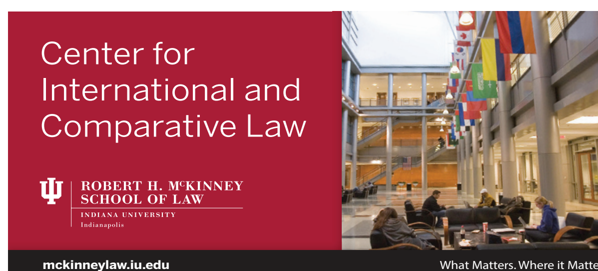
Csongor István Nagy is professor of law at the University of Szeged and recurrent visiting professor at Central European University (Budapest/New York) and Sapientia University of Transylvania (Romania). Earlier, he had visiting appointments in the Hague, Munich, Brno, Hamburg, Edinburgh, London, Bloomington (Indiana), Brisbane and Beijing. He is admitted to the Budapest Bar and an arbitrator at the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry. He earned his J.D. and Ph.D. from the Eötvös Loránd University of Sciences and his LL.M. and S.J.D. from Central European University.

With the emerging wave of new-generation free trade agreements (both bilateral BITs and multilateral IIAs), investment arbitration has become one of the central issues of the contemporary discourse on international economic relations.
Critics argue that investment disputes are settled in the frame of intransparent arbitral proceedings devoid of any democratic legitimacy, giving ad-hoc private bodies and "judges" the competence to adjudicate public law questions of great significance - and potentially great cost - to host countries. So far, the main actors in investor-state arbitration have been slow to respond to this criticism. As a result, several countries have refused to honor awards against them and a couple have even withdrawn from investment arbitration altogether.
The present volume addresses five central issues in the scholarly debate on investment arbitration and national interest:

1. Challenges to the legitimacy of the current system, in particular based on cases of abuse, lack of access and transparency, insufficient public participation, and difficulties with balancing of investor rights and host state (public) interests;
2. Strengths and weaknesses of participating institutions;
3. Increasing issues with the enforcement of awards and what can be done about it;
4. Some regional efforts and perspectives; as well as
5. The global debate about reforms and their successes and failures to date.

Contributors include many experts with experience as arbitrators, legal counsel to investors and/or governments, as well as public interest organizations.



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Csongor István Nagy (ed.)

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edited by Csongor István Nagy

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Csongor István Nagy*

EXTRA-EU BITS AND EU LAW: IMMUNITY, "DEFENSE OF SUPERIOR ORDERS", TREATY SHOPPING AND UNILATERALISM

Abstract

This paper addresses three aspects of the relationship between extra-EU BITs and EU law. First, are disputes under extra-EU BITs concluded before the given country's accession affected (and suppressed) by EU law? Second, given the fact that Member States ceded parts of their sovereignty to the EU, would the "defense of superior orders" work in relation to Member State acts mandated by EU law? Third, will the suppression of intra-EU BITs intensify the use of extra-EU BITs in terms of treaty shopping?

I. Introduction

In recent years, various issues concerning the relationship between EU law and bilateral investment treaties (BITs) have emerged and reached the Court of Justice of the European Union (CJEU).

Earlier this year, the CJEU, in *Achmea*,[1] pronounced an arbitration clause in an intra-EU BIT non-compliant with EU law because it found that it endangered the stability of the EU's judicial architecture and encroached on EU courts' privilege to interpret EU law. While it is unclear what the judgment's holding is and whether it covers arbitration clauses different from the one that reached the CJEU,[2] it is certain that the ruling generated a huge pessimism as to the future of investment arbitration in intra-EU matters.

In parallel to this, Belgium submitted a request for an opinion to the CJEU concerning the EU law compatibility of the rules on resolution of investment disputes between investors and states of the Canada-EU Free Trade Agreement (Comprehensive Economic and Trade Agreement – CETA).[3]

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* LL.M., Ph.D., S.J.D, dr. juris, professor of law and head of the Department of Private International Law at the University of Szeged, research chair and the head of the Federal Markets "Momentum" Research Group of the Hungarian Academy of Sciences, recurrent visiting professor at the Central European University (Budapest/New York), the Riga Graduate School of Law (Latvia) and the Sapientia University of Transylvania (Romania).
The author is indebted to Wojciech Sadowski for his comments on this paper. Of course, all views and any errors remain the author's own.

1 Case C-284/16 *Slovakia v. Achmea BV*, ECLI:EU:C:2018:158.

2 Csongor István Nagy, *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: "Know Well What Leads You Forward and What Holds You Back"*, 19(4) German Law Journal 981 (2018).

