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The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden

Abstract

On June 18, 2015, the European Commission initiated infringement proceedings against five Member States over the termination of intra-EU bilateral investment treaties (BITs). In spite of targeting selected agreements, the outcome of these proceedings is bound to have broader ramifications for all existing BITs currently in force between Member States. Engaging in an assessment of the Sweden-Romania BIT, it is of pivotal importance to determine whether the substantive or procedural protections provided for investors under the agreement are compatible with the internal market. Notably, investors from Member States that are not party to the Sweden-Romania BIT are excluded from its protection. In circumstances where these investors are in a similar situation to Romanian and Swedish investors the provisions of the BIT are likely to constitute a violation of the principle of non-discrimination. However, even though the termination of intra-EU BITs appears to be the only pragmatic solution, this cannot have retrospective effect or affect currently pending disputes. Whether or not termination can avoid the prolonging effects of sunset clauses, on the other hand, primarily depends on the view of the investor-state tribunal examining the issue in accordance with international law. However, in anticipation that Sweden decides to negotiate the termination of its BIT with Romania, it is imperative that sunset clauses are addressed explicitly.

1 Intra-EU BITs: a by-product of enlargement

The alleged conflict of intra-EU BITs with the internal market of the European Union (EU) must be understood against the backdrop of the accession of Central and Eastern European states to the EU in the years 2004 and 2007. The regional effort to establish a single market characterised by, *inter alia,* free movement of capital and freedom of establishment may have discouraged the conclusion of investment treaties amongst the initially relatively small group of EU Member States.[1] The situation was, however, rather different for Central and Eastern European countries. In their transition to free-market economies following the breakup of the Soviet Union and Yugoslavia in the early 1990s, BITs constituted important instruments for attracting investment from – amongst others – EU Member States.[2] Upon accession of such countries to the EU in 2004

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1 Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', 2009, 58(2) *International and Comparative Law Quarterly,* 297, p. 297.

2 Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ', 2009, 8(2) *The Law & Practice of International Courts and Tribunals,* 225; Wehland (2009), p. 298.

and 2007,[3] many of these BITs turned into agreements between Member States, i.e. intra-EU BITs, raising intricate questions about their compatibility with EU law.[4]

Despite the fact that these concerns were not adequately addressed during the accession negotiations,[5] the Commission has long been aware of the adverse effects of intra-EU BITs on the internal market. In its annual report to the Commission in 2006, the Economic and Financial Committee (EFC) emphasised that "part of their content [had] been superseded by Community law upon accession". The EFC recommended that Member States review the need for these BITs by the end of 2007;[6] however, until recently, no action has been taken. Finally, on June 18, 2015, the Commission initiated infringement proceedings against five Member States, including Sweden,[7] over the termination of their intra-EU BITs. These pilot proceedings are likely to have broader consequences for all Member States.

This paper discusses the reasoning of the Commission in its case against Sweden. The assessment of the compatibility of intra-EU BITs with the internal market focuses mainly on the potentially discriminatory aspects of BITs on grounds of nationality. Part 4 ultimately discusses the effects of termination of intra-EU BITs in the light of survival clauses. Given that the case against Sweden appears to be built on the Sweden-Romania BIT, this BIT is also adopted as an analytical framework for the purpose of the present exercise. However, it is also an objective of this paper to highlight the potential effects of infringement proceedings on other intra-EU BITs to which Sweden is a Contracting Party and, further, to illustrate the broader ramifications for the existing web of intra-EU BITs.

2 The formal letter of notification

On June 18, 2015, the Commission issued a formal letter of notification to the Swedish Ministry of Foreign Affairs, followed by a press release revealing that a total of five Member States had been targeted in the pilot proceeding.[8] In its letter, the Commission accuses Sweden of failing to comply with its Treaty obligations – which necessarily means that the Commission's initiation of infringement proceedings has direct legal consequences for the Swedish government. However, the arguments presented by the Commission are illustrative of the Commission's overall position with regards to the compatibility of intra-EU BITs with EU law and, thus, relevant beyond the Swedish context.

Whereas the Commission emphasises that the Sweden–Romania BIT "in its entirety" violates EU law, it recalls specifically that: (i) the standards of investment protection under the BIT as well as provisions on expropriation and capital transfer provisions overlap with provisions of the Treaty on the Functioning of the European Union (TFEU) regulating the internal market and discriminate against EU investors on grounds of nationality; (ii) provisions providing for investor-state and state-to-state arbitration are incompatible with Article 344 TFEU, which prevents Member States from resorting to any judicial body other than the Court of Justice of the European Union (CJEU) for the resolution of disputes whose subject-matter falls within EU competence; and (iii) the BIT's survival clause, which guarantees the applicability of the BIT even after its termination, further aggravates the current situation. Some of the arguments echo the Commission's reasoning in earlier *amicus* submissions, whereas others are voiced for the first time.

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3 Cyprus, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia acceded in 2004, whilst Bulgaria and Romania joined the EU in 2007.

4 Before the 2004 wave of accessions, the only intra-EU BITs in force were the Germany-Greece and Germany-Portugal BITs. Both agreements were concluded before Greece and Portugal acceded to the EU in 1981 and 1986, respectively. There is currently approximately 183 intra-EU BITs in place (Data from UNCTAD, http://investmentpolicyhub.unctad.org).

5 On the contrary, the conclusion of BITs was generally encouraged throughout the pre-accession period and, in fact, was dominated by Western countries, see Art. 76(2) Europe Agreement Establishing an Association Between the European Economic Communities and their Member States, of the One Part, and Romania, of the Other Part signed on 21.12.1993, OJ L 178/76, 12.7.1994; Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty', 2007, 24(5) *Journal of International Arbitration,* 455, p. 456; Marek Wierzbowski and Aleksander Gubrynowicz, 'Conflict of Norms Stemming From Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions' in Christina Binder and Christoph Schreuer (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), p. 544.

