INSTRUCTIONS FOR THE PRACTICAL SKILLS EXAM

1. Practical Skills is a mandatory course. The exam for the Practical Skills course must be passed **before all other exams** for courses for which the student has opted for, including the Introduction to the Studies of the EU course.

2. The exam for the Practical Skills course is a written exam and it is designed to test student's knowledge of the MA Thesis Guidelines (www.pogestei.ius.bg.ac.rs) and Legal English.

3. Format of the exam is based on a 'mock exam', the sample of which is given below. It is an article written by one of our former students with missing front page, abstract, key-words and table of contents. Also, the footnotes and the list of references from the paper are not compliant with the MA thesis guidelines. A similar paper will be given for the final exam.

What are students expected to do for the exam?

Student shall prepare: the front page (with his/her name on it and somebody's name as his/her mentor), table of contents (based on the titles and subtitles of the paper), write an abstract with key words in English (based on the contents of the paper), make the footnotes compliant with the MA thesis guidelines and organize the table of references so that the references are listed in alphabetical order under different subheadings (books, articles, internet sources and like), whereas legal texts and case-law should be organized in chronological order under different sub-subheadings referring to their jurisdictions of origin (e.g. Case Law (subheading): sub-subheadings: Austria….. France… Germany…. etc).

4. The text of the exam will be posted on the first day of the first exam period in which the students can take the exam. The students are required to send the completed exam (in accordance with instructions from para. 3 above) as a word document attached to an e-mail within 7-10 days from the date the exam is posted on moodle (http://moodle.ius.bg.ac.rs/) or sent by e-mail, to **milena@ius.bg.ac.rs**, in order to allow Ass. Prof. Milena Đorđević enough time to correct the exams. The receipt of the e-mail will be confirmed by e-mail. Also, the results of the exam will be sent to students by e-mail i.e. whether a student has passed or failed the exam.

5. The final grade takes form of **pass or fail** and is entered in the student book/index as well as in the official examination list in the examination period for which the student has timely registered. The official date of the exam, i.e. the date when students will get their grades inscribed in their student book/index will be the last day of the exam period.

6. Students will be informed in a timely manner about the exact dates of examination terms, as well as about the registering schedule for each examination term. Exams` registering forms are available in the Faculty bookstore. The filled out forms should be put in the master exams box, placed in front of the amphitheater V (besides the first year exams` box). Generally, first registering for passing exam is free of charge, all subsequent registrations are subject to payment of a prescribed fee.

THE ISSUES OF ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS IN THE POST-LISBON ERA

ABSTRACT

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Key words: ……………….

1. INTRODUCTION

Foreign Direct Investment (hereinafter FDI) is universally considered an integral part of an open and effective international economic system and a major catalyst to development.[1] The liberalization of FDI, combined with suitable and effective trade policies, economic and technological forces, sustain and propel the expansion of international production.

Naturally, as a consequence of the increasing importance and expansion of FDI, the need to sustain and efficiently protect it has developed in parallel.[2] This has led to the conclusion of International Investment Agreements (hereinafter ILAs) and, in particular, Bilateral Investment Treaties (hereinafter BITs).[3] Although, as authors

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[1] OECD, Foreign Direct Investment for Development Maximizing Benefits, Minimising Costs, http://www.oecd.org/investment/investmentfordevelopment/1959815.pdf, last visited on 1 October 2012.

[2] Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, *International Commercial Arbitration, an Asia-Pacific Perspective*, Cambridge University Press, 2011, p. 478.

[3] Stefan D. Amarasinha, Julianne Kokott, „Multilateral Investment Rules Revisited“, Oxford Handbook of International Investment Law, 2008, 124: “[I]t would be wrong to conclude that there is no multilateral regime for foreign investment. Rather, it is a fragmented regime with a variety of

have noted, in spite of the proximity between international trade and investment, there is disproportion in the extent and intensity of their regulation and liberalization at the multilateral level.[4] In other words, at least for now, BITs have been dominating the scene of international investment.

With the aim of ensuring the protection and promotion of foreign investments as well as developing the economies of states in which investments are made, BITs are infused with provisions covering reciprocal conditions for access of FDI between the contracting parties. These provisions contain guarantees for national treatment, fair and equitable treatment, full protection and security, prohibition of expropriation and transparency, etc. Importantly, a vast number of BITs contain specific dispute settlement provisions which enable investors to pursue claims they have against host states in breach of their treaty obligations. The plethora of BITs has created a universal system of substantive and procedural investment protection, a fundamental part of the contemporary international economic order.[5]

Within the borders of the EU, Member States have, between themselves, concluded more than 1,100 BITs.[6] Furthermore, the EU accounts for more inward and outward

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contracting parties, some being bilateral, others regional or multilateral, as in the case of WTO Agreements. The result is that for each pair or group of international investment agreements (IILs), creating incentives for 'treaty shopping' by foreign investors who seek to enhance their protection even in cases where their own country has not concluded agreements that offer the same level of protection as those used by other countries. Thus there may be significant reasons for moving to a new multilateral investment regime."

