The Conflict between EU Law and International Law in the Area of Intra-EU BITs

Lessons from the Hungarian Sodexo Case

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Abstract

This article demonstrates that in the area of international investment protection (in particular in relation to intra-EU BITs) there is a conflict between EU law and international law, for which there is no legal solution acceptable from the perspective of both legal regimes. The Sodexo case and the case law illustrate that in investment protection disputes, international arbitral tribunals acting under intra-EU BITs base their position purely on international law, while the defendant Member States and the EU (in particular following the CJEU's Achmea judgment) base their position purely on EU law, resulting in a situation that seems to be irreconcilable. While the two areas of law are constantly in conflict in these disputes, investors find themselves in a situation where the guarantees of investment protection may ultimately be unenforceable.

Keywords: intra-EU BITs, Achmea, Termination Treaty, investment protection, Sodexo

1. Introduction 585
2. The Sodexo Case – Facts 586
3. The International Law Basis of the Sodexo Case 587
   3.1. The BITs 587
   3.2. International Arbitration and ICSID 589
4. Disputes Based on BITs before Arbitral Tribunals 589
5. Can the BITs Be Considered to Have Lapsed after EU Accession? 592
6. The Relationship between BITs and EU Law Today 594
7. Infringement Proceedings Concerning the Reform of the Hungarian Cafeteria System 595
8. Achmea – a Turning Point in the Debate on BITs? 596
9. The Sodexo Case 597
10. The Termination Treaty: the End of Intra-EU BITs? 598
11. Changes in the Hungarian Legal Environment 600
12. The Issue of Enforceability 601
13. Constitutional Complaint by Sodexo 603
14. Closing Words 604

1. Introduction

In the field of cross-border, international investment, a constant battle is ongoing between international law and EU law over the past two decades.

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The parties to this battle – international arbitral tribunals and EU institutions, in particular the CJEU – have taken different approaches to bilateral investment protection treaties (BITs) concluded between Member States of the EU (intra-EU BITs). The turning point in the fight was the CJEU's *Achmea* judgment[1] and an international treaty[2] concluded by Member States to implement EU law. However, this turning point does not seem to have resolved the dispute over investment protection agreements, but merely shifted it to the national level, where national law is now in conflict with the binding norms of international law. One example of this struggle is the case of the French company Sodexo Pass International SAS, which won an award for damages against Hungary before ICSID[3] in an investment dispute, but was subsequently unable to enforce the judgment, at least through the courts.

The study seeks to answer the question of the consequences of *Achmea* for companies making an international investment in other Member States. Is there absolute justice in the conflict between international law and EU law, or is there a perpetual stalemate if neither side bows to the other? Did the EU play by the rules of international law in the battle it initiated (and was it compelled to do so?)? In the context of the *Sodexo* case, why are the Hungarian legislator's actions following *Achmea* a cause for concern? In preparing this study, I used the judgment submitted by Sodexo Pass International SAS in the Hungarian court enforcement proceedings. The study deals only with the conflict between EU law and international law, without touching on the ICSID judgment (due to its confidential content, which affects the parties' business interests).[4]

2. The Sodexo Case – Facts

Sodexo Pass Hungária Kft., a subsidiary of French-owned Sodexo, started its operations in Hungary in 1993, mainly selling meal vouchers. In Hungary, these vouchers are part of the fringe benefits (in Hungary referred to

1 Judgment of 6 March 2018, *Case C-284/16, Achmea*, ECLI:EU:C:2018:158.
2 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (Termination Treaty), SN/4656/2019/INIT.
3 ICSID, Case No. ARB/14/20, *Sodexo Pass International SAS v Hungary*.
4 The operative part of the judgment was made public to the press. Several Hungarian sources reported that Sodexo had won its case against Hungary. *See e.g.* https://bbj.hu/politics/polls/issues/hungary-to-pay-sodexo-eur-73-mln-in-arbitration-ruling.

as: 'cafeteria') scheme, which is usually subsidized by the state in the form of a tax relief. Initially, the voucher market was barely regulated in Hungary, but when Sodexo entered the market, there was already a subsidy scheme in place, including meal vouchers. The main companies in the Hungarian cafeteria market at the time were Sodexo and two other French-owned companies, Le Cheque Déjeuner and Edenred.

In the framework of the 2011 tax reforms, the Hungarian legislator created the Széchenyi leisure card (SZÉP Card), which aimed to expand the availability of health related services and services promoting healthy lifestyle. Its introduction also affected the market for meal vouchers. The conditions for issuing the SZÉP Card were laid down by the legislator in such a way that the French companies concerned were not eligible for issuing SZÉP Card. The legislator also created the Erzsébet vouchers, which could be used mainly to purchase ready-to-eat meals. With the creation of the Erzsébet voucher, the legislator amended the rules on the cafeteria payments, with the effect that employers' subsidies for food purchases were only taxed favourably in case the employers provided these in the form of Erzsébet vouchers.[5] Accordingly, although the French companies could formally continue to be present on the cafeteria market, the tax rules had *de facto* eliminated their vouchers from the market.