6 ECFIN/CEFCPE(2006)REP/56882, Economic and Financial Committee, *Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments* (2006), p. 7.

7 In addition to Sweden, the four other targeted countries are Austria, the Netherlands, Romania and Slovakia.

8 Formell underrättelse – överträdelse nummer 2013/2207, skrivelse från Europeiska kommissionen, Generalsekretariatet till Sveriges ständiga representation vid Europeiska unionen, June 18, 2015 (only in Swedish).

With its infringement proceedings against Sweden the Commission attempts to address the controversial *Micula* dispute against Romania. With the enforcement of the award by Romania resulting in the reinstatement of illegal state aid, *Micula* exemplifies the potential for conflicts that intra-EU BITs create on the internal market. Unsurprisingly, therefore, the letter is explicitly directed at the Sweden–Romania BIT. It is not particularly far-fetched to assume that the Commission's selection of Member States for the five pilot proceedings was motivated by a desire to target intra-EU BITs already subject to well-known disputes. The letter cites, as its basis of selection, the "unwillingness" of the Member States to terminate their intra-EU BITs, as well as, more generally, the increased use of arbitration based on such treaties. In this respect, it is notable that the BIT between Sweden and Slovakia is not being targeted at this stage, although, as already mentioned, the current proceedings will have broader ramifications for all intra-EU BITs currently in place.

3 Compatibility of intra-EU BITs with EU law

3.1 Investment protection and the internal market

3.1.1 Substantive aspects: standards of investment protection

Articles 1 and 2 of the Sweden-Romania BIT establish substantive standards of investment protection, constituting arguably the broadest and practically most useful protection for investors. The articles provide for, *inter alia*, promotion and protection of investments, fair and equitable treatment of investments, national treatment, and most favoured nation treatment. Additionally, Article 4 protects investors from expropriation without just compensation and Article 5 guarantees the right to free transfer of capital in relation to the investment. According to the Commission, these provisions overlap with primary EU law and discriminate against investors from Member States that are not Contracting Parties to the BIT.

It is indeed largely uncontested that standards of investment protection and the capital transfer clauses under intra-EU BITs fall squarely within the scope of the Treaty provisions on the right of establishment (Article 49 TFEU) and the free movement of capital (Article 63 TFEU).[9] It is irrelevant in this respect that EU law lacks standards of protection identical to those under the BITs – such as fair and equitable treatment – provided that the subject-matter of such standards falls within areas regulated by EU law. The expropriation provision is somewhat different from the other types of protection under BITs. This is because Article 345 TFEU stipulates that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". This raises the question as to whether the regulation of conditions for expropriation is a reserved competence of the Member States. EU law does, however, provide rules to protect property rights of EU nationals from interference by EU measures.[10] Additionally, as the Commission correctly reasons, Member State regulation of expropriation remains subject to the limits provided by EU law, including Articles 49 and 63 TFEU, and, more generally, the principle of non-discrimination.[11] In this respect, Article 4 of the Sweden-Romania BIT necessarily falls within the scope of EU law.

Notably, Member States are not prevented – through national law or international agreements – from enacting more favourable provisions for investors than those available under EU law.[12] Provided that the provisions of the BIT are not preemptive of EU internal market rules, BITs establish merely additional rights for investors, which cannot ultimately affect higher protective standards for investors under EU law.[13]

In an argument familiar to the Swedish Government, the Commission emphasises that the unconditional right to free transfer of capital under Article 5 of the Sweden-Romania BIT violates the right of the European Parliament and the Council to impose restrictions on capital transfers

9 Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements Between EU Member States under EU and International Law', 2011, 48 *Common Market Law Review,* 63, pp. 64–65.

10 *Ibid.,* p. 65; Indeed, the CJEU in *Kadi* (Joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, paras. 354 and 355), and before that in *Bosphorus* (Case C-84/95, EU:C:1996:312, paras. 19 and 20), acknowledged the recognition of a right to respect for property in EU law, which also finds expression in Article 17 of the Charter of Fundamental Rights of the European Union (OJ 2010 C83/02).

11 *Ibid.*, pp. 65-66.

12 *Ibid.*, p. 78; Wehland (2009), p. 310.

13 Wehland (2009), p. 310.

within the EU, in accordance with Article 75 TFEU.[14] The Commission correctly points out that Article 75 TFEU is not confined to the extra-EU context. More controversial is the argument of the Commission that Article 5 of the Sweden-Romania BIT has the potential to affect even the application of Articles 64(2) and 66 TFEU, which reserves power to the European Parliament and the Council to impose restrictions on the movement of capital to third countries. This, the Commission contends, is the case where a third country national has economic assets in a Member State that are protected under an intra-EU BIT. It is, however, difficult to conceive how the capital transfer clause will impact on restrictions imposed under Articles 64(2) and 66 TFEU, which are expressly directed at transactions between Member States and third countries.

