THE DECIMATION OF THE INTRA EU BITS

Beatrice Onica JARKA*

Abstract

The article concentrates on the process which led to the decimation of the intra-EU Bilateral Investment Treaties, due the affirmation of the public policy of European Union which takes precedence over the international obligations arisen for states from Bilateral Investments Treaties (BITs) and other multilateral investment treaties. In a last update on the situation, the Court of Justice of the European Union found on 6th of March 2018 for a first time, by way of providing answers to a preliminary question addressed by German Federal Court of Justice, that the arbitration clause in intra EU BITs is incompatible with the European Law as it provides a mechanism for settling investment disputes which is not capable of ensuring the proper application and full effectiveness of EU law, having an adverse effect on the autonomy of EU law.

The effects of the Court of Justice of the European Union decision on 6th of March 2018 are going to be various at national, european and international level from the transformation of the still existing intra EU BITs or multilateral investments treaties, in useless international instruments to changing entirely the investment law system of guarantees and perhaps to engaging the state or EU responsibility for internationally wrongful acts.

Keywords: *Intra – EU BITs, arbitration clause, EU law, investor –state dispute.*

1. Introduction

The story of the intra EU BITS reached on March 6, 2018, its climax. By the judgment in Slovak Republic v. Achmea BV[1], the Court of Justice of the European Union (EU) found that investor-State arbitration under the Bilateral Investment Treaty between the Netherlands and Slovakia is incompatible with EU law.

Bilateral Investment Treaties (BITs) are agreements which extablish the terms and conditions for private investment by nationals and companies of one state in another state.

BITs insure for the investments made by an investor of one Contracting State in the territory of another Contracting State several guarantees referring *inter alia* to fair and equitable treatment, the most favoured nation principle, the national treatment principle, direct or indirect compensation in the event of expropriation.

The specificity of many BITs is that such legal instruments provide for an alternative dispute resolution mechanism, under which an investor whose rights under the BIT have been violated could recourse directly to international arbitration, either under the auspices of the ICSID (International Center for the Settlement of Investment Disputes[2]), or under other international treaties, instead of suing the host State in its own courts. Such process is known as the Investor State Dispute Settlement (ISDS).

The first BIT ever signed was between Pakistan and Germany in 1959[3]. Since then, more than 2000 BITs had been signed, many of them between the EU countries, out of which most of them, at least for one party, before such countries become EU members. For a long time, BITs and the alternative dispute resolution system provided under BITs functioned quite well. ICSID and other arbitration institutions dealing with investor states settlement have been succesfull in passing enforceable awards subject to the limited review of the national tribunals of enforcement and cancelation under New York 1958 Convention.

The growing number of investor state disputes based on BITs between member states had trigger EU attention and reaction which finally materialised in declaring by the Court of Justice of EU of the incompatibility of BITs with the EU law. The position of EU institutions has passed through several phasis with the reach of such strong final outcome, which, as

* Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest Avocat – Partener la Cunescu, Balaciu & Asociatii (www.cunescu.ro), arbitru la WIPO, Arbitration Forum și Czech Court of Arbitration în disputele referitoare la nume de domenii, Vice – Președinte al Curtii de Arbitraj Ilfov din București (www. caib-biac.ro), Vicepreședinte al Institutului Arbitral Român (e-mail: beatrice.onicajarka@cunescu.ro)

[1] The judgement of the European Court of Justice in case C-284/16, dated March 6, 2018, makes reference to a request for a preliminary ruling regarding a Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic and its provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party and the Compatibility with Articles 18, 267 and 344 TFEU — Concept of 'court or tribunal' — Autonomy of EU law. Information are available at: doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057.

[2] ICSID is the International Center for Settlement of Investment Disputes established under ICSID Convention, entered into force on October 1966, and which has been ratifed by 153 Contracting States, in 2018. More information about ICSID could be found at https://icsid.worldbank.org.

[3] The Treaty for the Promotion and Protection of Investments Germany and Pakistan was adopted on 25 November 1959, 457 U.N.T.S. 24 and entered into force on 28 November 1962.This document is available on the United Nations Treaty Collection website at: http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef

we shall demonstrate is consolidating the European public policy within the autonomy of the EU law and establishes an imposed supremacy of the EU law over the international obligations predating EU law.

