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The Constitutional Dilemmas of Terminating Intra-EU BITs

ABSTRACT: *The adoption of the agreement for the termination of intra-EU bilateral investment treaties in 2020 is a big step forward in the long saga of these investment treaties. This agreement aims to overcome every point of discord between the investment agreements and the EU legal order by terminating both intra-EU bilateral investment treaties and the pending dispute settlement procedures that arose from them. In light of the landmark 2018 Achmea judgement, the agreement asserts that the key role should be given to the Court of Justice of the European Union in this area. This is a great endeavour since almost one-fifth of the investment arbitrations worldwide came from disputes within the European Union.*

However, it does not seem that the agreement will have the final say since constitutional questions were raised concerning its application. In this spirit, this article briefly outlines the legal and constitutional dilemmas intra-EU bilateral investment treaties pose in the European Union. Then, it outlines the contours and major provisions of the termination agreement, especially with regard to the pending arbitration proceedings. In light of a concrete case brought before the Hungarian Constitutional Court, the article explores the constitutional dilemmas raised by the termination agreement. It highlights three major questions: the international legal aspects, the question pertaining to the European judicial dialogue, and the constitutional principle of non-retroactivity. The article takes into account the major theoretical aspects of each of these dilemmas.

KEYWORDS: International investment agreements (IIAs), European Union (EU), intra-EU bilateral investment treaties (intra-EU BITs), Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Agreement).

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1. Introduction

As previous articles have pointed out in detail, the compatibility of bilateral investment treaties concluded between Member States of the European Union (hereinafter, intra-EU BITs) with the Founding Treaties and with the law of the European Union (hereinafter, EU law) has increasingly come into questions in recent decades. Since the eastward enlargement of the European integration in the early 2000s, various stakeholders and countries have adopted different positions on whether intra-EU BITs can be reconciled with the requirements of EU law, especially with the principle of non-discrimination as well as that of the autonomy of the EU legal order.[2] This on-going debate has reached a major turning point with the adoption of the landmark decision of the Court of Justice of the European Union (hereinafter, CJEU) in the Slovak Republik v. Achmea BV [C-284/16] (hereinafter, the Achmea decision).[3] In this judgement, the CJEU declared that the dispute-settlement mechanism (hereinafter, ISDS) of intra-EU BITs is contrary to the principle of the autonomy of the EU legal order.[4] This landmark judgement first led to a declaration of its legal consequences in January 2019, in which Member States committed to terminate their existing intra-EU BITs.[5] This declaration became the basis of the subsequently concluded agreement for the termination of intra-EU bilateral investment treaties (hereinafter, Termination Agreement) in which Member States agreed to terminate intra-EU BITs as well as pending arbitration procedures that have their legal basis in these intra-EU BITs.[6] The termination agreement was designed to implement the legal consequences of the Achmea decision. Despite the long-standing debate along with efforts to reach a reassuring solution on this issue, recently arising constitutional cases show that the dilemma of intra-EU BITs continues to linger.

This paper first seeks to explore the background and the regulatory concept, as well as the major provisions, of the international agreement that aims to terminate intra-EU BITs and pending ISDS (part 2). Then, it outlines a particular constitutional case stemming from this termination agreement (part 3). Through the lenses of this specific case, the article also seeks to analyse the actual and potential constitutional and European legal dilemmas the case raises in general. It contemplates the theoretical arguments and explores the potential way forward (part 4). Finally, as a conclusion, it

2 While the institutions of the European Union, especially the European Commission and the CJEU, along with Central and European countries are in favour of terminating intra-EU BITs, investors and generally large capital-exporting countries are in favour of retaining these treaties.

3 The landmark Achmea decision of the CJEU is available here: https://bit.ly/3rdL0kI (Accessed: 15 September 2021).

4 See paras. 58–60 of the Achmea decision.

5 The declaration of January 2019 is available here: https://bit.ly/33ticMT (Accessed: 15 September 2021).

6 The agreement for the termination of intra-EU BITs is available here: https://bit.ly/33ticMT (Accessed: 15 September 2021).

outlines the major lessons learned through this legal dilemma, which is unique to the European integration (part 5).

2. The Termination Agreement

The roots of the phenomenon of intra-EU BITs predate the change of regimes in the Central European countries, i.e. this phenomenon existed well before the time they became BITs within the European Union, namely, true 'intra-EU' BITs. As previous studies have highlighted, these BITs were the first international legal instruments that provided liberalisation and protection for the eastward capital flow from Member States of the then European Economic Community towards the Central European countries that were still under Soviet domination but had begun to liberalise their planned economies and markets. It should also be noted that although the international investment agreements (hereinafter; IIAs) were not originally designed to govern economic relations among European countries,[7] international financial institutions, including the European Commission, encouraged the individual states to conclude these types of international treaties.[8] Owing to the eastward enlargement of the European Union in 2004, 2007, and 2013, these IIAs became 'intra-EU' BITs, and implementation of their ISDS began between investors residing in EU Member States and other EU Member States.[9] Detailed analyses of the relevant intra-EU BITs cases show that the overwhelming majority of them were triggered after the enlargement of the European Union, mostlyagainst the newly joined Central European Member States.[10]

The consequences of the intra-EU BITs phenomenon are at least twofold. On the one hand, two parallel systems designed to protect capital flow began to operate simultaneously, since both the intra-EU BITs and fundamental parts of the Founding Treaties of the European Union were created to facilitate and safeguard the free

7 The IIAs were designed to govern economic relations between developed and developing countries generally severing colonial ties. See, for example, Sándor, 2019, pp. 459–469.