3.1.2 Procedural aspects: investor-state arbitration and the 'survival' clause

The Commission also challenges both Article 7 (investor-state dispute settlement) and Article 8 (state-state dispute settlement) of the BIT. Even though no state-to-state proceedings under intra-EU BITs are known to have taken place to date, Article 8 is indeed in conflict with Article 344 TFEU, whereby Member States undertake to solve disputes falling within areas covered by EU law exclusively in the manner prescribed by the Treaties.[15] Therefore, in as far as substantive protection under the BIT overlap with EU internal market provisions, Article 8 allows disputes to take place outside the framework of the Treaties that are otherwise subject to the control of the CJEU. More complex is the issue of investor-state arbitration, which, in principle, falls outside the scope of Article 344 TFEU, which is addressed to Member States only.[16] In its letter, however, the Commission implies that it would require Member States to terminate agreements that provide individuals with means of dispute resolution other than those provided for under the Treaties. This would indeed constitute an extensive, but – in the eyes of the authors – reasonable interpretation of Article 344 TFEU. The Commission further suggests that investor-state arbitration – unlike domestic court proceedings – does not provide for affected third parties to intervene. This is erroneous. In fact, the Commission itself benefited on many occasions from Rule 37(2) ICSID that expressly allows for third-party submissions. The UNCITRAL rules have also consistently been interpreted as implicitly allowing for such submissions.[17]

Lastly, the Commission requests Sweden to ensure that the application of the BIT, including all ongoing disputes, is terminated with immediate effect. This is problematic considering that Article 10(3) of the BIT provides for the continuing application of the BIT for a period of 20 years following the period of notice. This aspect will be discussed in more detail below.[18] Suffice it to emphasise, at this juncture, that the provision does not raise questions of compatibility in and of itself but rather aggravates existing incompatibilities between other provisions of the BIT and EU law.

3.1.3 Discrimination under intra-EU BITs: a substantive or procedural issue?

The Commission's principal concern is that intra-EU BITs violate the principle of non-discrimination on grounds of nationality. As a fundamental principle of EU law, the principle of non-discrimination finds general expression in Article 18 TFEU and constitutes a pivotal element of both Articles 49 and 63 TFEU.[19] Member States are generally at liberty to implement more favorable rules than those provided for under the Treaty, as long as the benefits thereby created are available to EU investors on a non-discriminatory basis. The Sweden-Romania BIT, on the other hand, reserves substantive and procedural benefits to investors from the States Parties while excluding investors from other Member States.[20]

As regards double taxation treaties (DTTs), the CJEU has maintained a position that exempts Member States from the obligation to extend tax benefits to nationals of Member

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14 In *Commission v. Sweden* (Case C-249/06, EU:C:2009:119) the Commission successfully contested the incompatibility of capital transfer clauses in a number of BITs concluded by Sweden with third countries citing Articles 64(2) and 66 TFEU, which allows the European Parliament and the Council to impose restrictions on the movement of capital to third countries. For a discussion of this case see Potestà (2009), pp. 238 ff.

15 Case C-459/03, *Commission v. Ireland (MOX plant),* [2006] ECR I-4657, paras. 126-127.

16 Dimopoulos (2011), p. 87.

17 See generally Maciej Zachariasiewicz, 'Amicus curiae in international investment arbitration: can it enhance the transparency of investment dispute resolution?', 2012, 29 J. Int. Arb., 2; Jorge E.Viñuales, 'Amicus Intervention In Investor-State Arbitration', 2007, 61 Disp. Resol. J., 72.

18 *Infra* section 4.2 for a detailed discussion on the termination of survival clauses.

19 Article 18 TFEU is applicable to companies with a corporate nationality of a Member State, see Case C-221/89, *The Queen / Secretary of State for Transport, ex parte Factortame,* EU:C:1991:320.

20 Potestà (2009), pp. 231 and 237; Wehland (2009), pp. 310 and 311.

States, which are not privy to the DTT.[21] This is often referred to as supporting the notion that the EU principle of non-discrimination does not extend to intra-EU most favoured nation treatment (MFN).[22] Indeed, Member State agreements in areas of reserved competence[23] must in principle be compatible with the EU non-discrimination requirement[24]; however, the area of direct taxation is subject to an important caveat. Article 65(1)(a) TFEU provides Member States with the right to differentiate between taxpayers "who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested". The CJEU also supports the proposition that the abolition of double taxation is an objective of the Treaty.[25] Before the coming into force of the Lisbon Treaty, Article 293 EC even explicitly encouraged Member States to conclude intra-EU DTTs.[26]

The reasoning of the CJEU in *Saint-Gobain*[27] and *Gottardo*[28] further supports the conclusion that Member States are under an EU law obligation to unilaterally extend benefits under bilateral agreements to all EU nationals that are in a comparable situation. In neither of these cases was the unilateral extension of benefits deemed to affect the rights and obligations of the other State Party under the DTT or the cultural agreement, respectively.[29] In *Matteuci* the CJEU emphasised that an obligation under EU law to guarantee equal treatment arises also in cases where the burden falls on the other State Party to the agreement.[30] In the *Open Skies* cases, the CJEU was explicit in its insistence that international agreements by which a third country limits the benefits it grants to companies substantially owned and effectively controlled by nationals of a limited group of Member States violate the principle of non-discrimination.[31] These considerations apply equally to the Sweden-Romania BIT. The benefits under the BIT are provided by the host country. In the case of Sweden, a unilateral extension of benefits could easily be achieved through domestic legislation without affecting the rights and obligations of Romania under the BIT. Therefore, in order to salvage the agreement, both Sweden and Romania were required to unilaterally extend the substantive rights of the BIT – as well as to guarantee access to investor-state arbitration – to all EU investors in their territories.[32] If that is not possible, the BIT must be terminated.