[4] Ibid., 120.

[5] Karl Heinz Bökstiegle, An Arbitrator's Perspective of BITs and their Relation to Other International Law Obligations, http://www.arbitration-icca.org/media/1/13202154888160/3an_arbitrators_perspective_of_bits_.pdf.

[6] See UNCTAD, Recent Developments in International Investment Agreements (2008-June 2009) ,http://unctad.org/en/docs/webdiaeia20098_en.pdf.

FDI than any other trading entity. According to a review conducted by Copenhagen Economics, over the past decades, EU firms have increased their investments outside EU borders by a factor of five.[7] By 2008, the EU27 stock of outward FDI in non-EU countries amounted to €3.3 trillion,[8] whilst the stock of FDI into the EU by non-EU investors amounted to €2.4 trillion in 2008.[9] The conclusion of the study was, inter alia, that outward FDI has led to an increase in EU GDP of more than €20 billion over the period between 2001-2006.

The coming into force of the 2009 Treaty on the Functioning of the European Union (hereinafter the Lisbon Treaty)[10] represents a milestone in how investment regulation is managed within the borders of Europe. The new Treaty, by expanding its definition of the Common Commercial Policy (hereinafter the CCP), has subsumed foreign direct investment as an area of exclusive Union competence. Although the Union's firm intentions to intervene in foreign investment policy can be traced back at least a decade, its latest attempt seems to have reaffirmed authority in the field of foreign investment by shifting the vertical allocation of competences in favour of the Union, to the loss of its Member States.[11]

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[7] Copenhagen Economics, Impacts of EU Outward FDI, Final Report, 20 May 2010, http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146270.pdf.

[8] *Ibid.*

[9] *Ibid.*

[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

[11] The Union has legitimized this change in policy by purporting to level the playing field of EU investors abroad and aiming to secure external competitiveness in addition to gaining maximum leverage in negotiations with non-EU states. With regard to the latter, it seems that the EU's new powers have arrived just in time. Vested with the authority to conclude investment agreements on behalf and in the interest of its Member States, the Union may be able to negotiate advantageous positions for its investors more easily in the future. In addition, with the emergence of China as a

However, the Lisbon Treaty is fraught with deficiencies and ambiguity. The emphasis of this paper will lie on the analysis of these deficiencies and their potential implications for the enforcement of investment arbitral awards.

Given that the settlement of investment disputes has been predominately handled by arbitration over the past fifty years, it is important to distinguish between, firstly, the impact that EU law may have on the competence of tribunals to settle investment disputes in the future, and secondly, whether or not tribunals have the capacity to interpret and apply EU law. These issues are of critical relevance in the context of the recognition and enforcement of arbitral awards because both may be used as tools with which to challenge an arbitral award.

2. THE LISBON TREATY – A NEW INVESTMENT ORDER

As noted in the Commission's 2010 Communication, investment presents itself as a new frontier for the Common Commercial Policy (hereinafter the CCP).[12] The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on FDI. The EU's task is to develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth.

Articles 206[13] and 207[14] of the Treaty set the deck to what constitutes a shift in the vertical alignment of competences between Member States and the EU. With the

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serious new competitor and the elaborate influence the Untied States has in the global trade order, the EU will be dealing a new hand in future trade and investment negotiations.

[12] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, 2010, http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

[13]Article 206 of the Lisbon Treaty: "By establishing a customs union in accordance with Articles 28 to

inclusion FDI as one of the areas covered by the commercial policy of the Union via Article 207, the Union now has the exclusive competence to develop and protect a "common" investment policy.[15] The EU, now with greater political leverage, might be able to push for a global policy – succeeding where international organizations have failed previously. What is more, a complete European investment policy might help in the development of a more balanced investment treaty regime.[16]

32, t**he Union shall contribute**, in the common interest, to the harmonious development of world trade, the **progressive abolition of restrictions** on international trade and **on foreign direct investment**, and the lowering of customs and other barriers." (emphasis added)

[14] Article 207 of the Lisbon Treaty: "**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." (emphasis added)

[15] Authorities have stated that the inclusion of FDI in the CCP is a natural progression after the Nice Treaty that declared trade in services, which under the General Agreement on Tariffs and Trade, includes the right of establishment, i.e. the entry of investments to fall within the Union's exclusive competence. Thereby remedying the discrepancy that trade in services was part of exclusive Union competence, whereas FDI in manufacturing was not. See Angelos Dimopoulos, The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?, Croatian Yearbook of European Law and Policy, Vol. 4 No. 4/2008. Furthermore, the fragmented approach to investment policy has been branded sub-optimal, inter alia, because of the relationship between trade in goods and services on one hand and FDI on the other. See Directorate-General for External Policies, The EU Approach to International Investment Policy After the Lisbon Treaty 2010, http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=33990.

