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What is the Future of Intra-EU BITs?

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After the enlargement of the European Union in 2004, many eastern bloc countries acceded to the European Union. BITs entered into between the eastern bloc and the western bloc were transformed into the so-called "Intra-EU BITs".

The problems of Intra-EU BITs arose when the European Commission started its campaign against Intra-EU BITs, alleging their incompatibility with EU law. Many EU Member States have taken different actions: Czech Republic, Ireland, Italy, and Romania have terminated their Intra-EU BITs unilaterally, while Poland and Denmark have expressed an intention to do the same; other Member States such as Germany, Finland, the Netherlands, Austria and France proposed a system for multilateral termination of Intra-EU BITs.

European Commission's War against Intra-EU BITs

The European Commission began to take a soft formal stand against Intra-EU BITs as early as 2006 through a note addressed to the Economic and Financial Committee of the Council ("EFC"). In 2009, the EFC stated in its letter to the President of the Council of the European Union that the majority of Member States wished to maintain their Intra-EU BITs since they did not share the European Commission's view on the incompatibility between these BITs and EU law.

In addition, the European Commission has petitioned investment tribunals, through *amicus curiae*, for challenging their jurisdiction and the application of Intra-EU BITs. The European Commission has also made submissions before ICSID annulment committees and national courts in enforcement proceedings.

For instance, in *Micula v. Romania* the ICSID award was only partially enforced because the European Commission issued in 2014 a suspension injunction calling Romania to suspend the remaining payment due under the award. In its decision of March 2015, the European Commission found that the payment of damages under the award was incompatible with EU State aid provisions, and prohibited Romania from making any further payment.

In June 2015, the European Commission took a further step by initiating infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden in order to formally request them to denounce their Intra-EU BITs. These proceedings had little success since Romania was the only country to have formally terminated, though on a unilateral basis, all of its Intra-EU BITs in March 2017.

Intra-EU BITs and EU Law: Are They Really Incompatible?

The core concern of the European Commission is the alleged incompatibility between Intra-EU BITs and EU law. The European Commission has raised many arguments in support of this position but in all occasions arbitral tribunals refused to uphold these arguments.

The **first argument** is the principle of *lex posterior* under Article 59 of the Vienna Convention on the Law of Treaties. This principle is often invoked along with Article 351 of the Treaty on the Functioning of the European Union ("TFEU"), which requires the Member States to take actions against incompatibilities between EU law and an earlier treaty. This argument was raised as a defence to bar the tribunals' jurisdiction. For instance, the arbitral tribunal in *Achmea v. Slovakia* did not uphold this argument because (i) Intra-EU BITs provided wider investment protections than EU law, (ii) there was no incompatible provision for protecting an investment under Intra-EU BITs and EU law, and (iii) there was no intention on the part of the Member States to derogate from the application of Intra-EU BITs.

The **second argument** is the principle of supremacy of EU law, which enables EU law to prevail over treaties concluded between EU Member States. For example, the arbitral tribunal in *Achmea v. Slovakia* pointed out that it had to apply international law since it derived its power from the Intra-EU BIT, and not EU law. It concluded that international law had to be applied as a matter of law, while EU law may be applied as facts, in assessing whether there was a breach of the afforded substantive protection.

The **third argument** is the availability of equivalent investment protection under EU law. In the view of the arbitral tribunal in *Achmea v. Slovakia*, investment protections under Intra-EU BITs were neither covered nor applied in the same scope as under EU law. Particularly, EU law did not grant access to investment arbitration or an equivalent provision that would allow a EU investor to bring a claim against a EU Member State.

The **fourth argument** is the principle of non-discrimination under Article 18 of TFEU, which prohibits any discrimination on grounds of nationality. The arbitral tribunal in *Binder v. Czech Republic* refused to accept this argument because in the absence of Intra-EU BITs, investors could bring their claims before national courts. In this regard, arbitration was just a form of adjudication that replaced the access to national courts.

The **fifth argument** is the violation of State aid rules under EU law. *Micula v. Romania* is a very controversial ICSID case regarding State aid, in which the European Commission persistently contested the tribunal's jurisdiction and the enforcement of the award. The arbitral tribunal in this case refused to allow the prevailing application of EU law over the BIT, since the investment was made prior to Romania's accession to the EU, thus being subject only to the Intra-EU BIT. Furthermore, the arbitral tribunal denied that the issue of enforcement was a matter to be resolved before it.

The **last argument** is the exclusive jurisdiction of the CJEU on interpreting EU law and that an arbitral tribunal is not competent to seek preliminary ruling from the CJEU. Arbitral tribunals denied this argument on the ground that the CJEU had no jurisdiction over investor-State disputes, and there was no prohibition of investor-State arbitration under EU law. The arbitral tribunal in *Achmea v. Slovakia* added that EU domestic courts were not always required to seek preliminary ruling from the CJEU for every interpretation of EU law.