It is furthermore noteworthy that a company incorporated in Sweden, which is owned or controlled by a Romanian national, may constitutes an investor for the purpose of the Sweden-Romania BIT, as well as a (corporate) Swedish national for the purpose of Article 49 TFEU.[33] In these instances, discrimination may manifest itself in relation to national treatment, i.e. national *vis-à-vis* non-national, rather than MFN treatment. It must be remembered that EU law does not recognise ownership or control as relevant criteria for justifying differential treatment.[34]

Having accepted that intra-EU BITs squarely falls within the scope of the EU principle of non-discrimination on grounds of nationality, it is important to identify the particular benefits that may accrue exclusively to investors from either Sweden or Romania. The discriminatory nature of Articles 2, 3, 4 and 5 of the Sweden-Romania BIT is perhaps best

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21 Case C-376/03, *D. v. Inspecteur van de Belastingdienst,* EU:C:2005:424, para. 63; Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation,* EU:C:2006:773, para. 94.
22 Dimopoulos (2011), pp. 81-82; Wehland (2009), pp. 315-317.
23 i.e. areas of competence that are reserved to the Member States; direct taxation is an area of reserved competence, see Case C-374/04, *Test Claimants*, para. 36.
24 Cases C-466-469/98, C-471-472/98, C-475-476/98, *infringement proceedings against Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden and the United Kingdom,* 5 November 2002.
25 Case C-540/11, *Daniel Levy and Carine Sebbag v. Belgian State,* EU:C:2012:581; Case C-336/96, *Gilly v. Directeur des services fiscaux du Bas-Rhin,* EU:C:1998:221, para. 16; see also Luc De Broe, 'Relief of Double Taxation of Cross-border Dividends within the Union and the Principle of Loyal Cooperation', 2012, 21(4) *EC Tax Review,* 180.
26 Case C-376/03, *D*, paras. 49 and 50; C-374/04, *Test Claimants*, para. 51 and 52.
27 Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt,* EU:C:1999:438, para 64.
28 Case C-55/00, *Elide Gottardo v. Istituto nazionale della previdenza sociale,* EU:C:2002:16, para. 39.
29 Case C-307/97, *Saint-Gobain*, para. 60; Case C-55/00, *Gottardo*, para. 37.
30 Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium,* EU:C:1988:460, para. 17.
31 See e.g. Case C-471/98, *Commission v. Belgium,* EU:C:2002:628, paras. 137–142.
32 For a contrary opinion see Wehland (2009), pp. 314 and 317.
33 Markus Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State', 2006, 7(6) *The Journal of World Investment & Trade,* 857; Dimopoulos (2011), p. 83.
34 Case C-221/89, *Factortame II*, paras. 29-33.

exemplified by the capital transfer clause (Article 5). It has already been demonstrated that an unconditional capital transfer clause in intra-EU BITs violates Article 75 TFEU to the extent that it potentially conflicts with restrictions and freezing of assets sanctions imposed by the Council. Article 65(1) TFEU provides Member States with the right to impose additional procedures or restrictive measures on capital movement. Capital transfer provisions in international agreements, which guarantee to investors the unrestricted transfer of capital, merely constitute a waiver of such rights. Provided that the capital transfer clause can be aligned with Article 75 TFEU, it would not principally be in violation of EU law.

However, a Member State that avails itself of its rights to impose additional procedures or restrictive measures in accordance with Article 65(1) TFEU would inevitably violate Article 5 of the Sweden-Romania BIT.[35] This does not mean that Romanian investors are exempted from measures imposed under Article 65 TFEU; a similar logic applies to the provisions of Article 75 TFEU. The CJEU has unmistakably established the primacy of the Treaties over international agreements in the case of conflict.[36] Rather Article 5 of the BIT provides Romanian investors with a cause of action for damages arising out of measures, which, though adopted in accordance with EU law, violate the BIT. This reasoning applies equally to Articles 2, 3 and 4 of the Sweden-Romania BIT in as far as Article 52 TFEU enables Member States to impose restrictions on the right of establishment on grounds of public policy, public security or public health. In cases of incompatibility Member States and their domestic courts are obliged to apply the Treaty and ignore the more beneficial rights under the BIT.[37] Investment tribunals, on the other hand, are neither bound by the primacy of EU law nor the case law of the CJEU.[38] While investment tribunals have had recourse to public policy exceptions in the past when applying the fair and equitable treatment standard, the scope and content of such exceptions are likely to differ significantly from that awarded to Member States under EU law.[39]

Thus, the Sweden-Romania BIT grants to a selected group of investors the power to access investor-state tribunals.[40] These investors differentiate themselves from other EU investors solely on the grounds of nationality. Eligible investors can collect damages outside the framework of EU law in claims against measures, which, although in accordance with EU law, violate the BIT.[41] Thus, irrespective of substantive incompatibilities of Articles 2, 3, 4 and 5, discrimination under the Sweden-Romania BIT is an issue that ultimately manifests itself by the application of Article 7 to investor-state arbitration.[42]

3.2 Other considerations concerning agreements amongst Member States

Lastly, the Commission contends that the Sweden-Romania BIT more generally covers an area that, in accordance with Article 3(2) TFEU, falls within exclusive EU competence. Relying on *Pringle,* the Commission reasons that Member States are prevented from concluding agreements among themselves that – as in the case of the BIT in question – "may affect common rules or alter their scope".[43] *Pringle*, however, addresses intra-EU agreements that run counter to EU objectives or substantively affect

[35] With the exception of perhaps Article 65(1)(a) which allows Member States "to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested".

[36] Case 10/61, *Commission v. Italy,* EU:C:1962:2, para. 23; Case 235/87, *Matteucci*; Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* EU:C:2014:2454, para. 193; Case C-28/12, *Commission v. Council,* EU:C:2015:282, para. 40.

[37] Case 10/61, *Commission v. Italy*, para. 23; Opinion 2/13, *Accession to the ECHR*, para. 193; Case C-28/12, *Commission v. Council*, para. 40.