This paper shall consider, the rise of the ISDS disputes under intra EU BITs, the evolution of the EU institutions positions on the matter and finnaly the effect of the EU Court of Justice procedures at least on the intra – EU BITs and perhaps on the entire existing system of ISDS.

2. Content

2.1. Short history of Intra EU –BITs

In the 1990s, most EU Member States from Western Europe countries signed BITs with Central and Eastern European nations. Among these contries were the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Romania and Bulgaria.

While the 12 new Central and European states became EU members the BITs between them and EU countries became BITs between EU Member States, or intra-EU BITs.

The specific of the situation in the new EU member states, as newly democracy and free economies, led to the conclusions of privatisations agreements with investors which contained advantages or state subsidies of significant proportions for such investors in order to be attracted to invest in these regions. Joining the EU implied also that these agreements needed to comply with EU law, which most of them did not, as they were failing sometimes to comply with EU state aid policy. This led to a series of withdrawals of such advantages finally, ending in investor state dispute settlementsunder the arbitration clause provided by BITs.

Until 2014, based on the UNCTAD data, which was considered in an European Commission report on Investor-to-State Dispute Settlement.[4], there has been a total of 608 known ISDS claims (out of which 356 cases were concluded). Investors from the EU Member State are the largest users of ISDS. In the same report[5], it appears that cases brought by investors from the European Union were in total 327, thus accounting for more than 50 % of ISDS cases initiated and that investors from almost all EU Member States have brought ISDS cases (except Estonia, Slovakia, Romania, Bulgaria, Malta and Ireland). Combined, investors from the Netherlands, the UK, Germany, France, Spain and Italy have launched all together 236 cases, representing 72 % of all EU based[6].

2.2. Raise of the EU position

In its 2006 report[7] to the Council of European Union, the Economic and Finance Committee (EFC) takes note that there were currently around 150 Bilateral Investment Treaties (BIT) still in force between the EU Member States (200, according to EU Commission[8]), while part of their content has been superseded by Community law upon accession. In order to avoid legal uncertainties and unnecessary risks for EU Member States in the unclear situation, Member States (MS) were invited to review the need for such BITs agreements; and inform the Commission about the actions taken in this context so that progress can be reviewed by the EFC by the end of 2007.

In 2015, The Directorate General for Internal Policies remarks in its Study for the Juri Committee titled Legal Instruments and Practice of Arbitration in the EU[9] that the underlying problem of intra-EU BITs is the relationship between public international law (and, in particular, international investment law) on one hand and EU law on the other hand. According to the same report[10], investment deals, to a great extent, with subject matters, which are also covered by the EU law, such as the free movement of capitals. The Directorate General for Internal Policies further concludes that investment law and EU law potentially enter into conflict and the existence of intra-EU BITs could amount, from the point of view of EU law, to discrimination between EU citizens and therefore run contrary to Article 18 TFEU, as they afford foreign investors standards of protection which are not necessarily the same as the ones included in EU law.

2.3. Sketching of the EU position in regards of the arbitral awards based on intra – EU BITS

Although the position of the EU institutions was general, there were two cases in particular in which enforcement of arbitral awards grounded on BITs infringements was at stake, and the Commission and recently the European Court of Justice by the decision dated March 6, 2018, took a clear stand on the incompatibility of intra EU BITs with EU law.

These cases were: *Micula v. Romania*[11] (based on a BIT between Sweden and Romania) and *Achmea v.*

[4] The report of the European Comission on facts and figures on Investor –to – State Dispute Settlement is available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf,

[5] Ibidem.

[6] Ibidem.

[7] The 2006 report of the Economic and Financial Committee to the Commission and the Council on the Movement of Capital and the Freedom of Payments is available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205044%202007%20INIT

[8] ibid, infra note iv.

[9] Legal instruments and practice in the EU – Study for the Committee Jury is available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf

[10] Ibidem.

[11] IOAN MICULA, VIOREL MICULA, S.C. EUROPEAN FOOD S.A., S.C. STARMILL S.R.L. AND S.C. MULTIPACK S.R.L. CLAIMANTS v. ROMANIA RESPONDENT ICSID Case No. ARB/05/20, dated 11 December 2013 is avalable at https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

Slovakia[12] (based on a BIT between Netherlands and Slovakia).

