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THE ARBITRABILITY OF DISPUTES ARISING FROM INTRA-EU BITS

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I. INTRODUCTION AND SCOPE OF THE WORK

1.1 The issue of the jurisdiction¹ of arbitral tribunals in international investment disputes between an investor, whose home State is a Member of the European Union (“EU”), and a State which is, in turn, also a Member of the EU, is one of the most discussed topics in recent years by international investment law scholars and practitioners. These disputes are initiated by investors on the basis of so-called “Intra-EU BITS,” i.e. Bilateral Investment Treaties (“BITS”), stipulated between two EU Member States prior to the accession in the EU of one of them. As of today, pursuant to the expansion of the EU that occurred mainly in 2004 and 2007, there are more than 100 Intra-EU BITS in force, in particular between the former States of the Union and the later-joining States from Eastern Europe. Pursuant to these expansions, as it will be further explained below, the validity and/or effectiveness of such treaties – and subsequently the arbitrability of the disputes regulated by intra-EU BITS – have been questioned by the EU Commission, by certain States, and on the part of scholars. The reasons for these objections are based on arguments of both international and EU law. With regard to the former, it has been argued that intra-EU BITS have become invalid or inapplicable in light of the provisions on conflict of norms provided for in the 1969 Vienna Convention on the Law of Treaties (“VCLT”); concerning the latter arguments, it has been stated that intra-EU BITS violate the principles of supremacy of EU law, uniform interpretation of EU law, and non-discrimination on the basis of nationality set forth in the EU treaties.

The debate on the matter is therefore still very much open² and it will probably be so, at least until the Court of Justice of the European Union (“CJEU”)

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¹ In the opinion of the author the arbitrability of the dispute is related to the jurisdiction of the tribunal. On this point see Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 19-46 (Loukas Mistelis & Stavros Brekoulakis eds., 2009).

² The debate among scholars is still very intense. For a general account of how the relationship between EU and investor-state arbitration is gradually emerging and taking shape, see Gabriele Mazzini, *The European Union and Investor-State Arbitration: A Work in Progress*, 24 *AM. REV. INT’L ARB.* 611 (2013). In particular, in support of the

argument that intra-EU disputes are arbitrable; *see, e.g.*, Markus Burgstaller, *European Law and Investment Treaties*, 26(2) J. INT'L ARB. 181 (2009); August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39(2) LEGAL ISSUES OF ECON. INTEGRATION 157 (2012); Christian Soderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24(5) J. INT'L ARB. 455 (2007); Christian Tietje, *Bilateral Investment Treaties Between Member States (Intra-EU-Bits)—Challenges in the Multilevel System of Law*, 10(2) TRANSNAT'L DISP. MGMT (2013), available at <http://www.transnational-dispute-management.com/article.asp?key=1945>; Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58(2) INT'L & COMP. L. Q. 297 (2009); Rumiana Yotova, *The new EU competence in foreign direct investment and intra-EU investment treaties: Does the emperor have new clothes?*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW 388 (Freya Baetens ed., 2013).

For articles which endorse the view that does not support the arbitrability of intra-EU investment disputes, see Mark Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12(1) SANTA CLARA J. INT'L L. 159 (2013); Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU and International Law*, 48 COMMON MKT. L. REV. 63 (2011); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MKT. L. REV. 383 (2009); Thomas Eilmansberger, *Investment Arbitration—Bilateral Investment Treaties and EU Law*, in AUSTRIAN ARBITRATION YEARBOOK 515 (Christian Klausegger et al. eds., 2009); Stephen Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, 39(2) LEGAL ISSUES OF ECONOMIC INTEGRATION 179 (2013); Stephen Hindelang, *Member State BITs—There's Still (Some) Life in the Old Dog Yet*, in Y.B. INT'L INVESTMENT L. & POL'Y 217 (2011).

Other works dealing with the issue of intra-EU BITs are John Gaffney, *Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings from the Court of Justice of the European Union?*, 10(2) TRANSNAT'L DISP. MGMT. (2013), available at <http://www.transnational-dispute-management.com/article.asp?key=1944>; Ahmad Ghouri, *Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options*, 16(6) EUR. L.J. 806 (2010); Thomas Henquet, *International Investment and the European Union: An Uneasy Relationship*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW 375 (Freya Baetens ed., 2013); Dominik Moskván, *Is There an Alternative to Intra-European Bilateral Investment Treaties Framework Under European Law?*, in BUS. L. F. 353 (2012); Cecilia Olivet, *A Test for European Solidarity*, TRANSNATIONAL INSTITUTE (Jan. 2013), available at http://www.tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf; Michele Potestà, *Bilateral Investment Treaties and the European Union, Recent Developments in Arbitration and Before the ECJ*, 8 L. & PRAC. OF INT'L CTS. & TRIBS. 225 (2009); Michele Potestà, *Il Caso Eastern Sugar: Accordi Bilaterali sugli Investimenti, Unione Europea e Diritto Comunitario*, 44(4) RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 1055 (2008); Konstanze Von Papp, *Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ?—A Plea for Direct Referral from Investment Tribunals to the ECJ* (May 16, 2013), available at <http://ssrn.com/abstract=2267045>; Marek

rules on the matter. The relevance of the issue is shown, *inter alia*, by the fact that, as of today, “around 70 percent of ICSID cases involving EU nationals or Member States arise under intra-EU BITs.”³

The present paper is aimed at examining if arbitral tribunals dealing with disputes arising from intra-EU BITs have jurisdiction. Such analysis, in turn, requires the identification of the system of law applicable to the determination of such jurisdiction;⁴ it is in light of the applicable system of law, in fact, that we may determine if an arbitral tribunal may exercise jurisdiction on a certain case or if it is precluded from doing so due to the inarbitrability of the matter.

In light of the examination of the relevant international and EU law principles, this article affirms that the only proper law to determine the jurisdiction of arbitral tribunals in intra-EU disputes is the relevant BIT (and, as a consequence, international law) and, therefore, such jurisdiction may not be denied on the basis of the application of other systems of law (e.g. EU law). Moreover, this paper argues that the applicability of BIT provisions on jurisdiction does not violate any provision of EU law.

After having introduced, in the following subsection (paragraph 1.2), the leading case and the general remarks on the matter, we will focus in Section II on the applicability of the international law principles on conflicting treaty obligations, namely Articles 59 and 30 of the VCLT. Paragraphs 2.2 and 2.3 respectively demonstrate that such rules are not applicable to the issue at stake and that intra-EU BITs provisions are still valid and applicable notwithstanding the alleged contrasts with EU law. Furthermore, in paragraph 2.4, it is argued that, in international law, States are not free to revoke the rights they have freely granted to investors and on which the same investors have relied. Section III examines the EU Commission’s arguments against the applicability of intra-EU BITs based on EU law, i.e. the alleged violations of the exclusive competence of the CJEU in the interpretation of EU law, the alleged discrimination between EU investors based on their nationality, and the violation of the principle of mutual trust. It is argued that: (i) considerations of mutual trust are not at stake in the present case

Wierzbowski & Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CRISTOPH SCHREUER 544 (Christina Binder et al. eds., 2009).

³ Yotova, *supra* note 2, at 388.

⁴ As did Friedrich Karl von Savigny, SYSTEM OF THE MODERN ROMAN LAW (1840-49), we have to understand to which court a legal relationship “belongs,” and what is the appropriate “seat” of the legal relationship. Therefore, the assumption from which we move is that every legal issue has its proper jurisdiction, that shall be ascertained according to the intention of the parties and to the proper law of the relationship. Once the proper law is established, the relevant tribunal will base its jurisdiction on such law. This approach has also been followed by the CJEU in Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 2008 E.C.R. I-06351, ¶¶ 281-282, where it was stated that the perspective of the CJEU shall be dictated by the treaties establishing it. As stated by Wehland, *supra* note 2, at 300, “each tribunal derives its legitimacy from the specific act providing for its creation.”

(paragraph 3.2). Therefore, neither the application of EU law by arbitral tribunals, nor the possibility (only granted to certain investors) to have access to international investment arbitration amounts to a violation of EU law; (ii) on the basis of the principle of equality, as applied by the CJEU, there is no discrimination between investors of different nationalities (paragraph 3.3); (iii) EU law is applied by arbitral tribunals as a matter of fact and so it does not violate the competence of the CJEU (paragraph 3.4). Finally, Section IV argues that, considering that it is likely that the CJEU will rule for the applicability of EU law to matters related to intra-EU investments, it is necessary to find a general criterion to establish the jurisdiction of arbitral tribunals in cases arising from intra-EU BITs, even if such treaties are declared invalid/inapplicable (paragraph 4.1). Such a criterion might be found in the doctrine of separability, as developed in international commercial arbitration. Paragraph 4.2 analyzes the possibility of applying such doctrine to BITs, and reaches the conclusion that this seems to be precluded by the VCLT. In any event, paragraph 4.3 demonstrates that the undesirable effect that arbitral tribunals would not have jurisdiction on the basis of the invalidity/inapplicability of intra-EU BITs might be avoided on the basis of the application of the principle of irrevocability of consent to BITs. According to this doctrine, the arbitration clauses contained in such treaties – once the consent on arbitration is perfected – will continue to be valid and applicable even if the other BIT provisions should be considered invalid or inapplicable by the CJEU in the future. The effects of the irrevocability of consent expressed through a BIT might therefore be equated to those which the separability principle generates in commercial contracts containing an arbitration clause, i.e. the arbitral tribunal will have jurisdiction over the case even if there is an allegation of invalidity/inapplicability of the main contract in which the arbitration clause is included. Finally, paragraph 4.4 analyzes the issue of the time from which the consent might be considered irrevocable and the various theories proposed in this regard.