[38] Wehland (2009), p. 300; Miron discusses the relationship of arbitration tribunals with the CJEU and points out that: "[the CJEU case law] may be identifying arbitration as a 'safe shore' from the application of EU law, whenever the European norms may be disadvantageous for the party commencing arbitral proceedings", see Miron (2014), p. 334.

[39] Dimopoulos (2011), pp. 79–80.

[40] Potestà (2009), pp. 232–233.

[41] This is further supported by a 2006 Commission note setting out that: "[T]he risk remains that arbitration instances, possibly located outside the EU, proceed with investor-to-state dispute settlement procedures […]. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States as a possible outcome.", The Free Movement of Capital, Note for the Economic and Financial Committee, prepared by the European Commission, Internal Market and Services DG, 27, cited by Wehland (2009), p. 309.

[42] For a contrary opinion see Söderlund (2007), p. 462.

[43] Case C-370/12, *Thomas Pringle v. Government of Ireland,* EU:C:2012:756, paras. 100–101.

rights established under EU law or the powers of EU institutions. The Sweden-Romania BIT merely overlaps with Treaty provisions on the internal market, providing additional protection to investors. It has already been mentioned that Member States are not precluded from adopting more beneficial rules on investment protection, provided that these apply in a non-discriminatory way to all EU investors. It is noteworthy, in this respect, that *Opinion 2/13* does not, as the formal letter of notification appears to suggest, support the Commission's claim. On the contrary, *Opinion 2/13* underlines that Member States are under an obligation to resolve conflicts between their international commitments and EU law in favour of the latter.[44] Hence, insofar as Article 5 of the BIT is incompatible with Article 75 TFEU, Swedish courts and authorities must guarantee that Romanian investors do not escape restrictions imposed under Article 75 TFEU.

Unlike domestic courts, however, investor-state tribunals, established under Article 7 of the Sweden-Romania BIT, are neither bound by Article 3(2) TFEU nor the case law of the CJEU. The recent *Micula* award and, more generally, investment awards resulting in the reinstatement of illegal state aid,[45] demonstrate the extent to which investor-state arbitration can affect common rules of EU law. Paradoxically, this argument is not advanced by the Commission in its formal letter of notification.

Something the Commission does address is that investor-state arbitration undermines the principle of mutual trust. The Commission, again, relies on *Opinion 2/13* where the CJEU refers to Article 2 TEU as the basis for mutual trust between the Member States.[46] Article 2 TEU stipulates that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Despite the significance of the principle of mutual trust for the protection of fundamental rights in the EU, it remains difficult to transfer the reasoning of the CJEU in *Opinion 2/13* to the field of investment protection.[47]

4 Effects of termination

In the formal letter of notification, the Commission underlines that the legal effects of the intra-EU BITs must cease with immediate effect.[48] As a matter of international law, States Parties may suspend a treaty, withdraw from it, or terminate it by mutual consent. Withdrawal is the unilateral termination of an agreement.[49] Also, treaties can be renegotiated in such a way as to make them compatible with other alleged obligations.

In discussing these questions, the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as VCLT or Convention) is taken as the point of departure. Sweden and Slovakia are parties to the Convention,[50] but not Romania. However, parts of the VCLT are regarded as a codification of customary international law[51] and some of the Convention's rules on termination have been applied as customary law.[52] Leading commentators hold that the

44 Opinion 2/13, *Accession to the ECHR*, para. 193; Case C-28/12, *Commission v. Council*, para. 40.

45 Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards', 2015, 16(2) *The Journal of World Investment and Trade,* 205.

46 Opinion 2/13, *Accession to the ECHR*, para. 168.

47 Potestà discusses the principle of mutual trust with reference to the objective of intra-EU BITs to provide a depoliticised forum and an alternative to judicial structures in Central and Eastern European countries, which were inherently distrusted by investors. He is correct in pointing out that this objective is no longer relevant in a post-accession context. However, it is argued here that this is limited to the objectives underlying the conclusion of intra-EU BITs in general and does not, therefore, extend to the judicial function of investment tribunals, see Potestà (2009), p. 233.

48 Formal letter of notification, p. 15, where the Commission notes that the BIT should be ended in such a way that all future application ceases, including the ongoing proceedings instituted through the conflict resolution available in the BIT. Furthermore, the Commission notes that Sweden must assure that Article 10(3) in the Swedish-Romanian BIT be not used in order to achieve further application.

49 In a bilateral (and more seldom in a multilateral) setting this is at times called "denunciation".

50 Sweden has made a number of interpretative declarations that do not appear important in this context and Slovakia has not entered any reservations or interpretative declarations.

51 James Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (Oxford University Press, 2012), p. 367; Malcolm Shaw, *International Law*, 7th edn. (Cambridge University Press, 2014), p. 655; Anthony Aust, *Modern Treaty Law and Practice*, 2nd edn. (Cambridge University Press, 2000), pp. 12–13.

52 For example in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at p. 47.

effect of the Convention is considerable even where it is not formally applicable.[53]

4.1 Unilateral or mutual termination

As the Commission requests all the targeted Member States to end their BITs, withdrawal is not what is being sought. Rather, the Commission desires that Member States terminate the agreements by mutual consent. However, it may be that the five targeted states will react differently, and, consequently, that one State Party to a BIT may wish to terminate it, whereas the other State Party desires to keep it in place. In such circumstances, the rules of the BIT will determine the possibilities for unilateral termination according to Article 54(a) of the VCLT. If the article does not provide for such termination, a party cannot withdraw from the treaty unless (a) it is established that the parties intended to admit the possibility of withdrawal, or (b) a right of withdrawal may be implied by the nature of the treaty, according to Article 56(1) of the VCLT. The onus to prove that the exceptions are applicable is on the State Party wishing to withdraw.[54] The rule on the implied right of withdrawal will only rarely be of relevance, as most BITs regulate termination.[55] Moreover, the situation will differ between BITs and their wording must, consequently, be carefully studied. In the case of the Sweden-Romania BIT, the relevant rules on termination were drafted together with the rules on prolongation of the treaty. These questions will thus be discussed together.