2.3.1. Micula v. Romania

In the Micula v. Romania, the issue of the incompatibility of the EU law with BIT arbitration awards had been the EU State aid rules. On this issues the EU Commission ruled on 30 March 2015. The case arose from certain exemptions from Romanian customs duties, enacted before Romania joined the EU. When Romania began accession talks with the EU, the disputed incentives were repealed in order to comply with the EU State aid rules. Such repealment was the source of the dispute that Micula brothers, investors in Romania, brought before an arbitration tribunal under the Romanian-Swedish bilateral investment treaty (BIT). The Commission intervened in the proceedings as *amicus curiae*, pointing out that the disputed incentives breached the state aid rules, and that any reinstatement of those incentives, as a result of the arbitration, would itself also amount to unlawful state aid. Nonetheless, in the Award of 11 December 2013[13], the Arbitral Tribunal found that by revoking the incentives allowed to the Claimants, Romania "violated the Claimants" legitimate expectations with respect to the availability of the such incentives until 1 April 2009. The Arbitral Tribunal further concluded[14] that, with the exception of maintaining the investors' obligations under the existing law after revocation of the relevant incentives, "Romania's repeal of the incentives was a reasonable action in pursuit of a rational policy." However, the Tribunal went on to state[15] that: "[T]his conclusion does not detract from the Tribunal's holding […] above that Romania undermined the Claimants" legitimate expectations with respect to the continued availability of the incentives until 1 April 2009. As a result, Romania's actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable agreements.

Following the proceedings initiated in the Romanian Courts for the enforcement of the damages awards in the Romanian courts, the Commission intervened once again[16]. Ignoring the Commission position, the Romanian courts ordered the execution of the arbitration awards, followed by executor actions to seize the accounts of Romania's Ministry of Finance in order to make payment.

While Romania funds were being seized tin the processs of enforcement of the arbitration award, the EU Commission initiated an investigation[17] on the grounds that payment of the damages awarded by the arbitration tribunal appeared to constitute State aid. In its decision dated March 30, 2015[18], the EU Commission confirmed among others that its State aid analysis was not precluded by the fact that the aid arose through the payment of compensation awarded by an arbitral tribunal.

Indeed, the Commission affirmed that "In the case of intra-EU BITs, the Commission takes the view that such agreements are contrary to Union law, incompatible with provisions of the Union Treaties and should therefore be considered invalid." (para 128) Furthermore, the Commision helds: "Where giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law, that Member State must uphold Union law since Union primary law, such as Articles 107 and 108 of the Treaty, takes precedence over that Member State's international obligations." In this sense, the EU Commission found that the payment (however resulted from the forced enforcement) of the compensation awarded by the arbitration tribunal to the Micula brothers and their associated companies amounted to the granting of an incompatible State aid, and the Commission ordered Romania to recover it.

The Micula brothers, and their companies, have appealed the decision to the General Court in Case T-646/14, which ended, according to the request of the applicants lodged at the Court Registry on 2 December 2015 to discontinue proceedings, with the President Order[19] dated February 29, 2016, who ordered the removal of the case from the General Court Register.

In Micula v. Romania arbitral award, the European Commission had its last word in declaring that EU law in state aid is breached by the ICSID award and that in the ierarchy between the Union primary law, such as Articles 107 and 108 of the Treaty, and international obligations, the first takes precedence over that Member State's international obligations.

[12] The final award in PCA Case No. 2008-13 in the matter of an arbitration before a tribunal constituted in accordance with the agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 april 1991, entered into force on 1 october 1992 ("treaty") –and the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Arbitration Rules") -Betweenachmea B.V. (formerly known as "Eureko B.V.") ("Claimant") –and the Slovak Republic ("Respondent," and together with Claimant, the "parties") is available at https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf

[13] Ibid. infra note 11

[14] Ibidem.

[15] Ibidem.

[16] COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013(notified under document C(2015) 2112 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470

[17] Ibidem.

[18] bidem.

[19]ORDER OF THE PRESIDENTOF THE FOURTH CHAMBER OF THE GENERAL COURT dated 29 February 2016 in Case T – 646/14 is available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130deb00bb5867733494c9075dcf1954e1eb4e34KaxiLc3eQc40LaxqMbN4Pb34Ke0?text=&docid=174864&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=270324

2.3.2. Slovak Republic v. Achmea B.V.

In comparision the Micula v Romania, in the Slovak Republic v. Achmea B.V.[20], EU Court of Justice had finally the chance to deliver its word on the compatibility of the EU law with the intra EU BITs, going to essence of such incompatibility.