3. The International Law Basis of the Sodexo Case

3.1. The BITs

Since the 1960s, the development of international capital flows entered a new phase, with the proliferation of Bilateral Investment Treaties (BITs), which helped attract foreign investment to capital-importing states and to protect investors from capital-exporting states, with specific legal guarantees to protect the interests of foreign investors.[6] Over time, a series of BITs were established, mainly between Western developed countries and

5 *See e.g.* Sándor Szemesi,'Egy SZÉP történet vége? A magyar cafeteria szabályozás és a nemzetközi jog', *Közjavak*, 2016/1. pp. 30–32.

6 János István Molnár, *A nemzetközi gazdasági kapcsolatok Joga I, 2nd edition,* Patrocinium, Budapest, 2016, p. 119.

third countries. As international treaties, BITs are concluded by two contracting states and typically contain provisions widely used in international practice.[7] The foreign investor's interest is to secure the broadest possible guarantees for its business activities, while the host state's objective is to use the inflow of capital to strengthen its own economy.[8] In the agreements, both the host and the sending states make reciprocal commitments and usually include principles of fair and equitable treatment and non-discrimination.[9] The parties agree to the jurisdiction of a permanent or *ad hoc* arbitral tribunal, independent of the contracting states, to settle disputes that arise.[10] The rationale for providing for a court that is independent of the contracting states is precisely that customary international law cannot itself provide a basis for jurisdiction or procedural rules in such a cross-border investment relationship. It is reasonable to assume that, once a dispute arises, one party (the host state) will be reluctant to bring the dispute before an international court, while the other party (the investor) will not want the court of the state that is alleged to have infringed its rights to rule on the infringement, and it is advisable to regulate such situations in advance (before the dispute arises).

Since the 1980s, several EU (EEC) Member States have concluded BITs with Central and Eastern European countries, including Hungary. The French-Hungarian BIT [promulgated in 59/1987 (XI. 29.) MT Decree in Hungary] relevant for this study was concluded in 1987 and provided for non-discrimination, national treatment and most-favoured-nation treatment for investments between the two states.[11] Article 9 of the BIT designated the International Centre for Settlement of Investment Disputes (ICSID) as the court of arbitration, in particular for disputes relating to restrictions on property and compensation. On the basis of the BIT in question, Sodexo, Edenred and Le Cheque Déjeuner initiated ICSID proceedings,

7 Gary B. Born, *International Commercial Arbitration, Second Edition, Vol I,* Wolters Kluwer, Alphen aan den Rijn, 2014, p. 124.

8 Gábor Bánrévy, *A nemzetközi gazdasági kapcsolatok joga, 10th revised edition,* Szent István Társulat, Budapest, 2018, p. 75.

9 Michael J. Trebilcock, *Advanced Introduction to International Trade Law*, Edward Elgar, Cheltenham, 2015, pp. 133–134.

10 Molnár 2016, p. 125.

11 59/1987 (XI. 29.) MT Decree on the proclamation of the Agreement between the Government of the Hungarian People's Republic and the Government of the French Republic on the mutual promotion and protection of investments (in Hungarian).

claiming that Hungary violated the provisions of the BIT by restructuring the cafeteria system.[12]

3.2. International Arbitration and ICSID

The essence of so-called mixed or international arbitration is that states are on one side of the dispute and private entities on the other.[13] The parties to the dispute do not leave it to the courts of the state that is a party to the dispute to decide their case, but take their dispute to an external court, which usually operates under its own rules and independently of the state concerned.

The Washington Convention (ICSID Convention) was adopted in 1965 to resolve disputes arising from international investments. In order for a party to a dispute to be subject to proceedings under the Convention, it must voluntarily submit to ICSID jurisdiction in the specific case, unless the contracting countries have agreed in an existing investment protection agreement to submit to ICSID dispute settlement in the event of disputes arising under that agreement.[14]

One of the dispute resolution methods of the Convention is arbitration, in which case the ICSID award is binding on the parties. The Convention does not allow for appeals, but the parties have extraordinary remedies, such as an application for review if a new fact arises or annulment under certain conditions.[15]

4. Disputes Based on BITs before Arbitral Tribunals

Following the 2004 enlargement of the EU, an interesting phenomenon emerged surrounding disputes before international arbitration tribunals based on intra-EU BITs. In disputes involving foreign investors suing (typically newly joined) Member States, the arbitral tribunals and the Member

12 ICSID, *Sodexo*; ICSID, Case No. ARB/12/21, *Edenred S.A. v Hungary*; ICSID, Case No. ARB/13/35, *UP and C.D Holding Internationale v Hungary*.

13 Tamás Kende *et al.* (eds.), *Nemzetközi jog,* Wolters Kluwer, Budapest, 2019, para. 1799.

14 Éva Horváth, *Nemzetközi választottbíráskodás,* HVG-ORAC, Budapest, 2010, p. 236.

15 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159 (ICSID Convention), Articles 51–53.

