

**INTRA-EU BITS – ARE THEY REALLY STILL NECESSARY?
THE BEST AWARD OF THE YEAR 2012
AND PROF. EMMANUEL GAILLARD SAY “YES”**

Agnieszka Różalska-Kucal*

1. Introduction

The protection of foreign direct investments in the European Union is probably the greatest in the world, especially as regards investments amongst EU Members States. In addition to the existence of a real web of bilateral investment law treaties (constituting international law instruments), the EU legal system also contains rules guaranteeing the freedom of establishment, free movement of capital and numerous specific legal provisions regarding investments. However, the situation wherein there exist two independent lines of legal protection gives rise to more questions than it answers and genuine debate is currently underway within the European Union to seek a resolution to the problems this causes.

The problem in its current guise has arisen relatively recently, namely following enlargement of the European Union in 2004. It was caused due to the simple fact that States from the “old” EU had not

* Courtr of Arbitration of the Polish Confederation of Private Employers “Lewiatan”.

entered into investment agreements *inter se*, since they did not find it necessary. The very first BIT was signed by Germany and Pakistan in 1959 at the moment of developing European economic integration, following the conclusion of the Treaties of Rome, which would affect and protect investors from all the Member States and would result in more specific and strict protection than that resulting from international instruments. The only exceptions were the treaties concluded between Germany, on the one hand, and Greece and Portugal on the other hand¹. Both of these treaties were, however, signed prior to accession of Greece and Portugal to the EU and no single claim is known to have arisen on the basis of these treaties².

A different situation applied as regards the States from Central and Eastern Europe. At the end of the 1980s and the beginning of the 1990s, hence at the moment of their economic transformation, these States concluded many investment treaties, amongst which were those concluded with the “old” EU Members. The economies of the post-communist States needed foreign investments in order to assist their development and transformation into capitalist systems, whereas investors mainly from Western Europe were keen to invest in the newly opened markets. Consequently, the number of BITs concluded between the current EU Members States rose to 190 in 2008³. The result of this process was an increase in foreign direct investment inflows, *e.g.*, in Poland from EURO 1,581.00 million in 1994 to 17,242.00 million in 2007⁴. A very similar situation occurred in other States such as Hungary or the Czech Republic. However, following the enlargements of 2004 and 2007, investors and

¹ Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Bonn, 1980; Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Athen, am 27.3.1961, available at: <http://www.unctad.org/ia>.

² Ch. Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, ‘Journal of International Arbitration’ 2007, Vol. 24, No. 5, at p. 456.

³ 2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, Brussels, 8.1.2008, 5123/08, at para 14.

⁴ UNCTAD World Investment Report 2010, available at: http://www.unctad.org/en/docs/wir2010_en.pdf; Polish Information and Foreign Direct Investment Agency, www.paiz.gov.pl.

investments have been subjected to two different legal systems having the same aim – the protection and promotion of foreign direct investments.

The discussion concerning the relationship between intra-EU BITs and EU law became known to the public in 2007 due to the case *Eastern Sugar B.V. v. The Czech Republic*⁵. This case made reference to a note from the European Commission to the Economic and Social Committee of 2006, which contained procedural and substantive arguments regarding the unacceptability of intra-EU BITs. The arguments offered in support of this opinion included *inter alia*: the prevalence of EU law over BITs, the absence of control by the Court of Justice over decisions taking EU law into account, the unequal treatment of investors by Member States and, finally, the superfluity of such agreements. The Commission concluded its statement by advising the Member States to exchange notes confirming the cessation of applicability of intra-EU BITs. The Tribunal did not agree with many of these arguments, and, similarly, it did not agree with an argument on the termination of BITs⁶ as a result of EU enlargement.

Since recently, discussions on this matter have reached their pinnacle. In October 2010, the European Commission initiated a meeting with the Member States to discuss whether intra-EU BITs were still necessary or whether they should be terminated. Simultaneously, on 26.10.2010, an arbitral tribunal consisting of Professor Vaughan Lowe, Professor Albert Jan van den Berg and Mr. V. V. Veeder issued an award on jurisdiction, arbitrability and suspension in a case between Eureko B.V. and the Slovak Republic, which essentially supported the *Eastern Sugar* decision⁷. The award however was not merely a repetition of the arguments raised in that case. Given the existence of discussion throughout the whole of Europe in recent years, the award represents a well-structured analysis of most relevant jurisprudence and constitutes an important interpretation and guidance for potential similar cases. Its importance has been also confirmed by the OGEMID which chose this Award as the Arbitration

⁵ *Eastern Sugar B.V. v. The Czech Republic*, SCC No. 088/2004, Partial Award of 27.3.2007 [“*Eastern Sugar*”], available at: www.iisd.org/pdf/2007/itn_eastern_sugar.pdf.

⁶ *Eastern Sugar*, at para 127.

⁷ *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on jurisdiction, arbitrability and suspension, 26.10.2010 [“*Eureko*”], available at: <http://ita.law.uvic.ca/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf>.

Award of the year 2010⁸. Nevertheless, it has not put an end to the ongoing discussion.

Recently, the European Commission has stated that all intra-EU BITs should be terminated, which has given rise to numerous objections⁹. A majority of Member States have already expressed their opinion that BITs should remain in force¹⁰. This view is shared by academics such as E. Gaillard, who underlines that the disappearance of BITs within the EU would only lead to the export of the registered seats of the greatest companies to outside the EU in order to enable their continued reliance on the BIT system¹¹. Conversely, other European States support the abandonment of BITs and provide protection for foreign direct investments solely on the basis of EU law. In other words, those subjects who support the repeal of intra-EU BITs are mainly host States and the European Commission, whereas exporting States and investors are rather content with the current duplicity of legal protection. And this is the essence of the problem – it is rather improbable that all 27 EU Members will agree to repeal all intra-EU BITs, which means that some will remain in force. Notwithstanding the economic motivations underlying the various States' preferences, from a legal perspective it is worth re-thinking whether in fact the Commission's view is justified in claiming that intra-EU BITs should be repealed. Probably the only argument which would lead to the undisputed disappearance of the BITs in question is their inconsistency with EU law. But is this really the case?

This article examines whether or not intra-EU BITs have terminated within the meaning of Article 59 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). It focuses on: (1) the question of applicability of this provision; (2) the issue of the same subject matter of two regimes; (3) whether the parties intended to replace the earlier treaty

⁸ <http://www.transnational-dispute-management.com/ogemidawards>.

⁹ <http://www.globalarbitrationreview.com/news/article/29884/killing-off-intra-eu-bits-european-commission-plans-level-playing-field-investors>.

¹⁰ 2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, available at: http://www.parlement.com/9353000/1/j4nvgs5kkg27kof_j9vvhy5i95k8zxl/vi7jgt7lx2y9.

¹¹ <http://www.globalarbitrationreview.com/news/article/29884/killing-off-intra-eu-bits-european-commission-plans-level-playing-field-investors>.

with the latter; and (5) whether the provisions of the two regimes are so incompatible as to render them mutually incompatible.

2. Applicability of Article 59(1) of The Vienna Convention on the Law of Treaties

The main issue is the question as to whether or not the investment treaties entered into by and between the Member States have been, following their accession to the EU, replaced by the appropriate provisions of EU law, thereby leading to their termination. As mentioned above, this problem was first publically raised in the *Eastern Sugar* case. The case concerned a Dutch sugar producer acting on the territory of the Czech Republic. The subject matter of the dispute were three decrees from the years 2000, 2001 and 2002 aiming to make the Czech sugar market fit for competition within the framework of the EU by, *inter alia*, imposing minimum and maximum purchase prices, establishing an obligation to export excess sugar and – the most important in this case – fixing sales quotas which, following the second decree, were to be reduced in the event that they remained unutilized and upon the third decree with regard to Eastern Sugar they were reduced by more than the entire country quota reduction¹². Consequently, Eastern Sugar submitted that the Czech Republic had violated the Czech – Dutch BIT by failing to provide fair and equitable treatment, failing to provide full protection and security and by imposing discriminatory measures on management or enjoyment of the investment.

The very basic argument raised by the Czech Republic was that, as of the moment of accession to the EU, the bilateral investment treaty no longer represented the applicable law regulating the rights and obligations of the investments and had been replaced by the appropriate provisions of EU law¹³. The Responding State further pointed out that, between EU Members, no single BIT had been concluded at the time of their membership since European economic integration also extended to the field of direct investments “leaving no room for bilateral treaties”.

¹² *Eastern Sugar*, at paras 293–296.

¹³ *Ibidem*, at paras 97–101.