It is worth noting that the present article will not deal with issues related to the substantive protection of intra-EU investors, the application of the Energy Charter Treaty in Europe and the human rights concerns arising from the application of the European Convention on Human Rights in intra-EU investment cases.

1.2 The issues related to intra-EU BITs, as well as the various positions expressed with regard to the validity and applicability of such treaties, are clearly expressed in the “award on jurisdiction, arbitrability and suspension” issued in the *Eureko v. Slovakia*⁵ case.

⁵ *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension (Perm. Ct. Arb., Oct. 26, 2010). In this case the investor brought a claim for indirect expropriation based on certain measures by the host State in the health insurance market, which allegedly destroyed the value of Eureko’s investment. Such actions, according to the investor, represented a violation of the standards of treatment provided for in the BIT between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic stipulated in 1992, so prior to the accession of the respondent State in the EU.

In *Eureko*, the Slovak Republic argued that, as a matter of international law, EU law and German law (the law of the seat of arbitration), the State's accession to the EU, which occurred in 2004, terminated the Dutch-Slovak BIT or, alternatively, rendered the arbitration clause inapplicable. As a result, the arbitral tribunal would lack jurisdiction to hear the claim. The respondent's arguments were mainly based on Articles 59 and 30 of the VCLT, which respectively regulate the "Termination or suspension of a treaty implied by the conclusion of a later treaty" and the "Application of successive treaties dealing to the same subject-matter." The application of these rules (the analysis of which will be carried out below), argues the Slovak Republic, determines that the Dutch-Slovak BIT should have become entirely invalid (according to Article 59 of the VCLT) or that its provisions in conflict with the EU Treaties should be inapplicable (following Article 30 of the VCLT).

Such arguments have been (at least the one based on Article 30) supported by the EU Commission, which submitted to the tribunal detailed observations in response to an invitation by the same tribunal. According to the EU Commission, in fact, "there are some provisions of the Dutch-Slovak BIT that raise fundamental questions regarding compatibility with EU law," in particular those related to investor-State arbitration, and "the European Commission must therefore express its reservation with respect to the Arbitral Tribunal's competence to arbitrate the claim brought before it by *Eureko*." Furthermore, the EU Commission pointed out that the arbitrability of the dispute would violate the principle of mutual trust between the EU national courts, revealing mistrust in the courts of EU Member States, that are – in the Commission's opinion – the natural judge for the dispute. The EU Commission also stated that the jurisdiction of the arbitral tribunal would undermine the exclusivity in the interpretation of EU law of the CJEU, conferred by Articles 344 (and 267) of the Treaty on the Functioning of the European Union ("TFEU"). Finally, the fact that only nationals of the States that concluded the BIT may have access to arbitral tribunals allegedly constitutes an illegitimate discrimination between the investors from the various Member States.

The tribunal rejected this approach and upheld the opinion expressed by the investor and the Dutch State – which submitted observations as did the EU Commission – stating that the BIT is still valid and that the tribunal had jurisdiction to hear the claim. Furthermore, the tribunal pointed out that "the fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of Jurisdiction," nor undermine the role of the CJEU.

The award follows the position held on the issue by the previous arbitral tribunals that dealt with the matter. In particular, it is worth mentioning the decision in *Eastern Sugar BV v. The Czech Republic*,⁶ based on the same BIT and in which the tribunal reached the same conclusion.⁷

⁶ *Eastern Sugar BV v. Czech Republic*, SCC Case 088/2004, Partial Award, (Arbn. Inst. of the Stockholm Chamber of Commerce, Mar. 27 2007).

⁷ In the same vein, note the awards in *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill Srl & S.C. Multipack Srl v. Romania*, ICSID Case No.

Moreover, it is worth noting that the Slovak Republic challenged the award before the Higher Regional Court of Frankfurt, the court of the seat of the arbitration, which upheld the tribunal decision on jurisdiction and declared that the arbitrability of disputes arising from intra-EU BITs does not violate any provision of EU law.⁸ For this reason – and on the basis of the doctrine of *acte claire* – the Court also refused to submit the issue to the CJEU.⁹

The facts of the case show that we are currently facing a clash of legal systems, in which – on the one hand – arbitrators try to defend the international investment arbitration system based on the consent of the parties and – on the other hand – the EU Commission tries to protect the monopoly of CJEU jurisdiction in all the matters that occur within the EU borders.¹⁰ Both the arbitrators and the EU Commission want to secure the dispute to their jurisdiction by means of the application of their own system of law to the dispute.

This situation recalls the 17th century scholars' debate aimed at finding a solution for conflicts of jurisdictions to be resolved on the basis of the identification of the proper law to determine jurisdiction. The solution that the

ARB/05/20, Decision on Jurisdiction and Admissibility of Sept. 24, 2008 and *Binder v. Czech Republic*, UNCITRAL award, unreported. Some other unreported arbitrations are *Nepolsky v. Czech Republic*, *HICEE v. Slovakia* and *Euram v. Slovakia*, which are mentioned in the Investment Arbitration Reporter website. Furthermore, note that there are various awards regarding the compatibility of EU law with the 1994 Energy Charter Treaty, which support the opinion of the arbitrability of disputes arising from Intra EU investments. In particular, it is worth mentioning the awards in *AES Summit Generation Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010; *ADC Affiliate Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006; *Telenor Mobile Communications v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, Sept. 13, 2006; *Electrabel SA v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012; and *EDF International SA v. The Republic of Hungary*, UNCITRAL Award, unpublished. Finally, note that in *Saluka Investment BV v. The Czech Republic*, UNCITRAL Partial Award, Mar. 17 2006, the issue of intra-EU investments was briefly addressed.

⁸ *The Slovak Republic v. Eureko BV*, Higher Regional Court of Frankfurt, Decision of May 10, 2012, 26 SchH 11/10. For a detailed analysis of the award, see M. Keller & S. Miron, *Message From Frankfurt – The Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt) Speaks on the Relationship Between EU Law and International Investment Law*, 10(2) TRANSNAT'L DISPUTE MANAGEMENT, available at www.transnational-dispute-management.com.

⁹ On September, 19 2013 the German Federal Supreme Court – before which the award on jurisdiction was challenged – issued a procedural order through which it delayed its ruling on the award, on the basis of the fact that Slovakia also challenged the final award before the Higher Regional Court of Frankfurt, raising the same jurisdictional objection, and therefore it would be inefficient to have two rulings on the same case.

¹⁰ On this point, see Yotova, *supra* note 2, at 411, stating that “both the CJEU and arbitral tribunals display the inclination not to apply the legal orders outside their constituent one.” Moreover, note that Tietje, *supra* note 2, at 22, has described an “insoluble dilemma” with regard to the clash of legal systems that relate to the intra-EU BITs issue.

works of such scholars, and in particular Ulrich Huber,¹¹ has reached is that the legal systems involved in the dispute should exercise their jurisdiction in respect of each other and “protecting the parties’ expectations in the interest of international commerce.”¹² Such a conclusion also seems to be appropriate with regard to the issue of jurisdiction for disputes arising from intra-EU BITs.¹³ The problem of arbitrability of disputes, such as *Eureko*, should therefore be resolved in light of the proper law to be applied to jurisdiction, as well as by considering the expressed will of the parties, in order to protect the legitimate expectations of the investor acquired when the investment was initiated.

II. INTRA-EU BITS, THE VCLT AND THE “DIRECT RIGHTS THEORY”

2.1 From an international law perspective (i.e. from the perspective of the VCLT), the invalidity or non-applicability of the BIT provisions regarding jurisdiction may be argued on the basis of either Article 59 or Article 30 of the VCLT. The present section will deal with these two rules and will try to demonstrate their inapplicability to the issue at stake.

Moreover, this section will demonstrate that BIT provisions granting rights to investors should be valid and applicable until the expiry date agreed by the States when entering into the BIT, even in the event that the parties (i.e. the States) should – expressly or impliedly – terminate the BIT.

2.2 Article 59 of the VCLT regulates the case of implicit termination of a whole treaty due to the conclusion of a later treaty between the same parties and on the same subject matter. The rule establishes that, in order to consider the prior treaty terminated: (i) it must appear from the later treaty, or be otherwise established, that the matter must be governed by that later treaty; or (ii) 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. The invalidity of intra-EU BITs on the basis of Article 59 of the VCLT was claimed

¹¹ *De Conflictu Legum Diversarum in Diversis Imperiis*, published in 1684. For a complete English translation, see Ernest G. Lorenzen, *Huber’s de Conflictu Legum*, 13 ILL. L. REV. 375 (1918-1919).

¹² Joel R. Paul, *Comity in International Law*, 32(1) HARV. INT’L L.J. (1991). The author cites the decision in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Generally speaking the concept of comity was developed by Huber in *Praelectiones juris romani et hodierni*, published in 1689. He found in the doctrine of international comity the proper solution for conflicts of jurisdiction. It is not possible here to illustrate further the concept of international comity. For a survey, see ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS I* (1992).

¹³ In this regard see Paul, *supra* note 12, at 7 (“comity as a wall, preserves private party autonomy to opt out of a particular system of domestic regulation. In this sense, comity expands the scope of private transactions as it restricts the scope of public regulation”).

by both the respondent States in the *Eureko* and *Eastern Sugar* cases, but not by the EU Commission.