8 It is important to emphasise that the European Commission—in the spirit of the 'Washington consensus', together with the World Bank and the International Monetary Fund—urged Member States to conclude such BITs with the Central European countries instead of expanding and using the common commercial policy of the European Community to do so.

9 At the beginning of 2020, there were 188 intra-EU ISDS, which was one fifth of the total number of ISDS. See IIA Issues Note International Investment Agreements, July 2020, available here: https://bit.ly/3fmMPWY (Accessed: 10 October 2021). This trend seems to have continued last year as well (in 2020–2021); see IIA Issues Note International Investment Agreements, September 2020, available here: https://bit.ly/31T5d6G (Accessed: 10 October 2020).

10 Central European countries are respondent States in more than half the total intra-EU BITs, and 95% of the investment procedures were based on IIAs that were concluded during the change of regime. The overwhelming majority of ISDS were initiated after their accession to the EU. See IIA Issues Note International Investment Agreements, July 2020, available here: https://bit.ly/3fmMPWY (Accessed: 10 October 2021).

movement of capital as well as the freedom of establishment.[11] These requirements are also considered to be the preconditions of the single market that is the primary objective of the European integration. On the other hand, intra-EU BITs—especially the arbitration awards based on these treaties—might interfere with significant policies of the European Union, such as the common commercial policy, competition policy, or common agricultural policy. Furthermore, these treaties might not be compatible with the logic of the single market since they do not treat investors equally.[12] Based on these considerations, although the European Commission encouraged individual Members States to conclude such BITs before the eastward enlargement, it changed course and began to urge Member States to terminate them after their accession to the European integration, which also shows the inconsistency of its policy position in this particular question.[13]

These tensions culminated in the abovementioned Achmea decision. Although multiple questions, including the incompatibility of the intra-EU BITs regime with the single market, were raised in this particular case, the CJEU only addressed the issue concerning the autonomy of the EU legal order. In the aftermath of this milestone judgement, the European Commission, in its communication, repeatedly reminded Member States of their legal obligation to terminate intra-EU BITs, since these treaties are incompatible with EU law for several reasons.[14] Furthermore, the Commission sent a formal notice of infringement procedure to several Member States including Finland and Austria for failing to take steps to terminate intra-EU BITs.[15] Additionally, Member States adopted a declaration in January 2019 on the legal consequences of the Achmea decision, in which all Member States committed to terminate intra-EU BITs.[16]

In light of the CJEU's Achmea decision as well as of the communication from the European Commission, the vast majority of the Member States signed the Termination Agreement in May 2020, which, despite being in the form of an international treaty, *de facto* implemented obligations existing under EU law.[17] Both the Preamble and Art. 4 of the Termination Agreement acknowledge that since the arbitration clauses of the BITs

11 See Art. 49 and Art. 63 of the TFEU.

12 Article 18 of the TFEU prohibits discrimination against EU investors based on their nationality. Furthermore, see the interview with Professor Markus Krajewski on the challenges of intra-EU BITs, available here: https://bit.ly/3zXBkyB (Accessed: 10 October 2021).

13 The European Commission even launched infringement procedures against several Member States. https://bit.ly/3fo6BS5 (Accessed: 10 October 2021).

14 According to the clearly detailed position of the European Commission, the basis of incompatibility is much broader than what the Achmea decision declared, since intra-EU BITs are tantamount to a violation of the fundamental requirements that constitute the single market. The Communication COM(2018) 547 is available here: https://bit.ly/3FoOhCM (Accessed: 5 October 2021).

15 See https://bit.ly/3noUfgL (Accessed: 10 October 2021).

16 The declaration is available here: https://bit.ly/3KaRSIr (Accessed: 5 October 2021).

17 However, Austria, Ireland, Finland, Sweden, and the United Kingdom (which exited the EU on 31 January 2020) did not sign the Termination Agreement. In addition, even though the Termination Agreement is ambitious, one of its greatest shortcomings is that it does not cover the Energy Charter Treaty.

are contrary to EU law, Member States have an obligation to ensure their legal orders conform to the requirements of EU law.[18] Interestingly, the final provisions of the Termination Agreement, whereby the Secretary-General of the Council of the European Union acts as the depositary of this agreement, also underline its overall objective to implement the obligation of EU law.[19] Additionally, in the course of the 'structured dialogue', as set out in Art. 9 of the Termination Agreement, the facilitator shall take due account of the case law of the CJEU as well as the decisions and guidance of the European Commission.[20] Consequently, as set out in Arts. 2 and 3, in compliance with EU law, the ultimate objective of the Termination Agreement is to terminate intra-EU BITs, the possible legal effects of their sunset clauses, and the arbitration procedures for which these intra-EU BITs serve as a legal basis.[21]