3 Opinion 1/17: Request for an Opinion Submitted by the Kingdom of Belgium Pursuant to Article 218(11) TFEU.

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This paper addresses three aspects of the relationship between extra-EU BITs and EU law. Are disputes under extra-EU BITs concluded before the given country's accession affected (and suppressed) by EU law? Given that Member States ceded parts of their sovereignty to the EU, would the "defense of superior orders" work in relation to Member State acts mandated by EU law? And would the suppression of intra-EU BITs intensify the use of extra-EU BITs in terms of treaty shopping?

II. Are Rights Protected by Pre-Accession Extra-EU BITs Suppressed by EU law?

Notwithstanding the changes in the division of competences between the EU and Member States brought about by the Treaty of Lisbon, BITs involving an EU Member State and a third country have remained, in essence, intact.

On one hand, Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries made it clear that extra-EU BITs, concluded before the Treaty of Lisbon or accession, will remain valid "until a bilateral investment agreement between the Union and the same third country enters into force."[4] On the other hand, extra-EU BITs may be governed by Article 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".

> *"Article 351*
> *The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding states, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*
> *To the extent that such agreements are not compatible with the Treaties, the Member State or states concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*
> *In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."*

The CJEU established very early, in *Attorney General v. Juan C. Burgoa*,[5] that the purpose of Article 351 TFEU is to make sure 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.[6]

[4] Article 3.

[5] Case 812/79 [1980] ECR 02787, ECLI:EU:C:1980:231.

[6] This phrasing has been consistently followed in the judicial practice. *See* Case C-84/98 *Commission v.*

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> *"[T]he purpose of that provision is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder. Although the first paragraph of Article 234 makes mention only of the obligations of the Member States, it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question.*
> *Since the purpose of the first paragraph of Article 234 is to remove any obstacle to the performance of agreements previously concluded with non-member countries which the accession of a Member State to the Community may present, it cannot have the effect of altering the nature of the rights which may flow from such agreements. From that it follows that that provision does not have the effect of conferring upon individuals who rely upon an agreement concluded prior to the entry into force of the Treaty or, as the case may be, the accession of the Member State concerned, rights which the national courts of the Member States must uphold. Nor does it adversely affect the rights which individuals may derive from such an agreement."*[7]

In *Commission v. Slovak Republic*,[8] 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 Article 351 TFEU.

In 1997, ATEL, a Swiss company, was granted preferential access to the electricity grid in Slovakia. The Commission launched an infringement 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 paragraph of Article 351 EC, it cannot be affected by the provisions of the EC Treaty";[9] "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 paragraph of Article 351 EC".[10]

Accordingly, investment rights and privileges granted before accession to non-EU investors persist on the basis of Article 351 TFEU if they were converted into a treaty right before accession. It has to be taken into account that in *Commission v. Slovak Republic* not

Portuguese Republic, [2000] ECR I-05215, ECLI:EU:C:2000:359, para 53; Case C-216/01 *Budéjovický Budvar, národní podnik v. Rudolf Ammersin GmbH* [2003] ECR I-13617, ECLI:EU:C:2003:618, paras 144-145; Case C-249/06 *Commission v. Sweden*, para 34.

7 Case 812/79 *Attorney General v. Juan C. Burgoa* [1980] ECR 02787, ECLI:EU:C:1980:231, paras 8-10.

8 Case C-264/09 *Commission v. Slovak Republic* [2011] ECR I-08065.

9 Para 51.

10 Para 52.

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only the BIT but also the investment contract was concluded before Slovakia's accession. The situation may be different if the promise or benefit protected by the extra-EU BIT (investment contract) is made or granted after the accession. Would the pre-accession BIT, under Article 351 TFEU, equally save a Slovak promise made post-accession for preferential access? The BIT itself, as a treaty concluded before accession, would certainly benefit from the immunity granted by Article 351 TFEU but would a post-accession measure enjoy the same treatment? Can a post-accession private law right turn into a treaty right under a pre-accession BIT?

The answer appears to be negative. Article 351 TFEU applies to treaties and not to (investment) contracts. In *Commission v. Slovak Republic* it was the contractual rights confirmed and protected by the BIT that benefited from Article 351 TFEU: the promise of preferential access was lawful before accession and it also ossified under the Swiss-Czechoslovak BIT before accession. Nonetheless, a similar post-accession promise may not be susceptible of ossifying. Even though the BIT would keep on benefitting from Article 351 TFEU, its immunity would not extend to post-accession private law rights and contracts.