Both the Sweden-Romania and the Sweden-Slovakia BIT have rules that concern automatic prolongation. Articles 10(2) and 11(2) of the two respective BITs both read as follows: "[t]his Agreement shall remain in force for a period of twenty years. Thereafter it shall remain in force until the expiration of twelve months from the date that either Contracting Party in writing notifies the other Contracting Party of its decision to terminate this Agreement".[56]

Thus, when the first twenty-years period has lapsed, each Contracting Party is free to terminate the agreement unilaterally, but subject to the twelve-month period. Depending on the wording of a treaty, unilateral termination might be possible during an initial period of application, but, in most instances, the ordinary meaning would indicate that a party cannot withdraw unilaterally within the initial period.[57] The most reasonable interpretation is therefore that the minimum period of application is 21 years, where only one of the parties wishes to terminate it.[58] Additionally, this is further subject to the rules of the so-called survival clause.

However, as long as both parties wish to terminate the agreement, this can be done at all times. This applies notwithstanding the possibility that the treaty provides for an initial period of application.[59] However, to the extent that third-party rights have arisen those might continue to subsist. That question will be discussed under section 4.3 below.

4.2 Termination and survival clauses

Most BITs include application of the rules of the treaty to previous investments even after their termination. Such survival clauses are common in BITs.[60] They do not preclude unilateral termination, but regulate its effects.[61] Depending on their wording, they might be considered applicable even in instances of termination by consent.[62]

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53 Crawford (2012), p. 368: "Indeed, its provisions are regarded as the primary source of law, irrespective of whether the VCLT applies qua treaty in the given case." In a similar vein, see Aust (2000), p. 12: "When law of the treaties questions arise during negotiations, whether for a new treaty or one concluded before the entry into force of the [Vienna] Convention, the rules set forth in the Convention are invariably relied upon, even when the states are not parties to it."

54 Aust (2000), p. 290.

55 In situations where this is not the case, a right to withdrawal will typically not be implied. As BITs are designed by the States Parties to provide stability and regulate termination, it is probable that the intention of the drafters or the nature of the treaty will not imply that withdrawal was contemplated. Aust (2000), p. 291, holds that withdrawal from commercial or trading agreements are more likely to fall under the 56(b) exception.

56 The only difference is that the Swedish-Slovakian BIT contains a misspelled "therafter", at least in the version printed in SÖ 1991:42.

57 Harrison (2012), at p. 934.

58 See examples to this effect in Aust (2000), pp. 284–85.

59 Aust (2000), *Modern Treaty Law and Practice*, p. 288.

60 Federico M. Lavopa, Lucas E. Barreiros and M. Victoria Bruno, 'How to Kill a Bit [sic] and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties', 2013, 16(4) *Journal of International Economic Law*, 1, p. 11.

61 Harrison (2012), p. 935.

62 See for example the yet unpublished case *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, where the relevant BIT was reportedly terminated by mutual consent.

Thus, if the Member States decide to terminate their respective BITs with immediate effect, care must be taken to make sure that a possible survival clause is not activated. Survival clauses normally provide for both the substantive and dispute resolution provisions of the agreements to remain in force for a specified time after the date of the notice of termination. In the Sweden-Romania BIT, the period of time is set to twenty years, while the Sweden-Slovakia BIT has a ten-year survival clause. Both clauses apply only to investments made prior to the date when the notice of termination becomes effective.[63] Therefore, in cases of unilateral termination, investors have a twelve-month period to establish investments that are protected. This protection lasts for the length of time specified in the BITs – in the present case, respectively, ten and twenty years after the twelve-month time has lapsed.

The Sweden-Slovakia BIT was signed on 13 November 1990.[64] Following the exchange of notes, the Agreement entered into force on 23 September 1991.[65] It can thus be terminated unilaterally, but subject to the twelve-month waiting period. Such termination would trigger the survival clause in Article 11(3), which would extend for an additional ten years the protection of the substantive and conflict resolution provisions to investments made prior to the effective date of the notice of termination. Practically speaking, this means that a unilateral termination would grant investors one year to benefit from a protection that would then continue for a further ten years.

In the Sweden-Romania BIT, the situation is different. The Agreement was signed on 29 May, 2002.[66] Following exchange of notes, it entered into force on 1 April 2003.[67] Thus, the initial period of twenty years has not yet lapsed. Provided that no other right to withdraw from the treaty can be implied, this means that it cannot be terminated unilaterally until 1 April 2023. The only possibility of terminating the treaty before that date, therefore, is by mutual consent.

As discussed above, by virtue of Article 54(b) of the VCLT, termination of a treaty can be effected by the consent of all parties at any time. Thus, with respect to the Sweden-Romanian BIT, such termination can be achieved in spite of the initial period of twenty years. Termination releases the parties from any obligation to further perform the agreement. Therefore, the States are free to opt out of the survival clause by mutual consent. An exception exists, however, under Article 70(1)(b) of the VCLT, whereby the termination does not affect any right, obligation or legal situation of the parties created through the execution of a treaty prior to its termination. As this exception concerns the legal situation of the parties, it does not apply to vested rights of individuals.[68]

4.3 Termination and third-party rights

As BITs afford rights to third parties, some authors have discussed whether international law might restrict the removal of such rights.[69] This is often discussed either in terms of the establishment of third-party rights, acquired rights, or the establishment of “objective régimes”. The latter concept was discussed by the International Law Commission (ILC) in the course of the drafting of the VCLT and has been influential despite the fact that the ILC did not incorporate it into the Convention.[70] The notion is connected to the concepts of contractual and law-making treaties. Treaties that are of a law-making character are more likely to create third-party rights that cannot be revoked. Though often treated together, the notion of third-party rights and objective régimes are not inseparable.[71] Vested

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63 Article 10(3) of the Sweden-Romania BIT and Article 11(3) of the Sweden-Slovakia BIT.

