| Chapter 4 |

Common Commercial Policy and Member States' Playing Fields

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ABSTRACT

This chapter analyzes the playing field afforded by the EU exclusive competence over commercial policy to the Member States to develop an independent policy in relations to extra-EU trade. First, the chapter presents the primary elements of the EU's 'constitutional authorization.' particularly regarding investments, where the EU is less omnicompetent. Second, the nature of international economic relations is presented. This section shows that the focus of international commercial policy shifted from traditional restrictions of trade to regulatory trade barriers. Third, the elements of the EU's commercial policy and the Member States residual powers are presented to elucidate how the Member States may engage in commercial policy notwithstanding the exclusive EU competence. This section shows that, on the one hand, the margins of commercial policy are somewhat unclear, and, on the other hand, there are regulatory questions that are legally not part of the common commercial policy but do have an impact with trade with non-EU countries and, hence, giving a chance to Member States to develop an independent national policy toward extra-EU trade.

KEYWORDS

common commercial policy, extra-EU trade, internal market, international trade, intra-EU trade, investment protection, WTO

1. Introduction

The common commercial policy, including the customs union, is one of the few major fields where the EU has traditionally had exclusive competence. Given the Lisbon Treaty's extension of this competence to all four channels of international economic relations (goods, services, intellectual property, and investments), Member States' possibilities to influence their economic relations with countries outside the EU seem to be completely suppressed. Still, notwithstanding the exhaustive language of Art. 207 TFEU, Member States have important possibilities to carry out an independent commercial policy in relations to non-EU countries. This chapter takes stock of and

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evaluates these possibilities.[1] It must be noted that, when examining the remnants of independent national commercial policy, this chapter analyzes the possibilities of the regulatory state and not the state engaged in commercial transactions. Obviously, Art. 207 TFEU does not limit Member States in entering into commercial transactions with sovereign and non-sovereign actors.

Section 2 presents the primary elements of the EU's 'constitutional authorization.' Section 3 presents the nature of international economic relations and shows that the focus of international commercial policy shifted from traditional restrictions of trade to regulatory trade barriers. For instance, as to trade in goods, the major hurdles to trade are no longer tariffs and quantitative restrictions but technical barriers to trade, such as product standards, local regulation, licensing requirements, and taxation. Section 4 presents the elements of the EU's commercial policy and residual national powers to elucidate how Member States may engage in commercial policy notwithstanding the exclusive EU competence. This section shows that, on the one hand, the margins of commercial policy are somewhat unclear and, on the other hand, there are regulatory questions which are legally not part of the common commercial policy but do have an impact on extra-EU trade and, hence, give a chance to Member States to develop an independent national policy.

2. What is the EU's Actual, Exclusive Competence? The Common Commercial Policy

International economic relations are traditionally conceived as having four channels: goods, services, intellectual property, and investments. While the first three come under global regime (owing to World Trade Organization law), the substantive treatment of investments, apart from some exceptions, is subject to myriads of bilateral investment treaties (BITs).

Art. 207 TFEU contains a very wide, seemingly all-embracing authorization, which creates an exclusive EU competence over all the four channels of international trade:

> "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

1 For an overview on the role and appearance of Member States' interests in the common commercial policy, see Horváthy, 2019.

Initially, the scope of Art. 113 ECT, the predecessor of Art. 207 TFEU, was uncertain, as it referred only to goods and tariffs, and it was questionable whether the EU competence extended to other channels of international trade, such as services. Art. 113 ECT was renumbered to Art. 133 by the Treaty of Amsterdam and complemented with a new para. (5), which authorized the Council to extend, unanimously, the application of Art. 133 to services and intellectual property. Finally, the Treaty of Lisbon, via Art. 207 TFEU, extended the common commercial policy all four channels of international economic relations: goods, services, intellectual property, and investment.

Art. 207 TFEU raises two important questions of interpretation.