Not only would it be preposterous to sanction state aids granted to non-EU investors with reference to extra-EU BITs but such an interpretation would also be conceptually flawed. Notably, Article 351 TFEU does not protect private law rights but treaty rights. This implies, that no treaty right comes into existence if there is no valid private law right to be protected by the BIT. Due to the doctrine of supremacy, EU law suppresses all non-compliant rights under national law. Therefore, a benefit infringing EU law will not be a valid right. Hence, it cannot ossify under the BIT.

III. The "Defense of Superior Orders" in the Arbitral Practice

The EU's multilayered system of competences and the partial transfer of national sovereignty create an involute system where competences and also responsibilities are shared. This may cause complicated questions in cases where the impugned national act was mandated by EU law.

A few arbitral proceedings have dealt with Member State liability for implementing the commands of EU law, i.e. Member States' liability for violations mandated by EU law.[11] In these cases, the Member State promised benefits which were revoked later on as illegal under EU law. These cases dealt with intra-EU BITs but may provide guidance also in relation to the same question under extra-EU BITs.

The problem may appear to be ephemeral, as pre-accession benefits will sooner or later fall out, lifting the factual basis of the theoretical question whether a Member States may be called to account for acts mandated by EU law. Indeed, this issue emerged in intra-EU disputes in the arbitral practice, where the benefits were granted before the country's accession. A common feature of these investment cases is that EU law, in particular state aid law, nullified benefits granted before accession. The claimed benefits

[11] *Cf.* Thomas Eilmansberger, *Bilateral Investment Treaties and EU law*, 46 Common Market Law Review 383, 413 (2009).

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were lawfully promised but subsequently became unlawful when the accession treaty entered into force. In these cases, the state entered into an agreement with an investor, or created a legitimate expectation, and it was established at or after the accession that this arrangement contained illegal state aid and had to be abolished.

Nonetheless, the above issue will persist as to Member State acts which were lawful when adopted but were made illegal by an amendment of EU law. In certain cases a Member State measure may be compliant with EU law when it is adopted but turn illegal by a change in EU law. In such cases, it may be convincingly argued that the nullification, i.e. the invalidity of benefits non-compliant with EU law, were not foreseeable for the investor, hence, its legitimate expectations were frustrated.[12] Given that, should the Member State be held to account for a promise it lawfully made but was outlawed later on by the EU?

The investment law liability for acts mandated by EU law raises issues of supremacy[13] and the question whether the "defense of superior orders" provides immunity to Member States. The Commission has championed the theory that benefits nullified by EU state aid law may give rise to no valid claims due to EU law's supremacy. On the other hand, tribunals have consistently rejected to judge the question on the basis of EU law's supremacy, though they adopted diverging approaches regarding the "defense of superior orders".

In *Electrabel S.A. v. Republic of Hungary*,[14] the Commission enjoined Hungary to put an end to the Hungarian national electricity company's (MVM)[15] long-term power purchase agreements 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[16] ("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 Treaty Energy Charter (ECT), which was ratified not only by the Member States but also by the EU itself). At the same time, 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.

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[12] Thomas Eilmansberger, *Bilateral Investment Treaties and EU law*, 46 Common Market Law Review 383, 418–419 (2009).

[13] Tamás Kende, *Arbitral Awards Classified as State Aid under European Union Law*, 3(1) ELTE Law Journal 37, 48 (2015).

[14] ICSID Case No. ARB/07/19. Award of 25 November 2015.

[15] In the mid-1990s Hungary privatized its power plants. The claimant purchased the majority 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).

[16] Commission decision on the state aid awarded by Hungary, C (2008) 2223 final.

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The claimant's expropriation claim was summarily rejected – the power purchase agreement itself was not considered to be a protectable investment and its termination did not deprive the claimant's investment (the power plant) of its value.[17] Hence, the case centered around the ECT's "treatment" provisions.