The case refers to a dispute between Dutch insurer Achmea B.V. (formerly known as Eureko B.V.) and Slovakia. In 2006, Slovakia partly reversed the previous liberalisation of its health insurance market, and vis-à-vis the Claimants, it prohibited the distribution of profits generated by Achmea's Slovak insurance activities.

In 2008, Achmea brought arbitration proceedings against Slovakia under the BIT on the grounds of violation of substantive treaty standards. The dispute was solved by an ad-hoc arbitral tribunal constituted under the UNCITRAL Rules, seated in Frankfurt[21] , which found in its 2012 award that, Slovakia had violated the existing BIT and ordered it to pay approximately EUR 22.1 million of damages to Achmea.

Slovakia challenged the arbitral award on jurisdiction before the German court[22], arguing that the arbitral tribunal lacked jurisdiction to hear the claims because the arbitration clause embedded in Article 8 of the BIT was incompatible with EU law, especially in relationship with articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

In these proceedings, the Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13[23] rejected Slovakia's arguments, finding that the BIT was not incompatible with the aforementioned provisions of the TFEU. Further, the German Federal Court of Justice decision of 3 March 2016 – Case I ZB 2/15, in hearing the appeal, referred questions on the compatibility with EU law of the BIT's arbitration clause to the Court of Justice of the EU for a preliminary ruling, stating nevertheless that in its view the arbitration clause was not contrary to the provisions of the TFEU.

In its Opinion[24] delivered on 19 September 2017, the Advocate General (AG) of the Court WATHELET concluded in principle that the specific BIT under analysis is not incompatible with EU law and the specific three articles from TFUE. In delivering its opinion, AG noted that for a long time, the argument of the EU institutions, including the Commission, was that BITs were instruments necessary for the accession to the EU and EU actually encouraged the countries of Central and Eastern Europe to sign them. The AG noted that these treaties did not contain any provisions within them that said they ceased to apply once the relevant country joined the EU, which normally if considered *ab initio* incompatible with EU law should have had happened. In addition, all Member States and the EU itself had ratified the Energy Charter Treaty[25] (ECT) which is a multilateral investment treaty and no Member State sought an opinion from the Court of Justice on the compatibility of the ECT with EU law.

By the Decision on 6th of March 2018, the Grand Chamber of Court of Justice of EU found departing from AG opinion and the position taken by the German Courts that the BIT in question is not compatible with EU law. Although the Court analysed the BIT between Austria and Slovakia, the rationale of the Court goes to the essence of the incompatibility between intra - EU BITs and European law.

The main argument used by the Court of Justice of the European Union in its resoning is the principle of autonomy of EU law[26]. According to this principle, EU law is characterised by the fact that it stems from an independent source of law, the EU Treaties, and by its primacy over the law of the EU Member States. Based on this principle, in the opinion of the Court, the EU treaties *"have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally…"*[27] and to the obligations of the EU Member States to insure its uniform and consistent territorial application by mean of the preliminary question as indicated in Article 267 TFEU.

Continuing its line of reasoning, the Court found[28] that the arbitral tribunal constituted under the BIT must rule on the basis of the law in force of the contracting state involved in the dispute as well as other (international) agreements between the contracting parties, which includes EU law and because of this characteristic may be called to use the preliminary question procedures. Nevertheless, the Court considered that the arbitral tribunal constituted under Article 8 of the BIT cannot be regarded as a court or tribunal of a Member State and has no power to make a reference to the Court of Justice of the European Union for a preliminary ruling. Taking notice of the fact that the arbitral award rendered by the tribunal under the BIT is, in principle, final and – by virtue of the applicable procedural law which is determined by the tribunal itself through the choice of the arbitral seat – subject only to limited judicial review by the competent

[20] Ibid. infra note 1

[21] Ibid. infra note 12.

[22] Ibidem.

[23] The Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13 is available at: https://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf

[24] OPINION OF ADVOCATE GENERAL WATHELET delivered on 19 September 2017 (1) Case C-284/16 Slowakische Republik v Achmea BV is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0284

[25] Ibidem.