First, in global trade traditional tools of trade restriction (such as tariffs and quantitative restrictions) no longer have a predominant role. Quantitative restrictions have already been banned by the 1947 General Agreement on Tariffs and Trade (GATT'47), while tariffs have been gradually decreased. Hence, international economic relations are increasingly not about traditional trade restrictions, such as tariffs and quotas, and the focus of world trade shifted from traditional trade restraints to regulatory restraints (facially even-handed regulatory hindrances, such as standards). The primary goal of traditional free trade agreements was to abolish quantitative restrictions and customs duties (tariffs). In addition to this, new generation free trade agreements aim at securing the 'smooth course' of trade through ironing out different regulatory obstacles.

Second, while the reference to goods, services and intellectual property are clear and embracing, in respect to investments the exclusive competence extends merely to 'foreign direct investment.' In the field of investments, states usually not only regulate (and liberalize) the free movement of capital but also provides for important investment protection standards and set up an effective investor–state dispute settlement (ISDS). The question is if all and if not all then which parts of these activities come under Art. 207 TFEU.

In Opinion 2/15,[2] the CJEU held that the mere fact that an act 'is liable to have implications for trade...is not enough for it to be concluded that the act must be classified as falling in the common commercial policy.' Only that act falls in the common commercial policy that 'relates specifically to...trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.'[3] In the context of the EU–Singapore Free Trade Agreement, the CJEU found that the rules on non-direct investment and investor–state dispute settlement did not come under exclusive EU competence.[4]

2 Opinion 2/15, Opinion of the CJEU (Full Court) of 16 May 2017, Opinion pursuant to Art. 218(11) TFEU, ECLI:EU:C:2017:376. See Horváthy, 2018, pp. 117–132.

3 Opinion 2/15, para. 36.

4 See also Opinion 1/17, Opinion of the Court (Full Court) of 30 April 2019, Accord ECG UE-Canada. Case Avis 1/17, ECLI:EU:C:2019:341.

3. The Nature of International Economic Relations

The contemporary history of world trade was opened by the conclusion of GATT '47 and was consummated by the creation of the World Trade Organization (WTO) in 1994. The last seventy years have seen a revolutionary development in world trade governance and have featured the enormous success of WTO and its predecessor, GATT '47. While initially this platform of cooperation was, for the most part, used by market-based economies and rejected by socialist countries,[5] the collapse of communism extended the club's membership considerably. In the last two decades, the WTO's disciplines became ubiquitous. With the accession of China and Russia, the WTO became the sole global framework of trade and covered almost the entire globe. With the accession of China in 2001 and Russia in 2012, the WTO became a truly universal trade organization: its member countries account for 96.4% of world trade,[6] and thus, its rules and principles are vested with a nearly *erga omnes* authority.

WTO law limits the use of traditional trade restrictions considerably. It virtually prohibits all kinds of quantitative restrictions (quotas) and significantly restricts tariffs. GATT '47 prohibited quantitative restrictions and measures having equivalent effects at large[7] and obliged states to solely use tariffs (tariffication). In addition, it made tariff caps binding, and served as a platform for a long process to universally reduce duty rates.

The era opened by GATT '47 saw a remarkable tariff abatement. The 20-30% average tariff rate prevailing in 1947 (pre-GATT)[8] fell considerably. In developed countries the average duty rate of industrial products fell to less than 4%.[9] In 2012 the average applied tariff was 1% in developed countries and between 4–10% in developing countries;[10] the average tariff on world trade was about 2%.[11] Approximately 40% of international trade was fully duty-free under most-favored nation (MFN) terms, while about 10% faced tariff peaks of over 10%.[12] The diminution of applied tariffs was paralleled by a similar process concerning bound tariffs—legally binding duty rate

5 With the notable exception of Czechoslovakia and Cuba, which were founding members and remained a member after the communists seized power. China was also a founding member but subsequently withdrew from GATT after the communists took power. Interestingly, it was not the People's Republic of China but the Republic of China governed by the Kuomintang, having fled to Taiwan, which notified the withdrawal as the entity occupying China's seat at the relevant time. Hsiao, 1994, pp. 433–434; see also Hsieh, 2005, pp. 1195–1121.