States, as well as the often intervening European Commission, took different positions on the validity and applicability of BITs. The cases have highlighted that arbitral tribunals approach the question of the applicability of BITs primarily from the perspective of international law, while Member States consider the question from the perspective of EU law.

To illustrate the different views, it is worth looking at some of the major cases. How are arbitration clauses normally used in BITs to be interpreted? Is there a place for intra-EU BITs in the internal market? Can the termination of a BIT be declared by applying an international norm?

In *Eastern Sugar*,[16] a Dutch company, which was an investor in the Czech sugar market, brought proceedings against the Czech Republic before an arbitration tribunal under the BIT between the Netherlands and the Czech Republic for having changed the rules of the industry to the company's disadvantage. In the Czech Republic's view, the arbitration procedure violated the principle of non-discrimination within the EU (as regards the forum selection clause) and the case should have been brought before the Czech national court.[17] The relevant international court did not share this argument of EU law and established its own jurisdiction, stating that discrimination should not be remedied by taking away rights already acquired (in this case the right to refer to arbitration), but rather by extending them.[18] Partially reiterating the above in the *Binder* case (which concerned a German national's investment in the Czech Republic), the court underlined that the replacement of "ordinary judicial remedy" by arbitration did not constitute discrimination, since both cases meant that the right to apply to the courts in the event of infringement was guaranteed.[19]

In *Eureko* (later Achmea), the Dutch company sued Slovakia before the Permanent Court of Arbitration (PCA), referring to the Dutch-Slovak BIT, because Slovakia had excluded the Dutch company from the health care market in the course of restructuring the health insurance system. Arbitration was conducted in Germany (an EU Member State). At the request of the arbitration tribunal, the European Commission prepared a detailed submission in which it raised concerns about the existence of intra-EU BITs

16 SCC No. 088/2004, *Eastern Sugar B.V. (Netherlands) v The Czech Republic,* Partial Award, 27 March 2007.
17 Id. para. 107.
18 Id. para. 171.
19 UNCITRAL, *Binder v Czech Republic,* Award on Jurisdiction, 6 June 2007, in particular para. 65.

in the internal market.[20] The Commission referred to the case law of the CJEU, according to which the Court has exclusive jurisdiction to rule on disputes between Member States which fall at least partly within the scope of EU law, and referred to the *MOX Plant* case[21] in which the International Tribunal for the Law of the Sea (ITLOS) suspended its proceedings until the European Commission had given its answer to the question referred to it. Both parties to the case were Member States and in the the infringement proceedings, the CJEU ruled in principle that it had exclusive jurisdiction to decide disputes between Member States concerning EU law.[22] Slovakia (the defendant in *Eureko*) asked the arbitral tribunal, whether it finds that it has jurisdiction to refer the case to the CJEU for a preliminary ruling,[23] and if so, to refer questions, and based on *MOX Plant*, to suspend the proceedings. However, the arbitral tribunal pointed out that the dispute (unlike *MOX Plant*) was not between two Member States but between a private party and a State, a dispute which the CJEU had no jurisdiction to decide.[24]

Furthermore, in this case, the Commission took the view that in the EU justice system the investor should either go to a national court or notify the Commission to launch proceedings against the Member State, but an arbitration mechanism is unacceptable within the context of EU law.[25] The Commission rejected the proposal to extend the principle of preferential treatment in each BIT to investors in all Member States, as this would 'externalize' disputes concerning EU law from the jurisdiction of national courts and the CJEU. According to the Commission, the principle of mutual trust would be undermined if the possibility of recourse to external fora were to be maintained.[26] On the other hand, arbitral tribunals

20 PCA, *Eureko B.V. v The Slovak Republic,* Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 177.

21 ITLOS, *MOX Plant (Ireland v United Kingdom),* Provisional Measures, Order of 3 December 2001.

22 Judgment of 30 May 2006, *Case C-459/03, Commission v Ireland,* ECLI:EU:C:2006:345, paras. 121–124. Marcel Szabó, 'A Mox Plant ügy: út az euroso-vinizmus felé?' *Európai Jog,* Vol. 10, Issue 2, 2010, pp. 18–28.

23 In *Achmea*, the CJEU ruled out the possibility of an arbitral tribunal initiating a preliminary ruling procedure. This approach also follows from *Dorsch Consult*. *See* Judgment of 17 September 1997, *Case C-54/96, Dorsch Consult*, ECLI:EU:C:1997:413.

24 PCA, *Eureko,* paras. 148 and 276.

25 Id. paras. 178–179.

26 Id. paras. 184–185.

take the view that the arbitration clauses in BITs reflect the contractual will of the parties, which must prevail.

In *Eureko*, the arbitral tribunal did recognize that it had to use EU law to decide the dispute, but only to the extent permitted by the provisions of the applicable BIT and German law (the tribunal was in Germany).[27] Accordingly, the arbitral tribunal did not deal with the merits of the Commission's arguments based on EU law and decided the dispute essentially on the basis of the rules of international law.