As a preliminary remark, it is worth mentioning that even if “the wording of art. 59(1) VCLT appears to suggest that, if the substantive criteria provided therein are fulfilled, the earlier treaty is automatically terminated....Article 59 VCLT is subject to a specific termination procedure pursuant to article 65 VCLT.”¹⁴ According to this provision, a State willing to terminate a treaty must notify the other parties of its claim. With regard to the vast majority¹⁵ of intra-EU BITs, this procedure has not been followed; this means that such treaties are still formally valid. As has been noted, “Also the Commission’s concluding remark that ‘eventually, all intra-EU BITs will have to be terminated’^[16] demonstrates that the Commission does not consider that the EU accession of the Czech Republic and Slovakia would have led to an ‘automatic’ termination of their pre-accession intra-EU BITs.”¹⁷

In any event, moving to an analysis of the substantive requirements of Article 59 of the VCLT, the first requirement is that the two treaties must be related to the same subject matter. In this regard, originally “the doctrine tended to consider that the requirement must be strictly interpreted and that two treaties shall only be considered as covering the same matter if their object is identical and presents a comparable degree of generality.”¹⁸ However, as of today, an identity of subjects or a strict overlap is not required. Even if it may be recognized that a later general treaty may replace a specific previous one, a mere incidental (i.e. related only to certain provisions) conflict is not sufficient.¹⁹ Hence, the arguments of those scholars²⁰ who affirm that the EU Treaties have implicitly terminated intra-EU BITs in light of the fact that they regulate the same subject matter fall short.

In fact, first of all, from a general point of view, it should be noted that while the EU Treaties focus on the protection of investors at the pre-investment stage, BITs give a broad range of substantive remedies at the post-investment stage.²¹ EU law is mainly focused on the liberalization of the market, while BITs primarily deal with the protection of investors.²² Furthermore, as previously noted, EU law

¹⁴ Reinisch, *supra* note 2, at 163.

¹⁵ Note that some EU countries such as the Czech Republic, have started the formal procedure to terminate such treaties.

¹⁶ *Eureko*, *supra* note 5, ¶ 182.

¹⁷ Reinisch, *supra* note 2, at 165.

¹⁸ Francois Dubuisson, *Article 59*, in *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, A COMMENTARY 1336 (Olivier Corten & Peter Klein eds., 2011).

¹⁹ *Id.*

²⁰ See, e.g., Dimopoulos, *supra* note 2, at 73.

²¹ See Tietje, *supra* note 2, at 14.

²² But see Dimopoulos, *supra* note 2, at 73, who states that “EU law provides rules for the post-establishment treatment and operation of foreign investments, the transfer of assets and the imposition of limitations on the rights of individuals resulting from EU or Member States’ measures. Hence, both intra-EU BITs and EU Treaties deal with foreign investment activity, and provide rules for the same aspects of foreign investment

does not provide for standards such as the fair and equitable treatment, the obligation to pay compensation in case of expropriation and – most importantly – the possibility to start a direct claim against the host State before an arbitral tribunal.²³

In light of the aforementioned differences, it could be observed that the requirement that “the two treaties are not capable of being applied at the same time” is not fulfilled. As stated in *Eureko*, “the later treaty must have more than a minor or incidental overlap with the earlier treaty.”²⁴ This overlap, in our case, is not present.²⁵ The fact that the EU Commission did not support the argument based on Article 59 of the VCLT (i.e. on the termination of the prior treaty) is a clear indication of the weakness of such an argument that has – in fact – been rejected by all the tribunals that have dealt with it.

With regard to the intention of the parties to terminate the previous treaty, which is required by Article 59 of the VCLT as an alternative to the incapability of the treaties to be applied at the same time, first of all it must be noted that the wording of the later treaties (i.e. the Accession Treaties through which the new States have joined the EU) say nothing in this regard. In the absence of an express

regulation, namely their post-establishment treatment and operation, capital movements/transfers and limitations on private property rights.” It should be noted that such analogy of regulation is actually not present. The EU Treaties – through the so-called four freedoms (goods, persons, services and capital) – are aimed at eliminating the barriers in the pre-establishment phase and deal with the post-investment stage only in a cursory manner.

²³ On the differences related to the standards of treatment, see Reinisch, *supra* note 2, at 166-172. Furthermore, on the importance of the possibility of suing the host State before an arbitral tribunal, see the *Eastern Sugar* decision, *supra* note 6, ¶ 165, stating that “the fact that the EU does not provide for a possibility for an investor to sue a host State directly, and that in international BIT arbitration this is an essential feature of most bilateral investment treaties, is in itself sufficient to reject the Czech Republic’s equivalence argument.” On this point, see also Potestà, *Il caso Eastern Sugar*, *supra* note 2, at 1060. See also Wierzbowsky et al., *supra* note 2, at 555, stating that “the ECJ is not a court that is set up to protect investors and European law still has not developed more significant legislative action covering the problems that traditionally fall within the BIT. The broader access of an individual to a court is still barred by the *Topfer* and *Plaumann* doctrines.”

²⁴ *Eureko*, *supra* note 5, ¶ 242.

²⁵ See Eilmansberger, *Bilateral Investment Treaties*, *supra* note 2, at 401, stating that “in order for such a BIT to be challengeable as such under Community law, it would have to encroach upon an exclusive competence of the EC to regulate all matters in this field. There is, however, no such exclusive EC competence concerning the free movement of capital between Member States.” The same author, *Investment Arbitration*, *supra* note 2, at 523, stated that “BITs and . . . EC provisions should be complementary rather than contradictory.” In the same vein, Yotova, *supra* note 2, at 391, argues for the validity of intra-EU BITs and states that “given that the object and purpose of BITs is to encourage capital flows, it is difficult to conceive how they would contravene the TFEU capital freedoms.” These authors, stating that intra-EU BITs and EU law are capable of being applied at the same time, confirm that Article 59 VCLT is not applicable to the present case.

wording, “the ILC emphasized that the existence of an incompatibility between two treaties shall create, above all, a strong presumption that the intention of the parties was to abrogate the previous treaty; a presumption that could not be set aside unless there were elements to establish a contrary will of the states.”²⁶ Such a presumption is in our case not sustainable. This is confirmed by the fact that the behavior of the various States party of intra-EU BITs after their accession to the EU is clearly at odds with the alleged will to terminate such BITs.²⁷ In fact, as noted by the *Eastern Sugar* award²⁸ with regard to the Dutch-Czech BIT, the subject of the EU accession possibly superseding the BIT was not raised by the States during their consultations that followed the accession.²⁹

2.3 Having demonstrated the inapplicability of Article 59 of the VCLT to the present case, we shall now turn to the provision of Article 30(3) of the VCLT, which has been invoked by both the respondent States and by the EU Commission in the *Eureko* and *Eastern Sugar* cases as a basis for the inapplicability of BIT provisions regarding the jurisdiction of arbitral tribunals. According to this rule, which also applies to cases of treaties relating to the same subject matter, “when all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

As a preliminary remark, it is worth noting that Article 30(3) of the VCLT does not provide for the invalidity of the provisions of the earlier treaty, which are incompatible with the later one, but only for their inapplicability; Article 30(3), therefore, only establishes an order of priority in the application of the conflicting rules. This means that intra-EU BITs are still valid, but their provisions in conflict with EU Treaties are ineffective. The EU Commission has claimed that Article 30(3) of the VCLT shall apply to the arbitration clause contained in intra-EU BITs, which are allegedly incompatible with the jurisdictional regime established by EU Treaties and in particular with the exclusive role of the CJEU on the interpretation of matters regarding EU law.

In order to evaluate if the EU Commission’s remarks have a correct legal foundation, it is necessary to analyze the very applicability of Article 30(3) of the VCLT to the issue at stake.

²⁶ Dubuisson, *supra* note 18, at 1341.

²⁷ For a different argument for the same solution, see Wehland, *supra* note 2, at 305, who states that “a BIT could be seen as a *lex specialis* limited to bilateral investment issues between its signatories. This would seem a strong argument against the signatories’ intention to have a BIT replaced by the more general treaty.”

²⁸ *Eastern Sugar*, *supra* note 6, ¶ 151.

²⁹ For an analysis of the EU Commission practice concerning the validity of intra-EU BITs in the years that followed the expansion of the EU, see Yotova, *supra* note 2, at 392-400, who demonstrates that such practice – as well as the opposition of the majority of EU Member States to the termination of intra-EU BITs – is not compatible with the possibility of an implicit termination of the treaties by the States.

Article 30(3) VCLT presupposes a conflict of norms, i.e. presupposes that both the BIT provisions on arbitral jurisdiction and the EU Treaties provisions regarding the jurisdiction of the CJEU are applicable if a violation of the standards of protection of the investment occurs and the application of the former necessarily violates the latter.³⁰ Hence, as stated by the *Eureko*³¹ tribunal, Article 30(3) seems to require a stricter incompatibility than that required by Article 59. The concept of “sameness,” in this case, should be interpreted as requiring an actual identity of the subject matters regulated by the two conflicting rules.³² A comparison of the rationale and of the content of the jurisdictional clauses contained in the different treaties is therefore required.³³

Arbitration clauses contained in BITs provide for the direct attribution of an enforceable right to the investor to bring a claim, for matters arising out of an investment, before a third, impartial and neutral arbitral tribunal, the members of which are selected by the parties, which applies a body of law chosen by the parties and which award is binding on the parties on the basis of their consent. The attribution of such right is strictly related to the protection of the investor and is based on the fact that the host State agreed to submit to arbitration in order to promote foreign investments within its territory.

The jurisdictional function within the EU is, in turn, based on the concept of mandatory general jurisdiction of national courts, which apply their own national law and whose judges are automatically appointed for the case. The EU system does not provide for the possibility of the investor directly bringing a claim before the EU jurisdictional bodies and it is not related to the goal of promoting foreign investments.