64 Article 11(1) provides e.g. that the Agreement enters into force on the day the two Contracting Parties have notified each other. The original Contracting Parties were Sweden and the Czech and Slovak Federal Republic. In a letter to the UN Secretary General of 19 May 1993, however, Slovakia expressed its intent to remain bound by the treaties of Czechoslovakia.

65 According to SÖ 1991:42, p. 1.

66 Article 10(1) provides that the Agreement enters into force on the first day of the second month following the date of receipt of the last notification.

67 According to SÖ 2003:2, p. 1.

68 Aust (2000), p. 303,

69 This is in Harrison (2012), p. 942 ff.; Tania Voon, Andrew Mitchell and James Munro, ‘Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights’, 2014, 29(2) *ICSID Review*, 451, p. 468 *et seq.*

70 International Law Commission, The Yearbook of the International Law Commission, 1966, Vol. II, A/CN.4/SER.A/1966/Add.l, p. 231.

71 They are also connected to the question of acquired rights and the distinction between “executed” and “executory” stipulations, Hervé Ascensio, ‘Article 70’ in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties – A Commentary*, (Oxford University Press, 2011) at p. 1592 *et seq*. See also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge University Press, 1986), pp. 403–404.

rights seem to concern situations where third-party rights are intended to be irrevocable. The similarity between treaties granting third-party rights and objective régimes is that they aim to transcend the mere contractual relationship between the parties and achieve legal effects outside of those relationships. The difference is that an objective régime aims to legislate more generally, creating *erga omnes* effects, while a treaty granting third-party rights yields more limited individual rights.[72] The point of departure is that treaties provide rights between the parties and that the rights of non-state third parties are incidental to the original treaty.[73]

Typically, law-making treaties are multilateral treaties, aiming at the creation of global or regional standards.[74] In the case of BITs, we are probably not confronted with treaties attempting to legislate in a particular area. Rather, the typical BIT is contractual in nature, aiming to produce mutual gains for the Contracting Parties through the idea that *protection* of investments in one state will lead to *promotion* of investment in the other. In order to achieve that reciprocal bargain, third-party rights are granted to investors. The system of BITs was used only when a multilateral approach had failed.[75] These treaties are most likely to be considered contractual in nature.

The point of departure as far as third-party rights are concerned is found in VCLT Article 34. The rule adopts the principle of *pacta tertiis nec nocent nec prosunt*, meaning that third parties can neither be harmed nor benefitted by treaties. This rule reflects customary international law with respect to relations between States.[76] It clearly does not regulate the rights of third parties that are not States.[77] With regard to organisations – that are limited subjects of international law – its application is less certain.[78] However, the rule can be used as a point of departure for analogies.

According to Article 37(2) of the VCLT, a right is established for a third State if it is clear that the right was intended not to be revocable or subject to modification without the consent of the third State. Thus, the intention of the parties is determinative of whether the third-State rights should be revocable by mutual consent.[79] As consent is the basic principle of treaty law, it follows that the burden of proof is on the party wishing to establish that the treaty has established a third-party right.[80] This also flows from the *pacta tertiis* principle, which holds that treaties generally do not produce third party effects.[81] Also, as the VCLT provides default rules, one could argue that the inclusion of a survival clause constitutes regulation of third party rights.[82]

To the extent that the rules for the rights of third States can be applied analogously, one must establish if these rights were intended to be irrevocable. In relation to the two Swedish BITs at hand, two factors indicate that such rights are seen as auxiliary and not as aims in themselves: firstly, the increased economic cooperation is intended "for the mutual benefit of both States"[83] and, secondly, the investment promotion and protection are designed to "favour the expansion of the economic relations between the Contracting Parties".[84] If this interpretation is correct, this would make these rights stand apart from human rights, which are afforded to third-party individuals non-

72 Lori F. Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials*, 4th edn. (West Group, 2001), p. 519.
73 Christine Chinkin, *Third Parties in International Law* (Oxford University Press, 1993), at pp. 13–14: "States are free to waive, renounce, or dispose of a national's rights or interests by treaty unless restricted by national law."
74 Clear-cut examples are international human rights treaties, the fundamental rules of Treaty Law and State Responsibility, and the Law of the Sea Convention.
75 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (Kluwer Law International, 2009), p. 20 ff.
76 Harris states that this rule "undoubtedly reflects customary international law", David J. Harris, *Cases and Materials on International Law*, 6th edn. (Sweet & Maxwell, 2004), p. 847.
77 Pierre D'Argent, 'Article 36', pp. 929–947 in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties – A Commentary* (Oxford University Press, 2011), at p. 930.
78 Voon, Mitchell and Munro (2014), p. 469 ff.
79 This seems to follow the same approach as the Permanent Court of International Justice in the *Case of the Free Zones of the Upper Savoy and the District of Gex*, Judgment of June 7th, 1932, Series A/B no. 46, at pp. 55–57.
80 Aust (2000), p. 259, writes, with respect to the rights of third states, that "[t]he parties may not therefore revoke or modify rights *if it is established* that they were intended not to be revocable" (emphasis added).
81 The *Case of the Free Zones of the Upper Savoy and the District of Gex*, at p. 147: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour."
82 Voon, Mitchell and Munro (2014), p. 470.
83 Quotes are from the almost identical preambles of the Swedish BITs with Romania and Slovakia.
84 Ibid.