[26] Ibid. infra note 1.

[27] Ibidem.

[28] Ibidem.

national courts, the Court concluded that investor-state arbitration derives from a treaty by which MS agree to remove disputes concerning the application or interpretation of EU law from the jurisdiction of their own courts, and hence from the system of judicial remedies which the TFEU requires them to establish on questions of EU law. By this particular kind of agreement included in the BIT, the Netherlands and Slovakia established, in the opinion of the Court, a mechanism for settling investment disputes which is not capable of ensuring the proper application and full effectiveness of EU law. For all the considerations above, the Court concluded[29] concluded that the arbitration clause contained in the said BIT is incompatible with certain key principles of EU law and that it has an adverse effect on the autonomy of EU law.

2.4. Pro- action of EU Commission in decimation of intra-EU BITs.

The European Commission has not been restricted to manifest its poistion in particular cases of arbitral awards grounded on intra-EU BITs., but rather took defintive stand in decimating these bilateral agreement. In 2015, the European Commission has initiated infringement proceedin[30] against five Member States requesting them to terminate intra-EU bilateral investment treaties between them.

While the BITs were thus aimed at strengthening investor protection, for example by means of compensation for expropriation and arbitration procedures for the settlement of investment disputes, since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). In the opinion of the Commission[31], EU investors also benefit from the same protection due to the EU rules (e.g. non-discrimination on grounds of nationality), while intra-EU BITs confer rights on a bilateral basis to investors from some Member States only, which amounts to discrimination based on nationality which incompatible with EU law.

Such line of reasoning has supported the Commission decision to request five Member States Austria, the Netherlands, Romania, Slovakia and Sweden to bring the intra-EU BITs between them to an end. Due to the fact that most Member States have taken no action, the Commission felt obliged in 2015 to launch the first stage of infringement procedures against the five Member States.

At the same time, the Commission requsted information from and initiating an administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place and noted with satisfaction that two Member States – Ireland and Italy – have already ended all their intra-EU BITs in 2012 and 2013 respectively.

It is worth noting the position of Jonathan Hill, EU Commissioner for Financial Services, Financial Stability and Capital Markets Union which said: "Intra-EU bilateral investment treaties are outdated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States. We must all act together to make sure that the regulatory framework for cross-border investment in the single market works effectively. In that context, the Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes."

The infringments procedure were put on hold during the Couurt of Justice of the European Union proceedings in Achmea v. Slovakia.

On 27 February 2017, the Romanian Parliament adopted Law 18/2017 on the termination of Bilateral Investment Treaties concluded between Romania and European Union Member States (Law). The Law has been published in the Official Gazette no. 198 of 21 March 2017 and will enter into force on 24 March 2017. Law 18/2007 approves the mutual and unilateral termination of all the 22 intra-EU BITs concluded by Romania and which are currently still in force.

2.5. EU law taking precedence over the International obligations

Achmea v. Slovakia marks certainly the decimation of the intra EU BITs, although it is only the climax in a long standing of the affirmation of the European public policy and its precedence over the public international law obligations of states. BITs, intra EU and general had been seen as one of the strongest instruments aimed at providing legal certainty and protecting foreign investors against the risks of policy changes and the possible lack of neutrality and impartiality of judges and domestic courts of the host State. As mentioned above, the countries from the Central and Eastern European were actually encouraged before accesion to EU to conclude BITs with the existing then EU MS.

In comparison with international arbitration, to which ISDS reseambles, the resolution of the dispute grounded on BIT infringement rests on an international treaty governed by public international law and it is based on principles aimed at protecting the investor, such as the principle of fair and equitable treatment or the principles of national treatment, most favored nation or full protection and security[32]. BITs are preferred by the foreign investors as they provide a

[29] Ibidem

[30] The press release of the Commission dated June 18, 2015 mentions the Commission s position in the initiation of infringements at http://europa.eu/rapid/press-release_IP-15-5198_en.htm

[31] Ibidem

[32] See Ana M. López-Rodríguez, PhD* INVESTOR-STATE DISPUTE SETTLEMENT IN THE EU: CERTAINTIES AND UNCERTAINTIES in Jouston Journal of International Law vol 40/1, 2.21.2018. at: http://www.hjil.org/wp-content/uploads/Rodriguez-Lopez-FINAL1.pdf

level playing field where States shed their privileges and litigate on an equal basis with private companies[33].