Moreover, the BIT in question should have been deemed terminated in accordance with Article 59(1) of the Vienna Convention since both legal frameworks concerned the same subject matter and were mutually incompatible, firstly, given the possibility for discrimination amongst investors from different Member States (depending on whether or not the BIT has been concluded between States in question) and, secondly, the breach of the principle of mutual trust requiring the resolution of disputes based on EU law before the national courts¹⁴. Consequently, it was argued that the arbitration tribunal had no jurisdiction over the dispute¹⁵.

A similar situation arose in a dispute between Eureko B.V. and the Slovak Republic. The company in question is a well known insurance company which was interested in investing in Slovakia following that country's adoption of a package of reforms in 2004, aiming to liberalize the health insurance market. Union Healthcare, an entity incorporated on behalf of Eureko, transpired to be a great success and obtained almost 9% of the Slovakian health insurance market. However, in 2006 the new government introduced law amending the 2004 reforms. Eureko based its claim on nine measures which were, *inter alia*: the cap on operating expenses, the ban on brokers, the obligation to contract with specific state hospitals, a prohibition on the distribution of profits to shareholders, scrutiny of the company's budget, new solvency requirements and changes to the redistribution system.

At the jurisdictional stage, the Respondent challenged the tribunal's jurisdiction by highlighting that the BIT in question no longer constituted binding law. The Slovak Republic raised first and foremost Article 59 of the Vienna Convention, stating that two treaties, namely the BIT and the EC Treaty, concerned the same subject matter and either the States must be deemed to have intended the latter treaty to be binding or their provisions would be incapable of being applied simultaneously. Secondly, the Respondent relied on Article 30 of the Vienna Convention as regards the inapplicability of the arbitration clause and thirdly reference was made to the supremacy of EU law. Consequently, the tribunal was argued to lack jurisdiction. However, in the event that the tribunal decided otherwise, the Respondent requested a stay of proceedings and asked that the dispute be submitted to the ECJ.

¹⁴ *Ibidem*, at paras 102–107.

¹⁵ *Ibidem*, at para 108.

The basic issue discussed by both Tribunals, and still discussed by lawyers, is whether the intra-EU BITs have been terminated in accordance with Article 59(1) of the Vienna Convention¹⁶. The provision in question states as follows:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(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.”

Consequently, in order to recognize a treaty as terminated, two requirements shall be proved: firstly, that the later treaty addresses the same subject matter and secondly, either that the parties to both the treaties intended that the earlier treaty be replaced by the later or that the later treaty is inconsistent with the earlier one to such an extent that they may not be applied simultaneously.

3. The “same subject matter” problem

The first requirement resulting from Article 59(1) of the Vienna Convention is the most discussed aspect, in respect of which many years of debate have still failed to yield a common position. On the one hand, there is a bilateral investment treaty, on the other Treaty establishing European Community (now: Treaty on Functioning of the European Union¹⁷, “Treaty”) and in particular its provisions regulating the free movement of capital and freedom of establishment¹⁸.

¹⁶ Vienna Convention on the Law of Treaties, 23.5.1969; It is recognized however that it is applicable also to treaties concluded before its entry into force in 1980, since it codifies the international customary law in this regard: M. Shaw, *International Law*, Cambridge University Press, Cambridge 2003, at p. 811.

¹⁷ Consolidated Version of the Treaty on Functioning of the European Union, O.J. 30.3.2010, C-115, at p. 47.

¹⁸ T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, ‘Common Market Law Review’ 2009, Vol. 46, at p. 399; A. Radu, *Foreign Investors in the EU – Which “Best*

In the *Eastern Sugar* case the Czech Republic argued that the standard of protection arising from both regimes is not only comparable but also, when compared with EU law, it may be higher, since it provides more specific provisions¹⁹. Consequently, maintaining in force the BIT provisions would be *superfluous* given the existence of EU law on the same subject matter. The Tribunal, however, decided that the investment treaty regulates a different subject matter to EU law²⁰. It underlined that EU law guarantees the free movement of capital, which protects the rights of the investor to invest and to export profits to his home state, whereas the BIT covers also such substantial guarantees as the right to fair and equitable treatment (“FET”), full protection and security, it prohibits unjustified expropriation and – most essentially – it provides procedural protection, namely, the possibility to submit a claim to an international arbitration tribunal.

A similar approach to the Czech position was adopted by Slovakia in the *Eureko* case²¹. This State presented the arguments for the thesis that both treaties serve identical purposes by providing the same standards of protection, which was illustrated in the “Comparative table” presented below:

BIT	EC Treaty
Free Transfer of Capital (Article 4)	Free Movement of Capital (Article 56)
Fair and Equitable Treatment (Article 3(1))	Prohibition of discrimination (Article 12)
Full Security and Protection (Article 3(2))	Freedom of Establishment (Article 43)
Indirect Expropriation (Article 5)	Freedom of Establishment (Article 43), Article 17(1) ECHR

Furthermore, Slovakia underlined that the system of remedies in both regimes was comparable, since both – arbitration available under

Treatment”? Interactions between Bilateral Investment Treaties and EU Law, ‘European Law Journal’ 2008, Vol. 14, No. 2, at p. 239.

¹⁹ *Eastern Sugar*, at para 127; A. Radu, *op. cit.*, at p. 240.

²⁰ *Eastern Sugar*, at paras 159–166.

²¹ *Eureko*, at paras 65–77.

the BIT and dispute resolution before national courts within the auspices of the EC Treaty – enable a claim for damages. Consequently, since the Vienna Convention requires that the two treaties in question must “relate to” the same subject matter, they need not cover exactly the same subject matter, although this requirement was also argued to be fulfilled.

However, one should bear in mind that the provisions constituted by both regimes do not define the subject matter of two treaties. The subject matter as such is investment. The particular provisions providing, *inter alia*, for the scope of protection, procedural issues or system of remedies could easily differ between any two such treaties. It would suffice for one treaty to provide for litigation whilst the second provides for arbitration and the “same subject matter” requirement could be questioned. Hence, the subject matter or – strictly quoting the wording of the Vienna Convention – the condition that the two treaties are “relating to the same subject-matter” cover solely the definition of foreign direct investment (“FDI”). The question which arises, therefore, is whether the FDI means the same both within the BIT and EU law?

This problem is very often overlooked, since the term “investment” is so commonly used and similarly understood even when used in regard to different legal systems. The issue is more complex, since especially international law has not previously used the strict economic term “investment” but rather wider terms such as “property” or “rights”²². According to the economic meaning, investment is a transfer of financial resources aimed at a long-term project which gives rise to benefits, is at least partly managed by the investor and entails business risks²³. However, investment treaties are the very first source from which the definition of an investment may be derived. The BIT mainly provides a general definition as well as enumerative or particular list of assets that qualify as investments.

For instance, the Polish – Dutch BIT states that “the term ‘investments’ shall comprise every kind of asset” and enumerates, in particular, movable and immovable property as well as any other rights *in rem*, rights derived

²² R. Dolzer, Ch. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford 2008, at p. 60.

²³ *Ibidem*, p. 60.

from shares, title to money, intellectual property rights, *etc.*²⁴. Investment was similarly defined in the Canadian Model BIT, which lists particular types of assets before adding at the end “any other claims to money”²⁵. This is the broadest definition of the term “investment”, known as an “illustrative list”, since its main corpus is the phrase “any assets” and a non-exclusive list²⁶. However, this list may transpire to be very important, since arbitration tribunals firstly check whether the asset in question is on such a list and it is virtually unheard of that an asset was qualified as “any” or “other” assets²⁷. It is noteworthy that very often these lists broaden the scope of protection aimed originally at direct investments, by also including within their scope indirect investments (*e.g.*, possessing such an amount of shares as would not be sufficient to enable managing and controlling of the company) or *portfolio* investments²⁸.

Other treaties, as for instance the Ukrainian-Danish BIT, state that, first and foremost, investment extends to any kind of asset connected with the permanent provision of business²⁹. A similar definition is found

²⁴ Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments; Polish O.J. 1994, No. 57, Item 235.

Article 1 (a): “the term ‘investments’ shall comprise every kind of as set and more particularly, though not exclusively:

- i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
- ii. rights derived from shares, bonds and other kinds of interests in companies and joint-ventures;
- iii. title to money and other assets and to any performance having an economic value;
- iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
- v. rights to conduct economic activity, including rights to prospect, explore, extract and win natural resources, granted under contract, administrative decisions or under the legislation of the Contracting Party in the territory of which such activity is undertaken”.

²⁵ Article 1 of the Canada Model BIT 2004.

²⁶ P. Muchlinski, F. Ortino, Ch. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford 2008, at pp. 55, 57.

²⁷ C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *International Investment Arbitration. Substantive Principles*, Oxford University Press, Oxford 2007, at p. 172.

²⁸ P. Muchlinski, F. Ortino, Ch. Schreuer, *op. cit.*, at p. 56.