On the basis of the above comparison, it is legitimate to ask ourselves if Article 30(3) is applicable in the present case and – therefore – if the two regimes are incompatible, i.e. if the application of the one necessarily violates the other. The answer is that it seems not. In fact, as stated above, the two jurisdictions are designed to be applied to different situations and this is confirmed also by the fact that the CJEU has recognized the possibility of arbitration in matters regarding EU

³⁰ In fact, in the words of Hans Kelsen, “a conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly *violated*” (emphasis in original). See Hans Kelsen, *Derogation*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 339, 349 (Ralph A. Newman ed., 1962). See also Jan Mus, *Conflicts between Treaties in International Law*, 45(2) *NETHERLANDS INT’L L. REV.* 208 (1998).

³¹ *Eureko*, *supra* note 5, ¶¶ 239-40.

³² ELENA SCISO, *GLI ACCORDI INTERNAZIONALI CONFLIGGENTI* 78-84 (1987). The author also recalls the PCIJ 1939 case, *The Electricity Company of Sofia and Bulgaria*, in which the court faced a situation of two conflicting jurisdictional clauses and it refused to consider that the later one abrogated the earlier, on the basis of the non-identity of the subject matters. The court therefore applied the treaty provision that was more favorable for the attribution of jurisdiction.

³³ It should be noted that the conditions for the application of Article 30(3) of the VCLT (and in particular the requirement of the same subject matter) are still the object of debate among scholars. See, e.g., Aleksander Orakhelashvili, *Article 30*, in *THE VIENNA CONVENTION*, *supra* note 18, at 775-77.

law.³⁴ The logical consequence of this analysis is that the two regimes could be considered complementary, rather than incompatible.³⁵

2.4 It is worth noting that a closer look at the wording used in BITs reveals that, even if the aforementioned arguments should be rejected and the VCLT provisions on termination and incompatibility of subsequent treaties should be considered applicable to the case of intra-EU BITs, the effectiveness of the arbitration clauses contained in such treaties may be founded on the State parties' intentions as expressed in the relevant BIT.

In fact, as of today, substantially all BITs contain clauses providing for special conditions aimed at protecting investors in case of termination of the BIT. Such clauses are termed "survival clauses" and their effect is to freeze the condition of the investment for a period of time (usually from 10 to 20 years) after the termination of the BIT. An example of such a clause is Article 13(3) of the Dutch-Slovak BIT (which gave rise to the *Eureko* claim), providing, "In respect of investments made before the date of the termination of the present agreement, the foregoing articles thereof shall continue to be effective for a further period of fifteen years from that date."³⁶

The effectiveness of survival clauses in the framework of international investment law is strictly related to the acceptance of the so-called "direct-rights theory." This theory stipulates that the substantive and procedural rights conferred by BITs "belong to the claimant investor itself, rather than to that investor's home State asserted on behalf of the State by the investor."³⁷ The validity of such a theory is today endorsed by the vast majority of scholars³⁸ and by a broad range of national judgments³⁹ and arbitral awards.⁴⁰

³⁴ See, e.g., *Eco Swiss China Time Ltd. v. Benetton International NV*, case C-126/97, 1999.

³⁵ As it will be demonstrated in the following paragraph, the mere fact that arbitral tribunals may take into consideration and possibly apply provisions of EU law is not a sufficient argument to demonstrate that the exclusive role of the CJEU – to be intended as the possibility to rule on the interpretation of any EU law matter – is violated.

³⁶ Other examples are Article 10(3) of the Sweden-Romania BIT; Article 14 of the UK Model BIT and Article 22(3) of the U.S. Model BIT.

³⁷ CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEININGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 61.2 (2007).

³⁸ See, e.g., Zachary Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, 74 *BRITISH Y.B. INT'L L.* 182 (2003); Martin Paparinskis, *Investment Treaty Interpretation and Customary Investment Law: Preliminary Remarks*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 81-85 (Chester Brown & Kate Miles eds., 2011); Andrea K. Bjorklund, *Private and Public International Law: Why Competition among International Economic Law Tribunals Is Not Working*, 59 *HASTINGS L.J.* 126 (2007). A contrary approach seems to be endorsed by Tania S. Voon, Andrew D. Mitchell & James Munro, *The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 9(2) *ICSID REV.-FOREIGN INVESTMENT L.J.* 455 (2014), who seem to endorse the so-called "derivative theory," according to which the investor exercises rights of the State on its behalf. For an analysis of the various doctrines emerged in this area, see

If the direct rights theory is accepted, the consequence of survival clauses is that investors have a right to benefit from the substantive and procedural rights provided in the BIT for a certain period of time (established by the survival clause in the relevant BIT) after the termination of that BIT.⁴¹ Applied to the issue of jurisdiction of arbitral tribunals for disputes arising from intra-EU BITs, this statement leads us to the conclusion that intra-EU investors will have the power to bring a claim before an arbitral tribunal until the expiry date of the right established according to the relevant survival clause.

In any event, it is worth mentioning that while the existence of such a right is not questioned in cases of unilateral termination of BITs,⁴² some doubts have arisen with regard to the applicability of survival clauses in the case of mutual termination of BITs.⁴³ This is due to the fact that – according to such authors – the power to exclude the effectiveness of these clauses is implied in the concept of sovereignty of States.⁴⁴

In this regard, it should be noted that “the capacity of a State to agree to binding limitations on sovereignty is an attribute of that same sovereignty”⁴⁵ and that such “limitations on future government conduct are accepted predominantly as a matter of self-interest – through the mechanism of treaties for the promotion and protection of foreign investment.”⁴⁶ Hence, if the State has freely decided to accept a binding limitation on its sovereignty for a certain limited period of time, in order to gain a certain legal advantage, it is obvious that it cannot withdraw the rights it has granted to the investor *ad libitum*.⁴⁷

Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, available at <http://ssrn.com/abstract=2033167>.

³⁹ See, e.g., the English Court of Appeal in *Occidental v. Ecuador*, [2005] EWCA Civ. 1116, ¶ 37.

⁴⁰ See, e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005 ¶ 141; *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, Jan 15, 2008, ¶ 173; *Mondev Int'l Ltd v. United States*, ICSID Case No. ARB (AF)/99/2, Award, Oct 11, 2002, ¶ 143 et ss. As stated by Von Papp, *supra* note 2, at 14, this view endorses an analogy between international investment law and the European Convention of Human Rights. For contrary decisions endorsing the derivative theory, see *Loewen v. United States*, Award, June 26, 2003, 42 I.L.M. 811, ¶ 233 (2003).

⁴¹ For a similar conclusion, see also Ghouri, *supra* note 2, at 22-23.

⁴² See Voon et al., *supra* note 38, at 465; James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, 13 J. WORLD INVESTMENT AND TRADE 935 (2008).

⁴³ Voon et al., *supra* note 38, at 465.

⁴⁴ This theory finds support in the wording of Article 70 of the VCLT, providing for the non-retroactive effect of new treaties between the same parties *unless the parties otherwise agree*.

⁴⁵ Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1(2) J. OF INT'L DISPUTE SETTLEMENT 343 (2010).

⁴⁶ *Id.* at 344.

⁴⁷ This theory is known as the “theory of acquired rights.” While it has been considered as a general principle of international law by several scholars, e.g. Stephen

A different solution would also be contrary to the general principle of international law that protects the reasonable and legitimate expectations of a party that has relied on the acts of a State that were clearly intended to confer such rights.⁴⁸ According to this principle, a State cannot revoke the rights that a third party has acquired on the basis of the acts of that State, which acts created a legitimate and reasonable expectation of the actual conferring of these rights.⁴⁹

Wittich, *Article 70 – Consequences of the Termination of a Treaty*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1207 (Oliver Dorr & Kirsten Schmalenbach eds., 2012); Harrison, *supra* note 42, bases the existence of such a theory on an alleged general principle of international law, the content of which should be analogous to Article 37(2) of the VCLT. The problem related to this argument is that Article 37(2) of the VCLT requires that, in order to render a third-party right irrevocable, it must be clear that the parties intended that such right not be revocable. While it is easy to argue that the host State agreed to render the right irrevocable in the case it entered into an investment contract with the investor, such a conclusion is not so immediate in cases of “arbitration without privity” (i.e. in cases of arbitrations started on the basis of the wording of the sole BIT). *See also* Sciso, *supra* note 32, at 151-63, who has grounded the irrevocability of the rights of the third party on the presence of a collateral agreement between the original contractors and the third party. Such a theory might be considered applicable also in the present case.

For a survey on the doctrine of acquired rights, see Ko Swan Sik, *The Concept of Acquired Rights in International Law: A Survey*, 24(102) NETHERLANDS INT’L L. REV. 120 (1977). Such a doctrine is strictly related to the so-called “doctrine of inter-temporal law,” for which see Taslim O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT’L L. 285 (1980).

It is worth mentioning that the illegitimacy of the unilateral rescission of the arbitration undertaking has been considered by Pierre Lalive, *Transnational (or Truly International) Public Policy*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES NO. 3 at 296-99 (Pieter Sanders ed., 1987). This author demonstrates how the unilateral withdrawal of the consent to arbitrate by a State (even by means of a new law) is contrary to the concept of transnational public policy. On this matter, see section IV below.