To this end, the Termination Agreement classifies the intra-EU BITs according to the stages of the arbitration proceedings that are based on them. Hence, Art. 5 of the Termination Agreement declares that new arbitration proceedings cannot be based on the arbitration clauses of intra-EU BITs. In contrast, Art. 6 provides that concluded arbitration proceedings will not be affected by the terminations of intra-EU BITs, and hence, the Termination Agreement cannot serve as a cause or title to reopen or reinitiate these proceedings. Furthermore, the Termination Agreement does not cover amicable agreements that are subject to arbitration proceedings initiated prior to 6 March 2018, which is the date of the Achmea decision. These provisions aim to prevent the non-retroactive (*ex post facto*) effects of the Termination Agreement. However, the Termination Agreement also aims to settle pending arbitration proceedings with a complex set of provisions laid out in Arts. 7–10.

In the case of pending arbitration proceedings, Contracting Parties to intra-EU BITs shall inform arbitral tribunals about the legal consequences of the Achmea decision. If they are parties to judicial proceedings concerning arbitral awards, they shall request the competent national courts to set the arbitral award aside, annul it, or refrain from recognising and enforcing it. As of July 2018, there were 83 pending

18 According to the Preamble of the Termination Agreement, '(…) considering that, in compliance with the obligation of Member States to bring their legal orders in conformity with Union law, they must draw the necessary consequences from Union law as interpreted in the judgment of the CJEU in Case C-284/16 Achmea' and 'considering that investor-State arbitration clauses in bilateral investment treaties between the Member States of the European Union (intra-EU bilateral investment treaties) are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union (…)'. In addition to the Preamble, Art. 4 of the Termination Agreement declares that the 'Arbitration Clauses are contrary to the EU Treaties and thus inapplicable' and 'cannot serve as legal basis for Arbitration Proceeding'.

19 See Art. 11 of the Termination Agreement.

20 See para. 10 of Art. 9 of the Termination Agreement.

21 Sunset clauses in BITs remain operative for a certain period even in the case of and after the termination of BITs and thus secure protection in favour of investments that are made prior to the termination of BITs.

cases before intra-EU ISDS tribunals.[22] Arts. 9 and 10 of the Termination Agreement set up a transitional regime in cases in which 'an investor is party to Pending Arbitration Proceedings and has not challenged before the competent national court the measure that is subject to the dispute'. However, if the arbitration award issued before the Termination Agreement was enforced did not find violation of the intra-EU BIT, the transitional measure shall not apply. In light of these provisions, the ultimate goal of the Termination Agreement is to ensure the pending intra-EU BITs procedures are discontinued or settled.

To this end, the Termination Agreement lays down a transitional regime in the form of a 'structured dialogue' in Art. 9, and as an ultimate guarantee, also allows access to national courts in Art. 10. Apart from the structured dialogue, Art. 8 also allows the Contracting Party and the investor to agree on any amicable resolution that complies with the EU legal order. The investor party to a pending arbitration or a Contracting State concerned in the procedure can initiate the 'structured dialogue', provided the arbitration procedure is suspended. However, if there is already an award, the investor could choose to avoid pursuing enforcement, or its enforcement could be suspended. A further requirement is that the dialogue shall be initiated within six months of the termination of the relevant intra-EU BIT.[23] In addition, if either the CJEU or a national court finds that the contested state measure violates EU law, the 'structured dialogue' shall be initiated as well.[24]

The main goal of the 'structured dialogue' is to provide an impartial and confidential framework for the settlement procedure, which is overseen by a facilitator designated by mutual agreement of the investor and the State concerned. The facilitator shall possess in-depth knowledge of EU law and shall not be a national of either the home or the host State of the investment. Furthermore, the European Commission might also provide guidance on the relevant issues related to EU law, and the jurisprudence of the CJEU and national courts also have to be taken into due account. If an agreement is reached in the framework of the 'structured dialogue', its terms are legally binding and must include an obligation whereby the investor is obliged to withdraw the pending ISDS or enforcement proceeding, refrain from pursuing further proceedings, and waive all rights and claims related to the measure(s) subject to the agreement. Therefore, one of the major conditions of reaching a legally binding agreement is to renounce all the advantages the ISDS of the intra-EU BIT could otherwise provide.

In case the 'structured dialogue' does not or could not lead to an agreement, the investors are granted the right to bring pending ISDS claims before national courts that also serve as EU domestic courts.[25] The Termination Agreement only guarantees

22 See Fact Sheet on Intra-European Union Investor-State Arbitration Cases, available here: https://bit.ly/3norXmG (Accessed: 10 October 2021).

