matters attributed to its exclusive competence: "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts". Consequently, it was up to the EU to decide to authorize the States to conclude or maintain the extra-EU BITs in force.

2. The termination of intra-EU BITs: an Agreement to implement the EUCJ ruling.

The Commission's request to immediately terminate all intra-EU BITs was executed quite late, as most Member States did not share the same position on how to implement the withdrawal.

So that, between 2012 and 2017, some Member States unilaterally denounced their own BITs concluded with the other Member States (in 2017, after Ireland and Italy, Poland and Romania also denounced their intra-EU BITs). Others proposed, as an alternative solution, the conclusion of an agreement between the Member States themselves, in order to terminate all existing BITs concluded among them (see the Non-Paper, presented on 7 April 2016, by the delegations of Austria, Finland, France, Germany and the Netherlands, "Intra-EU Investment Treaties, Non-paper from Austria, Finland, France, Germany and the Netherlands).

The agreement in question should have favoured a coordinated and progressive termination of intra-EU BITs, in order to avoid any parallel unilateral or bilateral, denouncement processes. Because, starting from its entry into force, it would have immediately terminated all existing intra-EU BITs, in accordance with art. 59 of the Vienna Convention.

Nonetheless, without prejudice to compliance with EU law, the extinction of intra-EU BITs under the proposed agreement, would not affect in any way the dispute resolution proceedings between investor and Member State initiated in accordance with intra-EU BITs and still pending (Non-Paper, para. 5).

Meanwhile, the intervention of the EU Court of Justice played a crucial role on the question of the (in)compatibility of intra-EU BITs with the EU legal order. The circumstance was the well-known Achmea case, delivered on 6 March 2018 (Case C-284/16, Slovak Republik v. Achmea BV), in which the EUCJ ruled that the Investor to State Dispute Settlement (ISDS) clause contained in intra-EU BITs, is contrary to EU law. The ISDS clause refers to the provision "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" (see Achmea case para. 60).

Precisely, according to the Court, it may affect the principle of autonomy of the EU law set out in art. 344 TFEU or interfere with the jurisdictional monopoly exercised by the Court itself in resolving disputes relating to EU law and in interpreting the law of the Treaties, in accordance with art. 19 TEU (para. 32-36). In fact, by affirming the inapplicability of one of the most essential and emblematic clauses of the BITs, such as the arbitration clause, the Court has stated the general and substantial incompatibility of intra-EU BITs with the EU law (for an in-depth analysis see Nicolas De Sadeleer, The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded between Two Member States, in: European Journal of Risk Regulation, Online Publication Date: 6 March 2018, p. 355-371; Lorenzo Melchionda, The European Court of Justice Ruling in Achmea v. Slovak Republic: More Questions than Answers, in Diritto del commercio internazionale, 2018, p. 337-359).

Following the Achmea statement, on May 5, 2020, twenty-three Member States − with the exception of Ireland, Finland, Austria and Sweden − concluded an Agreement for the termination of BITs concluded between themselves (Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, entered into force on May 29, 2020). In other terms, it can be stated that, due to the binding and *erga omnes* enforceability of the judgments pursuant to art. 267 TFEU, the ruling of the CJEU in the Achmea case induced the Member States to comply with it and thus to solve the question of their permanence and compatibility with the legal system of the EU by formally withdrawing from all intra-EU BITs.

Art. 4 and 5 reaffirm the incompatibility of the "arbitration clauses" of intra EU-BITs with the EU Treaties and − starting from the date on which the last of the parties of the BIT in question has become a Member State of the European Union − their consequent inapplicability and impossibility of serving as a legal basis for new arbitration proceedings. Nevertheless, it should be noted that, providing for the complete termination of all intra-EU BITs (which are listed in an annex), the Termination Agreement exceeds the scope of the Achmea judgment which essentially concerned the inapplicability of the arbitration clause contained in intra-EU BITs. Therefore, it may be assumed that the conclusion of this Agreement aims, primarily, at satisfying the request from the Commission to the Member States over the years.

The Termination Agreement consists of eighteen articles and crystallizes, once and for all, the principles of mutual trust and loyal cooperation between Member States and the

principles of the primacy and autonomy of EU law with regard to intra-EU BITs. Mainly, it seeks to regulate, in detail, the consequences of the termination of arbitration proceedings between investors and Member States promoted under intra-EU BITs. For that purpose, it is based on the distinction between arbitrations concluded, pending, and new from the date of the publication of the Achmea. Pursuant to art. 6, arbitrations concluded at the date of the Achmea are not affected by the Agreement. Whereas, art. 7 stated that with regard to pending arbitrations (started before the Achmea and still pending on the date of extinction) and new ones (started after the Achmea and still pending), the contracting States are required to promptly inform the arbitration boards of the ruling of the CJEU and of its consequences. At the same time, they are obliged to appeal the competent national judge (also a judge of a third State) so that he can revoke, annul or refrain from recognizing or executing an arbitration award made on the basis of an intra-EU BITs to which these States are a party.