⁴⁸ It is not possible to discuss here all the aspects and opinions expressed with regard to the principle of legitimate expectations. For an overview on the subject, see RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 145-49 (2012). *See also* Chester Brown, *The Protection of Legitimate Expectations as a “General Principle of Law”*: *Some Preliminary Thoughts*, TRANSNATIONAL DISPUTE MANAGEMENT, n.1 (2009). Elizabeth Snodgrass, *Protecting Investors’ Legitimate Expectations: Recognizing and Delimiting a General Principle*, 21 ICSID REV.-FOREIGN INVESTMENT L.J. 1 (2006). FULVIO MARIA PALOMBINO, *IL TRATTAMENTO GIUSTO ED EQUO DEGLI INVESTIMENTI STRANIERI* 103 (2012), recognizes the existence of such a general principle but states that its content varies on a case by case basis, taking into account the concrete circumstances that must be evaluated by the judge. CHRISTIAN ECKART, *PROMISES OF STATES UNDER INTERNATIONAL LAW* (2012) and SERGIO M. CARBONE, *PROMESSA ED AFIDAMENTO NEL DIRITTO INTERNAZIONALE* (1967) carry out a complete analysis of the doctrine in relation to the concept of promises of a State in the framework of public international law.

⁴⁹ As Palombino, *supra* note 48, at 103, has done, it should be noted that the existence of such a principle is not recognized by all scholars. *See, e.g.*, MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENTS* 354-55 (2010);

In the case of intra-EU BITs, the investor started its investment relying on a certain legal framework and made relevant decisions on the basis of such framework. The investor relied on a BIT that was enacted in order to attract foreign capital and its provisions cannot be suddenly not applied or terminated by the same host State which had guaranteed the existence of such legal framework.⁵⁰

It is therefore also likely that the possibility for the investor to bring a claim before an investment arbitration tribunal survives the termination/misapplication of the relevant BIT.

2.5 It has been demonstrated that, from a public international law perspective, arbitration clauses contained in intra-EU BITs should be considered still applicable, notwithstanding the supervening EU obligations. As a result, if the arbitration clauses provided by intra-EU BITs should be deemed incompatible with the EU regime by the CJEU, the State will face two parallel treaty obligations and may possibly violate one of them.⁵¹ This might bring the

Michele Potestà, *The Doctrine of Legitimate Expectations in Investment Treaty Law*, available at <http://ssrn.com/abstract=2102771>. Finally, see Pedro Nikken's separate opinion regarding the decision on liability of July 30, 2010 in *Suez/AWG v. Argentina*, ICSID case No. ARB/03/19, July 30, 2010, ¶ 22.

⁵⁰ See Palombino, *supra* note 48, at 142-143, who shows that this approach has also been followed by several ICSID tribunals, such as *Suez/AWG v. Argentina*, ICSID case No. ARB/03/19, Award, July 30, 2010; *Total S.A. v. Argentina*, ICSID case No. ARB/04/1, Decision on Liability, Dec. 27, 2010. See also Christoph Schreuer & Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?*, available at http://www.univie.ac.at/intlaw/pdf/97_atwhattime.pdf at 8. For a contrary reconstruction of the principle of legitimate expectations in the framework of intra-EU BITs, see Hindelang, *Member State BITs*, *supra* note 2, at 225. See also Soderlund, *supra* note 2, at 459 ("potential disputing investors are third parties, who should be deemed to have been notified of their entitlement to international arbitration by the publication of the BIT. They have a right to rely on that promise until it has been duly terminated according to the terms of the BIT itself").

⁵¹ See Ghouri, *supra* note 2, at 9. The doctrine of parallelism of treaties was recognized in the *Southern Bluefin Tuna* case (*Australia and New Zealand v. Japan*), Award on Jurisdiction and Admissibility, Aug. 4, 2000. The arbitral tribunal was constituted under Annex XII of the United Nations Convention on the Law of the Sea. The award, at ¶ 52, stated, "it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. *There is frequently a parallelism of treaties, both in their substantive content and in their provision for settlement of disputes arising hereunder.*" (emphasis added)

It is worth noting that the solution we have reached is contrary to what the EU Commission said in *Eureko*, *supra* note 5, ¶ 180. There, the Commission stated that "the ECJ has consistently held that in cases of conflict between bilateral agreements between Member States and EU law, the latter prevails." "Under EU law, a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law." The Commission relied on the following cases: *Matteucci v. Communauté française de Belgique et al*, Judgment of Sept. 27, 1988, (1988) ECR 05589, ¶ 22; *Exportur SA v. Lor*

consequence of contingent infringement proceedings started by the EU Commission in the event EU law should be violated.

III. INTRA-EU BITS AND EU LAW

3.1 It is now worthwhile to analyze the relevant EU provisions which are allegedly violated by the application of intra-EU BITS, in order to ascertain if – within the context of the EU – States are actually facing parallel (and maybe conflicting) obligations pursuant to intra-EU BITS and EU law. We conclude that none of the alleged violations of EU law is actually generated by the application of intra-EU BITS as the proper law to determine jurisdiction of arbitral tribunals.

In *Eureko*, the Commission stated that the possibility for an investor to sue the host State before an arbitral tribunal violates (i) the principle of mutual trust in the administration of justice in the EU; (ii) the principle of non discrimination on the basis of nationality; (iii) the exclusive role of the CJEU. We will deal with these arguments separately.

3.2 In the words of the Commission, “continued resort to outside dispute settlement mechanism by EU subjects based on intra-EU BITS reveals mistrust in the courts of EU Member States. This has no place in the current post-enlargement context, which is rooted in mutual trust between Member States and founded on the development of a common favorable investment environment. Mutual trust in the administration of justice in the European Union is one of the principles regarded as necessary by the European Court of Justice for the sound operation of the internal market.”⁵²

This statement requires a brief analysis of the concept of mutual trust as developed in the EU framework. In *Gasser v. MISAT*,⁵³ the CJEU explained this concept as the principle that characterizes the relationship between the courts of different Member States in situations of conflicting jurisdictions. According to this principle, “the court second seized is never in a better position than the court first seized to determine whether the latter has jurisdiction.”⁵⁴

In the situation of intra-EU BITS, there is no conflict between two Member States courts. At most, the conflict is between an arbitral tribunal and a Member State court. There is no mutual trust as the basis of this relationship. Furthermore, an investor who started a business on the basis of certain guarantees by the host State, including the possibility of having recourse to investor-State arbitration, may not be forced to bring its claim before a national court on the basis of mutual

SA and Confiserie du Tech SA, Judgment of Nov. 10, 1992, (1992) ECR I-5529, ¶ 8; Commission v. Italy, Judgment of Feb. 27, 1962. A similar position is advocated by Eilmansberger, *Bilateral Investment Treaties*, *supra* note 2, at 425. In our opinion, as stated in this article, we cannot talk about a conflict between EU law and BITS and therefore the rule *pacta sunt servanda* applies with regard to the latter.

⁵² *Eureko*, *supra* note 5, ¶ 185.

⁵³ Case C-116/02, 2003 ECR I-14693.

⁵⁴ *Id.* ¶ 48.

trust. This principle may not operate to limit the principle of party autonomy, which is the legal basis of the investment arbitration system.

Hence, there is no place for mutual trust considerations in the discussion regarding jurisdiction of arbitral tribunals in disputes arising from intra-EU BITS and thus such principle is not violated.

3.3 With regard to the issue of discrimination against investors on the basis of their nationality, Hindelang⁵⁵ has stated, “not each and every Member State maintains BITS with all other Member States. In such a situation, a host-State might be perceived to be granting an EU investor protected by a BIT more favorable treatment than an EU investor not protected by a BIT. Not being justifiable, this situation is prohibited by the fundamental freedoms.” On this point, Hindelang is in strong disagreement with Wehland, who has stated that there is no place for the application of the most favored nation principle within EU law and therefore the different treatment is fully justifiable.⁵⁶

In our opinion, the evaluation of an alleged discrimination must necessarily start from an analysis of the principle of equality within the EU. In fact, Article 18 of the TFEU only stipulates that any discrimination on the basis of nationality is forbidden, but in order to establish the presence of such discrimination, the starting point is necessarily the principle of equality.⁵⁷

⁵⁵ *Member State BITS*, *supra* note 2, at 222.

⁵⁶ Wehland, *supra* note 2, at 315. Wehland based his opinion on the CJEU jurisprudence dealing with double taxation treaties concluded by Member States. On the contrary, Hindelang, *Member State BITS*, *supra* note 2, at 223, has stated that this comparison is not appropriate in light of the fact that the direct taxation area is still “a policy area which has remained in the realm of the Member States,” while intra-EU BITS concern “the treatment of a foreign investment on the market of a Member State. This market is significantly formed and characterized by EU internal market legislation, including EU competition or EU State aid law.” Hindelang finds support for his interpretation even in light of systematic and teleological considerations based on Article 350 of the TFEU, that “explicitly reserves special benefits for the beneficiaries of the Belgium-Luxembourg Economic Union and Benelux Customs Union that cannot be extended to other Member State nationals by virtue of EU law. Hence, *argumentum e contrario*, in the absence of a specific permission, a Member State appears *not* to be entitled to grant specific benefits to a particular Member State or group of Member States.” *See also* Dimopoulos, *supra* note 2, at 82 *et seq.* (in particular at 84-85), who supports the theory of discrimination.

⁵⁷ Marzia Barbera, *The Role of the Equality Principle in the European Multilevel System* (2009), available at www.europeanrights.eu/public/commenti/04_Barbera_uk.doc; Roland Bieber, *Balancing Difference and Equality of Political Rights in the European Union. A Paradigm of Constitutional Pluralism*, in *REFLECTIONS ON THE CONSTITUTIONALIZATION OF INTERNATIONAL ECONOMIC LAW* 139, 142 (Marise Cremona ed., 2013); Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762815.