²⁹ Article 1(1) of the Agreement Concerning the Promotion and Reciprocal Protection of Investments concluded between the Kingdom of Denmark and the Ukraine on 23.10.1992.

in the US Model BIT from 2004, which extends the term investment to any asset owned directly or indirectly or controlled by the investor and which has such characteristics as the contribution of capital or other resources, the expectation of gain or profit, or the assumption of risk. It goes on to provide a list of examples of such investments³⁰. Such a definition is known as a “hybrid” definition, since the investment in question must not only be listed but must also fulfill the requirements stated in the *chapeau*³¹.

In order to constitute an investment within the meaning of international investment arbitration governed by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States³² (“ICSID Convention”), the asset in question must be qualified as an investment within the meaning of the ICSID Convention. Article 25(1) of the ICSID Convention states that an arbitration tribunal has jurisdiction over any dispute arising out of an investment³³. Consequently, if the asset in question is not an investment, the tribunal lacks jurisdiction over the dispute. However, the ICSID Convention does not define the meaning of investment, which resulted from an absence of consensus at the time of its drafting and fears that any agreed definition would soon become outdated³⁴. The role of defining investment within the meaning of the ICSID Convention was passed to arbitration tribunals. Despite the prior existence of some definitions³⁵, to date the dominant definition is that provided in the *Salini v. Morocco* case³⁶. In this case, the arbitration tribunal applied a four-step test previously known as the *Schreuer test*,

³⁰ Article 1 of the USA Model BIT 2004.

³¹ P. Muchlinski, F. Ortino, Ch. Schreuer, *op. cit.*, at p. 57; C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 172.

³² Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18.3.1965.

³³ Article 25(1) of the ICSID Convention: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”.

³⁴ C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 164.

³⁵ *Fedax B.V. v. The Republic of Venezuela*, Decision on Jurisdiction, 11.7.1997, ‘International Legal Materials’ 1998, Vol. 37, at p. 1378.

³⁶ *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, 23.7.2001, ‘International Legal Materials’ 2003, Vol. 42, at p. 609.

subsequently as the *Salini test*, and concluded that, in order to constitute an “investment”, the following features must be present: a contribution made by investor (financial, personal, know-how, equipment³⁷), a period for which the investment will continue (at least 2 years are required³⁸), business risk and significance to the economy of the host State (which often proves problematic³⁹). Again, this definition is rather directed towards direct investment, thereby excluding the possibility to protect indirect or *portfolio* investment through international mechanisms. Moreover, the aforementioned USA Model BIT has incorporated the *Salini test* and, similarly, the OECD has also proposed a definition of an investment as a direct investment having the objective of establishing a lasting interest in an enterprise which the investor can control and manage in the host State⁴⁰.

Nevertheless, it remains for a tribunal to decide whether or not the asset in question is an investment, since tribunals often do not adhere strictly to the *Salini test*. Consequently, the following were all defined as constituting investments: road infrastructure, weapons’ production, running a hotel, farming of shrimps, transporting minerals, credits, purchase of promissory notes or rights to manage a company⁴¹. Moreover, one tribunal stated that financial transfer is unnecessary in order to create an investment and that the crucial element is control over the asset in question⁴². However, actions taken at the pre-investment phase were not recognized as “investments” meriting protection⁴³. Nevertheless, recently the *Salini test* has once more been more strictly taken into account by arbitration tribunals when ruling on their jurisdiction⁴⁴.

³⁷ Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Decision on Jurisdiction, 14.11.2005, at para 131; Saipem S.p.A. v. The People’s Republic of Bangladesh, Decision on Jurisdiction, 21.3.2007, at para 100.

³⁸ Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt, Decision on Jurisdiction, 16.6.2006, at paras 93–96.

³⁹ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 69.

⁴⁰ OECD Benchmark Definition of Foreign Direct Investment, 4th ed., 2008, at pp. 11–13.

⁴¹ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 69; C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 165.

⁴² P. Muchlinski, F. Ortino, Ch. Schreuer, *op. cit.*, at p. 61.

⁴³ *Ibidem*, at p. 67.

⁴⁴ C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 170.

As regards European Union law, foreign direct investments were first defined in Appendix 1 to Council Directive 88/361/EEC of 24.6.1988 for the purposes of implementing Article 67 of the Treaty⁴⁵. This provision concerning the free movement of capital, was – by that time – not directly effective. With regard to the Directive, the Member States were obliged to abolish restrictions on capital movements, as defined in Appendix 1, and this provision was directly effective⁴⁶. The Appendix 1, called a “nomenclature”, was of great importance since it was *de facto* the first definition of movement of capital as such. Group 1 of the nomenclature was entitled “Direct Investments” and listed:

- “1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.
2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.
3. Long-term loans with a view to establishing or maintaining lasting economic links.
4. Reinvestment of profits with a view to maintaining lasting economic links.”

All transactions could be made either by non-residents into the State in question or by residents abroad. Moreover, at the end of the Appendix, a short explanatory note to the term “direct investments” was provided:

“Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.”

⁴⁵ O.J. 8.7.1988, L-178, at pp. 5–18.

⁴⁶ Criminal Proceedings against Aldo Bordessa, Vicente Mari Mellado and Concepción Barbero Maestre, Joined Cases nos. C-358/93 and C-416/93, Judgment of 23.2.1995, E.C.R. 1995, p. I-00361.

Following the entry into force of the Maastricht Treaty in 1993, the free movement of capital became a directly effective treaty-based freedom and it was uncertain how the term capital should be understood, since the Treaty continued to lack any definition thereof. The question was finally answered in 1999 when the European Court of Justice (“ECJ” or “The Court”), in the *Trummer v. Meyer* case⁴⁷, stated that, since no definition had been provided for in the Treaty itself, the definition from Appendix 1 to Directive 88/361 remained valid (despite the expiry of the Directive from 1.7.1990)⁴⁸. At the same time, however, the Court concluded that the nomenclature from the Appendix 1 is not an enumerative list and that free movement of capital should be understood in its widest sense. Furthermore, this was confirmed by one of the most famous cases, namely the *Volkswagen* case⁴⁹. This case concerned regulations issued by a State which limited shareholders’ rights by decreasing the voting power of shareholders owning more than one fifth of shares to such a level as would otherwise have been applicable in the case of an owner of one fifth of those shares. Equally, those regulations increased the shareholder majority required for particular decisions from three quarters in general law to fourth fifths in respect of the Volkswagen company. The ECJ stated that the free movement of capital also covers foreign direct investments, which implies the creation of a direct link between a natural or legal person and an enterprise by virtue of possession of a particular number of shares enabling the shareholder to exercise management control over a company⁵⁰. These restrictions were found to be unjustified and in violation of the Treaty.

At first glance, this definition is even more restrictive than in international investment law, since it requires a long-term economic activity within the host state. Moreover, on the basis of the Directive, EU law rather puts accent on either establishment of an enterprise or financial transfers regarding its management and control (acquisition

⁴⁷ Manfred Trummer and Peter Mayer, Case No. C-222/97, Judgment of 16.3.1999, E.C.R. 1999 [“Trummer v. Meyer”], at p. I-01661.

⁴⁸ *Ibidem*, at para 21.

⁴⁹ Commission of the European Communities v. The Federal Republic of Germany, Case No. C-112/05, Judgment of 23.10.2007, ECR 2007, at p. I-08995.

⁵⁰ *Ibidem*, at paras 72–78.

of shares, long-term loans, reinvestment of profits). Finally, it gives rise to serious doubts that, according to EU law, such assets as patents or services will be defined as direct investments. Moreover, other transfers of capital being indirect or *portfolio* investments are protected by EU law, however solely by the free movement of capital and not concurrently by the freedom of establishment (which also regulates direct investments, as explained further later in this article). Therefore the ECJ qualified as capital movement loans⁵¹ or purchase of land⁵². However, it remains the purchase of shares enabling management or control of a company that is predominantly recognized as a direct investment. In one such case, namely the *Commission v. Belgium* case, the Court in 2002 strictly referred to the nomenclature from Appendix 1⁵³.

Accordingly, it seems that the definition of a direct investment under international investment law, despite the double BIT and ICSID test, is broader. Not only can it cover particular assets but also rights, provided that those rights possess significant value or are crucial for the investment as a whole. In other words, treaties which aimed to protect foreign direct investment can also cover indirect investments or *portfolio* investments. Quite to the contrary, under EU law, given the aforementioned linking of direct investments and the free movement of capital, solely financial or quasi-financial transfers having the aim of a long-term business activity are recognized as direct investments. Other transfers or rights may be protected on the basis of particular provisions, but not as a direct investment *per se*, which are given a broad scope of protection. Consequently, an investor seeking protection of his investment, which is other than a pure possessing of shares, is more likely to base his claim on international investment law rather than on EU law. This indicates that the very subject matter of the BITs and the Treaty differs as regards foreign direct investment.