5. Can the BITs Be Considered to Have Lapsed after EU Accession?

Articles 30 and 59 of the 1969 Vienna Convention on the Law of Treaties (VCLT) were invoked several times by the Commission and the Member States in each case. The question was whether provisions of EU law with a similar content to the BITs could 'override' the provisions of the BITs in international law terms, following the concept of 'new treaties on the same subject matter'. According to Article 59 VCLT, a new treaty identical in substance to the old one may replace the earlier if all parties to the old treaty are parties to the new one. This is so in case it can either be established from the later treaty that the parties intended to 'replace' the old treaty or the two treaties are incompatible in substance. In the present case, the question to be examined was the latter, in such a way that the BITs are the old treaty and the TFEU the new one.

In *Eastern Sugar*, the Czech Republic argued that the provisions of the BITs and EU law constitute a competing legal framework, as they regulate the same subject matter, and therefore the BITs can be considered to have been terminated under Article 59.[28] In *Eureko*, the Commission stated that, although the regime of intra-EU BITs should be dismantled, and although this has not yet taken place, the provisions of the BITs which are incompatible with EU law cannot be applied. The Commission based its reasoning on Article 30(3) VCLT, which provides that, in the case of treaties on the same subject matter, only those provisions of the old treaty which are compatible with the new treaty may be applied.[29] In international law terms, the two arguments appear to be contradictory: if the BIT has been terminated

27 Id. paras. 279–280.
28 SCC, *Eastern Sugar,* paras. 100–101.
29 PCA, *Eureko,* paras. 187–188.

under Article 59, Article 30(3) can only be relevant insofar as a terminated treaty would apply on the same point. The question whether the BITs and the TFEU can even be considered to be treaties with the same subject matter is not obvious in itself. In *Eureko,* the Commission expressly referred to the fact that the arbitral tribunal in *Eastern Sugar* had interpreted the VCLT's concept of 'same subject matter' too narrowly, whereas the subject matter of contracts must be similar at a general level.[30]

The arbitral tribunals have consistently rejected the international law arguments of the Commission and the Member States, in particular because the fundamental freedoms of the EU do not fully cover the investor protection guarantees contained in the BITs, but are rather complementary norms.[31] Some authors argue that, although the BITs and the TFEU differ in their regulatory concept, their purpose and effect are the same: „to promote and protect investments".[32] However, the BITs are a *lex specialis* in relation to the general rules of EU law, and the principle of *lex specialis derogat legi generali* means that the BITs should apply in such cases.[33] There is also an argument that the purpose of BITs is to protect investments that have already taken place, whereas internal market freedoms only remove barriers to market access.[34] However, the latter approach is in fact an overly narrow interpretation of EU market freedoms.

In these cases, it became clear that the position of the Member States and the Commission was that the BITs had clearly been superseded by EU law, while the arbitral tribunals and investors took up a completely opposite position. The reason is that the former approach is based on EU law while the latter on international law, so the question is really whether international law should defer to EU law in similar cases or *vice versa*? The answer depends mostly on who answers this question.

30 Id. para. 191.
31 Tamás Szabados, 'A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban', *Állam- és Jogtudomány*, Vol. 58, Issue 3, 2017, p. 21.
32 Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', *International and Comparative Law Quarterly,* Vol. 58, Issue 2, 2009, pp. 304–305.
33 Id. p. 305.
34 Szabados 2017, p. 20.

6. The Relationship between BITs and EU Law Today

With the entry into force of the Lisbon Treaty, the area of foreign direct investment has become an exclusive competence of the EU, so Member States no longer have the right to act independently in this area.[35] The area of foreign investment concerns Member States' agreements with third countries, but the status of intra-EU BITs has not been clarified by the Lisbon Treaty.

Regulation (EU) 2019/2012 was created to address the situation of BITs with third countries, which allows BITs concluded by Member States to remain in force until the EU concludes an agreement with the third country. However, agreements between Member States are excluded from the scope of the Regulation.[36] Recital (5) of the Regulation recognizes that bilateral investment agreements remain binding upon Member States under public international law and will be replaced by agreements concluded by the EU over time. With this act, the EU has also recognized that BITs are valid under international law and has adopted a provision of a transitional nature.

If BITs did not automatically cease to apply with the Lisbon Treaty, why would intra-EU BITs have become inapplicable with EU accession? After all, both refer to an area of exclusive competence, the former to the common commercial policy, the latter to the internal market. The different approach may be explained by the fact that the Lisbon Treaty explicitly modified the scope of the common commercial policy (in the case of BITs), while some interpretations of the law have argued that the existence of intra-EU BITs was already contrary to EU law. Accordingly, the Lisbon Treaty in fact only extended the prohibition of intra-EU BITs to third countries.

35 Id. p. 22.

36 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, paras. 7 and 15.

