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The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective

I Introduction

It is estimated that almost 3,000 BITs are currently in existence worldwide. Of these, about 190 have been concluded between Member States of the European Union (intra-EU BITs). Most of these are between old Members of the EU and new Members in Central and Eastern Europe. While there are almost no BITs between the old Members in Western Europe,[1] there is a dense network of BITs between the old and new Members.

Most of the new Members concerned acceded to the Union in 2004,[2] Romania and Bulgaria in 2007.[3] Only some of the Member States have terminated intra-EU BITs. Denmark has allegedly terminated its BIT with the Czech Republic and Italy has terminated its BITs with a number of Eastern European States.[4] About 170 of the previous 190-intra EU BITs remain in force.

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1 There are BITs between Germany on one side and Portugal and Greece on the other. However, these BITs do not provide for investor-State arbitration, UNCTAD International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/78?type=c#iiaInnerMenu>; Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, dBGBl. Teil II, Nr. 9 vom 10.4.1963; Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, dBGBl., Teil II, Nr. 3 vom 21.01.1982.

2 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, OJ L236 23.09.2003.

3 Treaty of Accession of the Republic of Bulgaria and Romania, OJ L157, 21.06.2005.

4 See UNCTAD, International Investment Agreements Navigator, available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/57?type=c#iiaInnerMenu> (Denmark-Czech Republic); Italy has terminated its BITs with all new Member States which acceded to the EU in 2004 and 2007 except for Malta, see UNCTAD, International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/103?type=c#iiaInnerMenu.

1 The Perspective of the Commission

The European Commission has voiced misgivings about the continued existence of intra-EU BITs and has called for their termination. The Commission has not taken the position that these BITs have become automatically abrogated through the accession to the EU of the States parties to them. However, it sees intra-EU BITs as incompatible with the overall structure of European Union law and takes the position that Member States are under an obligation to take steps to terminate these treaties.[5]

2 Reasons

The reasons given by the Commission for its position on intra-EU BITs are essentially threefold:

1. The Commission is of the view that the current situation involving BITs between some EU Members but not between others creates a situation that is *discriminatory.*
2. The Commission is of the view that there is a potential or actual *conflict* between EU law and *the substantive standards* contained in BITs.
3. The Commission is of the view that investment arbitration constitutes a *parallel system of adjudication* that is removed from the European Court's supervision and control.[6]

Let me address point two, the perceived conflict between BIT standards and European Union law and its consequences for jurisdiction, applicable law, merits and enforcement from a public international law perspective.

II Jurisdiction

Some new Member States have, in their role as respondent in investment arbitrations, asserted that there is an incompatibility between intra-EU BITs and EU law, which would lead to the automatic termination upon accession to the EU of the intra-EU BIT and would deprive investment tribunals of their jurisdiction.[7] They based this argument on Article 59 of the Vienna Convention on the Law of Treaties (VCLT).[8]

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[5] See letter of the European Commission, Internal Market and Services of 13 January 2006 quoted in *Eastern Sugar B.V.* v. *Czech Republic,* Partial Award, 27 March 2007 at pp. 24–26; European Commission Observations, 7 July 2010, paras 30, 38, cited in the case *Eureko BV (The Netherlands) v. The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 180, 182.

[6] *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007, p. 25, para 126.

[7] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, paras 310–311; *Eastern Sugar v. Czech Republic*, Partial Award, paras 100–102, 105–107; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Decision on Jurisdiction, 30 April 2010, paras 41, 65–66; *Eureko BV (The Netherlands) v. Slovak Republic,* UNCITRAL, PCA Case No. 2008–13 Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras 58, 59.

[8] Termination or Suspension of the Operation of a Treaty Implied by Conclusion of a Later Treaty. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

As, for example, the *Eureko* Tribunal has stressed, Article 59 is subject to the provisions of Article 65 VCLT,[9] which regulates the procedure to be followed with respect to invalidity, termination or withdrawal of a treaty. It does not provide for the automatic termination of treaties and the procedure has not been followed in any of the intra-EU BIT cases so far decided.

However, tribunals did not stop here, but plunged deeply into arguments based on Article 59 VCLT. Article 59 VCLT provides, under limited conditions, for an implied termination of a treaty in the event of conclusion of a later treaty.

The application of Article 59 VCLT rests on two conditions. First, the earlier and the later treaty must relate to the 'same subject matter'. If this is the case, the parties to the treaty must either have intended this matter to be governed by the latter treaty or the treaties must be so incompatible that they are not capable of being applied at the same time.