6 Williams, 2008, p. 10.

7 General Agreement on Tariffs and Trade, Art. 11, October 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

8 World Trade Organization, 2007, p. 207; Brown and Irwin, 2016 (finding that the average tariff level in 1947 was about 22%).

9 World Trade Organization, 2007, p. XXXI. After the Uruguay Round, the weighted bound tariff average of the United States, Japan, and the EU (at that time having 12 Member States) was 3.1%, with the US having 3.5%, Japan 1.7% and the EU 3.6%. See id. at 209.

10 UN Conference on Trade and Development, 2013, p. 5.

11 Ibid, p. 3.

12 Ibid, p. 7.

caps established for specific product lines. These were agreed in a series of rounds that provided a platform for GATT members to negotiate tariff reductions with each other and to gradually reduce duty rates. While states may unilaterally change their applied tariffs, Art. II GATT makes tariff promises binding.

WTO members' tariff bindings were included into the Schedule of Concessions and Commitments annexed to GATT '94. The Uruguay Round, which took place in 1986–1994, was extremely successful in extending binding coverage: in developed countries, bound rates were virtually extended to all products (99% of product lines), same as in transition economies, which increased their binding coverage from 73% to 98%. This was paralleled by a similar process in developing countries, where binding coverage increased[13] (extended to most products: 73% of products lines that increased from 21% pre-Uruguay)[14] and bound tariffs also came down sharply (although remained high).[15]

The world's ten largest economies[16] by GDP (representing 80% of world GDP) are characterized by almost full-binding coverage (except for India) and relatively low bound tariffs. The first three economies—EU, Japan, and the United States (representing 52% of world GDP)—have less than a 5% simple average bound tariff.[17] It must be added that the actual tariff rates are usually considerably lower than the bound tariffs (the latter functioning only as a ceiling).

The above demonstrates that in global trade, the traditional and most robust tools of trade restriction are not determinant factors anymore. While specific products may be subject to above-average tariffs, for most products the major trade hurdles are technical barriers, such as local products standards, licensing requirements, and regulatory authorization.

A similar framework prevails as to trade and services, where the Schedule of Commitments annexed to the General Agreement on Trade and Services (GATS) fulfills a role like that of the Schedule of Concessions and Commitments annexed to GATT 1994. The GATS agreement was, for the most part, modelled after the GATT, but it contains two important limitations: as to services, market access and national treatment must be provided only if the member state concerned specifically promised them as to a given sector. This means that WTO members' enterprises are not guaranteed access to foreign markets and need not be afforded national treatment unless the country of destination promised one or both services in its Schedule of commitments. States may make commitments as to any of the four modes of supply specified by GATS (cross-border supply, consumption abroad, commercial presence, physical presence) and may make these commitments with restrictions. As with tariff bindings, GATS commitments cannot be revoked unilaterally unless the affected members are duly compensated.[18]

13 World Trade Organization, 2007, p. 45.
14 World Trade Organization, no date.
15 See World Trade Organization, 2015.
16 Based on the 2017 GDP, see Nagy, 2019.
17 World Trade Organization, 2017.
18 Art. XXI GATS (General Agreement on Trades and Services), January 1995.

4. The Absoluteness of the EU Common Commercial Policy

This section addresses Member States' playing field as to goods, services, and investments. The regulation of the commercial aspects of intellectual property has centered around the protection of intellectual property rights and not about the movement of technology. States naturally do not restrict the free movement of technology (though they may restrict investments, as well as the entry of enterprises that use a certain technology); hence, the international regulation in this field has focused on the minimum level of protection States must provide.