From the aforementioned cases, however, this issue was only briefly mentioned in the *Eureka* case but was not fully discussed. Firstly, the

⁵¹ Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme, Case No. C-484/93, Judgment of 14.11.1995, E.C.R. 1995, at p. I-03955.

⁵² Margarethe Ospelt and Schlössle Weissenberg Familienstiftung, Case No. C-452/01, Judgment of 23.9.2003, E.C.R. 2003, at p. I-09743.

⁵³ Commission of the European Communities v. Kingdom of Belgium, Case No. C-503/99, Judgment of 4.6.2002, E.C.R. 2002, at p. I-04809.

Responding State admitted that, pursuant to Article 1(a) of the BIT between Czechoslovakia and the Netherlands, investment constitutes “every kind of asset”, whereas EU law protects all freedoms of the internal market, hence “the same type of investments as those covered by the BIT”⁵⁴. Since this argument did not form the basis of the objection, the Claimant made no comment in this regard. The Tribunal also failed to discuss this aspect by stating merely that the relationship between the provisions can indicate either the intention of the parties (whether the later treaty shall replace the earlier one) or the alleged incompatibility of particular provisions of the two treaties in question. Probably in this – very starting point – debate will resume again, especially if the investment in question, not being an enterprise but *e.g.*, an intellectual property right, is treated as an investment by only one legal regime.

4. Common intention of the parties to replace the earlier treaty by the later

The second condition enabling the bilateral investment treaty in question to be deemed as terminated is an alternative: either it is clear that the parties intended to replace the earlier treaty (Section 1(a)), hence approaching the question from a subjective point of view, or that the provisions of both treaties are so incompatible as to be incapable of simultaneous application (Section 1(b)), hence approaching the question from an objective viewpoint. The subjective aspect requiring common intention is always difficult to prove at the time of the dispute. Nevertheless, in both of the cases discussed herein, the parties focused on this condition.

In the *Eastern Sugar* case, the Czech Republic argued that existing investment treaties did not fulfill their protective function. It was submitted that, whilst such treaties represented proper instruments for the protection and promotion of foreign direct investment during the 1990s, from the time of the accession to the European Union, the Member States intended to govern foreign direct investments by more

⁵⁴ Eureko, at para 67.

specific, common and far-reaching provisions of EU law⁵⁵. Furthermore, the duplicity of such legal protection may not be reasonably deduced.

A similar view was presented by Slovakia in the *Eureko* case. The Respondent submitted that the BIT represented the very first step towards creation of a “trading platform” in Europe and an accessory to EU law⁵⁶. Moreover, Slovakia presented a few initiatives that had originated in the European Commission and certain Member States, regarding the need to begin discussions on the various interpretations of the intra-EU BITs problem⁵⁷. Finally, Slovakia argued that, since on the basis of Article 59 of the Vienna Convention the termination of the treaty is *ex lege*, the explicit intention of the parties is not required⁵⁸. The Claimant replied that, when concluding the BIT, Slovakia had to have in mind its probable future treaty obligations as even Article 8(6) of the Dutch-Slovak BIT mentions as a possible source on which a tribunal may rely other treaties relating to investments (which, at the time of the dispute meant the EC Treaty). Moreover, both the Netherlands and the Slovak Republic continued to list the BIT as a treaty in force on their official websites and in any documents or opinions concerning the alleged termination of the BIT, made five years following Slovakia’s accession to the EU.

Both Tribunals held that there was no common intention of the parties to replace the BIT by the Treaty. The Tribunal in the *Eastern Sugar* case underlined the fact that Article 118 of the Europe Agreement, entered into by and between the Czech Republic on the one hand, and the EC and its Member States on the other hand, clearly stated that this agreement shall not impair the rights and obligations of individuals as guaranteed by agreements in force between one or more Member States and the Czech Republic as far as those corresponding rights are guaranteed by EC law⁵⁹. However, the Accession Treaty contained no such provision. Consequently, the Tribunal stated that there was no intention as to the termination or replacement of the BIT since only one treaty stated a proper provision with no strict condition or a date in this regard

⁵⁵ *Eastern Sugar*, at para 127.

⁵⁶ *Eureko*, at paras 86–87.

⁵⁷ *Ibidem*, at paras 90–91.

⁵⁸ *Ibidem*, at paras 92–96.

⁵⁹ *Eastern Sugar*, at para 145.

and further agreements replacing the Europe Agreement (“Association Agreement”) did not uphold that provision. Moreover, the Tribunal stated that both States to the dispute listed the BIT as a treaty in force and neither of them had previously made any official statement regarding its termination⁶⁰.

The Tribunal in the *Eureko* case stated that, having taking into account all relevant international agreements such as the Association Agreement, the Accession Treaty and the Lisbon Treaty, no evidence existed as to the parties’ intention to terminate the BIT⁶¹. Furthermore, the Tribunal analyzed the allegedly corresponding provisions of the BIT and the Treaty in order to confirm whether the provisions are so identical that the parties intended to replace the BIT with the Treaty. However, since this was mainly discussed in the context of the alleged incompatibility of these provisions, this analysis will be presented in the following part of this article. Nevertheless, the Tribunal concluded that the parties did not intend to replace the earlier treaty with the latter.

Moreover, given the different subject matter and scope of the provisions, those Member States which did not terminate the BITs at the time of their accession to the EU intended to maintain them in force, as opposed to terminating them⁶². This is especially so given that the investment treaties concern only one economic aspect – foreign direct investments. It is, accordingly, rather difficult to accept that the States intended to replace specific treaties focused solely on investment with a more general agreement concerning many economic aspects and regulating those aspects in a fairly similar, general manner⁶³.

At the present time there are approximately 190 intra-EU BITs in force⁶⁴. In November 2006 the Internal Market and Services Directorate General of the European Commission sent a notice to the Economic and Financial Committee, aiming to present to the Member States

⁶⁰ *Ibidem*, at para 155.

⁶¹ *Eureko*, at para 244.

⁶² T. Eilmansberger, *op. cit.*, at p. 401.

⁶³ H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, ‘International and Comparative Law Quarterly’ 2009, Vol. 58, No. 2, at p. 305.

⁶⁴ 2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, at para 14; <http://www.unctad.org/ia>.

the variety of problems regarding intra-EU BITs and to encourage the termination of such treaties. However, as stated in the Commission's Reports from 2007 and 2008, the Member States were not afraid of discrimination against subjects originating from different Member States and sought to maintain the BITs in force, especially given their provisions regarding expropriation, compensation and arbitration⁶⁵. Moreover, following the greatest EU enlargement in 2004, during only 2005 – 2006 the Member States concluded 47 new intra-EU BITs⁶⁶. Other treaties which were shortly due to expire were prolonged for periods of between 10–15 years and will continue to remain in force even after the year 2020. Currently, the Commission underlines that the BITs should be terminated, since the States will otherwise face infringement proceedings. However, the Member States still do not appear to be in a great hurry to do so.

Taking into account the aforementioned, it cannot be said that the EU Member States intended for investment to be governed solely by EU law. Whilst no common policy exists in this area, and unless the next treaty concluded under the auspices of the European Union clearly states that intra-EU foreign direct investments are forthwith to be governed solely by EU law, the BITs may not be deemed as having been terminated.

5. Alleged incompatibility of provisions

The alternative justification for concluding that both treaties had been terminated is the incompatibility of their provisions to such an extent as to render it impossible to apply both treaties simultaneously. This issue was raised in both cases and discussed to the greatest extent. Whereas the Respondents in the *Eastern Sugar* and *Eureko* cases focused mainly on the aspect of breaching one treaty whilst fulfilling the other, the Tribunal in the *Eureko* case compared the provisions of both treaties to decide whether the provisions were indeed mutually incompatible.

⁶⁵ 2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, at para 15.

⁶⁶ <http://www.unctad.org/ia>.

5.1. Typical BIT provisions

Indeed, it is most commonly said that both regimes promoting foreign direct investment create a specific legal framework, whilst nevertheless pursuing separate aims⁶⁷. Firstly, the type of protection guaranteed by the investment treaties should be borne in mind. Various substantive standards (fair and equitable treatment, full protection and security, free transfer of capital, prohibition of unlawful expropriation) and procedural standards exist (dispute resolution by arbitration tribunal) which, despite being phrased differently in various treaties, are found in all such treaties and represent the basis of investor protection.

The *fair and equitable treatment* standard (“FET”) represents a “must” for every investment treaty. To the best knowledge of this author, no single BIT exists from which this clause is absent. Often, the provision imposing the obligation of FET simultaneously prohibits the use of arbitrary or discriminatory measures⁶⁸. However, at the very beginning the FET clause merely laid down a minimum standard of treatment of aliens, which constitutes a norm of customary international law. Even today, the Model BITs of the USA and Canada provide that the FET clause does not require a standard going beyond what is to be found in customary international law⁶⁹. Despite these examples, the FET standard was expanded by jurisprudence and – unless the BIT in question provides otherwise – it is a particular standard of treatment, different from and going beyond what is stated under customary international law⁷⁰. This is justified by the fact that, if the Contracting States incorporate into the treaty a specific standard of treatment solely with regard to investors

⁶⁷ T. Eilmansberger, *op.cit.*, at pp. 400-401; Ch. Söderlund, *op. cit.*, at p. 461.