The tribunal established that the relationship between the ECT and EU law is somewhat special and "the ECT should be interpreted, if possible, in harmony with EU law".[18] It held that "there can be no practical contradiction between the ECT and EU law in regard to the [Commission's] Final Decision" and "the ECT does not protect the claimant, as against the Respondent, from the enforcement by the Respondent of a binding decision of the European Commission under EU law."[19] However, the tribunal also noted that the EU itself is not immune from liability under the ECT.[20]

The tribunal also stressed that Hungary's immunity was due to the compelling nature of the Commission's state aid decision and, for this reason, it extended only to the point where it had no autonomy of action.[21] Details left to its discretion or not spelled out in the Commission decision came under Hungary's individual liability and were to be scrutinized by the tribunal.[22]

Contrary to the above, in *EDF International S.A. v. Republic of Hungary*,[23] 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).[24] Unfortunately, the award is not publicly available so the tribunal's arguments cannot be reconstructed.

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[17] ICSID Award in Case No. ARB/17/19, Paras 6.53 and 6.57-6.58.

[18] Para 4.130. First, the EU and its Member States were closely involved in the adoption of the ECT, and since according to Article 207(3) TFEU the Council and the Commission have to ensure that "the agreements negotiated are compatible with internal Union policies and rules". Paras 4.135-4.136. Second, the ECT and the EU have similar objectives: the ECT "is an instrument clearly intended to combat anti-competitive conduct, which is the same objective as the European Union's objective in combating unlawful state aid." Para 4.133. *See also* paras 4.137 and 4.141. Third, the tribunal also established (para 4.142.) that the ECT implicitly recognized that Commission decisions are binding on all Member States. *See* Article 1(3) ECT: "A "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters."

[19] Para 4.169.

[20] Para 4.170.

[21] Paras 4.191 and 4.196.

[22] Paras 6.72 and 6.76. Hungary created a scheme for establishing the net stranded costs and for compensating the power plants for these (in case these had not been recovered). The tribunal found that Hungary's own acts were in line with the applicable standards; however, since the last stage of this scheme was still to be carried out at the time of the award, the tribunal reserved the right to decide on this in another award. Paras 6.108-6.109 and 6.118. *Cf.* Thomas Eilmansberger, Bilateral investment treaties and EU law, 46 Common Market Law Review 383, 413 (2009) ("The EC law origin of the measure cannot exculpate the host state if it had some discretion as to the interpretation or application of the EC law provisions in question. Relevant BIT investment protection guarantees oblige Member States to exercise this discretion in the most investor-friendly (and investmentsparing) way.").

[23] 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.

[24] *See* http://globalarbitrationreview.com/news/article/33251/edf-wins-claim-against-hungary/.

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In *Micula Brothers v. Romania*,[25] the tribunal condemned Romania for withdrawing certain benefits due to EU state aid law. This case spectacularly presents the clash between BITs and EU law and demonstrates the vicious circle[26] encapsulated in this issue. After Romania provided compensation to the claimants (as ordered by the tribunal), the Commission established that the compensation stepped into the place of the illegal subsidy it was meant to make up for and, hence, qualified as a state aid and ordered Romania to recover 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 EU state aid law.

The dispute emerged from Romania's introduction and subsequent revocation (during the accession negotiations) of certain economic incentives for companies operating in under-developed regions.[27] The tribunal established that there was no real conflict between the BIT and EU law as at the relevant moment Romania was in the negotiation stage and not subject to EU law.[28]

The tribunal held that although Romania's conduct was, for the most part, reasonable and "appropriately and narrowly tailored in pursuit of a rational policy" (i.e. EU accession), it did undermine the investors' "legitimate expectations with respect to the continued availability of the incentives" and, hence, qualified as unfair or inequitable and was not sufficiently transparent.[29] Romania, with the support of the Commission, sought the annulment of the award before the ICSID but its plea was rejected.[30]

IV. The Longing for Intra-EU BITs and Treaty Shopping

Extra-EU BITs may gain enhanced significance due to the CJEU's perceived suppression of intra-EU BITs in *Achmea*. Whatever the proper interpretation of the ruling may be,

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[25] *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. Case T-646/14 *Micula and Others v. Commission* (pending).

[26] Tamás Kende, *Arbitral Awards Classified as State Aid under European Union Law*, 3(1) ELTE Law Journal 37, 50-51 (2015) (circularity argument).

[27] Claimants argued that they made substantial investments in the legitimate expectation that these benefits would persists for a 10-year period. During Romania's accession negotiations, the EU invited Romania to put an end to the subsidy schemes incompatible with EU state aid law; and Romania terminated the incentives in question as from February 22, 2005 (though they were supposed to persists until April 1, 2009); Romania's accession to the EU entered into force on January 1, 2007, so the incentives were terminated two and a quarter year before EU law became applicable in the host country. While the Commission's position expressed during the negotiations was clear, no formal decision required Romania to revoke the incentives; in fact, no such formal decision could have been rendered, since during the relevant period Romania was not a Member State; however, the Commission made the termination of the subsidies a pre-condition of accession.