4.1. Trade in Goods

Trade in goods with non-EU countries has been largely 'Europeanized.' Customs policy is an exclusive EU competence (that is, Member States do not have the right to impose tariffs).[19] In the same vein, the representation of the EU on the international scene, including representation in the WTO and the conclusion of free trade agreements (provided their provisions have a 'specific link' to international trade in goods) are also an exclusive EU competence. The power to adopt measures against unfair trade were also shifted to the EU level: anti-dumping and countervailing duties are imposed by the European Commission.[20]

The only area in which Member States may manifest their preferences concerning (and adopt measures impacting on) extra-EU trade is technical barriers to trade, as long as the given question has not been preempted by EU legislation. Technical barriers to trade are state measures that establish, for instance, standards, testing and certification requirements, and rules of taxation. These may, at times, be even more burdensome than customs duties and quantitative restrictions. Member States have very broad regulatory power to establish such requirements, and their regulatory policy may consider commercial policy considerations. Perversely, if a Member States measure breaches WTO law (with a free trade agreement, or FTA), the Commission has the power to have it invalidated by the CJEU by means of an infringement procedure. Apart from that, however, Member States may make use of this regulatory power.

As noted above, due to the remarkable drop in tariffs in the last several decades, especially after the Marrakesh Agreement of 1994 establishing the WTO, technical barriers to trade (including sanitary and phytosanitary measures) came to the fore. Tariffs are no longer the major issue (though in certain industries they may still be high), and states strive to enhance the fruit-bearing capacity of trade through the

19 See *TARIC, the integrated tariff of the European Union*. https://web.archive.org/web/20220101133256/https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/customs-tariff/eu-customs-tariff-taric_en.

20 See e.g., Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community, OJ L 56, 6.3.1996, pp. 1–20; Council Regulation (EC) No. 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community, OJ L 288, 21.10.1997, pp. 1–33.

diminution of technical barriers. Nowadays, they are the most significant hurdles to trade, particularly in relation to commerce between developed countries, which have reduced their customs duties the most. For producers, beyond the costs of having double or multiple production lines, discrepant national standards necessitate extra administration, red tape, and paperwork in the form of conformity assessments (e.g., registration, testing, certification, licensing), which generates delays and unpredictability. Member States' regulatory powers concerning these questions gives them a wide playing field, and this has given them an opportunity to develop a policy toward extra-EU trade.

Central European countries have largely benefitted from the uniform EU commercial policy, which accumulates a stronger bargaining power than may have individually. The emerging waiver of FTAs concluded by the EU also creates new business opportunities in trade in goods. At the same time, it needs to be considered that Central European countries, which have a competitive advantage in the internal market due to lower labor costs, may be counter-interested in free trade agreements with low-cost developing countries.

4.2. Trade in Services

The exclusive competence over trade in services covers all the four modes of supply identified by the GATS: cross-border provision of services, consumption abroad, commercial presence, and physical presence.[21] Nonetheless, as long as the EU does not preempt Member State law by way of legislation, and Member State law does not go counter to the EU's international commitments, Member States have a wide playing field to develop an independent regulatory policy, which may extend to service standards, licensing requirements, recognition of certificates and diplomas, and government contracts. Contrary to goods, trade in services is not subject to a comprehensive EU program.

Member States' arena is expected to be further limited by the emerging EU regulation on service and take-over subsidies. On June 17, 2020, the European Commission adopted the White Paper on Levelling the Playing Field as Regards Foreign Subsidies. The white paper responds to the danger posed by 'state sponsored unfair trading practices.'[22] Non-EU subsidies may promote foreign undertakings' existing activities in the EU, enable them to underbid their non-subsidized competitors at public tenders, and help them acquire EU companies. The white paper identifies the major gaps in the international disciplines (and EU law mechanisms) on subsidies, and proposes a set of rules to neutralize unfair trade practices and ensure a level playing field in international trade and the EU internal market.