2.1. Controversial effects of the Termination Agreement: the sunset clause's extinction

One of the most relevant provision of the Termination Agreement concerns the so called "sunset clauses", which is a provision that, in order to protect the legal expectations of investors who made their investments based on the existence of the respective BITs, it extends the protection of investments made before the date of the termination of a BIT for a further period of time, generally for an additional 10-20 years.

In this regard, art. 7 of the Termination Agreement states that the sunset clauses contained in the intra-EU BITs "shall not produce legal effects" (see Christina Binder, A Treaty Law Perspective on Intra-EU BITs, in: The Journal of World Investment & Trade, Online Publication Date: 26 Nov 2016, p. 964-983). Otherwise, the persistence of this clause would have led to the possibility that the effects of the BITs in question continued in relation to the investments made before their extinction.

Although it is worth noting that part of the doctrine points critically at this provision. They support the argument that the principle of the irrevocability of the right granted in a treaty in the benefit of a third State (codified in art. 37 par. 2 of the Vienna Convention) would be an expression of a general principle "applicable to all third party holders" (James Harrison, The Life and Death of BITs:Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties, in: The Journal of World Investment & Trade, Online Publication Date: 01 Jan 2012, p. 928-950). Consequently, according to this thesis, the referred principle could be also extended to the right that treaties eventually recognize to non-State third parties, namely private third parties, such as investors are in BITs.

This interpretation could represent a limit to the rule, codified in art. 54 lett. b of the Vienna Convention according to which the termination of a treaty may occur "at any time by consent of all the parties". The State's practice, however, does not seem to be clearly oriented in this sense. As a result, under general international law, as codified in the Vienna Convention, States remain free to dispose the treaty's extinction by mutual consent and this also applies to investment agreements which, in addition to recognizing

individual rights, include sunset clauses too.

Furthermore, it has been argued that the practice made for an explicit provision concerning the extinction of the sunset clause constitutes a strategy of Member States to avoid any arbitration awards that could state the survival of the sunset clauses of a BITs even after its extinction (this concept has been expressed by Loris Marotti, Aspetti problematici dell'accordo sull'estinzione dei trattati bilaterali di investimento tra Stati membri dell'Unione europea, in Rivista di diritto internazionale privato e processuale, ottobre-dicembre 2020, p. 859).

3. A Regulation to Define a Legal Framework of extra-EU BITs

As previously mentioned, problems of compliance with the EU's exclusive competence on FDI pursuant to the art. 207 TFEU also concern extra-EU BITs.

Regarding these sources of law, EU agreed to confirm its status quo with respect to international law. At the same time, it assumed that it was necessary to specify their status under EU law. Primarily, in the absence of a transitional regime provided for by the Treaties, it was necessary to provide investors with some clarity regarding the status of extra-EU BITs after the Lisbon Treaty entered into force.

Along this path, on December 12, 2012 the Regulation (EU) No. 1219/2012 was issued and entered into force on January 9, 2013 (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, hereinafter "Regulation").

The Regulation defines a legal framework for the maintenance in force, modification, or conclusion of extra-EU BITs, until their gradual replacement with bilateral investment agreements concluded by the EU itself with the same third States (see Nikos Lavranos, In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs - A Member State's Perspective, in Transnational Dispute Management, Online Publication date: 2 Mar 2013,(10)2, p. 1-16). To achieve this purpose, the Regulation establishes a procedural framework aimed at verifying the compliance of extra-EU BITs with EU law, or at authorizing Member States to amend or conclude such agreements (art. 1, par. 1).

However, the control procedure established by the Regulations completely managed by the Commission was thought-out as an exceptional transitional measure. The extra-EU BITs compliance check is based on the two different procedures: "maintaining in force" or "authorisation". One or the other apply depending on whether the intra-EU BITs in question were signed before the Lisbon Treaty's entry into force (or before a Member-State's accession to the EU), after the Regulation's entry into force, or between the Lisbon Treaty's and the Regulation's entry into force.

The "existing" extra-EU BITs belonging to the first category may remain or enter in force in accordance with the Regulation (so called "grandfathering regulation" procedure), and it is sufficient for Member States to notify the Commission of BITs they intend to maintain or enter into force. Then, annually, the Commission publishes the list

of the agreements notified which, once a specific evaluation phase has been passed (*ex post* control), remain in force until a new BIT between the Union and the same third State enters into force (art. 2-6).

The Regulation also establishes a framework whereby Member States are empowered and authorized to start negotiations in order to amend or conclude "new" extra-EU BITs (such as those of the second category) in the future. In this case, the European Commission carries out an *ex ante* control aimed at monitoring the work of the Member States (art.7-11).

At least, pursuant to the Regulation, the BITs belonging to the third category, so called "in-between BITs", may be maintained or may enter into force under certain conditions (art- 12-15).