⁶⁸ E.g. Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Article 3(1): “Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors”.

⁶⁹ Article 5(2) USA Model BIT 2004; Article 5(2) Canada Model BIT 2004.

⁷⁰ *Saluka Investments BV v. Czech Republic*, Partial Award of 17.3.2006, available at: <http://www.pca-cpa.org/>; C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 226.

and investments from other Contracting States, it would constitute a *lex specialis* standard of treatment to be contrasted with the *lex generalis*, being a minimum standard of treatment of aliens and concerning any alien from any state. It is recognized that the FET standard covers all acts of a host State which should not be unfair or inequitable as regards the investor⁷¹. Consequently, investors are entitled to: transparency of procedures, stability of rights and obligations, possessing legitimate expectations, States' compliance with treaty and contractual obligations, procedural propriety and due process, good faith of the State or freedom from coercion and harassment⁷². This is not a closed list, however, and the FET clause is interpreted on a case-by-case basis by arbitration tribunals⁷³. Accordingly, this clause is frequently relied upon by investors alleging a breach of their rights by the hosting State.

Another typical standard of treatment, forming the foundations of every BIT⁷⁴, is *full protection and security*. This concerns the freedom of investors and investments from acts of a hosting State which adversely affect their security⁷⁵. Traditionally, this standard of protection is linked with the use of armed forces or police, but it may also concern attacks perpetrated by rebellions or terrorists⁷⁶. Naturally, in the latter example, the host State may be relieved of any responsibility if it proves that the attack in question constituted a *force majeure* event, although such a plea

⁷¹ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 130; I. Szasz, *Treaty Arbitration for the Protection of Foreign Investments*, [in:] A. Tynel, A. Szumański, S. Pieckowski, P. Nowaczyk, J. Poczobut (eds.), 'Międzynarodowy i Krajowy Arbitraż Handlowy u Progu XXI wieku, Księga Pamiątkowa dedykowana Doktorowi Habilitowanemu Tadeuszowi Szurskiemu' [International and National Commercial Arbitration at the edge of the XXIst Century. Essays in honour of Tadeusz Szurski] CH Beck, Warsaw 2008, at p. 217.

⁷² R. Dolzer, Ch. Schreuer, *op. cit.*, at pp. 133–147; C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at pp. 227–243.

⁷³ LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award of 25.7.2007.

⁷⁴ *E.g.*, Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Article 3(2); Article 5(1) USA Model BIT 2004; Article 5(1) Canada Model BIT 2004.

⁷⁵ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 149.

⁷⁶ Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, Award of 27.6.1990, 'ICSID Reports' 2000, Vol. 4, at p. 245; Wena Hotels Ltd v. Arab Republic of Egypt, Award of 8.12.2000, 'ICSID Reports' 2000, Vol. 6, at p. 67.

is rarely successful. Consequently, all acts of a State which endanger an investor's security are prohibited.

Another fundamental foreign investor right commonly found in investment treaties is the *free movement of capital*. Without this right, foreign direct investments would be incapable of functioning, since investors invest funds (when purchasing shares) and gain profits which are also partly transferred to the sending State (or, put frankly, to the mother-companies). Such transfers cover *inter alia* dividends, profits, loans, credits or even employee's earnings. It is therefore a necessary provision of all investment treaties⁷⁷.

Another guarantee frequently relied upon by investors in investment disputes is protection from expropriation. Each BIT contains a provision regulating this aspect⁷⁸, despite the fact that expropriation is not illegal *per se*. In most legal systems, expropriation of national assets is recognized as lawful provided that it fulfills certain requirements. The same is true within international investment law. Expropriation is lawful if it fulfills four prerequisites: it is undertaken in the public interest, it is conducted in a non-discriminatory manner, and it is conducted in accordance with due process and for compensation⁷⁹. If however, the expropriation in question fails to fulfill even one of these requirements, it becomes unlawful and violates investors' rights. The predominant problem concerning expropriation is the issue of compensation, since investment treaties very rarely define the appropriate method for calculating due compensation in a strict and clear manner. The most frequently used phrases are: fair market value⁸⁰, just or appropriate compensation⁸¹ or combination of few

⁷⁷ E.g., Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Article 4; Article 7 of the USA Model BIT 2004; Article 14 of the Canada Model BIT 2004.

⁷⁸ E.g., Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Article 5; Article 6 of the USA Model BIT 2004; Article 13 of the Canada Model BIT 2004.

⁷⁹ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 91.

⁸⁰ Article 5 of the Agreement between The Republic of Austria and The Republic of Slovenia on The Mutual Promotion and Protection of Investments, Vienna, 7.3.2001.

⁸¹ Article 5 of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments; Article 5 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic.

factors⁸², which almost always leads to further dispute. Consequently, if an investor claims that the due compensation is inadequate, it may sue the hosting State for illegal expropriation and claim damages. However, it should be borne in mind that no consensus exists as to how much higher damages for unlawful expropriation should be in comparison with compensation for lawful expropriation. Compensation awards in expropriation cases typically state that they also include compensation for lost profits.

Moreover, nowadays currently expropriation is a very wide legal term, covering not only direct expropriation, whereby an investor is deprived of a legal title to the investment such as by way of administrative decision, but also indirect expropriation. This latter concept extends to situations wherein an investor has not been deprived of legal title to the investment, but the surrounding circumstances indicate that formal lawful title to the investment has become meaningless since the measures undertaken by the host State have deprived the investor of most of the rights and profits flowing from the investment⁸³. This is especially important in cases concerning the possession of shares or intellectual property rights when, despite not impairing legal title to the investment, the investor may be deprived thereof by *inter alia* State control over the company or the issuing of compulsory licenses. Any act of expropriation, whereby an investor is deprived of the bulk of profits flowing from the investment constitutes a breach of international investment law if it does not fulfill the requirements stated in the BIT.

Finally, one of the most important investor rights is a procedural right, namely the possibility to submit a claim against a hosting State to an international arbitration tribunal. It is the essence of international investment law that individuals are entitled to sue the State before an

⁸² *Ibidem*.

⁸³ *E.g.*, Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, Article 5; Article 6 of the USA Model BIT 2004; Article 13 of the Canada Model BIT 2004; R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 98; I. Szasz, *op. cit.*, at p. 220. *S.D. Myers Inc v. Government of Canada*, First Partial Award and Separate Opinion of 13.11.2000, at para 283; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award of 12.4.2002, 'ICSID Reports' 2005, Vol. 7, at para 107; *Consortium RFCC v. Royaume du Maroc*, Award of 22.12.2003, ICSID Case No. ARB/00/6, 'ICSID Reports' 2005, Vol. 20, at para 391.

independent forum. One such forum is the International Centre for the Settlement of Investment Disputes (ICSID)⁸⁴, within the auspices of the World Bank. Other commonly used arbitration centers include the International Court of Arbitration at the International Chamber of Commerce, the Institute of Arbitration at the Stockholm Chamber of Commerce or *ad hoc* arbitration tribunals.

This right is said to be the most important of all treaty provisions. Not only are investors not required to sue the State before its own courts, on its own territory and on the basis of domestic law, but they are entitled to submit the case to an international forum which acts on the basis of international law⁸⁵. Moreover, an investor may individually sue the host State without submitting a motion for diplomatic protection to its home State, which would enjoy full discretion as to whether to act and sue the other contracting State. The investor acts independently, which also facilitates execution of the award by avoiding ties with diplomatic or consular procedures or other political aspects. Furthermore, the host State does not need to provide its consent to arbitration since such consent is stated in the BIT and the State in question is simply obliged to be a party to the dispute. Consequently, investors are resorting to this right on an increasingly frequent basis. Since 1985, there have been at least 500 cases begun on the basis of investment treaties, more than two thirds of which commenced following the year 2002⁸⁶.

Conversely, all of the aforementioned rights may be limited or not applied by the State without this constituting a breach of the applicable law. Such a possibility arises from so-called non-precluded-measures (“NPM”) or public-security clauses. These clauses allow a State to take measures necessary to safeguard its essential interest, which in other

⁸⁴ Acting on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States from 18.3.1965; available at: <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

⁸⁵ Note however that sometimes the BITs demand from the investor to submit the claim to the domestic courts firstly: *e.g.*, Article 8(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, signed in London on 11.6.1975.