Practice on Article 59 VCLT is scarce. The Official Records to Article 59 state that the Expert Consultant declared that 'those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty…'[10]

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(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.

On Article 59 VCLT see e.g.: Capotorti, 'L'extinction et la suspension des traités' (1974) III (134) RCADI, 417 et seq.; Plender, 'The Role of Consent in the Termination of Treaties' [1986] BYBIL, 133 et seq.; Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' [1988] BYBIL, 75–111; Villiger, 'Article 59' in *Commentary on the 1969 Vienna Convention on the Law of Treaties,* 720 et seq. Dubuisson, 'Article 59' in Corten, Klein (eds), *The Vienna Conventions on the Law of Treaties. A Commentary, vol. II.* (Oxford University Press 2011, Oxford) 1325 et seq.

[9] 1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

On Article 65 VCLT see Briggs, 'Procedures for Establishing the Invalidity or Termination of Treaties under the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 61 AJIL, 976 et seq.; Briggs, 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68 AJIL, 51 et seq.; Prost, 'Article 65' in Corten, Klein (n 8); Reisman, 'Procedures for Controlling Unilateral Treaty Terminations' (1969) 63 AJIL, 544 et seq.; Rosenne, 'The Settlement of Treaty Disputes under the Vienna Convention of 1969' (1971) 31 ZaöRV, 1 et seq.; Villiger (n 8) 799 et seq.

[10] Official Records, 2nd session, 91st meeting, p. 253, para 41.

Doctrine tends to a strict interpretation and requests an identical overall object as well as a comparable degree of generality and comparability of the two treaties to be seen as covering the same subject matter.[11]

Respondents in many of the intra-EU BIT cases argued that EU law and intra-EU BITs covered the same subject matter. They argued that the substantive provisions in BITs would correspond to the guarantees contained in the so-called four freedoms (prohibition on restriction on capital and movement and the prohibition on discrimination and the freedom of establishment) as well as to the protection of property in the Charter of Fundamental Rights.[12]

This opinion was not shared by investment tribunals, such as *Eastern Sugar, Jan Oostergetel* and *Eureko.* The tribunals unanimously considered that the substantive guarantees in BITs are broader and more specific than those available under EU law.[13] Furthermore, the focus of the so-called four freedoms in EU law is more on the establishment phase of an investment whereas a typical intra-EU BIT contains, in essence, guarantees in the post establishment phase of an investment.[14] The dispute settlement procedure, whereby a state can directly be sued by an investor, is furthermore also absent from EU law.[15] As such, the tribunals have already rejected the claim that the two treaties cover the same subject matter.[16]

Furthermore, the tribunals also held that neither of the other two conditions for the application of Article 59 VCLT was fulfilled. Neither the intra-EU BITs nor the accession treaties to the EU indicate any intention of the parties that the matters covered by any of the intra-EU BITs should, after the accession of the new Member State, be governed by EU law only.[17]

Furthermore, the tribunals did not consider the two treaties to be 'so far incompatible' that they are not capable of being applied at the same time. They stated that the fact that BITs provide for broader protection and offer a higher level of post-investment protection than EU law did not make them incompatible as such with EU law but would instead complement it.[18]

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[11] Dubuisson (n 8) para 25; Dubuisson in Corten, Klein (eds) *Les Conventions de Vienne sur le droit des Traités, Vol III.* (Bruylant 2006, Bruxelles) 2107; Aust, *Modern Treaty Law and Practice,* (2 nd edn, 2007, Cambridge) 229.

[12] *Eureko BV (The Netherlands) v. The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension paras 69, 70; *Jan Oostergetel v. The Slovak Republic,* Decision on Jurisdiction, para 66; *Eastern Sugar v. Czech Republic*, Partial Award, para 101.

[13] *Jan Oostergetel v. Slovakia,* Decision on Jurisdiction, paras 75–79; *Eastern Sugar v. The Czech Republic,* Partial Award, paras 159–165; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 245, 249–262.

[14] Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39 (2) Legal Issues of Economic Integration, 167.

[15] *Eastern Sugar v. Czech Republic*, Partial Award, para 180; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 264; *Oostergetel v. Slovakia*, Decision on Jurisdiction, para 77.

[16] *Eastern Sugar v. Czech Republic,* Partial Award, para 159; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 74.