Equality is a general principle of EU law⁵⁸ and is interpreted to mean that comparable situations shall be treated in the same way, while different situations shall be treated differently, unless exceptions to this rule are objectively justified.⁵⁹ “This implies that where two categories are treated differently, the first issue is whether the categories involved are similar or not. If they are not, there is nothing wrong with treating them differently. If they are, the question is whether the difference in treatment can be justified.”⁶⁰

Hence, the question that must be answered in the case of intra-EU BITs is the following: is there discrimination between investors based on the fact that only certain of them enjoy the rights provided by intra-EU BITs? The answer seems to be no. The reason lies in the fact that the position of an investor who started a business in a foreign State in light of certain guarantees provided by a BIT may not be compared to that of an investor who – when starting the business – already knew that EU law was applicable to the investment. In the former situation, as already explained, there is a legitimate expectation that the legal framework under which the investment was initiated will be maintained. In the latter case, there is no such expectation. The starting point in the two cases is completely different.

Therefore, it seems that no violation of the principle of equality and no discrimination occur as a consequence of the possibility that only certain investors (on the base of nationality) have access to investor State arbitration within the EU.⁶¹

⁵⁸ Joined cases 117/76 and 16/77, *Ruckdeschel v. Hauptzollamt Hamburg-St. Annen*, (1977) ECR 1753.

⁵⁹ See McCrudden & Prechal, *supra* note 57, at 4. Furthermore, see Case 106/83 *Sermide SpA v. Cassa Conguaglio Zucchero*, (1984) ECR 4209, ¶ 28; Case C-189/01 *Jippes v. Minister van Landbouw, Natuurbeheer en Visserij*, (2001), ECR I-5689, ¶ 129; Case C-149-96 *Portugal v. Council*, (1999) ECR I-8395, ¶ 91; Case C-411/98 *Angelo Ferlini v. Centre Hospitalier de Luxembourg*, (2000) ECR I-08081.

⁶⁰ McCrudden & Prechal, *supra* note 57, at 11 *et seq.* The authors examine the application of the principle by the constitutional courts of the various member states. The application of the principle of equality as set forth by the authors, (i.e. equality that is rationality-based) is practiced, *inter alia*, in Italy (for a detailed analysis of the Italian approach with regard to the principle of equality see McCrudden & Prechal, *supra* note 57, at 45-46; furthermore see Italian Constitutional Court, judgments Nos. 53 of 1958 and 15 of 1960), France, Cyprus (for a detailed analysis of the approaches followed in France and Cyprus with regard to the principle of equality, see McCrudden & Prechal, *supra* note 57, at 12), Poland and Latvia (for a detailed analysis of the approaches followed in Poland and Latvia with regard to the principle of equality see McCrudden & Prechal, *supra* note 57, at 13). McCrudden & Prechal, at 13, further refer to the CJEU Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l'Ecologie et du Développement durable and Ministre de l'Economie, des Finances et de l'Industrie*, (2010) ECR II-211.

⁶¹ Such a solution is different from the one proposed by Dimopoulos, *supra* note 2, at 85, which, in light of the fact that in his opinion intra-EU BITs are discriminatory, states that “given that the incompatibility may be remedied by extending unilaterally these rights to other EU nationals.” This position seems to us impracticable, considering that the whole legal framework of EU law would have to be amended. In this regard, note *Eureko*, *supra*

3.4 Concerning the alleged violation of the exclusive interpretative role of the CJEU by the arbitration clauses contained in intra-EU BITS, various arguments have been proposed.

First of all, it has been stated⁶² that – according to Article 344 of the TFEU – Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein. The authors endorsing this theory find support in the CJEU *MOX Plant*⁶³ decision. As stated by the *Eureko* tribunal⁶⁴ and by the vast majority of scholars,⁶⁵ the ruling in the *MOX Plant* case “is not applicable to disputes which are not disputes between Contracting Parties but investor-State disputes.”⁶⁶ Furthermore, it is still unclear⁶⁷ if Article 344 of the TFEU is applicable to situations such as investor-State arbitration. A literal interpretation of the rule seems to suggest a negative answer.

More persuasive arguments might be founded on the rules contained in Article 19 of the Treaty on the European Union (“TEU”) and in Article 267 of the TFEU. The former provision “safeguards the autonomy of Union law by establishing the CJEU as the exclusive and ultimate judicial mechanism that has the right to interpret EU law.”⁶⁸ The latter rule establishes the mechanism of preliminary rulings by the CJEU in cases of doubts on the interpretation of EU law. The alleged violation of these provisions lies in the fact that “the Court has explicitly recognized that situations when a third court could offer a binding interpretation of EU rules without the *possibility* of review by the CJEU conflicted with its exclusive jurisdiction under article 220 EC (now 19 TEU).”⁶⁹ (emphasis in original)

note 5, ¶ 185, where the tribunal stated, “The Commission considers that granting the opportunity for arbitration to all investors would inevitably promote competing judicial and arbitral mechanisms, increase ‘forum shopping’ and contribute to the risk of further fragmentation of international law.”

⁶² See *Eureko*, *supra* note 5, ¶ 178; Dimopoulos, *supra*, note 2, at 86; Hindelang, *Member State BITs*, *supra* note 2, at 230. Hindelang endorses the theory that Article 344 is violated by the fact that the investor exercises a right of its national State when suing the host State before an arbitral tribunal. As stated above, this theory seems to us outdated and not respecting the actual situation of investment arbitration.

⁶³ Case C-459/03, *MOX Plant* (2006) ECR I-4657. The case involved a dispute between two EU States, Ireland and England, on the basis of the United Nations Convention on the Law of the Sea. The CJEU held that an inter-State arbitration started pursuant to the aforementioned Convention was in violation of Article 344 of the TFEU because the disputes involved matters governed by EU law.

⁶⁴ *Eureko*, *supra* note 5, ¶ 276.

⁶⁵ See, e.g., Wehland, *supra* note 2, at 318; Eilmansberger, *Investment Arbitration*, *supra* note 2, at 520-21; Dimopoulos, *supra* note 2, at 87.

⁶⁶ See *Eureko*, *supra* note 5, ¶ 276.

⁶⁷ See von Papp, *supra* note 2, at 11, who recalls the “undefined interpretative monopoly of art. 344 TFEU.”

⁶⁸ Dimopoulos, *supra* note 2, at 87.

⁶⁹ *Id.*, referring to CJEU Opinion 1/91 (EEA Agreement), (1991) ECR I-6079, ¶ 35. For a similar position, see Hindelang, *Member State BITs*, *supra* note 2, at 228-30.

We must, therefore, examine if arbitral tribunals may offer an autonomous interpretation of EU law that may generate a violation of EU law. Even in this case, the answer seems to be no. The reason lies in the fact that, as it was stated by the arbitral tribunal in the *AES v. Hungary* case, “EU law has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration national laws are to be considered as facts.”⁷⁰

If the aforementioned statement is considered valid, it follows that arbitral tribunals do not have the power to freely interpret EU law and they are bound by the interpretation that the proper judicial authority (i.e. CJEU) has given of EU law. As stated by Lew, Mistelis and Kroll, “applicable substantive law should be applied and interpreted by the tribunal in the way it would have been applied by national judges applying that law.”⁷¹

It follows from these considerations that arbitral tribunals should not be in the position to misapply EU law or to give an interpretation of EU law that is contrary to one given by the CJEU.⁷²

Finally, it should be noted that this interpretation is supported by what the CJEU has stated in the *Commission v. Slovakia*⁷³ case. In this case, the CJEU has

⁷⁰ *AES v. Hungary*, *supra*, note 7, ¶ 7.6.6. This position is also supported by Tietje, *supra* note 2, at 9-13. Note that this theory is not unanimously considered valid. In *Electrabel v. Hungary*, *supra* note 7, ¶¶ 4.117 and 4.119, the arbitral tribunal stated that “EU law is a sui generis legal order, presenting different facets depending on the perspective from where it is analyzed. It can be analyzed from the perspective of the international community, individual Member States and EU institutions Considering the international setting in which this Tribunal is situated and from which it necessarily derives its perspective, EU law has to be classified first as international law.”

⁷¹ JULIAN D. M. LEW, LOUKAS MISTELIS & STEPHAN KROLL, *INTERNATIONAL AND COMPARATIVE COMMERCIAL ARBITRATION* 444 (2003).

⁷² Furthermore, it should be noted that in arbitral proceedings that are not conducted under the ICSID system, national courts will always have the last word on the award at the enforcement stage. With regard to ICSID arbitrations, this is not likely to happen, but the host State always has the ability to challenge the award before an *ad hoc* committee for manifest excess of powers of the tribunal due to the misapplication of the substantive law.

It is also worth noting that any possible conflict between the substantive provisions of intra-EU BITs and EU law should be assessed at the merit stage by the arbitral tribunal and does not affect the jurisdiction of the tribunal, which is, in any event, bound to apply EU law as interpreted by the ECJ.

As noted by Burgstaller, *supra* note 2, at 190, this thesis also finds indirect support in what the European Court of Human rights stated in *Matthews v. United Kingdom*, (Grand Chamber) App. No. 24833/94, Judgment of Feb. 18, 1999, and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland*, (Grand Chamber) App. No. 45036/98, judgment of June 20, 2005, where the Court stated that it was incompetent to review EC acts. This situation might be compared to the one that arbitral tribunals applying intra-EU BITs are facing today.