[28] Para 319.

[29] Para 827. Romania failed "to inform the claimants in a timely manner that the regime would be terminated prior to its stated date of expiration" Para 872.

[30] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on annulment, 26 February 2016.

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the general feeling is that it made arbitration under intra-EU BITs very risky. This may incite investors to seek alternative ways 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, the vast majority of arbitral awards, in fact almost all of them, has 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."[31] 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, in itself, not an abuse justifying the piercing of the corporate veil.

Notwithstanding the growing role of denial of benefits clauses,[32] 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.[33]

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[31] Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Business Law Journal 225, 228 (2015).

[32] Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 Hastings Business Law Journal 225, 289 & 302-303 (2015). *See* Remarks by Gabriela Alvarez, Proceedings of the Annual Meeting (American Society of International Law), Vol. 103, International Law As Law (2009), pp. 328–330, 329 ("Another concern is treaty shopping by investors for the sole purpose of obtaining protection of BITs. Some of the new provisions included in the new model BITs address this problem directly. For instance, the new models include a Denial of Benefits Clause that allows a state to deny benefits of the treaty to an investor of the other party if 1) the enterprise has no substantial business activities in the territory of the other party, and 2) if persons of a nonparty, or of the denying party, own or control the enterprise (i.e., shell companies). The extent to which these provisions will avoid treaty shopping still remains to be seen. The application of this type of clause has already caused a number of treaty interpretation problems. In the Norway Model BIT, the requirement of substantial business activities is directly contained in the definition of investor, which leaves it to tribunals to delineate the concept of substantial business activities. Also, the new Canada Model BIT provides that Most Favored Nation ("MFN") treatment does not extend to treatment accorded under existing treaties, and thus the MFN guarantees are applicable only to future treaty provisions.").

[33] "These investment agreements confirm that states parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine– Lithuania BIT, by contrast, includes no such 'denial of benefits' provision with respect to entities controlled by third country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed." *Tokios Tokeles*, para 36.

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In *ADC & ADMC v. Hungary*,[34] Canadian investors made investments in Hungary through a mailbox company incorporated in Cyprus. The Hungarian government objected that the Canadian investors were led by the motivation to gain access to ICSID jurisdiction as Canada was (at the relevant time)[35] not a party to the ICSID Convention. The tribunal rejected to pierce the corporate veil, because the Cyprus-Hungary BIT provided

> *"in its Art. 1(3)(b)* […] *that a Cypriot 'investor' protected by that treaty includes a 'legal person constituted or incorporated in compliance with the law' of Cyprus, which each Claimant is conceded to be.* […] *As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction, which in any event are no different. In either case inquiry stops upon establishment of the state of incorporation, and considerations of whence comes the company's capital and whose nationals, if not Cypriot, control it are irrelevant."*[36]

The tribunal refused to read any "genuine link" requirements into the BIT.

> *"While the Tribunal acknowledges that such requirement has been applied to some preceding international law cases, it concludes that such a requirement does not exist in the current case. When negotiating the BIT, the Government of Hungary could have inserted this requirement as it did in other BITs concluded both before and after the conclusion of the BIT in this case. However, it did not do so* […] *The Tribunal cannot read more into the BIT than one can discern from its plain text."*[37]

In *Saluka Investments BV v. Czech Republic*,[38] which likewise involved a shell company (incorporated in the Netherlands and owned by Japanese investors), the tribunal also refused to read extra requirements into the BIT.

> *"To depart from that conclusion requires clear language in the Treaty, but there is none* […] *The parties having agreed that any legal person constituted under their laws is entitled to invoke the protection of the Treaty, and having agreed so without reference to any question of their relationship to some other third state corporation, it is beyond the powers of the Tribunal to import into the definition of 'investor' some requirement relating to such a relationship*

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[34] *ADC Affiliate Limited & ADMC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award of 2 October 2006.

[35] In Canada, the ICSID Convention entered into force on 1 December 2013. *See* https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

[36] Para 357.

[37] Para 359.

[38] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006.