[17] *Eastern Sugar v Czech Republic,* Partial Award, para 167; *Eureko v Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 244–245, 262; *Oostergetel v. Slovakia*, Decision on Jurisdiction, para 80.

[18] *Eastern Sugar v Czech Republic,* Partial Award, para 170; *Oostergetel v. Slovakia*, Decision on Jurisdiction, paras 86–87.

The Tribunal in *Eureko* held, in this context:

> Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.[19]

The Tribunals unanimously found that they were not deprived of jurisdiction by the operation of Article 59 VCLT.[20]

A further line of the Respondent's and the Commission's argument is that the Tribunal lacks jurisdiction because of the operation of the rules set out in Article 30 VCLT.[21] Article 30 regulates situations of incompatibility between particular provisions in successive treaties relating to the same subject matter. The relevant clause in paragraph 3 provides that in such a situation the earlier treaty only applies to the extent that its provisions are compatible with those of the later treaty.

Confronted with this argument, the Tribunals in cases such as *Eastern Sugar* and *Eureko* and *Jan Oostergegetel* found, first, that the treaties did not relate to the same subject matter and that therefore Article 30 VCLT is not applicable.[22] Second, they held that there was no incompatibility. Rather, there was a situation of complementarity of the substantive norms.[23] The Tribunals stated that even if there was such an incompatibility this would be a question of the applicable law and not one of jurisdiction.[24]

With regard to the alleged incompatibility between investor-State arbitration and EU law, the tribunals found no prohibition of investor-State arbitration in the treaties and therefore no incompatibility.

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[19] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 263.

[20] *Eastern Sugar v. Czech Republic,* Partial Award, para 181; *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 293; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 190.

[21] Application of successive treaties relating to the same subject-matter
(3) 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.
On Article 30 VCLT see e.g.: Orakhelashvili, 'Article 30' in Corten, Klein (n 8) 764 et seq.; Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington International Law Review 573 et seq.; Roucounas, 'Engagements parallelès et contradictoires' (1987) 206 (VI) RCADI 13 et seq.; Dahl, 'The Application of Treaties Dealing with the Same Subject-Matter' (1974) 17 India YBIA 279 et seq.; Karl, 'Conflicts between Treaties' (2000) 4 EPIL 935 et seq.; Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYBIL 75 et seq.

[22] *Eastern Sugar v. Czech Republic,* Partial Award, para 180; *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 104.

[23] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, paras 263, 271, 272, 274, 277.

[24] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 272.

III Applicable Law

The approach of tribunals concerning EU law as part of the applicable law was fact-driven. The Respondent in *Eureko* argued that the BIT provisions were inapplicable because of the operation of EU law. The Tribunal summarised the Respondent's arguments as follows:

> if the same subject is regulated by both EU law and national law (the BIT), EU law prevails. Therefore, the Tribunal would be actually deciding on a breach of EU law by the Slovak Republic.[25]

The Tribunal rejected this analysis and stated that neither party relied on any specific provision of EU law in a manner that would influence the decision or reasoning of the Tribunal. It held that nothing in those Treaty standards is in conflict with any provision of EU law. Nothing in this Award amounts to, or implies, a decision that Respondent or Claimant has acted in conformity with EU law or contrary to EU law in any respect. This Award has no bearing upon any question of EU law. This Award relates only to the compliance by Respondent with the terms of the obligations it has assumed under the agreement that it made in the Treaty [i.e. the BIT].[26]

It concluded that it may therefore apply the treaty without being required to touch upon questions of EU law.[27]

In *Jan Oostergetel,* the Tribunal held that the applicable law includes domestic law, which in turn includes EU law following Slovakia's accession to the EU.[28] It said:

> 'Therefore, if EU law must be applied, this Tribunal will seek to interpret both the BIT and applicable EU law in a manner that minimizes conflict and enhances consistency.'[29]

On the facts, there was no need to apply EU law and the Tribunal dismissed all the claims on the basis of investment law.

In *Micula* the Tribunal had to decide on a case brought by Swedish investors who had taken advantage of various incentives offered by Romania in the late 1990s. The investors had expanded their operations in a disadvantaged area of Romania, significantly relying on the incentives offered by Romania for a 10 year period (1999–2009). Romania revoked all but one incentive prematurely, with a view to aligning its incentives with EU law in the accession process.