23 Art. 9 para. 2 of the Termination Agreement.

24 Art. 9 para. 3 of the Termination Agreement.

25 See Art. 10 of the Termination Agreement.

already available judicial remedies in the national legal system and hence does not create any new remedy. Access to national courts is a condition of renouncing the guarantees and advantages the ISDS procedures could offer and committing not to undertake any further ISDS dispute. Furthermore, this avenue can be used to make a claim based on national and EU law. In other words, the intra-BIT's provisions can no longer serve as the law governing the dispute. To facilitate access to national courts, the Termination Agreement provides derogation from time limits for bringing actions before national courts.

In sum, the Termination Agreement chose a quite radical path to ensure intra-EU investment arbitration conforms to the requirements of the EU legal order. Instead of widening, for example, the interpretational horizon of ISDS tribunals by emphasising the integration rule of the Vienna Convention on the Law of Treaties,[26] or creating a channel of dialogue between the CJEU and intra-EU ISDS, it terminates intra-EU BITs altogether. While the Termination Agreement does not cover concluded agreements, the arbitration clauses of the terminated intra-EU BITs can no longer serve as a legal basis for new arbitration proceedings. The sunset clauses do not remain to protect previously made investments, either. With regard to the pending intra-EU arbitration proceedings, the Termination Agreement offers two alternative avenues: the framework of the 'structured dialogue' and access to national courts. Some elements of the 'structured dialogue', such as confidentiality, resemble the characteristics of the ISDS procedure, while access to national courts is secured under a broader time limit. However, overall, what the Termination Agreement offers is precisely what the ISDS originally aimed to prevent by externalising and isolating the disputes that arise from the contested state measures.[27] In exchange for providing domestic enforceability, the Termination Agreement ties the investment disputes to EU and national law. This, of course, decreases the leeway of the investor to be able to file for a successful claim, since ISDS would have evaluated the claim only in light of the relevant intra-EU BIT, offering a rather one-sided set of guarantees to the investor. Consequently, channelling the pending arbitration procedures to alternative avenues and terminating the sunset clauses have detrimental effects on the rights of the investors who have already made investments. That might have constitutional implications, especially in terms of the prohibition of retroactive (*ex post facto*) regulation or acquired rights and settled expectation. In the following section, these constitutional dilemmas are examined in light of one specific case that has so far arisen.

26 According to the systemic integration enshrined in Art. 31 para. (3) (c) of the Vienna Convention on the Law of Treaties, in the course of the treaty interpretation, 'There shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties'.

27 Owing to the lack of trust in the legal and court systems of the host countries, the logic of IIAs was to circumvent them both by tying the disputes to international law and using an international venue instead of the domestic courts.

3. An upcoming constitutional case and the dilemmas it raises

Constitutional aspects in relation to the Termination Agreement of some intra-EU investment cases have already arisen, and many more are expected to arise in the near future. For example, in the case of the Republic of Poland v. PL Holdings S.à r.l., Swedish courts granted PL Holdings the enforcement of an intra-EU ISDS award that was issued after the Achmea decision. However, the Supreme Court of Sweden requested a preliminary ruling from the CJEU on the validity of the Belgium-Luxembourg Economic Union-Poland BIT.[28]

One particularly interesting case, however, has recently arisen before the Constitutional Court of Hungary.[29] The constitutional case has its roots in the investment dispute between the French company Sodexo Pass International SAS and Hungary.[30] Sodexo Pass International SAS made investments in the social vouchers market in Hungary. The claim of Sodexo Pass International SAS was based on the BIT concluded by France and Hungary in 1986.[31] Sodexo Pass initiated the arbitration procedure before the International Centre for Settlement of Investment Disputes (hereinafter, ICSID) in 2014 because of the enactment of a legislation in 2011 granting the Hungarian Government a monopoly over the prepaid corporate vouchers industry, which thus restructured this social voucher market. The French company alleged that as the new legislation introduced a State-run voucher system with conditions more favourable than those granted to private operators, based on the intra-EU BIT, it amounted to an indirect expropriation with regard to their investment in the social voucher market.

The ICSID tribunal sided with the French investor company in its award rendered on 28 January 2019, which was after the date of the Achmea decision. The arbitration panel declared that the introduced reforms in Hungary amounted to an indirect expropriation, as set out in Art. 5 para. 2 of the intra-EU BIT between France and Hungary.[32] Therefore, owing to the declared breaches of the investment treaty, Hungary was obliged to pay more than €70 million as compensation to Sodexo Pass International SAS.[33] In accordance with Art. 52 para. 1 of the ICSID Convention, Hungary requested the annulment of the award and a stay of the enforcement before the Secretary-General. However, in the annulment procedure, the ICSID upheld the judgement, which is in favour of the French investor company, in May 2021.[34]

28 See https://bit.ly/3fnPDTI (Accessed: 20 October 2021). See also the Advocate General opinion: https://bit.ly/3K8r23l (Accessed: 20 October 2021).