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having the effect of excluding from the Treaty's protection a company which the language agreed by the parties included within it."[39]

"The predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Art. 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed."[40]

Most importantly, the tribunal noted that the host state has been fully aware that the claimants were "special-purpose vehicles set up for the specific and sole purpose of holding those shares."[41]

The same conclusion was reached in *Yukos v. Russia*, where the claimant, Yukos Universal Limited, a company incorporated in the UK (Isle of Man), was claimed to be controlled by Russian nationals. The arbitral tribunal held that as the claimant was "a company organized in accordance with the laws of the Isle of Man, qualifies as an Investor for the purposes of" the Energy Charter Treaty.[42]

"The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements – which the drafters did not include – into a treaty, no matter how auspicious or appropriate they may appear."[43]

In *Niko Resources v. Bangladesh and others*,[44] the arbitral tribunal came to the same conclusion as to the subsidiary (allegedly shell-company) of a Canadian oil and gas exploration company in Barbados.[45]

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[39] Para 229.

[40] Para 241.

[41] Para 242.

[42] Para 417.

[43] Para 415.

[44] *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 No ARB/10/11 and 10/18, Decision on Jurisdiction 19 August 2013.

[45] Paras 174–208.

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"The Respondents have not presented any authorities to support their view that a requirement of a "real connection", assuming it were applicable in diplomatic protection or in treaty claims, should apply to contract claims as in the present case. In the Tribunal's view such an additional requirement cannot be read into the text of the Convention; nor can the travaux préparatoires for the Convention justify the assumption that this had been intended. It is sufficient for a claimant to show that it has the nationality of another Contracting State by reference to one of the generally accepted criteria, in particular incorporation or seat."[46]

The very same line of interpretation has been taken as to "round-tripping", when domestic investors establish a shell company in a foreign country so as to be protected by the BIT between their home country and the shell company's country of incorporation.

In *Tokios Tokelés v. Ukraine*,[47] the claimant was a Lithuanian company, 99% of its shares were 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*,[48] where a Dutch company owned and controlled by Romanian nationals relied on the Netherlands-Romania BIT.

In *Alpha Projektholding v. Ukraine*,[49] quoting *Tokios Tokelés v. Ukraine*, the arbitral tribunal pointed out that it is the respondent who bears the burden of proof that the consent to arbitration, expressed in the BIT, was "clearly […] not intended" for the purpose of encompassing an entity such as the claimant.[50]

In *KT Asia v. Kazakhstan*,[51] the tribunal also confirmed that where a BIT extends the scope of protection to entities incorporated in the other contracting party, the tribunal cannot read more demanding requirements, such as real connection or *siège social*, into the BIT, neither can it read a denial of benefits clause into the BIT.

"Accordingly, simply reading this provision, a legal entity incorporated in a Contracting State is deemed a national of that state. Faced with this definition, the Respondent argues that the principle of real and effective nationality sets requirements that go beyond this definition. The Tribunal cannot follow this argument."[52]

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[46] Para 203.

[47] *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[48] *Rompetrol Group NV v. Republic of Romania*, ICSID Case No ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008.

[49] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No ARB/07/16, Award, 8 November 2010.

[50] Para 345.

[51] *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, paras 111-139.

[52] Para 114.

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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.

V. Conclusions

After acquiring new competences in the field of investment protection, the EU has started elaborating a scheme for the relations with third countries. This paper examined three aspects of the "Europeanization" process: the status and validity of old extra-EU BITs, the problems that may emerge as a result of the division of regulatory competences between the EU and Member States and the perspectives of treaty shopping.

Given the division of powers between the EU and the Member States, it would be essential to ensure that liabilities under investment protection law match legislative and regulatory competences. The emerging question of "defense of superior orders" may be relevant also in the context of extra-EU BITs: the growing regulatory competences of the EU may lead to situations where national measures mandated by the EU give rise to investment claims. Once the BITs shift to the EU level, the problem of matching liabilities with competences may also be raised the other way around, as it is may emerge that the EU, absent provisions to the contrary, could be held liable for the acts of the Member States. A cautionary tale is found in *Abitibi-Bowater*, where Canada paid C$130 million in compensation for expropriatory acts of Newfoundland and Labrador. While it was the provincial acts that gave rise to the investment claim, the investor launched proceedings against the federal government.[54]

[53] *Venoklim Holding BV v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/22, Award, 3 April 2015.

[54] Sue Bailey, Williams Unrepentant as Taxpayers on Hook for NAFTA Deal with Abitibi, Globe & Mail Report on Business (published on 25 August 2010, updated on 2 May 2018), available at https://www.theglobeandmail.com/report-on-business/williams-unrepentant-as-taxpayers-on-hook-for-nafta-deal-with-abitibi/article1378194/.

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