The Tribunal stated that there was no conflict of treaty norms.[30] It held that the primary source of law applicable to the case at hand was the BIT.[31] Furthermore, the Europe Agreement was a relevant rule of international law applicable in the period relevant for the dispute.[32] EU law was not directly applicable, since the accession treaty entered into force only on January

[25] *Eureko v. Slovakia,* Final Award, para 274.
[26] *Eureko v. Slovakia*, Final Award, para 276.
[27] *Eureko v. Slovakia*, Final Award, para 275.
[28] *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 100.
[29] Ibid.
[30] *Micula v. Romania,* Final Award, para 319.
[31] Ibid, paras 318–319.
[32] Ibid, para 319.

1st 2007, which was after the interferences with the investment had occurred.[33] The Tribunal stated that it was taking the general context of EU accession into account when interpreting the BIT.[34] It noted that the Parties appear to agree that EU law forms part of the 'factual matrix' of the case.[35]

As such, it considered the question of EU law to be of importance for the decision on fair and equitable treatment and on the issue of legitimate expectations of the investor.[36] The facts of the case all occurred before the entry into force of Romania's accession agreement. EU law was therefore only part of the applicable law to the extent it was incorporated into the Europe Agreement. The Tribunal took the EU law regime on state aid and the interaction with the Europe Agreement into account when it decided on the existence of legitimate expectations and the reasonableness of the Romanian measures, repealing all but one of the incentives.[37]

The Tribunal found a violation of the Claimant's legitimate expectations.[38] Furthermore, it found it unreasonable that Romania had abolished the investment incentives while the Claimants had corresponding obligations to remain invested in the disfavoured region.[39] The rest of Romania's measures were considered reasonable in the light of the EU accession.[40]

As these cases show, in arbitrations based on BITs, the basis of the claim is typically an alleged violation of the BITs' substantive standards and is not concerned with the interpretation of the EC Treaties or the validity of decisions made by EU institutions. Invocation of European Law usually takes place defensively, to justify the host States' conduct. In situations of this kind it is conceivable that EU rules on competition, State aid and procurement are relied upon by host States to ward off claims based on BIT standards, such as fair and equitable treatment, protection against uncompensated expropriation and umbrella clauses. The cases show that the potential for a genuine conflict between BITs and European Law is limited.[41]

In the cases so far decided, the interferences occurred before the accession of the Respondents to the EU. Even in this set of circumstances, tribunals were prepared to take the context of the accession into account in their assessment of the substantive protection standards. Both the *Micula* and the *Jan Oostergetel*[42] Tribunals stated that they were not interpreting the BIT in splendid isolation but, on the contrary, were striving for a harmonious interpretation of the different treaties.

The *Micula* Tribunal stated that the Tribunal will interpret each of the various applicable treaties having due regard to the other applicable treaties, assuming that the parties entered into each of those treaties in full awareness of their legal obligations under all of them.[43]

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[33] Ibid, para 319.
[34] Ibid, para 327.
[35] Ibid, para 328.
[36] Ibid, para 328.
[37] Ibid, paras 131–132, 692, 695–697.
[38] Ibid, para 677.
[39] Ibid, para 826.
[40] Ibid, para 825.
[41] Reinisch (n 14) 157 et seq.
[42] *Oostergetel v. Slovakia,* Decision on Jurisdiction, para 100.
[43] *Micula v. Romania,* Final Award, para 326.

For investments made after accession to the EU, EU law will invariably be part of the applicable law, either as part of international law or as part of host State law. Hence, there will not be any legitimate expectations that a legal situation that is in conflict with EU law will prevail.

IV Enforcement of Awards

With regard to enforcement, two types of situations have to be distinguished, UNCITRAL arbitrations with a seat in the EU, and ICSID arbitrations.[44] With regard to an UNCITRAL arbitration, three situations are feasible should the EU state party be obliged to pay compensation: 1. compliance by the Member State, 2. enforcement in a third State or 3. enforcement in an EU Member State. In situations 2 and 3, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards will apply.[45] If enforcement is attempted in an EU Member State, the courts of the State of enforcement could request a preliminary ruling from the European Court of Justice if a question of EU law should arise.[46] In *Eureko,* the Slovak Republic asked the *Oberlandesgericht Frankfurt am Main* to refer three questions to the ECJ. The Court declined to refer the questions, since it considered the questions it was asked to refer to the ECJ as not capable of being put before the ECJ.[47] On 19 September 2013 the *Bundesgerichtshof* declined to refer the case to the ECJ, since in the meantime the final award had been issued. The Bundesgerichtshof therefore stated that there was no need for legal relief concerning the interim award.[48]