⁸⁶ <http://www.unctad.org/ia-dbcases/cases.aspx>; T. Eilmansberger, *op. cit.*, at p. 386; A. Radu, *op. cit.*, at p. 242.

circumstances would constitute a violation of a BIT⁸⁷. Consequently, such a measure does not breach the BIT at all. The State must prove that all requirements laid down in the clause have been fulfilled, especially that the essential interest of the State was in danger and that non-compliance with the BIT was an appropriate manner to safeguard this interest⁸⁸. Since the possible scope of application is very narrow, this clause does not represent the most successful defense⁸⁹. Moreover, amongst EU Member States, such provisions were often omitted from the treaties, although some rare examples exist, such as the German – Polish BIT⁹⁰. Therefore, NPM clause may not be deemed to be a common basis for limiting investor's rights.

Investment treaties provide a specific set of rules which, although not strictly defined in the treaties themselves, are interpreted rather broadly by arbitration tribunals and constitute a genuinely wide sphere of protection offered to foreign investors. Every aspect of management, disposal, use, gaining profits from the investment or claiming for damages is subject to guarantees flowing from the BIT.

5.2. EU law regarding foreign direct investments

European Union law also provides protection which is based primarily on the provisions of an international treaty, namely the Treaty

⁸⁷ Agreement between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, Article XI, 14.11.1991, available at: <http://www.pca-cpa.org/upload/files/10%20US-Arg%20BIT.pdf>: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests”.

⁸⁸ W.W. Burke-White, A. von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, ‘Virginia Journal of International Law’ 2008, Vol. 48, No. 2, at p. 319.

⁸⁹ LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability of 3.10.2006.

⁹⁰ Treaty concerning the encouragement and reciprocal protection of investments (with protocol) between the Federal Republic of Germany and the Republic of Poland, signed at Warsaw on 10.11.1989, Article 2b of the Protocol: Measures that have to be taken for reasons of public security and order, for the protection of life and health or public morality shall not be deemed „treatment less favourable” within the meaning of Article 3.

on the Functioning of the European Union. Since, as stated above, direct investments are “undertakings”:

“which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity”⁹¹,

they are in fact governed by two treaty freedoms: the free movement of capital and the freedom of establishment. As was stated in the definition contained in Appendix I to Directive 88/361, foreign direct investments, whilst being a part of “capital movement”, mean *inter alia* the settlement of subsidiaries or new enterprises, which imminently represents a feature of the freedom of establishment.

This was confirmed and clarified by the European Commission, which in 1997 issued a Communication on Certain Legal Aspects Concerning Intra-EU Investments⁹². This document clearly stated that foreign direct investments, involving the acquisition of controlling stakes, are subject to both treaty freedoms⁹³. By the same token, direct investments are more than mere capital transfers, since they also require establishment or development of an enterprise, even if such enterprise is merely a subsidiary. Therefore, in such circumstances, foreign direct investment is regulated by the free movement of capital and the freedom of establishment, operating conjunctively.

When considering the free movement of capital, the most important provision is Article 63 (ex. 56) of the TFEU which states that: “1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. [...]”.

It should be borne in mind that, contrary to the remainder of the treaty freedoms, only this freedom extends to the subjects – or strictly capital – coming from the third States. Therefore extra-EU capital flows

⁹¹ Council Directive No. 88/361/EEC of 24.6.1988 for the implementation of Article 67 of the Treaty, O.J. 8.7.1988, L 178, at p. 5–18.

⁹² Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, O.J. 19.7.1997, C 220, at p.6.

⁹³ *Ibidem*, at para 4.

and the subjects directing such flows are able to rely upon EU law to freely invest in one of the EU Member States.

When considering the freedom of establishment, the core provision is Article 49 of the Treaty, which states:

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

It is noteworthy that, in addition to natural persons, *i.e.*, nationals as stated above, legal persons are also able to rely on this provision. As it is provided in Article 54:

“Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

According to EU law, each treaty freedom may be restricted either on the basis of strict treaty provisions, which however are applicable only as regards foreign subjects, or on the basis of imperative requirements (or, in other words, the “rule of reason”)⁹⁴, which are to be applied without

⁹⁴ Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), Case No. 120/78, Judgment of 20.2.1979, E.C.R. 1979, at p. 00649; Criminal proceedings against Bernard Keck and Daniel Mithouard. Joined cases No. C-267/91 and C-268/91, Judgment of 24.11.1993, E.C.R. 1993, at p. I-06097.

distinction between nationals and non-nationals. Reference should also be made to the Communication mentioned above. It clearly stated that, in order for such restrictions to be lawful, each derogation must comply with the respective requirements laid down in both treaty freedoms.

The most important treaty restriction and conditions constituting the lawful reliance thereupon, as regards the free movement of capital, is Article 65 of the TFEU:

- “1. The provisions of Article 63 shall be without prejudice to the right of Member States:
 - (a) 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;
 - (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.4. [...]”

As regards foreign direct investments, such restrictions could include the imposition of limitations on the number of acquired shares or requirements for investors to acquire permission for acquiring a particular number of shares⁹⁵. Such restrictions were discussed in the *Association Eglise de Scientologie de Paris*⁹⁶ case, wherein foreign investors whose

⁹⁵ Communication Of The Commission On Certain Legal Aspects Concerning Intra-EU Investment, *supra note* 92, at para 5.

⁹⁶ *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v. The Prime Minister*, Case No. C-54/99, Judgment of 14.3.2000, ECR 2000, at p. I-01335.

investments could constitute a danger for public safety and order were firstly required to obtain permission for such an investment. The ECJ declared that such a system was insufficiently clear for investors who were unilaterally required to decide whether or not their investment was dangerous. Moreover, that system was not restricted to so-called strategic sectors, such as energy, but was applicable to all possible foreign investments. The Court stated that such a system, which makes foreign direct investments less attractive and constitutes a restriction on the free movement of capital, is prohibited by the Treaty.

Turning to the freedom of establishment, the treaty restrictions are stated in Articles 51 and 52 of the TFEU:

“Article 51. The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority. [...].

Article 52. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health [...].”

Consequently, if a restriction on foreign direct investment is encountered in a provision regarding golden shares, which is justified by exercising official authority, such restriction is lawful from the perspective of the freedom of establishment, but the State will nevertheless remain responsible for violation of the free movement of capital, since restrictions to this freedom may not be based upon such a ground. In fact, the only identical requirements within the two freedoms are public security and public policy (Article 65(1)b and 52 of the TFEU). However, these two grounds are most commonly argued by States, thereby making it possible to apply the two treaty freedoms (and restrictions) simultaneously to foreign direct investments.

The situation concerning restrictions based on imperative requirements is more unified. These restrictions, which operate with no distinction between national or foreign subjects, are based on the same reasoning under both treaty freedoms⁹⁷. The Communication of

⁹⁷ Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, *supra* note 92, at para 8.

the Commission provides that such restrictions can concern, e.g., general limitations on acquiring of particular number or value of shares or the right of official authorities to veto particular management decisions (golden shares)⁹⁸. As underscored by the Commission, a restriction will not be unlawful if it fulfills the requirements laid down in earlier ECJ jurisprudence⁹⁹. Consequently, such restrictions must be justified by a legitimate non-economic interest, they may not be discriminatory, they must be proportionate and they may not go beyond what is necessary to protect the relevant State interest. Moreover, with regard to direct investments such a measure must be foreseeable, made public and control of the company in question must remain in the investor's hands so that no expropriation, even if indirect, may occur¹⁰⁰.

The Court of Justice has already dealt with such measures in many cases. One such case was *Commission v. The Kingdom of Spain*¹⁰¹ where the subject matter of the dispute was, *inter alia*, restrictions in the acquisition of shares and the possibility to block any liquidation proceedings or mergers involving the company. The Court stated that such measures were incapable of justification given the extent of available restrictions, the discretion of official authorities and the absence of clearly defined rules. The investors in fact had no possibility to foresee when the State may intervene and what would be the potential result of such intervention. A juxtaposed situation occurred in the *Commission v. The Kingdom of Belgium* case¹⁰², where the subject matter concerned golden shares held by the State. Belgium sought to justify its restrictions on the basis of public security in relation to the energy sector and the need to possess a certain

⁹⁸ *Ibidem*, at para 5.

⁹⁹ *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman et Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*, Case No. C-415/93, Judgment of 15.12.1995, ECR 1995, at p. I-04921; *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case No. C-55/94, Judgment of 30.11.1995, ECR 1995, at p. I-04165.

¹⁰⁰ Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment, *supra* note 92, at para 5.

¹⁰¹ *Commission of the European Communities v. The Kingdom of Spain*, Case No. C-98/01, Judgment of 13.5.2003, ECR 2003, at p. I-04641.