29 See https://bit.ly/3tl1cmZ (Accessed: 20 October 2021).

30 See, for example: https://bit.ly/3Fwc0kM (Accessed: 20 October 2021).

31 The BIT concluded by France and Hungary was promulgated in Hungary by the Regulation of Ministerial Council no. 59/1987. (XI. 29). Available here: https://bit.ly/3Fwc0kM (Accessed: 10 October 2021).

32 Para. 362 of the ICSID award, available here: https://bit.ly/3tl1cmZ (Accessed: 20 October 2021).

33 Para. 519 of the ICSID award.

34 The annulment proceeding is registered under case no. ARB/14/20. See https://bit.ly/3twUYAi (Accessed: 20 October 2021).

In the meantime, according to Arts. 53 and 54 of the ICSID Convention, Sodexo Pass International SAS sought enforcement before the regular national courts of Hungary in 2019. The Hungarian courts denied the French claimant's request for enforcement in both instances. In its 2020 decision, the first instance court, the Municipal Court of Budapest, referred to the legal consequences of the Achmea decision of the CJEU as the ultimate reason for the denial of the enforcement of the ICSID award.[35] In addition, the Budapest Court of Appeal, as the second instance court, relied on the Termination Agreement as the basis for denying the enforcement.[36] Sodexo Pass International SAS initiated a constitutional complaint procedure in the fall of 2020 against this decision, both before the Curia, which is the Supreme Court of Hungary, and the Constitutional Court. The Constitutional Court has suspended its own procedure until the Curia renders its final decisions in the case.[37]

Regardless of the outcomes of the on-going procedure before the Curia, the claimant company raised abstract and theoretically sound constitutional dilemmas with regard to the relation between the Termination Agreement and the constitutional guarantees enshrined both in national constitutions like the Fundamental Law of Hungary and in the EU legal order. These dilemmas have wider implications with regard to the nature of rights conferred upon investors by BITs as well as the deeper questions of the compatibility of obligations stemming from intra-EU BITs with EU law and the obligation to which national courts of Member States should comply. Accordingly, the main argument of the claimant company is that regarding the pending arbitration procedure, the Termination Agreement in general and their judicial interpretation in the concrete case are in contrast with the principle of non-retroactive (*ex post facto*) legislation. In principle, the Hungarian Fundamental Law—as do other national constitutions in Europe and EU law—prohibits the adoption of *ex post facto* laws. In the jurisprudence of the Hungarian Constitutional Court, the requirement of Art. B) of the Fundamental Law, which declares Hungary as an independent, democratic rule-of-law State, implicitly contains the principle of the settled expectation of the law, which, in principle, prohibits retroactive regulation.

In the reading of the claimant investor company, the Termination Agreement deprived them of substantive rights that are provided in the intra-EU BITs and procedural rights that are guaranteed by the ICSID Convention. These are a set of rights that would allow the investor to ‚externalise' the investment dispute with the host state by tying it to various international standards, such as indirect expropriation or fair and equitable treatment, and by providing a venue that is isolated from the court system of the host state.[38] Furthermore, as the so-called ‚sunset clauses' provide, those alleged rights shall be in effect for a longer time span—in the concrete case, 20 years after the BIT is terminated. However, the Termination Agreement prevents these rights to be

35 See decision no. 32.Vh.400.043/2020/6 of the Budapest Municipal Court.
36 See, decision no. 2201-3.Pkf.25.414./2020/4. of the Budapest Court of Appeal.
37 See decision no. 3209/2021. (V. 19.) of the Constitutional Court of Hungary.
38 See Sornarajah, 2010, pp. 281–284.

exercised in pending arbitration procedures and therefore, it violates the principle of non-retroactivity. The constitutional complaint in the concrete case raises three broad questions. First, looking at the Termination Agreement as a whole, could it violate the principle of non-retroactivity? Second, if the Termination Agreement *de facto* implements EU legal obligation, what are its constitutional implications? Last but not least, what is its relevance with regard to the investors' constitutional right that the intra-EU BITs are inter-state international treaties? The following section will take a closer look at these dilemmas and examine those questions systematically, starting with the last one.

4. Arguments to be considered and the potential way forward

The first broad and rather theoretical question is whether intra-EU BITs and IIAs in general confer individual rights upon investors that are protected in the same way as rights under constitutions or under domestic law are. In the concrete dilemma, this question can be phrased as whether the same standard applies to rights guaranteed under the constitution and rights that arise out of inter-state treaties. What constitutionally protected expectations could an individual investor rely on under IIAs? What constitutional leeway could the Contracting States have in changing the terms of the treaties? From a formalistic point of view, IIAs provide investors with both substantive and procedural rights that circumvent the domestic court system and, to a great extent, the domestic legal system as well.[39] However, a profound understanding of the history of IIAs and the characteristics of international law would certainly lead to a more nuanced answer than a formalistic approach would.