⁷³ Case C-264/09 European Commission v. Slovak Republic, judgment of Sept. 15, 2011, No. 2011 I-08065, ¶ 40.

declared that “it is not for the Court to interpret the Investment Protection Agreement,” thus acknowledging that there are limits to its interpretative monopoly and that there are other, better suited tribunals to interpret the provisions of investment treaties.

IV. INTRA-EU BITS AND SEPARABILITY

4.1 The above discussion has shown the full validity and applicability of arbitration clauses contained in intra-EU BITS and has demonstrated that these clauses do not violate any EU law provision. We may therefore endorse the approach followed by the Higher Regional Court of Frankfurt in the *Eureko* case, which (even if partially on the basis of different arguments) refused to refer the matter to the CJEU on the basis of the doctrine of *acte claire*. However, it is realistic to envisage that the issue will be referred to the CJEU in the near future, and it is also true that “[c]onsidering the importance that the ECJ attaches to the uniform and consistent interpretation and application of EU law, it is clear that the ECJ is very reluctant to accept the possibility that other international courts and tribunals, which are unable to request a preliminary ruling, are in a position to challenge its exclusive jurisdiction.”⁷⁴ It is therefore likely that, should the CJEU rule on intra-EU BITS, it will consider them inapplicable, notwithstanding the above considerations.

This situation entails the necessity of establishing the jurisdiction of arbitral tribunals for cases arising from intra-EU BITS on a legal basis that goes beyond mere discussion on the validity/applicability of such treaties, i.e. a rule of international law according to which – once consent to arbitration is perfected – arbitral tribunals have jurisdiction even if the relevant BIT is invalid or inapplicable.

Such a rule might be found in the doctrine of separability. In arbitration law, “the doctrine of separability recognizes the arbitration clause in a main contract as a separate contract, independent and distinct from the main contract Separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal.”⁷⁵ According to the separability doctrine, if a party claims that the main contract is invalid, this does not invalidate the consent to arbitration that such a party has

⁷⁴ Nikos Lavranos, *Bilateral Investment Treaties (BITs) and EU Law*, ESIL CONFERENCE 2010, available at http://www.esil-en.law.cam.ac.uk/Media/Draft_Papers/Agora/Lavranos.pdf at 23.

⁷⁵ LEW, MISTELIS & KROLL, *supra* note 71, at 102. Note that separability also operates as a conflict of laws rule, according to which the arbitration agreement may be governed by a law different from the one of the main contract. On this point, see Adam Samuel, *Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice*, 9 ARB. & DISPUTE RESOLUTION L. J. 36 (2000).

already given and on which the other party relied.⁷⁶ It should be emphasized that this principle is – as of today – so widely accepted that it is considered by the leading international arbitration scholars as “one of the true transnational rules of international commercial arbitration”⁷⁷ and as “a general principle of international arbitration law, reflected in international arbitration conventions, national arbitration legislations and judicial decisions, institutional arbitration rules and arbitral awards.”⁷⁸

4.2 In order to conclude that separability can be the legal basis for jurisdiction of arbitral tribunals in investment cases based on BITs, it should be demonstrated that this doctrine is also applicable to arbitration clauses contained in investment treaties.

Unfortunately, this seems to be precluded by Article 44 of the VCLT (“Separability of Treaty Provisions”). This provision establishes – as general rule – the principle of the integrity of treaties⁷⁹ and – as an exception in cases of

⁷⁶ Per Lord MacMillan, in *Heyman v. Darwinds Ltd.*, (1942) AC 356, 374, (“It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clauses survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.”).

⁷⁷ LEW, MISTELIS & KROLL, *supra* note 71, at 106.

⁷⁸ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 353 (2d ed. 2014). The author has demonstrated that separability “is widely established in the arbitration statutes of all developed jurisdictions.” In fact, it was initially developed in Germany and in Switzerland, but is today accepted and applied, inter alia, in the U.S., France, England, Japan, China, India, Belgium, The Netherlands, Sweden, Italy, Portugal, Turkey, Syria, Indonesia, Scotland, Algeria, Bolivia, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Mexico, Paraguay, Peru and Venezuela. The doctrine is moreover applied in all the Model Law countries. With regard to the application of the principle by national courts, in the words of Born, “national judicial authority is essentially unanimous in recognizing the basic principle that an agreement to arbitrate is presumptively separable from the underlying commercial contract in which it is contained and that a defect in the underlying contract will not ordinarily affect the validity of the associated arbitration agreement.” However, as stated by LEW, MISTELIS & KROLL, *supra* note 71, at 106, “full acceptance of the doctrine is still outstanding in certain Arab countries.”

⁷⁹ Article 44(2) of the VCLT provides that “a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.” With regard to the principle of integrity of treaties and to the related separability of invalid clauses, it is still doubtful if we are talking about a customary rule of international law. It should be noted, in fact, that, as stated by Kerstin Odendahl, *Article 44, Separability of treaty provisions*, in Dorr & Schmalenbach, *supra* note 47, at 753, 756, “there is not sufficient and no consistent State practice” on the matter. While Martyna Falkowska, Mohammed Bedjaoui & Tamara Leidgens, *Article 44*, in Corten & Klein, *supra* note 18, at 1046, 1052-53 and MARK VILLEGGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 571 (2009), refer to the emergence of a new customary rule, Odendahl, *Article 44, supra*, has expressed a negative

invalidity of particular clauses – the separability of such provisions (if the conditions set forth by paragraph 3 are fulfilled) on the basis of the well-known principle of international law, *utile per inutile non vitiatur*. Hence, Article 44 of the VCLT allows for the separability of treaty provisions in a situation that is the opposite of the one regulated by the doctrine of separability as applied to arbitration clauses contained in commercial contracts, i.e. where the whole contract is invalid and the arbitration clause – being considered as a separate agreement – is not affected by such invalidity.

Therefore, as already stated, in light of the wording of Article 44 of the VCLT and in light of its scope of application, an interpretation of this rule in compliance with the principle of separability as developed in international commercial arbitration seems not to be acceptable.⁸⁰

In any event, it should also be noted that such a conclusion would have the undesirable result that a State might avoid the jurisdiction of arbitral tribunals by simply contesting the validity of the BIT in which the arbitration clause is encapsulated.

4.3 Such an unwanted effect may actually be avoided through a balancing of the rule of Article 44 of the VCLT with the principle of irrevocability of consent, which is well established in investment arbitration practice and the effects of which are identical to those of the principle of separability as developed in

opinion. However, it should be noted that all these authors think that the principle of integrity is a general principle of law recognized by civil nations (in the sense of Article 38 of the Statute of the International Court of Justice). This opinion follows what was stated by the separate opinion of Judge Lauterpacht in the ICJ case, *Certain Norwegian Loans* (France v. Norway) 1957, ICJ Rep 34, 55-59. The separability of invalid treaty provisions has been acknowledged, *inter alia*, in the case *Interhandel* (Switzerland v. United States of America), ICJ Rep. 1959, 57, 77-78, 116-117. Finally, note that the principle has been recognized by the European Court of Human Rights in *Loizidou v. Turkey, Preliminary Objections*, Judgment of March 23, 1995, Series A, n. 310, ¶ 97. For a complete survey of the cases acknowledging the existence of the principle, see Falkowska, Bedjaoui & Leidgens, *Article 44, supra*.

⁸⁰ The fact that the concepts of separability as intended in international commercial arbitration and as developed by the VCLT are different is demonstrated in the dissenting opinion of Judge Bedjaoui in the case *Fisheries Jurisdictions* (Spain v. Canada), ICJ Report 1998, 540, ¶ 61, where the doctrine of separability as developed in international commercial arbitration was referred to only “by way of comparison,” acknowledging that the separability of arbitration clauses is well established in international commercial arbitration. This is also confirmed by Falkowska, Bedjaoui & Leidgens, *Article 44, supra* note 79, at 1050-51.

One could argue that the principle of separability established in international commercial arbitration practice might be founded on a reverse application of Article 44 of the VCLT, i.e. separability of the sole valid clause in a treaty may be affirmed if (i) the provision is separable; (ii) it was one of the bases for the parties’ consent; (iii) its continued performance is not unjust. Such interpretation is very attractive, but, as already said, it does not seem to be consistent with the wording of Article 44 of the VCLT.

international commercial arbitration practice. According to this principle, consent to arbitration – once perfected – may not be withdrawn by one party without the consent of the other.

The applicability of this principle in BIT arbitrations is confirmed by Article 25(1), last sentence, of the ICSID Convention, providing for the irrevocability of consent in ICSID arbitration once such consent has been given. As noted by Schreuer,⁸¹ “consent, once it is perfected, may not be withdrawn indirectly through an attempt to remove one of the other jurisdictional requirements under the Convention” and “the ICSID Convention not only declares the unilateral withdrawal of consent inadmissible, but also makes provision for the institution and continuance of proceedings despite the refusal of a party to cooperate.”

Moving from the ICSID framework to investment arbitration law in general, Schreuer⁸² has stated that “the binding and irrevocable nature of consent to the jurisdiction of ICSID is a manifestation of the maxim *pacta sunt servanda* and applies to undertakings to arbitrate in general. The principle’s aptness is obvious where the consent is expressed in a compromissory clause contained in an agreement. It applies equally where an offer of consent is contained in national legislation or a treaty which has been accepted by the investor.” The applicability of the principle of irrevocability of consent in investor-State arbitration is also acknowledged by Delaume,⁸³ who stated that “it is generally agreed that once a State has consented to arbitration, such consent is final and binding upon the State and that if it refuses to participate in the proceedings, arbitration can proceed unilaterally.” Typical examples are found in the *Sapphire*,⁸⁴ *Topco*,⁸⁵ *BP*⁸⁶ and *Liamco*⁸⁷ awards, which consistently held that a deliberate default did not prevent the case from proceeding and resulting in an award on the merits.” Moreover, in the *Framatome*⁸⁸ award, arbitrators expressly recognized that “it is superfluous to add that a general principle, universally recognized nowadays in both inter-State relations and international private relations.... would in any case prohibit the

⁸¹ Christoph Schreuer, *Consent to Arbitration*, in UNCTAD COURSE ON DISPUTE SETTLEMENT IN INTERNATIONAL TRADE, INVESTMENT AND INTELLECTUAL PROPERTY, available at http://unctad.org/en/docs/edmmisc232add2_en.pdf at 37-39.