7. Infringement Proceedings Concerning the Reform of the Hungarian Cafeteria System

The Commission found Hungarian legislation affecting the cafeteria system after 2011 incompatible with EU law, so in 2014 it launched infringement proceedings against Hungary.[37]

In its judgment, the CJEU found that the freedom of establishment and the freedom to provide services were also infringed, since only one company was allowed to carry out the specific economic activity, and there was no justification in terms of social policy for the legislation in question.[38] Restrictions on fundamental freedoms may be imposed only in case they comply with the requirements of necessity and proportionality and are designed to achieve an appropriate objective, but the CJEU did not consider that those requirements were met in the Hungarian case before it.[39]

The CJEU has answered the question of whether the changes made to the Hungarian cafeteria system are indeed contrary to EU law. However, when it comes to the three French companies, which were forced out of the cafeteria market, the EU law aspect was not the main issue, but whether Hungary had breached the provisions of the French-Hungarian BIT and whether they would be entitled to compensation. The French investors' cases were already pending before the foreign arbitration tribunal ICSID, but the proceedings of the CJEU did not play a role in the proceedings of this international court, which did not suspend its own proceedings to await a judgment from Luxembourg.[40] Thus, from an international law perspective we may conclude that it is not necessary for international fora to 'cede' their jurisdiction to the courts of EU Member States in disputes involving EU law but essentially based on an international legal relationship. Nor must they take into account the case law of the CJEU in their own proceedings, pending the outcome of an infringement procedure involving a party to the case.

37 Judgment of 23 February 2016, *Case C-179/14, Commission v Hungary,* ECLI:EU:C:2016:108, para. 1.

38 Id. paras. 164–169.

39 Id. paras. 170–174.

40 The speed and cost-effectiveness of the arbitral tribunal's conduct are also among the benefits of such fora.

8. Achmea – a Turning Point in the Debate on BITs?

The first proceedings concerning the changes to the cafeteria system was decided in 2016 in *Edenred*, and the proceedings concerning the other two companies were still ongoing[41] when the CJEU handed down the *Achmea* judgment. These judgments both gave new impetus to the Commission's action against BITs and set out Hungary's position in its defence.

The background to the *Achmea* case was the same as the facts in *Eureko* (Eureko BV has since been succeeded by Achmea BV). The case came before the CJEU because the arbitral tribunal that decided the dispute between the company and Slovakia was based in Germany, and Slovakia appealed against the judgment of the arbitral tribunal to the regional high court. The court rejected the application, and Slovakia appealed against the decision to the Bundesgerichtshof, which asked the CJEU for a preliminary ruling.[42]

On 6 March 2018, the *Achmea* judgment was handed down, in which the CJEU stated that the autonomy of the EU legal system *vis-à-vis* national and international law and the order of jurisdiction established by the Treaties are respected by the Court's jurisdiction. The uniform application of EU law requires cooperation between national courts and the CJEU, and one of the means of achieving this cooperation is the preliminary ruling.[43] The Court has held that, even if the international court were to rule only on a breach of the BIT, it must ultimately apply or even interpret EU law, in particular fundamental freedoms, which are by their very nature part of the legal system of the Member States. The CJEU has found that arbitral tribunals are not a national court within the meaning of the TFEU (*i.e.* they are not entitled to request a preliminary ruling) and that the review of their judgments by national courts is limited.[44] The CHEU has also ruled that EU law precludes a provision in an international agreement between two Member States which allows an investor from one Member State to bring proceedings against an investor from another Member State before an

41 In *UP and CD Holding*, Hungary was ordered by ICSID in 2018 to pay EUR 23 million in damages. ICSID, *UP and C.D Holding*, para. 623.

42 *Case C-284/16, Achmea*, paras. 10–12.

43 Id. paras. 32–33 and 36–37.

44 Id. paras. 40–42 and 55–58.

arbitral tribunal "whose jurisdiction that Member State has undertaken to accept".[45]

Some authors find the CJEU's view that there is insufficient control of arbitral awards to be unfounded, since in the case at hand it was the German court's review that led to the preliminary ruling. It is therefore conceivable that the CJEU's judgment may in fact have been directed at proceedings brought, or to be brought in the future under the BITs – as well as judgments rendered thereunder – which are governed by the rules of the ICSID Convention and are therefore not really subject to review by the national courts.[46] Indeed, the only remedies against an ICSID judgment are those provided for in the Convention.[47] In its submission in *Sodexo*, the Commission pointed out that, although *Achmea* concerned an UNCITRAL arbitration which does not completely limit the control of national courts, the ICSID rules exclude judicial review by the Member States of ICSID awards and that is why the CJEU's reasoning in *Achmea* applies to ICSID cases.[48]

9. The Sodexo Case

The *Achmea* judgment marked a major turning point in the Member States' defence. At the time of the judgment, Hungary was the subject of nine intra-EU BIT proceedings worth millions of euros, in which Hungary was now relying on the *Achmea* judgment to challenge the jurisdiction of the competent court. The CJEU's ruling also gave fresh impetus to the Commission, which had filed *amicus curiae* briefs in several cases, including against Hungary, alleging that the BITs were incompatible with EU law.[49]

In the procedure initiated by Sodexo, the Commission used the *Achmea* judgment in its submission, arguing that it also governs the French-Hungarian BIT and that in case of conflict EU law prevails over the provisions of the BIT. According to the Commission, the arbitration clause was rendered invalid by Hungary's accession to the EU, based on Article 30(3)

45 *Case C-284/16, Achmea*, para. 60.
46 Veronika Korom, 'The Impact of the Achmea Ruling on Intra-EU BIT Investment Arbitration', *Hungarian Yearbook of International Law and European Law*, Vol. 8, 2020, pp. 63–64.
47 ICSID Convention Article 53 para. (1).
48 ICSID, *Sodexo*, para. 167.
49 Korom 2020 pp. 54–55.