¹⁰² *Commission of the European Communities v. The Kingdom of Belgium*, Case No. C-503/99, Judgment of 4.6.2002, ECR 2002, at p. I-04809.

degree of control over companies in order to safeguard units of energy in the event of a crisis. Since the control concerned some clearly defined and limited managerial decisions and was performed by a single minister who operated subject to a strict procedure, the Court concluded that such a measure was not unlawful. The ECJ also underlined that public security would also justify an alleged violation of the freedom of establishment, without focusing on this matter in much detail. One should bear in mind that, as regards the free movement of capital and the freedom of establishment, no possibility exists to justify a restriction on the same grounds as laid down in the definition from the *Keck & Mithouard* case¹⁰³, i.e., that, provided the measures affect in the same way in law and in fact national and foreign subjects, no violation of the Treaty takes place. As was underlined by the Court in the *Commission v. The United Kingdom* case¹⁰⁴ and *Commission v. The Kingdom of Spain* case¹⁰⁵, the judgment in *Keck* case merely represented a clarification of the Court's earlier jurisprudence. Moreover, as regards the free movement of capital, even indistinctly applicable measures impede access to the market for foreign investors, thereby resulting in a different factual impact on nationals and non-nationals on every single occasion¹⁰⁶.

Bearing in mind the aforementioned regulations, it should be considered whether or not they are so incompatible as to be mutually exclusive to the provisions of BITs, thereby preventing their simultaneous application. Investment treaties, as confirmed in academic writings¹⁰⁷, mainly guarantee protection from the moment the investment is concluded and for such period as the business continues to operate. Such standards of protection as FET, full protection and security or prohibition of unjustified expropriation find their *ratio* only once the investment already exists and not when a potential investor is preparing to make

¹⁰³ Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined Cases No. C-267/91 and C-268/91, Judgment of 24.11.1993, ECR 1993, at p. I-6097.

¹⁰⁴ Commission of the European Communities v. The United Kingdom, Case No. C-463/00, Judgment of 13.5.2003, ECR 2003, at p. I-04581.

¹⁰⁵ *Supra* note 101.

¹⁰⁶ *Supra* note 102, at paras 28, 34, 45; *Commission v. Spain*, *supra* note 101, at paras 58-62.

¹⁰⁷ R. Dolzer, Ch. Schreuer, *op. cit.*, at p. 69; C. McLachlan, L. Shore, M. Weininger, L. Mistelis, *op. cit.*, at p. 165.

an investment. This earlier period is rather protected by EU law. This regime, comprising not only the free movement of capital but also the freedom of establishment, aims to eliminate trans-border barriers and is primarily applicable to the pre-investment or pre-entrance phase, whereas the later period is rarely affected. However, also with regard to the phase when the investment runs, it is hardly convincing to conclude that the provisions of these two regimes are incompatible. The fact of their partial similarity does not in any way imply the expiration of any treaty¹⁰⁸. For such a scenario to occur, the particular area of law should have formed part of the EU's exclusive competence – whereas the EU's competence in respect of the free movement of capital and the freedom of establishment continues to be shared with the Member States¹⁰⁹. Consequently, these two regimes are more complementary than contradictory. The same conclusion was reached by the Tribunal in the *Eastern Sugar* case¹¹⁰.

The Tribunal in the *Eureko* case also stated that “the BIT establishes extensive legal rights and duties that are neither duplicated in EU law nor incompatible with EU law”¹¹¹. It should be borne in mind that Article 59 of the Vienna Convention comes into operation when “the provisions are so far incompatible (...) that the two treaties are not capable of being applied at the same time”. The Tribunal admitted that such a situation may only arise if a State had a right or a duty under EU law to impose, e.g., a tax which would violate the BIT by breaching a FET clause¹¹². In all other situations, the BIT would only limit the State's freedom to act – as is the case with all treaty obligations. Moreover, the Tribunal noted that, pursuant to the BIT and being at the core of its jurisdiction, there exist many other provisions which are not duplicated in EU law, such as FET, which may not be deemed identical to the prohibition of discrimination contained in EU law, as argued and demonstrated by Slovakia in the aforementioned comparative table. Other examples include full protection and security, which have different aims to the provisions governing the freedom of establishment or the prohibition of

¹⁰⁸ T. Eilmansberger, *op. cit.*, at p. 401; H. Wehland, *op. cit.*, at p. 310.

¹⁰⁹ Article 4(2) of the Treaty.

¹¹⁰ *Eastern Sugar*, at para 127.

¹¹¹ *Eureko*, at para 245.

¹¹² *Ibidem*, at para 254.

unlawful expropriation, which is not regulated at all in EU law. Even if the Charter on Fundamental Rights is taken into account, this deals only with “property” or “possession” and makes no reference to any “assets” or “investments” of a company that may be expropriated¹¹³. Consequently, the Tribunal concluded that the BIT provides wider protection for investors and “there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law”¹¹⁴.

5.3. Specific issues on alleged incompatibility: discrimination and review by the Court of Justice

The Respondents in both cases argued that incompatibility also occurs when compliance with one treaty results in the violation of another, which occurred on at least two situations: regarding discrimination and the absence of ECJ review. This meant that it was impossible for a State to comply with the obligations derived from the two treaties simultaneously.

The first issue concerns discrimination against investors from Member States which are not bound by the BIT. Slovakia and the Czech Republic argued that compliance with the BIT provisions violated EU law (Article 18 of the Treaty) since it discriminates against other investors, hence making these two treaty regimes incompatible. This argument was first stated in the Notice of Internal Market and Services Directorate General from November 2006, presented in the *Eastern Sugar* case and subsequently upheld by the Commission in the *Eureko* case, highlighting that the EC Treaties contain no most-favoured-nation (“MFN”) clause, which would broaden the scope of application of *e.g.*, BITs provisions to all EU investors¹¹⁵. This is true of not only substantive provisions, such as those relating to expropriation, but also in respect of procedural provisions, hence the possibility to submit a claim against the host state before an arbitration tribunal and not the relevant national court, as is provided for by EU law. What is now being considered as a possible solution is the extension of these rights to investors from other Member States¹¹⁶. This

¹¹³ *Ibidem*, at paras 260–261.

¹¹⁴ *Ibidem*, at para 263.

¹¹⁵ *Eastern Sugar*, at para 126, A. Radu, *op. cit.*, at p. 249.

¹¹⁶ T. Eilmansberger, *op. cit.*, at p. 402; H. Wehland, *op. cit.*, at p. 312.

may not be automatic, however, given the absence of a MFN clause in the Treaty¹¹⁷, but shall be granted to any investor claiming equal treatment. Such an issue, albeit in different circumstances, has already been the subject of ECJ jurisprudence – in the *Mateucci* case¹¹⁸. The ECJ declared that, if matters not regulated by the Treaty are regulated by international agreements concluded by and between the Member States, the Member State may not preclude the extension of additional rights to subjects from different EU States, since this would constitute a violation of Article 18 of the Treaty. However, in the *Eureko* case, the Commission rejected such a possibility especially with regard to resolving disputes *via* arbitration, since it found this to be unacceptable from an institutional perspective. The Commission concluded that any investor-State arbitration mechanism shall be eliminated, since it amounts to an “outsourcing” of disputes involving EU law¹¹⁹. The Tribunal, however, presented quite the opposite view, since it found no reason for prohibiting such an extension. It noted that “it is not for an arbitral tribunal to cancel rights (...) in order to safeguard a State party against the possibility that it might one day decide to apply the treaty in a way that could violate its obligations (...)”¹²⁰.

The second particular aspect to be considered when dealing with incompatibility was raised with regard to the aforementioned “outsourcing” of dispute resolution on the basis of EU law. Again, this problem was raised originally due to the *Eastern Sugar* case, wherein the Czech Republic stated that, if an arbitral tribunal had decided on the basis of EU law, the ECJ would have no control over the content of such an award, which is incompatible with EU law¹²¹. In that case the Tribunal stated that, since the parties intentionally agreed to its jurisdiction and since it is not entitled to refer preliminary questions to the ECJ, there is no reason why

¹¹⁷ *D v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen*, Case No. C-376/03, Judgment of 5.7.2005, ECR 2005, at p. I-05821; *Test Claimants in Class IV of the ACT Group v. Commissioners of Inland Revenue*, Case No. C-374/04, Judgment of 12.12.2006, ECR 2006, at p. I-11673.

¹¹⁸ *Annunziata Matteucci v. Communauté française de Belgique i Commissariat général aux relations internationales de la Communauté française de Belgique*, Case No. 235/87, Judgment of 27.9.1988, ECR 1988, at p. I-5589.

¹¹⁹ *Eureko*, at para 184.

¹²⁰ *Ibidem*, at para 267.