⁸² CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH & TREVOR SINCLAIR, *THE ICSID CONVENTION, A COMMENTARY* 254 (2d ed. 2009).

⁸³ Georges R. Delaume, *The Finality of Arbitration Involving States: Recent Developments*, 5 *ARB. INT’L* 21, 23 (1989).

⁸⁴ *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, Award of March 15, 1963, 35 *Int’l L. Rep.* 136 (1967).

⁸⁵ *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, Award of Jan. 19, 1977, 17 *ILM* 3 (1978), 53 *Int’l L. Rep.* 420 (1979), 4 *Y.B. COM. ARB.* 180 (1980).

⁸⁶ *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, Award of Oct. 10, 1973, 53 *Int’l L. Rep.* 300 (1979), 5 *Y.B. COM. ARB.* 143 (1980).

⁸⁷ *Libyan American Oil Company (Liamco) v. Government of the Libyan Arab Republic*, Award of April 12, 1977, 20 *ILM* 1 (1981), 6 *Y.B. COM. ARB.* 89 (1981).

⁸⁸ *Framatome et al. v. Atomic Energy Organisation of Iran*, 8 *Y.B. COM. ARB.* 107-108 (1983) (English translation without the names of the parties).

State... to repudiate the undertaking to arbitrate which it made itself or which a public organization would have made previously... A Government bound by an arbitration clause... cannot validly free itself of this obligation by an act of its own will, such as for example a change in its internal law or by unilateral termination of the contract.”

A closer look at the legal consequences of the principle of irrevocability of consent reveals that they are equal to the effects of the principle of separability established in international commercial arbitration. Such effects might, therefore, also be considered present in the framework of investment arbitration, even if there is no express reference in the case law to the applicability of separability to BITs. Once the consent is given, the arbitral tribunal has jurisdiction to hear the claim notwithstanding an allegation of invalidity of the main contract or treaty.

The above is confirmed by the fact that the principles of separability and irrevocability of consent share the purpose of protecting party autonomy and the jurisdiction of arbitral tribunals through the safeguard of the applicability of the arbitration clause. In this regard, it should be noted that Lalive⁸⁹ has, *inter alia*, expressly related the principle of irrevocability of consent to the doctrine of separability. He defined the principle of irrevocability of consent by a State as a rule of “transnational (or truly international) public policy” and stated that “the general rejection of such State attempts to renege on their promise to arbitrate may be interpreted as based on an application of the ‘separability’ or ‘autonomy’ of the arbitration clause, which is a generally recognized principle... But it must be seen rather as a direct application of the concept of good faith or *bona fides* and is a fundamental principle of common sense as well as of the law of international arbitration.”⁹⁰

In conclusion, we may argue that, through the application of the principle of irrevocability of consent, the reasons which led to the development of the principle of separability in international commercial arbitration (i.e. the protection of party autonomy and of the jurisdiction of arbitral tribunals,⁹¹ as well as the

⁸⁹ Lalive, *supra* note 47, at 296-97.

⁹⁰ Note also that in the *Eureka* award, ¶ 138, the applicability of separability seems to be implicitly acknowledged by the tribunal and by the respondent State.

⁹¹ See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967), where it was said that “arbitration procedure, when selected by the parties to a contract, shall be speedy and not subject to delay and obstruction in the courts.” See also *Harbour Assur. Co. (UK) v. Kansa Gen. Int’l Ins. Co.*, (1993) 3 All ER 897 (English Court of Appeal). See also German Bundergerichtshof, Judgment of Feb. 27, 1970, reported in 6 ARB. INT’L 79 (1990), where the court stated that “there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so.” In this regard, it is worth noting, as Born, *supra* note 78, at 361, did, that a UK consultation paper on proposed English arbitration legislation (*UK Department of Trade and Industry, Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill, reprinted in* 10 ARB. INT’L 189 (1994)) stated that “it is not generally considered possible [for arbitration] to operate effectively in jurisdictions where the doctrine is precluded.” In relation to the necessity to apply separability to protect tribunals’

protection of international business in general)⁹² are equally applicable in investment arbitrations started pursuant to an offer to arbitrate made by a State in a BIT.

If the above is true, the arbitrability of disputes arising from intra-EU BITs should be ensured in any case, irrespective of any decision by the CJEU with regard to the incompatibility of BIT obligations with EU law. This means that EU law may not influence in any way the validity and applicability of such arbitration clauses.

4.4 It is worth noting that there are many discussions among scholars on the time from which the consent to arbitration expressed through a BIT may become irrevocable.⁹³

Schreuer⁹⁴ et al. affirm that consent is irrevocable only from the time it is formally perfected, i.e. from the moment the investor accepts the offer of the State (made through the BIT) by means of a formal statement of acceptance or through the commencement of an arbitration. Until that time, the offer of the State may be considered fully revocable.

On the contrary, others consider the offer as firm and irrevocable for a stated period of time, irrespective of a formal acceptance by the investor.⁹⁵ Such a result may be achieved by applying the common-law theory of jurisdictional estoppel⁹⁶ or the German law principle of irrevocability of pending offers.⁹⁷

jurisdiction, see also Phillip Landolt, *The Inconvenience of Principle: Separability and Kompetenz-Kompetenz*, 30(5) J. INT'L ARB. 511 (2013).

⁹² We can today talk about a general trend favoring the effectiveness of arbitration clauses. This has been clearly expressed by the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614 (1985).

⁹³ For a full survey on the matter, see Michael D. Nolan & Roque J. Caivano, *Limits of Consent—Arbitration Without Privity and Beyond*, in LIBER AMICORUM BERNARDO CREMADES 873 (Miguel Angel Fernandez-Ballestros & David Arias eds., 2010).

⁹⁴ See SCHREUER ET AL., *supra* note 82, at 38-39.

⁹⁵ E.g., Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237(122) N.Y. L.J. (June 26, 2007). See also Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 251 (Christina Binder et al. eds., 2009).

⁹⁶ According to this theory, as stated by Nolan & Caivano, *supra* note 93, at 875, “one exception to the common law rule of revocability is the instance in which there is detrimental reliance by the investor on an offer before a formal acceptance is made. In the case of offers of arbitration, such detrimental reliance may present issues of proof. Yet, it appears theoretically possible as an extension of the power of the investor ability to accept an offer of arbitration on account of an estoppel.” The authors also refer to BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY COURTS AND TRIBUNALS 143-44 (2006). The only limit to the application of such a theory is the requirement of consent in writing required in case of ICSID arbitrations under Article 25 of the ICSID Convention.

⁹⁷ See Nolan & Caivano, *supra* note 93, at 876, referring to Article 145 of the BGB, according to which “whoever offers another to conclude a contract is bound by its offer

While the theories endorsing the irrevocability of the offer better protect the interests of investors and are therefore more consistent with the aim of this paper, it should be acknowledged that Schreuer's theory is – as of today – the most frequently applied.⁹⁸ As a consequence, on a case-by-case basis, it should be ascertained that the consent has been perfected (according to the relevant rules on consent) in order to say that it is irrevocable.

In this framework, intra-EU investors who formally accepted the offer to arbitrate set forth in the relevant BIT prior to the access of the host state to the EU should be reassured that the consent to arbitration is irrevocable for them.

V. CONCLUSION

The present article has analyzed the issue of arbitrability of disputes arising from intra-EU BITS and it has argued that such disputes are still arbitrable notwithstanding any allegation of invalidity or inapplicability based on EU law. This is based on the fact that the validity of the arbitration clauses contained in BITS is still governed by international law and not by EU law.

In order to establish that the arbitrability of such disputes is still governed by BITS, it has been demonstrated that Articles 59 and 30 of the VCLT are inapplicable to the relationship between BITS and EU law and, moreover, that all the arguments alleging the invalidity of intra-EU BITS on the basis of EU law are unfounded. States are therefore not facing competing obligations under the two regimes.

Finally, it has been argued that – even if in the future the CJEU should rule that intra-EU BITS are invalid or inapplicable – the arbitrability of disputes arising from such treaties may be still ensured through the application of the principle of irrevocability of consent, the effect of which – that is equal to the one of the doctrine of separability – is to protect and ensure arbitral jurisdiction even if an allegation of invalidity of the main treaty should be made by a party.

unless the binding nature of the offer is expressly excluded.” It is worth noting that the common-law and German theories assume that BITS directly confer rights to investors, i.e. apply the direct rights theory referred to in paragraph 2 above. Other theories ground the irrevocability of consent on the presence of State to State obligations and on traditional public international law. For this theory, which is based on the derivative theory (also mentioned in paragraph 2 above) and is therefore not useful for the sake of the present paper, see Nolan & Caivano, *supra* note 93, at 877-79.

⁹⁸ See Voon et. al., *supra* note 38, at 457. The authors also note that this theory is the only one which complies with the writing requirement for consent as expressed by Article 25 of the ICSID Convention.