With regard to an ICSID award, the award has to be complied with by the Respondent or enforced by third states without any possibility of consultation of the ECJ. Therefore, the recent intervention of the Commission in *Micula v. Romania*[49] would, if followed by Romania, lead to a violation of Article 53 of the ICSID Convention.[50] The other state parties of the ICSID Convention will have to enforce the award without any possibility of an *ordre public* test, since, unlike in Article V of the New York Convention, no such test is provided for in Article 54 of the ICSID Convention.[51]

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[44] On the issue of enforcement of awards and state aid law see: Christian Tietje, Clemens Wackernagel, 'Outlawing Compliance?' – The Enforcement of intra-EU Investment Awards and EU State Aid Law, (2014) 41 Policy papers on Transnational Economic Law.

[45] See van den Berg, *The New York Convention of 1958,* (1981); Di Pietro, Platte, *Enforcement of International Arbitration Awards The New York Convention of 1958,* (2001); Bertheau, *Das New Yorker Abkommen vom 10.6.1958,* (1965); Brotóns, 'La reconnaissance et l'exécution des sentences arbitrales étrangères' (1984-I) 169 RdC, 184.

[46] *Micula v. Romania,* Final Award, para 336.

[47] Oberlandesgericht Frankfurt am Main, 26 SchH 11/10, Beschluss vom 10.05.2012, 4–6, 26–27.

[48] Bundesgerichtshof, III ZB 37/12, Beschluss vom 19. September 2013, para 11.

[49] *Micula v. Romania,* Final Award, paras 334–336.

[50] On Article 53 of the ICSID Convention see: Schreuer, *The ICSID Convention. A Commentary,* (2nd edn, 2009) 1096 et seq.

[51] On Article 54 of the ICSID Convention see: Schreuer (n 50) 1120–1121, paras 13–14.

V Conclusions

Intra-EU BITs do not just fade away by accession to the EU. They would have to be terminated and some already have been terminated.

The termination of intra-EU BITs would leave a substantial gap and is likely to have a number of negative consequences. It would remove the valuable protection to investments afforded by BITs without offering a replacement. As mentioned, EU law does not cover the full range of standards contained in BITs.

In addition, cutting off access to investment arbitration would seriously weaken the ability of investors to vindicate their rights. Resort to the host States' domestic courts is likely to be unsatisfactory. Apart from lengthy procedures and problems of independence and impartiality, domestic courts are of little if any use if adverse measures against foreign investors are taken by way of the national legislation which domestic courts must apply. Resort to the European Court by way of preliminary rulings is promising only to the extent that European law offers effective protection to investors, which, often enough, is not the case.

The termination of intra-EU BITs is likely to have also other negative effects. In the absence of effective judicial means to settle investment disputes, there is likely to be a revival of inter-State disputes involving investments. The re-emergence of diplomatic protection in investment disputes within the European Union would be a retrograde step that could put a serious strain on relations between Members.

Also, the removal of intra-EU BITs will introduce a curious new form of discrimination. EU investors will operate on a level playing field, since they are all without protection. However, they will be disadvantaged vis-à-vis investors from non EU countries that continue to have BITs with EU Member States.

Astute EU investors who plan their investments carefully will start arranging their investments in such a way as to enjoy the protection of BITs between EU Members and third States. EU investors who find themselves without the protection of BITs in other EU Members will start incorporating in non-EU countries that do have BITs with the EU Member State in which they plan to invest. For instance, an Austrian investor who wishes to invest in Romania but finds that the BIT between Austria and Romania no longer exists may incorporate in Norway, Switzerland, China or Singapore, in order to avail itself of the BITs between these countries and Romania and channel its investment through its subsidiary in one of these countries. The net result is likely to be a migration of investors away from EU Members.

In addition, BITs are just one source of consent to arbitration. Investors may still prevail upon host States to agree to arbitration through contracts. The extinction of the BIT system within the EU may therefore well lead to a revival of the old system of arbitration clauses in contracts.

Finally, there is a rather odd paradox about the plans to do away with BIT arbitration in the EU. The Energy Charter Treaty (ECT) provides for protections very similar to those of BITs. These include the offer of consent to investment arbitration. Not only would the ECT survive the extermination of BITs in Europe, in fact, the EU itself is a Party to the ECT and continues to be bound by its substantive and procedural safeguards.