¹²¹ *Eastern Sugar*, at para 119.

the tribunal should act to the contrary. In the *Eureko* case, the Respondent also raised the issue of non-uniformity and the absence of ECJ review in respect of the interpretation of EU law, which was supported by the Commission, as well as possible problems concerning the recognition or enforcement of an award¹²². The Commission also recalled the *Mox Plant* case, which concerned the initiation of the proceedings by Ireland against the UK on the basis of the United Nations Convention on the Law of the Sea and was found by the Court to contravene EU law, since the subject matter was regulated by the Treaty. Article 344 of the Treaty clearly states that the Member State may not submit any claims concerning EU law to any other forum. The Tribunal did not answer this last argument, probably since answers stated earlier in academic writings pointing out that, firstly, there is no comparable obligation of dispute resolution forum with regard to natural or legal persons and secondly, the subject matter of BITs is not regulated solely by EU law¹²³. The Tribunal, however, stated that the ECJ has no monopoly to interpret the EU law, since every day the national courts and the arbitration tribunals in commercial matters apply this law and often without the need to refer preliminary questions. The only monopoly possessed by the ECJ in fact is that concerning the final interpretation of EU law, but even as regards this there are certain well-recognized exceptions such as *acte clair* and *acte éclairé*. Finally, the Tribunal stated that it is entitled to apply EU law either as international law or as a matter of domestic law¹²⁴.

It is interesting to note the problem regarding possible difficulties concerning the recognition or enforcement of an award, as highlighted by Slovakia. Potentially, this may be achieved on the basis of a public policy clause, being in fact *EU public policy*, also known as the *EcoSwiss* doctrine. This was a case concerning the refusal to recognize an award on the basis

¹²² *Eureko*, at paras 115–116, 185.

¹²³ T. Eilmansberger, *op. cit.*, at p. 404; M. Burgstaller, *European Law and Investment Treaties*, 'Journal of International Arbitration' 2009, Vol. 26, at p. 190; Ch. Söderlund, *op. cit.*, at p. 458; J. Cazala, *La contestation de la compétence exclusive de la Cour de Justice des Communautés Européennes*, 'Revue Trimestrielle de droit européen' 2004, Vol. 40, No. 3, at pp. 509–515; Y. Kerbrat, P. Maddalon, *Affaire de l'Usine MOX: la CJCE rejette l'arbitrage pour le règlement des différends entre Etats Membres*, 'Revue trimestrielle de droit européen' 2007, Vol. 43, No. 1, at pp. 163–172.

¹²⁴ *Eureko*, at paras 282–283.

of public policy, since it had not taken into account EU competition law¹²⁵. The public policy of all Member States also concerns the compatibility of their law with EU law and the fact that EU law constitutes an inherent part of the Member States' laws. There is no reason why such reasoning may not be applied to the recognition or enforcement of investment awards, especially those adopted on the basis of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards¹²⁶. Article V(2)b thereof states that recognition and enforcement of an award may be rejected by a national court if it contravenes the public policy of the State. Moreover, during such a procedure, the state court may refer a preliminary question to the Court of Justice, which would have the possibility to deal with intra-EU BITs. Despite the existence of numerous arbitral awards, this has not yet happened. Such a possibility, however, is much limited in relation to ICSID awards, which may not be annulled by domestic courts and with regard to which state courts have no control¹²⁷.

Summarizing the issue on alleged incompatibility, it is also very interesting to note a fact mentioned by the *Eastern Sugar* tribunal, namely that the Commission has not initiated any proceedings against any Member State having an intra-EU BIT in force with another EU Member. Moreover, the EU itself is a party to the Energy Charter Treaty, which also provides for the resolution of disputes *via* arbitration, albeit that such disputes may concern EU law¹²⁸.

Furthermore, the Tribunal as such generally decides upon the BIT – and it may only declare a violation of a provision contained in the BIT itself. If an investor is unsuccessful at this stage, there is no bar to him initiating proceedings before the State court on the basis of an alleged violation of EU law (as per Article 49 of the Treaty), where the investor may also claim for damages¹²⁹. Since these two proceedings are separate and independent, the final result may differ. Naturally, foreign investors usually prefer international arbitration tribunals to the domestic courts of

¹²⁵ *Eco Swiss China Time Ltd v. Benetton International NV*, Case No. C-126/97, Judgment of 1.6.1999, ECR 1999, at p. I-3055.

¹²⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10.12.1958.

¹²⁷ Article 54 of the ICSID Convention.

¹²⁸ Article 26 of the Energy Charter Treaty.

¹²⁹ *T. Eilmansberger, op. cit.*, at p. 405.

the host State, but if they also wish to nullify the measure in addition to claiming damages, the national route, which includes the Court of Justice on the basis of EU law, is to be preferred¹³⁰. Accordingly, the problem of the possible “outsourcing” of dispute resolution and the absence of ECJ review is not in general very problematic.

Consequently, both Tribunals denied the existence of any incompatibilities between the respective provisions and obligations of the BITs and EU law as would be go “so far” as to prevent the simultaneous application of the treaties.

6. Conclusion

The Tribunal in *Eureko* case concluded that it had jurisdiction to resolve this case not only by rejecting the issues concerning Article 59 but also by rejecting the remaining arguments (*i.e.*, regarding Article 30 of the Vienna Convention with regard to the inapplicability of the arbitration clause and the supremacy of the EU law) by simply underlining that the EU legal system did not deprive the Tribunal of its own jurisdiction¹³¹. Notwithstanding the great applause with which the *Eureko* was greeted, the issue regarding the necessity or *ratio* of existence of intra-EU BITs still remains the subject of heated debate. The Commission clearly intends to encourage the Member States to terminate their BITs and the new Member States support this approach. It has been suggested that the Commission’s arguments will soon be supported by a show of power and that any States failing to not terminate their intra-EU BITs will be the subject of infringement proceedings brought by the Commission. However, on which legal provisions should such action be based? Conversely, the States of the “old fifteen” present a view being in accordance with international law and in conformity with the jurisprudence of the tribunals, namely that until such treaties are terminated or expire, foreign investors may rely on the parallel protection currently afforded by EU law and the BIT. Moreover, even termination of BITs will not resolve the problem immediately, since the majority of them contain a “survival clause” stating that investors

¹³⁰ *Ibidem*, at pp. 405–406.

¹³¹ *Eureko*, at paras 285 and 290.

may rely on the rights flowing from the BIT for a certain period of time (mainly 10–20 years) following the formal expiry thereof¹³². Probably the only realistic resolution to this situation is to leave the problem in the hands of the Court of Justice. The Court has previously dealt with extra-EU BITs of *inter alia* Sweden and Austria¹³³ and, having found that certain provisions were incompatible with EU law, the Court ordered that the challenged provisions be amended. These proceedings were initiated by the Commission. The simple question that comes to mind, and was pointed out by Slovakia, is why the Commission has not to date begun proceedings against any of the Member States maintaining in force an intra-EU BIT? Especially since the problem has been known since 2006 and the Commission occasionally reiterates that such proceedings remain a possibility. The political or strategic answer may be that the Commission knows that such a claim cannot be successful and has therefore decided to wait for any State to challenge the recognition or enforcement of an arbitral award, thereby opening the door to the Court of Justice. To date, however, no single case has been presented to the Court.

Accordingly, investors in the European Union may certainly rely upon EU law and on BIT protection if their home State and the host State are parties to such a treaty. Up until now, no termination of an intra-EU BIT has occurred and, even in the event that it does, the protection provided by the BIT will continue to last for many subsequent years. Therefore, the standard of protection offered to investors in the European Union

¹³² Eastern Sugar, at para 174; Article 13 of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments; Article 16(3) of the Agreement between The Republic of Austria and The Republic of Slovenia on The Mutual Promotion and Protection of Investments, Vienna, 7.3.2001; Article 11(2) of the Abkommen zwischen der Republik Österreich und der Ungarischen Volksrepublik über die Förderung und den Schutz von Investitionen, Budapest, am 26.5.1988; Article 12(3) of the Vertrag zwischen der Bundesrepublik Deutschland und der Portugiesischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Bonn, 1980; Article 13(3) of the Vertrag zwischen der Republik Estland und der Bundesrepublik Deutschland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Tallin, am 12.11.1992.

¹³³ *E.g.*, Commission of the European Communities v. The Kingdom of Sweden, Case No. C-249/06, Judgment of 3.3.2009, ECR 2009, at p. I-01335; Commission of the European Communities v. The Republic of Austria, Case No. C-205/06, Judgment of 3.3.2009, ECR 2009, at p. I-01301.

is as high as possible, at least until the EU itself changes the existing situation. However, all the possible advantages and disadvantages have to be balanced since otherwise, accordingly to E. Gaillard's words¹³⁴, the EU would be acting not in accordance with the philosophy of Shuman but, rather, in accordance with that of Rousseau.

¹³⁴ <http://www.globalarbitrationreview.com/news/article/29884/killing-off-intra-eu-bits-european-commission-plans-level-playing-field-investors>.