The rapidly evolving IIA landscape has its roots in diplomatic protection,[40] and hence, it forms an integral part of international public law. Therefore, similar to other areas of international law, the investment law regime also rests on the consensus and cooperation of Contracting States that are creating the law, but are also bound by it. For this reason, these inter-state treaties primarily reflect the interests of States by establishing mutual rights and obligations with respect to the standard of treatment vis-à-vis each of their investors. The underlying assumption behind those treaties has been that investment inflow would ultimately result in an increase of macroeconomic development in host countries and that international legal protection increases investment inflow. Therefore, according to this theoretical assumption, there is a strong correlation between the legal protection of investments and macroeconomic development, which is the ultimate goal of this international treaty system. In light of this consideration,

39 A recent effort to ease this characteristic of IIAs is the decision of the Constitutional Court of Columbia. This Court declared that IIAs could only be deemed constitutional if their provisions and their interpretations by the ISDS tribunals are in harmony with the Columbian constitution. The judgement is available here: https://bit.ly/33sbcjo (Accessed: 20 October 2021). An analysis of the decision is available here: https://bit.ly/3K5YHL7 (Accessed: 20 October 2021).

40 See Sornarajah, 2015, pp. 89–94.

the legal protection was designed to be an ancillary part of those treaties. However, it has long been questioned whether these inter-state treaties allow investors to file arbitration claims directly against States without individualised consensus between the investor and the State on the arbitration.[41] This practice was first recognised by an arbitration tribunal in the case between Asia Agricultural Products Ltd v. Sri Lanka[42] in 1990, at a time when the number of IIAs exploded owing to the collapse of command-and-control economic systems as well as the rise of the concept of the ‚Washington consensus'.[43] Although various States acknowledged this interpretation throughout the subsequent decade, recent academic discourse as well as international legislative proposals is increasingly calling it into question and the structure of international investment law is being reconsidered.[44]

In light of these brief historical and dogmatic considerations, it is obvious that a nuanced approach would be more appropriate in assessing whether and to what extent the various rights intra-EU BITs provide for investors are protected by national constitutions. In parallel, a more nuanced approach would be necessary to examine the constitutional leeway States can have to change the terms of or terminate BITs altogether. To what extent does the investment treaty system depend on the consensus of the Contracting States and the rights of the investors? This analysis becomes increasingly complex and challenging with regard to intra-EU BITs. Taking into consideration the eastward enlargement of the European integration as well as the subsequent direction of the development of EU law, EU-based investors should be aware of the weakening and increasingly questionable legal basis of intra-EU investment arbitration. As members of the European Union, the Contracting Parties of intra-EU BITs are no longer alone in exercising sovereign competences that concern the free movement of capital as well as the freedom of establishment. Instead, they exercise these competences jointly with other Member States, through the institutions of the European Union. Consequently, they can no longer autonomously act alone in this area since this belongs to either the exclusive or the shared competences of the European Union.[45] However, since these countries are now part of the same single market, the original consideration behind the conclusions of IIAs, namely, to contribute to macroeconomic development, does not seem to be valid any longer.[46] From this aspect, one interesting observation could be that had the European Community concluded investment treaties

41 See Paulsson, 1995.

42 The case is available here: https://bit.ly/3nklokT (Accessed 20 October 2021).

43 See Sornarajah, 2010, p. 66.

44 A clear example of the recent reform aspirations is the adoption of the United States-Mexico-Canada Agreement (USMCA) that replaced the North American Free Trade Agreement (NAFTA). The new treaty significantly reduced the possibility of initiating investor-State arbitration procedures.

45 See Art. 3 of the TFEU, which lists the exclusive competences of the European Union, and Art. 4 of the TFEU, which lists its shared competences.

46 The current academic research questions the direct relationship between IIAs and the increase of investment inflow. See, for example, Sornarajah, 2010, p. 66.

with the Central European countries, those treaties would have been terminated automatically at accession.

The considerations of this European aspect lead to the second legal dilemma: what are the constitutional implications if the Termination Agreement *de facto* implements EU legal obligations? As has been pointed out above, the ratification of the Termination Agreement was a result of a longer deliberation process of the European institutions, including the European Commission and the CJEU. These deliberations showed that intra-EU BITs restrict and negatively affect the effective enforcement of EU law. They contravene the principle of ‚level playing field' that is necessary for the single market, since these treaties discriminate among investors based on their place of incorporation or residence. On the other hand, their dispute settlement mechanisms do not guarantee the full observance—autonomy, consistent application, primacy, and direct applicability—of EU law since they are not channelled in the system of European judicial dialogue, as they are not considered to be a court or tribunal of a Member State in the reading of Art. 267 of the Treaty on the Functioning of the European Union (TFEU). The autonomy of the EU legal order, as it is recognised in Art. 344 of the TFEU, can only be guaranteed through institutionalised dialogue under the CJEU and by the proper allocation of powers. In light of the Achmea decision as well as the Communication from the European Commission, Member States decided to adopt an international treaty that aims to better protect the achievements of the single market and restore judicial dialogue in the European judicial area.[47] This is of particular relevance from the perspective of constitutional review since courts need to take into account that the Termination Agreement has a dual nature: on the one hand, it is an international treaty, but on the other hand, it might also contain EU legal obligation. This is of great importance since constitutional courts have different obligations and may have different competences with regard to the review of international treaty law and EU law. The standard of constitutional (or judicial) review—according to the constitutions of Member State might also be different in the case of international treaty and EU law as it differs based on whether the review is of international law or EU law. Consequently, the requirements of EU law cannot be ignored in the course of the constitutional review of the Termination Agreement.