The proposed measures are made up of three layers. A set of measures of general application is proposed to cover all foreign service subsidies granted to economic

21 See Opinion 1/08, Opinion of the CJEU (Grand Chamber) of 30 November 2009, Opinion pursuant to Art. 300(6) EC ECLI:EU:C:2009:739, paras. 4, 118 and 119; Opinion 2/15, para. 54.
22 Ibid, p. 4.

operators established or active in the EU market (Module 1), which are meant to offset both product and service subsidies, and two special regimes governing foreign subsidies provided in the context of acquisitions of EU targets (Module 2) and bids in public procurement in the EU (Module 3). The term ‘acquisition’ covers not only takeovers (where decisive control is obtained), but also the acquisition of non-controlling minority rights or shareholdings, and other transactions that result in ‘material influence’ being acquired in an EU undertaking. As noted above, in the parlance of GATS, commercial presence is a mode of service supply; hence, subsidies granted in the context of acquisitions may qualify as service subsidies. The decisive trigger in all three modules is that the subsidy is foreign—that is, it is provided by a third country. The proposed measures are modelled after EU state aid rules, which apply solely to state aids granted by Member States[23] and hence do not cover subsidies provided by foreign governments. The term ‘subsidy’ must be conceived broadly; in the context of acquisitions, in addition to the benefits explicitly linked to the transaction, it also covers indirectly related aids (e.g., measures that enhance the acquirer’s financial strength and, thus, facilitate the acquisition).

The operation of Module 1 is based on *ex post* investigations, while Modules 2 and 3 create an *ex ante* system and a duty of notification. Hence, the measures to be adopted because of the investigation slightly differ as to the three modules. Nonetheless, they are all ‘redressive measures’ aimed to obviate the repercussions of the foreign subsidy, and could range from structural remedies and behavioral measures to repayment.

The investigation extends to three core issues: existence of a subsidy, distortion in the internal market, and the subsidy’s most redeeming virtue—‘the positive impact that the supported economic activity or investment might have within the EU or on a public policy interest recognized by the EU.’[24] If a distortive subsidy has a redeeming virtue, the distortion and the positive effects must be balanced. The EU’s public policy objectives include, for instance, the creation of jobs, climate neutrality goals, environmental protection, digital transformation, security, public order, public safety, and resilience.

The above principles have recently been converted into a proposal for regulation.[25]

Although the emerging regime on service and take-over subsidies is expected to introduce some limitations, Member States have a wide sphere in which to develop an independent regulatory policy.

23 According to Art. 107(1) TFEU: “1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.” (emphasis added).

24 Ibid, p. 14.

25 Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market COM (2021) 223 final.

4.3. Investments

The EU's exclusive competence as to foreign investments[26] is exclusive but not all-embracing. It does not extend to foreign indirect investments and investor–state dispute settlement.[27] Furthermore, the EU very quickly delegated its power acquired by the Treaty of Lisbon back to the Member States via Regulation 1219/2012.[28] The regulation accomplished this re-delegation by two principles. First, it kept in force Member States' existing BITs (that is, BITs signed before December 1, 2009) 'until a bilateral investment agreement between the Union and the same third country enters into force.'[29] Second, it authorized Member States to conclude new BITs (or amend an existing BIT) with third countries provided the general framework set out in the regulation is respected, and they obtain the authorization of the European Commission.

This means that Member States have significant competences in the field of investments: foreign indirect investments and investor–state dispute settlements do not come under exclusive EU competence, while the conclusion of BITs was delegated back to them, subject to vague substantive conditions and individual Commission authorization.

The above implies that notwithstanding the changes in the division of competences between the EU and Member States brought about by the Treaty of Lisbon, pre-existing extra-EU BITs (that is, treaties involving an EU Member State and a third country) remained, in essence, intact. This is reinforced by Art. 351 TFEU, which provides that rights and obligations arising from treaties with third countries that precede accession "shall not be affected by the provisions of the Treaties.' The CJEU established very early, in *Attorney General v. Juan C. Burgoa,*[30] that the purpose of Art. 351 TFEU is to ensure that EU law does not affect Member States' duties to respects the rights of non-member countries, emerging from an agreement concluded prior to accession.[31] In *Commission v. Slovak Republic,*[32] the CJEU held that benefits accruing from a private law contract and protected by Slovakia's extra-EU BITs and the ECT antedating accession persist under Art. 351 TFEU. In 1997, ATEL, a Swiss company was granted preferential access to the electricity grid in Slovakia. The Commission launched an infringement

26 See Víg, 2018.

27 For an EU perspective of international investment arbitration, see Hajdu, 2021; Hajdu, 2020.

28 Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. OJ L 351, 20.12.2012, pp. 40–46.