VCLT.[50] Finally, the Commission stressed that the judgment in the proceedings would be unenforceable because it would be based on an invalid arbitration agreement, which became invalid with Hungary's EU accession in 2004. Therefore, national courts should refuse to enforce the judgment.[51]

By contrast, ICSID held that in *Achmea*, the arbitral tribunal established under the UNCITRAL rules was seated in an EU Member State and had to apply German law, and therefore the *Achmea* judgment concerned an *ad hoc* arbitral tribunal established under the law of Germany, an EU Member State. While the ICSID's authority as an arbitral tribunal derives from the ICSID Convention, the CJEU's judgments only apply to national courts. The court made it clear that it must only take into account the provisions of the BIT and international law, not EU law or national law, to decide the dispute.[52] ICSID did not consider the scope of the BIT and the TFEU provisions to be identical and therefore rejected the applicability of Articles 30 and 59 VCLT.[53]

Having established its jurisdiction, ICSID concluded that Hungary had violated the provisions of the BIT by taking measures to significantly deprive the company of certain rights in the course of the restructuring of the cafeteria regime, restricting its right of use and enjoyment, ultimately resulting in an indirect expropriation of Sodexo's property.[54] With this judgment, the history of the cafeteria cases before the international courts came to an end.

10. The Termination Treaty: the End of Intra-EU BITs?

From an international law point of view, the legality of the ICSID procedure cannot be challenged. The BITs were still valid and effective under international law, ICSID based its jurisdiction on the BITs and its procedure on their provisions and its own rules of procedure, and in its reasoning it made a substantial distinction between the cases on which the *Achmea* judgment was based and those referred to it. However, after *Achmea* it became clear that, from an EU perspective, intra-EU BITs were contrary to EU law.

50 ICSID, *Sodexo,* paras. 162–165.
51 Id. paras. 165 and 169.
52 Id. paras. 185–188.
53 Id. para. 192.
54 ICSID, *Sodexo*, paras. 237, 249 and 327.

On 5 May 2020, 23 Member States concluded an international treaty (called Termination Treaty) declaring the termination of the intra-EU BITs listed in the treaty. The treaty stipulates that a BIT expires when both parties ratify the text of the agreement. In other words, the mere creation of the Termination Treaty did not automatically terminate any intra-EU BIT, but was conditional upon the Member States' declaration of their approval.[55]

According to Article 5 of the Treaty, arbitration clauses cannot be used as a legal basis for new arbitration proceedings after the *Achmea* ruling, and therefore arbitral tribunals do not have jurisdiction in proceedings initiated after 6 March 2018. The Treaty requires Member States to request the competent national court to annul or set aside, refuse to recognise or enforce a judgment rendered in arbitration proceedings.[56] Article 9 establishes the so-called structured dialogue, which offers the investor the possibility to engage in a conciliation procedure, provided that it requests a stay of the pending proceedings or undertakes to refrain from enforcing the judgment already rendered. This can be interpreted as a form of pressure on investors not to exercise their right to the procedure or to enforce the judgment. However, the structured dialogue has not been well received by investors.[57]

The provisions of the Treaty are of concern in part because, in principle, they affect proceedings and judgments still pending at the time of the *Achmea* judgment, even though the Treaty itself was only concluded in spring 2020.[58] If it is accepted that the BITs will expire upon ratification of the provisions of the Termination Treaty by the States Parties, then the BITs were still in force before that date – certainly from the point of view of international law – and it is therefore debatable whether the Treaty can legitimately deprive arbitral tribunals of jurisdiction which based their proceedings on the BITs still in force at that time.

It is also repugnant that the countries that have concluded BITs are, by their own act, retroactively terminating inter-state treaties, depriving individual investors of rights on which they have relied over the long term. This

55 Termination Treaty, Article 16.

56 Id. Articles 5–7.

57 Veronika Korom, 'Intra-EU BITs in Light of the Achmea Judgment', *Central European Journal of Comparative Law*, Vol. 3, Issue 1, 2022, p. 112.