As has been recognised, for example, in the case law of the German Constitutional Court, it is of central importance from the perspective of the success of the European integration and the effective enforcement of EU law that this field of law shall be applied uniformly throughout the Member States.[48] In accordance with Art. 267 of the TFEU, the key guarantee of this uniform application is judicial dialogue. Thus, all courts—including constitutional courts of the Member States are obliged to engage in a dialogue with the CJEU. This requirement stems from the fundamental principle

47 In Hungary, decision no. 148/2018. (XII. 17.) of the Prime Minister gave the green light for the preparation of an agreement that would terminate BITs. See Korom and Sándor, 2019.

48 See BVerfG, Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14, para. 37.

of sincere cooperation,[49] which extends to cooperation and mutual respect between courts and tribunals of the Member States as well as to the courts of the European Union.[50] At the same time, the requirement of raising preliminary questions and thus engaging in a respectful judicial dialogue appears in national constitutions as well as in the case law of national constitutional courts.[51] For example, the case law of the Hungarian Constitutional Court indicates that judicial (constitutional) dialogue plays a paramount role in the European Union, and hence, the Court is committed to pursue this judicial dialogue,[52] as some significant cases have already shown in practice.[53] In the reading of the Constitutional Court, neither the ‚*sui generis*' nature of EU law nor the constitutional law of Member States can be guaranteed without proper judicial (constitutional) dialogue.[54] Therefore, the adequate resolution of conflicts between EU law and national constitutions depends on comprehensive multilevel cooperation of all courts in the European Union. Considering the role of judicial dialogue as well as the nature of the Termination Agreement—as it stems from EU legal obligation, its national constitutional basis is the same as that of EU law—it seems that national constitutional courts, based on the abovementioned principles and case law, cannot exercise constitutional review independently without engaging in a European judicial (constitutional) dialogue with the CJEU.

With regard to the concrete case, it would be worth highlighting the potential review power of constitutional courts over EU law; it underscores and supports the abovementioned conclusion. In principle, the Hungarian Constitutional Court is rather reserved in its case law vis-à-vis EU law, as it does not consider the constitutional question of the compatibility of domestic law with EU law.[55] However, following the footsteps of the German Constitutional Court, it also established the theoretical grounds of the review of EU law based on national constitutions. Safeguarding fundamental rights, sovereignty, and constitutional identity serves as the primary grounds for the constitutional review of EU law.[56] Since the Termination Agreement is specifically designed to protect the core values and objective of the European cooperation, namely, the autonomy of EU law along with the role the CJEU plays in it, as well as the competitive single market built on a ‚level playing field', it is unlikely that either sovereignty or

49 According to Art. 4 para. 3 of the Treaty on European Union, '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

50 See Nanteuil, 2017, p. 460; Chronowski, 2019, para. 29.

51 See Grabenwarte et al., 2021, pp. 43–62.

52 See para. 33 of decision no. 22/2016. (XII. 5.) of the Hungarian Constitutional Court as well as para. 49 of decision no. 2/2019. (III. 5.) of the Hungarian Constitutional Court.

53 See, for example, decision no. 3198/2018. (VI. 21.), decision no. 3199/2018. (VI. 21.), decision no. 3200/2018. (VI. 21.), and decision no. 3220/2018. (VII. 2.) of the Hungarian Constitutional Court.

54 See para 18 of decision no. 3241/2019. (X. 17.) of the Constitutional Court and para. 33 of decision no. 26/2020 (XII. 2.) of the Constitutional Court.

55 See Chronowski, 2019, paras. 21–22.

56 See Chronowski, 2019, para. 26; see also decision no. 22/2016. (XII. 5.) of the Hungarian Constitutional Court.

identity control will be relevant. Although a review based on fundamental rights (such as the principle of non-retroactivity) could be an issue in question, as the case law of the Hungarian Constitutional Court well indicates,[57] the question can be resolved in the framework of a judicial dialogue based on sincere cooperation with the CJEU.[58]

Last but not least, the third dilemma is whether the impugned Termination Agreement is indeed contrary to the principle of non-retroactive (*ex post facto*) legislation, in other words, whether it deprives investors of rights that are guaranteed under either the intra-EU BIT or the ICSID Convention in an unconstitutional way. Aside from its relevance to EU law, it seems necessary to explore the requirements stemming from the principle of non-retroactivity to find an appropriate solution for this issue. The Hungarian Constitutional Court has developed rich case law with regard to the principle of non-retroactive legislation, which is recognised as part of the rule of law clause of the Fundamental Law.[59] Even though the Court recognises the principle of non-retroactivity, it does not construe it as an absolute right that would shield all legal relations and acquired rights from any new regulations, intervention, or regulatory reforms.[60] Instead, a case-by-case balancing exercise is required on whether the changes in the law lead to a deprivation of rights that interferes in the settled expectation of the law in an unconstitutional way.[61] In the context of the relevant case law, one of the defining questions is whether the legislator provided straightforward and sufficiently grave or justifiable reasons for the regulatory intervention.[62] In addition, the Constitutional Court also differentiates between substantive and procedural law from this perspective, providing protection only for the former.[63]