Even such agreements are subject to notification to the Commission if a Member State, which is a party, intends to maintain or bring them into force, and it is also incumbent on the Commission to verify the compatibility of the new BITs with the EU law. It can, eventually, adopt a decision authorizing the maintenance or entry into force of the BITs, or a reasoned decision of refusal (art. 9, par. 1 and 2). It should be pointed out that, at first, the European Parliament argued the full incompatibility of such agreements, as concluded in violation of the EU's acquired competence on investment, and as not authorized by the Commission pursuant to the mentioned art. 2, par. 1 TFEU.

3.1. Questions about the automatic extinction or replacement of extra-EU BITs

Moreover, it must also be noted that, as a whole, some doubts could arise when analysing the application of the Regulation in the light of international law and particularly regarding the legitimacy of its mechanism of replacement of extra-EU BITs with the future EU BITs. Once more, the matter is related to art. 59 of the Vienna Convention.

According to this provision "a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter", meaning that, the identity, both of the matter and of the Parties, are mandatory requirements for the termination of a previous treaty due to the conclusion of a subsequent one. As a result, the automatic replacement mechanism set out in the Regulation would be contrary to international law, as there would be no perfect identity, especially of parties, between the extra-EU BITs and the future EU BITs.

However, according to a different interpretation of art. 59 of the Vienna Convention, the bilateral investment agreements concluded by the EU could legitimately be qualified as later treaties that replace the previous bilateral agreements concluded by the Member States with the same third States (see Court of Justice of the European Union, 28 october, 1982, Joined Cases C-50-58/82, Administrateur des affaires Maritimes de Bayonne and Procureur de la Rpublique c. José Dorca Marina and others.)

This thesis was inspired by the method of gradual "transition" implemented for trade agreements of the Member States following the attribution of exclusive competence to the EU in matters of common commercial policy, in the past considered to be a shared

competence. *Mutatis mutandis*, it can be argued that future EU's BIT could replace old extra-UE BITs since, pursuant to the shift competence implemented by art. 207 TFEU, the Member States have delegated the EU to conclude international investment agreements and tacitly consented to the abrogation of those previously signed by themselves. Finally, it has to be underlined that the CJEU also agreed with this interpretation when the question emerged, incidentally, in the context of Opinion 2/15 made on 16 May 2017 relating to the Free Trade Agreement between the European Union and the Republic of Singapore (see Opinion 2/15 of the Court (Full Court), 16 May 2017, point 246-249).

In conclusion, it can be said that the legitimacy of the automatic extinction and replacement of extra-EU BITs with future EU BITs depends on the two different interpretative approaches adopted. According to whether the question is analysed from the point of view of EU law or international law, it will be compliant with the first and contrary to the second regulatory framework.

Nevertheless, we also believe that a solution could be found by trying to justify the progressive replacement mechanism put in place by the Regulation in the light of international law. Firstly, it is necessary to renounce the mechanism of automatic replacement established by the Regulations.

Then, we must assume the formal denounce by Member States as an essential condition for the extinction of extra-EU BITs, in view of the progressive (but not already automatic) replacement with EU agreements pursuant to Regulation (EU) 1219/2012. In this way the compliance with international law would be satisfied, as the application of the EU regulatory regime.

Actually, in accordance with the principle of loyal cooperation pursuant to art. 4, par. 3 TFEU, Member States are required to take all appropriate measures to ensure that their respective BITs concluded with third States do not prevent the EU from achieving its objectives and exercising the acquired exclusive competence in the field of foreign direct investment.

Based on this logic, it therefore appears very reasonable that it is up to the Member States to proceed with the denunciation of their own extra-EU BITs, complying with the obligations arising by their participation in the EU.

4. Conclusion

As we have seen, the instrument implemented by the EU and the Member State in order to harmonise the bilateral investment treaties already binding on the latter, have raised significant issues of compliance to international law.

Both as regards the Agreement on extinction of intra-EU BITs reached on May 5, 2020 between the Member States themselves, and the Regulation applying on extra-EU BITs issued by the EU itself, problems of coordination have arisen not only between international arbitration on investments and EU law, but also with regard to the international law general rules on the extinction of the treaties.

In particular, with respect to the extinction of the sunset clauses contained in the

intra-EU BITs, the Agreement raises important questions related to respecting the rights that Member States recognized to individuals in such international agreements. Hence, it cannot be excluded that investors are likely, even after the entry into force of the Agreement, to continue to rely on the sunset clauses in the terminated intra-EU BITs.

But, aside from the position that the jurisprudence may take, it is important to highlight the fact that through the Termination Agreement, Member States finally complied with the EU Commission's request to terminate intra-EU BITs to ensure the autonomy and the primacy of the EU legal order.

The same goes for the concerns relating to the automatic replacement of the extra-EU BITs set by the Regulation UE) n. 1219/2012. It must be recognised that, in spite of the doubts of legitimacy connected to it, through that instrument the EU made sure that the Member States complied with its legal order preserving its autonomy and its primacy, with respect to the sources of international law put in place by the first until obtaining that they were extinguished or subjected to provisions of EU law.

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