58 The provision thus also affects *e.g.* the *UP and C.D Holding* and *Sodexo* cases, although they were announced before the Termination Treaty was adopted.

solution is expressly contrary to the principle of the protection of legitimate expectations, which is also enshrined in the case law of the CJEU.[59]

Following the Treaty, investors and arbitration tribunals have expressed the view that unless the protection guaranteed by BITs is replaced, intra-EU investment could decline and national companies could be at a disadvantage compared to third country investors or companies could resort to *forum shopping*.[60]

11. Changes in the Hungarian Legal Environment

Following the conclusion of the Termination Treaty, the Hungarian legislator promulgated the Termination Treaty surprisingly quickly, already in June 2020, with Act LXI of 2020, and with this act immediately repealed, among others, 59/1987 (XI. 29.) MT Decree, thus the BIT became *de facto* inapplicable in Hungarian domestic law (in the absence of a promulgating act), as the dualist concept of the Hungarian legal system requires the transposition of the international treaty by a promulgating act.[61]

In reaction to the legislator's action, Sodexo tried in vain to seek enforcement of the ICSID judgment in Hungary. In its order, the Budapest Court of Appeal held that the judgment was unenforceable because the promulgating legislation was no longer part of Hungarian law, and noted that as an EU court it was obliged to take into account the findings of the *Achmea* ruling. The court referred to the provision in the Termination Treaty which allows States Parties to request national courts to refrain from recognizing and enforcing an arbitral award, and which under the treaty applies to ICSID awards.[62]

Although Sodexo won the case before the ICSID, it was unable to enforce the judgment, primarily because of the rules of the Hungarian legal system, but indirectly because of EU law. Sodexo then lodged a constitutional complaint (against the final court judgment and the Hungarian law promulgating the Termination Treaty) before the Constitutional Court.

59 Judgment of 26 March 2018, *Joined Cases C-496/18* and *C-497/18*, *Hungeod and Others*, ECLI:EU:C:2020:240, para. 100.
60 Korom 2020, p. 72.
61 Fundamental Law of Hungary, Article Q(3).
62 Budapest-Capital Regional Court 2201–3.Pkf.25.414/2020/4.

12. The Issue of Enforceability

One of the main questions of this paper is whether the *Achmea* judgment alone automatically renders arbitral awards unenforceable within the EU? In the case of Sodexo, we are faced with a situation where, from an international law perspective, ICSID correctly established its jurisdiction based on the BIT in force at the time, but the award was nevertheless unenforceable before a national court. If we take only the *Achmea* judgment and the changed EU legal context in this context, a situation emerges in which Member States had two options after the ruling: to follow the CJEU's findings in full or instead, with due consideration to their international obligations and investors, to maintain their treaties contrary to EU law, exposing themselves to infringement proceedings.

If Member States apply the *Achmea* judgment consistently and uniformly, it is reasonable to assume that the *Achmea* judgment will indeed automatically render unenforceable arbitral awards under intra-EU BITs, since from an EU law perspective it is already beyond doubt that they are contrary to EU law. The loyalty clause, the principle of effectiveness and the requirement of uniform application of EU law give the binding EU rule such a legal force that its breach – in the present case, if the 'interests of the investors are chosen' – would constitute a serious breach of contract by the Member State and could even lead to competition law consequences (*e.g.* for prohibited state aid).

Decisions by national courts that violate EU law can also constitute an infringement by a Member State.[63] A national court enforcing a judgment rendered without jurisdiction under EU law, amounts to an infringement by the relevant Member States. The Hungarian judiciary seems to have opted for 'EU conformity' and did not consider the *Sodexo* judgment enforceable, citing the findings of *Achmea*. However, the referring court did not base its judgment exclusively on *Achmea*, but referred both to the repeal of the law promulgating the BIT and to the Termination Treaty,[64] although these are based on *Achmea* itself. The court was correct in refusing enforcement, since the BIT on which the ICSID award was based was no longer part of Hungarian law. On the other hand, from the point of view

63 Ernő Várnay, 'A tagállamokkal szembeni kötelezettségszegési eljárások jogiasodása az Európai Unióban', *Tézisek*, 2017, p. 11.

64 Kúria Pfv.21.094/2020/5, para. 4.

of international law, the BIT was still valid and therefore bound Hungary under international law.

Section 210 of Act LIII of 1994 (Act on the Enforcement of Judgments) provides for the enforcement of judgments also in accordance with the provisions of a separate Act and international conventions. Since EU law, and thus the *Achmea* judgment, is part of the legal system of the Member States, when deciding on the enforceability of a foreign judgment, the national judge fulfils an obligation under EU law when he examines the foreign judgment in the light of *Achmea*. Meanwhile, to refuse enforcement in that light would be to breach an international treaty.

It is too early to say whether the national courts will uniformly and consistently apply the provisions of the *Achmea* ruling. Even to assume so would be presumptuous, as Member States have always been divided on the validity of BITs[65] and even after *Achmea* there was no clear unanimity that BITs should be abolished.[66] Thus, it is also difficult to say at this stage whether *Achmea* alone will indeed make it completely impossible to enforce judgments of external fora based on BITs in the EU.