In the concrete case, the claimant French investor listed the various rights (both substantive and procedural in nature) it was entitled to, based on both the intra-EU BIT and the ICSID Convention. Considering the relevant constitutional aspects, however, it is of importance that the Termination Agreement does not in fact simply deprive the investor parties in the intra-EU BITs, including the French claimant company, of their existing substantive and procedural rights. Instead, it fundamentally transforms the way the rights of the investors can be exercised with regard to a measure contested in pending arbitration proceedings. To conform to the requirements of EU law, the Termination Agreement opens two new avenues for the investors: on one hand, it invites a ‚structured dialogue', and on the other hand, it provides access to national courts, which leaves open the prospect of remedy and compensation. At the same time,

57 Para. 20 of decision no. 2/2019. of the Hungarian Constitutional Court declares that it has no competence to annul EU law since EU law does not constitute part of the Hungarian legal system.

58 See Chronowski, 2019, para. 26.

59 See, for example, decision no. 1/2016. (I. 29.) of the Hungarian Constitutional Court.

60 See, for example, decision no. 24/2019. (VII. 23.) and decision no. 3244/2014. (X. 3.) of the Hungarian Constitutional Court.

61 See, for example, decision no. 3061/2017. (III. 31.) of the Hungarian Constitutional Court.

62 See, for example, decision no. 24/2019. (VII. 23.) of the Hungarian Constitutional Court.

63 See, decision no. 3024/2015. (II. 9.) and decision no. 3314/2017. (XI. 30.) of the Hungarian Constitutional Court.

intra-EU investors increasingly run the risk that favourable ISDS awards would not be enforced in the end, as they are not compatible with EU law.[64]

In light of these considerations, the violation of the principle of non-retroactivity (*ex post facto*) cannot be established automatically. Instead, the question shall be put into context and evaluated against the backdrop of these alternative channels of remedy. According to the case law of the Hungarian Constitutional Court, this requires a constitutional balancing exercise whereby the extent of the limitations of the existing rights of investors shall be considered in light of the objectives of the Termination Agreement.[65] In the course of this complex balancing exercise, the long-term and pending (not closed) nature of the legal (investor-State) relation also ought to be considered, which may offer more leeway for legislative interventions. Furthermore, since the principle of non-retroactivity is closely related to the requirement of settled expectation, the foreseeability of the overall regulatory transformation shall also be considered, and within this framework, the longstanding gradual shifts in EU law cannot be avoided.

As this rather complex case is about unfold before the Hungarian Constitutional Court, it would be interesting to see whether similar constitutional cases also arise with regard to pending intra-EU investment arbitration across the European Union. Although it is hard to provide one single straightforward solution for the constitutional dilemma of the Termination Agreement, it seems certain that national judicial forums alone cannot address it and that true European judicial dialogue is unavoidable.

5. Concluding remarks

As the previous sections have shown, despite the adoption of the ambitious Termination Agreement, it is unlikely to have the final say in this area, and the controversies surrounding the intra-EU BITs will remain for at least a while. On one hand, the Termination Agreement left the Energy Charter unaffected. This is a significant shortcoming since almost half the intra-EU BITs originated from that treaty, which covers many European energy investments.[66] On the other hand, the constitutional dilemmas of the Termination Agreement, especially with regard to pending investment arbitrations, have also appeared on the horizon.

Based on the concrete case before the Hungarian Constitutional Court, the constitutional dilemma raises three larger questions. First, it urges us to rethink how strongly the rights guaranteed under intra-EU BITs as inter-state treaties relate to individual investors and the leeway State Parties have in modifying or terminating those treaties. Second, considering that the Termination Agreement is based on EU law obligations, how much leeway do national constitutional courts of Member States have in deciding such claims? Third, what constitutional aspects should be taken into account

64 See Fermeglia and Mistura, 2021.
65 See, for example, decision no. 3062/2012. (VII. 26.) of the Hungarian Constitutional Court.
66 See Fermeglia and Mistura, *op. cit*.

in assessing whether the Termination Agreement conforms to the non-retroactivity (*ex post facto* law) principle? Although simple answers cannot be given for this complex dilemma, European judicial dialogue seems to be unavoidable to address it adequately. It should be noted that had the European Community been authorised to conclude the investment agreements with Central European countries in the course of their regime changes, many of these problems could have been avoided. However, since the IIAs were not concluded in this manner, the intra-EU BITs dilemma is going to remain and haunt the Europe judicial area for a while.

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