instrumentally, by virtue of their human dignity.[85] Also, not even human rights have been deemed to create irrevocable third-party rights.[86]

However, the preambles to the relevant BITs also contain language that indicate that the third-party rights should properly be interpreted as rights protection and, therefore, as constituting irrevocable third-party rights. One such example in the two above-mentioned BITs is found in the respective preambles, where they indicate that the Agreements aim to "maintain fair and equitable relations for investments". This language is suggestive of an intended right for deontological, rather than for instrumental, purposes.[87] However, the fact that the third-party right is seen in this way does not prove that it is intended to be irrevocable. However, this is a line of argumentation that an investor might pursue in an arbitration. Regardless of whether the Member States perceive this possibility as a potential risk or gain, an appropriate response may be formulated. For example, a subsequent agreement pursuant to VCLT 31(3)(a) could be adopted to strengthen the preferred approach.

Lastly, the Commission requests Member States to exclude any litigation under the relevant BITs. In order to determine if this is possible, a comparison with similar situations in public international law is a fruitful exercise. In several situations, the International Court of Justice continued litigation even after the termination of a treaty, resulting in removal of its jurisdiction.[88] This is typically justified by the view of the dispute as a legal situation with an existence independent of the treaty.[89] This gives weight to the view that procedural rights exercised through litigation cannot be retroactively extinguished.[90] This seems particularly reasonable in instances where an award is rendered and the litigation has ended.[91]

To sum up, most factors militate against the establishment of irrevocable third-party rights in the relevant Swedish BITs. However, there are certain factors that could be interpreted as speaking in favour of such rights: in particular, where the bilateral investment agreements together can be seen as establishing an "objective régime" or where treaties are so worded as to indicate a deontological type of property protection. Furthermore, there is evidence of an international practice indicating that retroactive extinguishment of procedural rights of States cannot frustrate litigation or change a rendered award.

5 Concluding Remarks

It is likely that the substantive standards of protection under the Sweden-Romania BIT violate the EU principle of non-discrimination on grounds of nationality. Whereas the CJEU recognises a higher level of discretion for Member States when concluding intra-EU DTTs, that reasoning cannot be extended to the Sweden-Romania BIT. The Sweden-Romania BIT provides Romanian investors in Sweden with greater substantive and procedural protection than that which is offered to investors from other Member States in a comparable situation. According to CJEU case law, Sweden is under a principal obligation to extend the benefits under the Sweden-Romania BIT to all EU investors. Although there might be some theoretical merit to such a principle, the intricate web of existing intra-EU BITs concluded by Romania renders this solution virtually impossible. Insofar as Sweden is unable to reconcile its obligations under the BIT with EU law, it is under an obligation to renegotiate or terminate the agreement. In this regard, termination of the Sweden-Romania BIT appears to be a pragmatic way to eliminate incompatibilities with EU law.

The possibilities for termination of treaties are governed by international law. As BITs create third-party rights, many of

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85 See, for example, the International Covenant on Civil and Political Rights, which states in the preamble, "Recognizing that these rights derive from the inherent dignity of the human person".

86 Ascensio (2011) at p. 1597 *et seq*.

87 This distinction between values that constitute goods in themselves and values that are important because they achieve another good is common in theories about rights.

88 E.g. the *Nottebohm Case (Preliminary Objections),* Judgment of November 18th, 1953: I.C.J. Reports 1953, p. III, see Ascensio (2011) at p. 1603 *et seq.* Note however that these situations often concern instances where the jurisdiction is removed unilaterally. Many reasons for a different outcome can be found where the decision is mutual.

89 Ascensio (2011) at p. 1603.

90 Voon, Mitchell and Munro (2014), p. 465, reaches a similar conclusion "particularly if [the extinguishment] involves demonstrable unfairness of bad faith on the part of the host State". In the context in question, such unfairness or bad faith seems unlikely.

91 Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), states at p. 403–404 that "a settlement of a dispute effected by a treaty does not become re-opened because the treaty terminates or is denounced".

the rules in the VCLT will give limited guidance. However, the immediate inapplicability of the BIT can probably only be achieved if the termination is effected by mutual consent. In such circumstances, it is wise to explicitly address the effect of the survival clause. It seems unlikely that the BIT would have created irrevocable third-party rights; however, the Member States may seek clarity on the issue by concluding a subsequent agreement. As a matter of international law, the termination of the Sweden-Romania BIT would not affect the validity of already rendered awards, or currently on-going proceedings.

As the obligations under international law and EU law appear to be irreconcilable, we are confronted with a treaty conflict. The type of forum that is chosen to pronounce on these questions, i.e. the CJEU or investment tribunals, will probably impact on how the question of compatibility is approached. It is very likely that the outcome of such a proceeding will have broader ramifications for existing intra-EU BITs that are not currently targeted by the Commission.[92] Thus, it remains to be seen if the infringement proceedings will encourage Member States to adopt an EU-wide solution to this problem.

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[92] Joel Dahlquist and Luke Peterson, 'European Commission's Infringement Arguments Come into Focus, as the Push to Dismantle Intra-EU BITS Also Shows Signs of Broadening', Investment Arbitration Reporter, Sep 10, 2015, available at http://www.iareporter.com/articles/ecs-infringement-arguments-come-into-focus-as-the-push-to-dismantle-intra-eu-bits-also-shows-signs-of-broadening/.