So is *Achmea* relevant to an international court? It is clear from the arbitral awards and their reasoning that the answer is no. Neither in *UP and C.D Holding* nor in *Sodexo* did the ICSID find the CJEU's judgment relevant to its own proceedings, as it was considered to be a matter of domestic law for the EU and its Member States to resolve from the point of view of international law. However, as a consequence of *Achmea*, by enforcing an award based on the arbitration clauses of a Member State's BIT, the Member State, while fulfilling its international law obligation, would ultimately be in breach of EU law. Since the conflict has not been resolved either by the arbitral tribunals or by the EU, the companies concerned and the Member States find themselves in a fuzzy situation even after the *Achmea* ruling.

65 A number of states shared the Commission's view that the BITs were incompatible with EU law, but especially the older Member States did not consider the guarantees of investor protection in the BITs and EU law to be identical for their investors. Korom 2022 p. 102.

66 Not all Member States are party to the Termination Treaty. Korom 2020, p. 71.

13. Constitutional Complaint by Sodexo

On 6 October 2020, the Constitutional Court of Hungary received Sodexo's constitutional complaint. In the complaint, Sodexo asked the Constitutional Court to declare certain provisions of Act LXI of 2020 promulgating the agreement on the termination of the BITs between the Member States to be unconstitutional and to annul them, as they violate the prohibition of retroactive legislation. The applicant also sought a declaration that the judgments of the Budapest-Capital Regional Court and the Budapest-Capital Regional Court of Appeal relating to the enforcement application are unconstitutional.[67] As regards the latter, there is a discrepancy between the reasoning of the two courts, since while the court of first instance[68] cited the consequences of *Achmea* as the primary reason for rejecting the application, the court of appeal based its judgment on the international agreement on the termination of the BITs.[69] What the judgments have in common, however, is that they directly or indirectly enforce EU law against an obligation under international law.

According to one of the considerations related to the constitutional review, since the Termination Treaty itself is of a dual nature, this should be taken into account in its constitutional assessment: on the one hand, it is an international treaty, but on the other hand, it contains, or rather implements, an obligation under EU law. This is important because each Constitutional Court has different powers to review international law and EU law. Furthermore, since the agreement is based on an obligation under EU law, its constitutional implications should be examined in the light of EU law.[70] It is questionable to what extent the Constitutional Court – which is does not review EU law in its procedures – would have taken EU law into account if the constitutionality of the challenged legal provision could be justified solely on the basis of this set of arguments.

67 Constitutional complaint, No. IV/01688/2020, I-III.
68 Budapest-Capital Regional Court 32.Vh.400.043/2020/6.
69 Lénárd Sándor, 'The Constitutional Dilemmas of Terminating Intra-EU BITs', *Central European Journal of Comparative Law.* Vol. 3, Issue 1, 2022, p. 185.
70 Id. p. 190.

14. Closing Words

Sodexo finally withdrew its constitutional complaint on 3 January 2022 and as a result, the Constitutional Court's proceedings ceased.[71] Therefore, we do not know how the Constitutional Court would have resolved the contradiction between EU law and international law in relation to enforceability in Hungary.

Although there has been no official communication from the Hungarian Goverment or the EU, the press has noted that Sodexo reported in its 2022 financial report that Hungary had paid it compensation amounting to EUR 33.5 million on 31 December 2021, and the dispute is considered closed.[72]

It is possible that a friendly settlement was reached in the background, as the French President and the Hungarian Prime Minister met in Budapest on 13 December 2021,[73] during which it cannot be excluded that the *Sodexo* case was also discussed, and they may have worked out a solution acceptable to the parties, with Sodexo reaching an agreement with the Government of Hungary. If this was indeed the case, a case with very interesting legal problems has finally ended with a positive outcome for the company concerned (at least in the sense that Sodexo has finally obtained compensation, although the amount received is only a fraction of the amount awarded in the original judgment). Moreover, in this case, a conflict between EU law and international law that seemed unresolvable has finally been resolved through diplomatic negotiations using tools of international law.

It should be stressed that the 'resolution of the conflict' only applies to *Sodexo*, as a bilateral inter-state negotiation cannot resolve the basic conflict between EU law and international law, but it can serve as an *ultima ratio* for resolving disputes in future cases based on BITs. This may be necessary if EU law continues to treat the issue of intra-EU BITs as 'resolved'. The legality of EU acts that do not take into account international law – and the interests of investors and their home Member States – in these cases is at least questionable from an international law perspective. It is difficult

71 Order No. 3126/2022. (III. 23.) AB and Order No. 3127/2022. (III. 23.) AB.

72 Sodexo – Financial Report for First half Fiscal 2022, Issy-les-Moulineaux, April 1, 2022, paras. 41–42. The report is available for download on Sodexo's website, at www.sodexo.com/en/investors/regulated-information.

73 Orbán-Macron meeting, Budapest, 13 December 2021, at www.france24.com/en/europe/20211213-macron-to-begin-hungary-visit-with-tribute-to-orban-opponent.

to take a clear position favoring one side over the other, since the EU has consistently invoked its own law to protect the integrity of the internal market, but in *Sodexo* we see that international law was ultimately capable of resolving the dispute. It is also true that in some cases investors have legitimately claimed damages, and the EU should take into account in its investment protection policy that European investment that has become shaky ground which may be a warning to investors, or at least a cause for concern.