29 Ibid, Art. 3.

30 Judgment of the CJEU of 14 October 1980, Attorney General v. Juan C. Burgoa, Case 812/79, ECR 02787, ECLI:EU:C:1980:231.

31 This phrasing has been consistently followed in the judicial practice. See Judgment of the CJEU of 4 July 2000,
Commission of the European Communities v. Portuguese Republic, Case C-84/98, ECLI:EU:C:2000:359, para. 53; Judgment of the CJEU of 18 November 2003, Budéjovický Budvar, národní podnik v. Rudolf Ammersin GmbH, Case C-216/01, ECLI:EU:C:2003:618, paras. 144-145; Judgment of the Court (Grand Chamber) of 3 March 2009, Commission of the European Communities v. Kingdom of Sweden, Case C-249/06, ECLI:EU:C:2009:119, para 34.

32 Judgment of the Court (First Chamber) of 15 September 2011, European Commission v. Slovak Republic, Case C-264/09, ECLI:EU:C:2011:580.

procedure against Slovakia due to discriminatory treatment. However, the CJEU held that 'the preferential access granted to ATEL may be regarded as an investment protected by the [Swiss–Czechoslovakian BIT] and that, under the first para. of Art. 351 EC, it cannot be affected by the provisions of the EC Treaty';[33] 'even if it were to be assumed that the preferential access granted to ATEL were not compliant with Directive 2003/54, that preferential access is protected by the first para. of Art. 351 EC.'[34]

The parallelism of EU law and BIT commitments may subject Member States to situations where EU law mandates Member States to violate a BIT obligation. In such cases, the question is whether the 'defense of superior orders' may be valid in such situations. A few arbitral proceedings have dealt with the Member States' liability for implementing the commands of EU law, i.e., Member States' liability for violations mandated by EU law.[35] In these cases, the Member State promised benefits that were revoked later as illegal under EU law.

In *Electrabel S.A. v. Republic of Hungary*,[36] the Commission enjoined Hungary to put an end to the long-term power purchase agreements of the Hungarian national electricity company (MVM)[37] because they contained veiled state aid. Though Hungary terminated the agreements through a legislative act, the tribunal established that Hungary was not liable as its act was mandated by the Commission's formal decision[38] ('defense of superior orders'). This may imply that the EU should have been sued instead (in fact, the EU could have been sued as the claim was based on the ECT). At the same moment, the tribunal did investigate those elements of Hungary's conduct where Hungary had a certain leeway. These acts were regarded as Hungary's own acts despite being done to implement the Commission's decision. Contrary to the above, in *EDF International S.A. v. Republic of Hungary*,[39] which was launched by another investor but emerged from the same state aid matter as *Electrabel*, the tribunal decided for the claimant (in an *ad hoc* arbitral proceeding conducted under the UNCITRAL rules).[40]

33 Ibid, para. 51.
34 Ibid, para. 52.
35 Cf. Eilmansberger, 2009, p. 413.
36 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.
37 Mid-'90s Hungary privatized its power plants. The claimant purchased most of the shares in Dunamenti power plant and invested considerable funds for the purpose of retrofitting. Dunamenti had a long-term power purchase agreement with MVM, the Hungarian national electricity company. Such contracts were common at that time and were meant to back the privatization of the power stations: these facilities needed significant retrofitting and the long-term power purchase contracts were meant, in economic terms, to guarantee the investors that they would be able to sell the electricity they produced (note that at that time MVM was the only purchaser of electricity in Hungary and remained a super-dominant undertaking also after the electricity market was opened).
38 Commission Decision on the State Aid awarded by Hungary through Power Purchase Agreements, Brussels, 2008.VI.04, C (2008) 2223 final.
39 The award was rendered on December 4, 2014. The tribunal consisted of Karl-Heinz Böckstiegel (chair), Pierre-Marie Dupuy and Albert Jan van der Berg.
40 See Thomson, 2014, EDF wins claim against Hungary http://globalarbitrationreview.com/news/article/33251/edf-wins-claim-against-hungary.