Problems of Terminating Intra-EU BITs

Termination of Intra-EU BITs may address the European Commission's main concern for their alleged incompatibility with EU law. However, without an alternative regime to replace these Intra-EU BITs, such termination can bring other problems.

Firstly, the lack of Intra-EU BITs means that EU investors can no longer benefit from the advantages of international investment arbitration for disputes arising out of their investment in a EU Member State. The sole available option would be to have recourse to national courts. However, the lack of procedural protection via arbitration may affect EU investors' confidence in their investment in EU countries, and may encourage forum shopping for restructuring the investment in a non-EU country that has a favourable BIT with a EU Member State.

Secondly, many Intra-EU BITs stipulate a sunset clause under which a protected investor continues to enjoy substantive and procedural protections under the BIT upon its termination for a specified period of time. In *Gavazzi v. Romania*, the investor was able to initiate in 2012 arbitration under the terminated Italy-Romania BIT, as the sunset period was not yet expired. Therefore, termination of Intra-EU BITs would not solve the European Commission's concern in the short-term.

Lastly, EU law has no equivalent substantive protections to Intra-EU BITs since the latter generally provide a broader scope of protections, as pointed out by the CJEU Advocate General Wathelet in the *Achmea v. Slovakia* preliminary ruling.

Potential Solutions

On a short-term basis, two solutions may be envisaged to tackle the issue of incompatibility between Intra-EU BITs and EU law.

One solution is to consider the proposal made in the non-paper of April 2016 by Austria, France, Finland, Germany and the Netherlands, which requested a multilateral agreement among the EU Member States, in order to replace and supersede pre-existing Intra-EU BITs. On the *substantive aspects*, the new multilateral agreement would (i) terminate all Intra-EU BITs and their sunset clause, and (ii) provide for common and wide substantive protections to all EU investors. On the *procedural aspects*, the multilateral agreement would create a single procedure for resolving Intra-EU BIT claims by either (i) conferring jurisdiction to the CJEU over Intra-EU investment disputes, (ii) establishing a Permanent Investment Court, or (iii) providing investor-State arbitration under the auspices of the Permanent Court of Arbitration.

Another solution is to obtain guidance from the CJEU in 2018, on the relationship and the compatibility between Intra-EU BITs and EU law. Since two-investment arbitration cases are pending before the CJEU (*Achmea v. Slovakia* and *Micula v. Romania*), these decisions could have a breakthrough implication on Intra-EU BITs.

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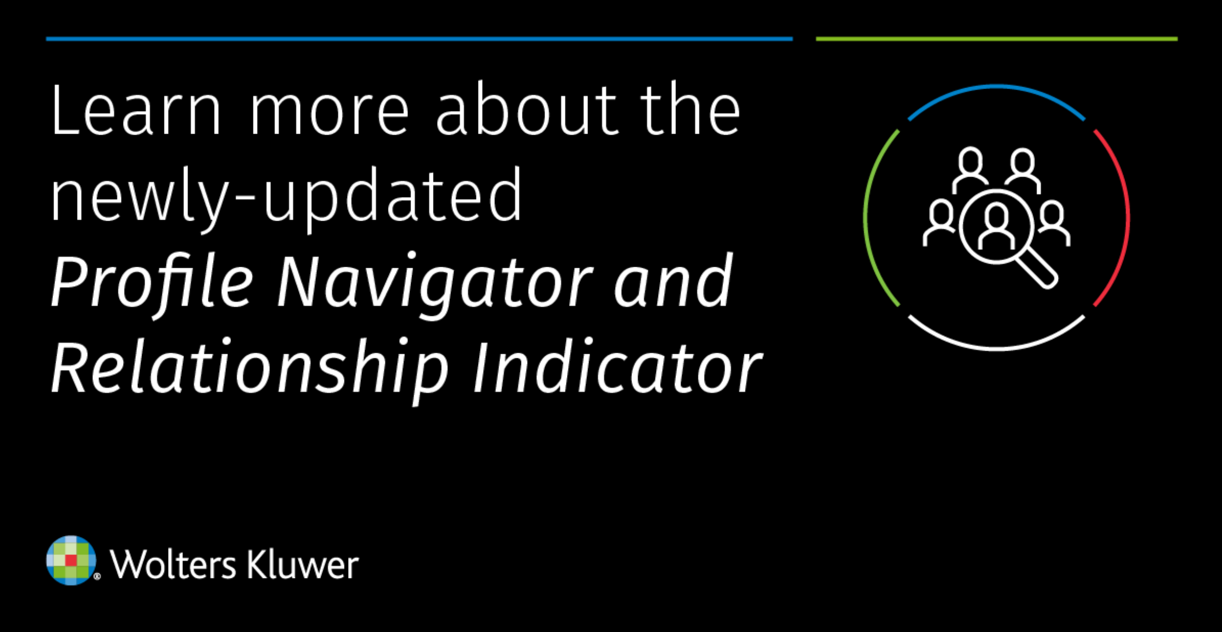

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