This brings within ISDS based on BITs intra EU or general. private level interests and the general interest on the same level. ISDS under BITs applies a commercial arbitration procedure to disputes which deal with the conformity of the exercise of the regulatory and administrative authority of the host State under the perspective of international law, which places such agreements at the level of public international order.

Moreover the force of the arbitration clauses is drawn and interpreted according to international public law which rules the BITs and give within national laws rayfing the BITs or orther multilateral investments treaties the superseeding status international public law has in the national public order of the national states.

The mere existance of an arbitral tribunal under BITs dealing with matters coming within EU Law and public policy, made EU to feel compelled to have a strong position against intra EU BITs and further against BITs with countries outside EU. With many occasions EU through the Commission and the Court of Justice declared, undoubtly the incompatibility with EU law of any judicial body or international tribunal that jeopardizes the principles of autonomy and primacy of EU law and the exclusive competence of the Court of Justice in its interpretation and application[34].

The main reasons provided by the Court in its opinions[35] referred to the need to respect the primacy and autonomy of EU law and the exclusive competence of the Court to interpret and apply EU law; to the need to preserve the exclusive competence of the Court in any dispute between the Member States concerning the interpretation or application of the Treaties, enshrined in art. 344 TFEU; to the need to guarantee the exclusive competence of the Court to rule on the distribution of responsibility for breach of an international agreement between the EU and its Member States and on the proper respondent in a proceeding; to the need to avoid further reviews of EU law, including secondary law, by the any other International Tribunal.

It is not surprinsing that the same kind of reasoning was actually used by the Court in its judgment in Achmea v. Slovakia delivered on 6th of March 2018. It is of interest that the judgement was delivered in relationship with an award rendered under intra-EU BITs by arbitral tribunals seated within the EU and in this regards, the effects of such judgement on ISDS before tribunals seated outside the EU, as well as intra-EU disputes under the Energy Charter Treaty, may be less definitive. It nevertheless rounds the general superior position which EU law and its own judicial system took in international law relationship which will undoubtly lead to the consolidation of this position in eliminating any judicial application and interpretation of EU law through other international tribunals. It is to be seen how investment arbitral tribunals will further react and if and how future ISDS if any shall suvive in Europe.

3. Conclusion

The ISDS days based on intra-EU BITs are numbered, as there will be no ISDS if the effects of the ISDS awards based on intra- EU BITs would not be recognised in the EU member states. The position of the European Commission requesting the termination of intra EU BITs addressed to five states under infringement procedure opening shows the determination in the decimation of the intra EU BITs, which will likely dissapear or shall not be further used for ISDS. It is obvious that EU order is tending to eliminate any extra legal system which would infringe primacy and autonomy of EU law and the exclusive competence of the Court to interpret and apply EU law and if it takes the ISDS in general so be it. There is nothing to fear herein except for a possible judicial review of such primacy over international public law obligations solved at the level of the International Court of Justice (ICJ) based on a infringements of BITs.

How would ICJ consider the issue? Is Court of Justice of the EU the only one to interpret and apply EU law? What about international public law to which actually ISDS belongs?

References

- COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013(notified under document C(2015) 2112 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470, accessed on March 10th, 2018
- Ana M. López-Rodríguez, PhD* INVESTOR-STATE DISPUTE SETTLEMENT IN THE EU: CERTAINTIES AND UNCERTAINTIES in Jouston Journal of International Law vol 40/1, 2.21.2018. at: http://www.hjil.org/wp-content/uploads/Rodriguez-Lopez-FINAL1.pdf, accessed on March 10th, 2018
- OPINION OF ADVOCATE GENERAL WATHELET delivered on 19 September 2017 (1) Case C-284/16 Slowakische Republik v Achmea BV is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0284, accessed on March 7th, 2018

[33] Ibidem.
[34] Ibidem.
[35] Ibidem.

- The Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13 is available at: https://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf accessed on March 10th, 2018.
- The report of the European Comission on facts and figures on Investor –to – State Dispute Settlement is available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf, accessed on March 10th, 2018
- The 2006 report of the Economic and Financial Committee to the Commission and the Council on the Movement of Capital and the Freedom of Payments is available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205044%202007%20INIT, accessed on March 9th, 2018