Unfortunately, the award is not publicly available, so the tribunal's arguments cannot be reconstructed.

In *Micul Brothers v. Romania*,[41] the tribunal condemned Romania for withdrawing certain benefits due to EU state aid law. This case presents the clash between BITs and EU law, and powerfully demonstrates the vicious circle[42] encapsulated in this issue. After Romania provided compensation to the claimants (as ordered by the tribunal), the Commission ruled that the compensation replaced the illegal subsidy it was meant to make up for, and, hence, it qualified as state aid, and ordered Romania to resume the financial benefit provided. This was a controversial position, as the benefits were withdrawn before Romania's accession to the EU, so the withdrawal was motivated, but not compelled, by the EU state aid law.

Extra-EU BITs may gain enhanced significance due to the CJEU's suppression of intra-EU BITs in *Achmea*.[43] As European investors can no longer rely on a BIT if they invest in another Member State, they may seek alternative methods of protection, and one of the obvious options is treaty shopping—EU investors may make investments in other Member States via third countries (or transfer their interests to special purpose vehicles in third countries) and claim the benefits of extra-EU BITs in intra-EU matters.

While some have acknowledged these strategies with aversion, most arbitral awards—in fact, almost all of them—have been intensely dismissive of piercing the corporate veil in cases where the BIT contained no specific requirements of substantive link or denial of benefits clause. In reality, 'it has become so easy for foreign investors to relocate to different jurisdictions that the contents of nationality have largely lost their essence.'[44] Although piercing the corporate veil is a living doctrine, it is exceptional and applies only to abusive practices. According to the arbitral practice, the mere fact that the nationals of a country establish a company in another country is not, in itself, an abuse that justifies piercing the corporate veil (*ADC & ADMC v. Hungary*,[45] *Saluka Investments BV v. Czech Republic*,[46] *Yukos v. Russia*,[47] *Niko Resources v. Bangladesh and others*[48]). The very same line of interpretation has been

41 See SA.38517 Micula brothers v. Romania (ICSID arbitration award); IP/15/4725: European Commission—Press release, State aid: Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme. Brussels, 30 March 2015.

42 Kende, 2015, pp. 50–51.

43 Judgment of the Court (Grand Chamber) of March 6, 2018, Slowakische Republik v. Achmea BV, Case C-284/16, ECLI:EU:C:2018:158. Subsequently, Member States terminated intra-EU BITs by means of an international treaty. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. OJ L 169, 29.5.2020, pp. 1–41.

44 Charisse, 2015, p. 228.

45 ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungary, ICSID Case ARB/03/16, Award (2 October 2006).

46 Saluka Investments BV. v. Czech Republic, UNCITRAL, Partial Award (17 March 2006).

47 Ibid, paras. 415 and 417.

48 Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case ARB/10/11 and 10/18, Decision on Jurisdiction (19 August 2013).

taken as to 'round-tripping.' when domestic investors establish a shell company in a foreign country to be protected by the BIT between their home country and the shell company's country of incorporation. In *Tokios Tokelés v. Ukraine,*[49] the claimant was a Lithuanian company, 99% of its shares was owned by Ukrainian nationals who, allegedly, wanted to make use of the Ukraine–Lithuania BIT. Although with the dissenting opinion of one of the arbitrators, the tribunal found no reason not to apply the Ukraine–Lithuania BIT. A similar approach was taken by the arbitral tribunal in *Rompetrol v. Romania,*[50] *Alpha Projektholding v. Ukraine,*[51] and *KT Asia v. Kazakhstan.*[52] The very rare exception that goes against the above clear line of case law is *Venoklim v. Venezuela,*[53] where the tribunal declined jurisdiction over a Dutch company's claim because the company was in fact controlled by Venezuelan individuals.

Notwithstanding the growing role of denial of benefits clauses,[54] a good part of BITs consistently accord protection to companies incorporated in the other country, without containing any requirements of substantive links. Arbitral tribunals have been constantly disinclined to pierce the corporate veil of shell (or 'mailbox') companies in the context of BITs. It is settled practice that absent a specific provision to the contrary, the tribunal will, in principle, refrain from looking into whether there is a substantive relationship between the company and the country of incorporation.[55] This provides important opportunities for treaty shopping.

5. Conclusions

Notwithstanding the exclusivity of EU common commercial policy, Member States have a significant playing field and, hence, the chance to develop an independent national policy in respect to extra-EU trade. First, the exclusivity of EU power does not extend to indirect foreign investments and investor–state dispute settlement. Second, the EU delegated back the power to conclude investment treaties, thus giving Member States a wide playing field to develop their own policies and engage in international economic relations. Third, even regarding subjects that come under the exclusive EU competence, there is a grey zone of measures that have an impact but no specific link to trade. The EU common commercial policy's exclusivity extends to measures that have a specific link to trade, but does not extend to Member States' trade-related actions that have no such direct link. This may embrace, for instance, regulatory

49 Tokios Tokelés v. Ukraine, ICSID Case ARB/02/18, Decision on Jurisdiction (29 April 2004).

50 Rompetrol Group NV. v. Republic of Romania, ICSID Case ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility (18 April 2008).

51 Alpha Projektholding GmbH v. Ukraine, ICSID Case ARB/07/16, Award (8 November 2010).

52 KT Asia Investment Group BV. v. Republic of Kazakhstan, ICSID Case ARB/09/8, Award (17 October 2013), paras. 111–139.

53 Venoklim Holding BV. v. Bolivarian Republic of Venezuela, ICSID Case ARB/12/22, Award (3 April 2015).

54 Charisse, 2015, pp. 289 and 302–303. See Alvarez, 2009, pp. 328–330 and 329.

55 Tokios Tokeles, para. 36.

policy, product and service standards, licensing and market authorization, and recognition of foreign certificates and diplomas. Finally, the exclusivity of EU commercial policy does not affect the Member States right to get involved in private transactions (directly, or through public enterprises) and invest or co-invest, buy, or sell, especially in network industries and sectors featuring public services.

The exclusivity of the EU commercial policy implies a complex set of advantages and drawback for the Central European region. The EU has an incomparably strong bargaining position in international economic relations and Member States have a much better opportunity to protect their interests in the framework of an EU policy than on an individual basis. The fact that the need for an exclusive EU competence has never been questioned since establishing the EU highlights the unquestionable preponderance of its merits over the potential drawbacks. Nonetheless, the various regions of the EU, including Central Europe, have their own traits and interests, and it is important that the EU policy be attentive to these. In the internal market, lower labor costs have been a competitive advantage for Central Europe, and the region has benefitted considerably from the relocation of work-intensive production operations in the automotive industry. FTAs with low-cost countries, which make the influx of goods, including interim goods, from these countries much easier, may interfere with this. Furthermore, when it comes to trade with non-EU countries, there is a tension between the uniformity required by the exclusive EU competence and the priorities of Central European countries, for instance, with respect to former Eastern Bloc countries. While the exclusive commercial policy requires uniformity, the economic interests and preferences of the Member States may be different. Nonetheless, Member States still enjoy a considerable playing field notwithstanding the exclusive EU competence. Moreover, the channeling-in of the interests of a region in EU commercial policy is expected to raise no difficulties if these do not conflict with the interests of another region.

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