[16] See W. Shan, S. Zhang, „From 'South-North Contradiction' to 'Public-Private Conflict': Revival of the Calvo Doctrine and New View of International Investment Law", Northwest Journal of International Law and Business, 27 2007, 631.

Also, even though the EU accounts for more inward and outward FDI than any other trading entity, the non-existence of an EU position on investment has undermined its propensity to articulate and negotiate international negotiations on investment, whether in the OECD, WTO or in bilateral and regional trade agreements. Moreover, disparate European investment policies and BITs have, according to the Commission, created inequality amongst European investors. Whereas countries such as Germany, France, the Netherlands, etc. have been active in negotiating BITs, other Member States have not.[17] This disparity between Member States' policies (or lack thereof) favours investors and economies of the latter group of states.[18]

If the EU is extending its grasp to the realm of FDI, a critical issue will be the topic of dispute settlement. Namely, the questions have arisen in the Eastern Sugar[19] and Eureko cases,[20] pertaining to the applicability of BIT dispute settlement provisions and a tribunal's capacity to interpret EU law. One should be mindful that enforcement of awards is the 'tail-end' of the problem. The legal basis for the challenge of any arbitral awards lies in the misapplication (or non-application) of applicable procedural and/or substantive law. This in mind, with the integration of investment law into European law, the latter may provide challenges to the enforcement of investment arbitration awards,[21] both from a procedural and substantive point of view.

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[17] For example, Ireland has not concluded a single BIT.

[18] See Directorate-General for External Policies, op. cit., fn. 15.

[19] Eastern Sugar B.V. v. Czech Republic, SCC No. 088/2004, Partial Award of 27 March 2007.

[20] Eureko B.V. v. the Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, 26. October 2010.

[21] M. Burgstaller, „European Law Challenges to Investment Arbitration", The Backlash against Investment Arbitration, 2010, 456.

2.1. European Law Challenges on Jurisdiction - The Applicability of BITs

To the extent the EU has not formulated and enacted its planned investment agreements, the lingering predicament of arbitral tribunals' jurisdiction will remain. As has been evidenced in the Eastern Sugar and Eureko cases, the question of jurisdiction boils down to the question of validity and applicability of BITs. Host states have, in order to shield themselves from the jurisdiction of arbitral tribunals, attempted to envoke the primacy of EU law which would render BITs, and therefore dispute settlement provisions contained therein, inapplicable.

In the Eureko case, the Slovak Republic put forward an argument pertaining to the alleged discriminatory nature of arbitration clauses.[22] Namely, because the EC Treaty fails to envision arbitration proceedings between Member States and investors, applying BIT arbitration clauses would transgress on Article 12 of the EC Treaty which prohibits discrimination on the grounds of nationality. Investors from Member States which have not concluded BITs with the Slovak Republic would be discriminated against as a result of the arbitration clause.[23]

However, the Eureko tribunal rightly adopted the claimant's position, rejecting such assertions from the Slovak Republic and the Commission, by claiming that

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[22] A similar argument was put forward by the Czech Republic in the Eastern Sugar case, although the Slovak Republic seems to have articulated this line of argument more comprehensively.

[23] Eureko Award, 183. The European Commission also iterated its fear that referring questions of EU law to arbitral panels would inevitably promote competing judicial and arbitral mechanisms and would therefore increase forum shopping by litigants and contribute to the risk of further fragmentation of international law. From the perspective of the Commission, 'outsourcing' disputes concerning EU law is unacceptable from an institutional EU law perspective and misunderstands the EU judicial system.

“[d]iscriminatory behaviour should be remedied by granting others a similarly favourable position, not by placing all parties in a similarly unfavourable position.“[24]

The issues of jurisdiction, in both the Eureko and the Eastern Sugar cases, were decided in favour of retaining jurisdiction. The tribunals concluded was that intra-EU BITs are not rendered inapplicable by way of their Member States' accession to the EU. The basis of this reasoning lies, inter alia, in the premise that obligations under BITs and EU law are not incompatible with one another.

2.2. European Law Challenges on the Merits - the Prevalence of EU Law

A further topic that demands attention is one of the applicability of EU in general, and its interpretation by arbitral tribunals in particular.

Going back to the aforementioned cases, whilst the tribunal in Eastern Sugar had been criticized for not dealing with the issue accordingly,[25] the tribunal in Eureko did attempt to reconcile the prima facia 'competing legal' orders. The Eureko tribunal correctly concluded that EU law may have bearing upon the scope of rights and obligations under the BIT by virtue of its role as applicable law under BIT Article 8(6) and German law as *lex loci arbitri.*[26]

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[24] Eureko Award, 123.

[25]M. Burgstaller , op. cit. fn. 21, 468. The tribunal in Eastern Sugar merely averred that “international law generally applies“ without addressing the question of whether it thought that international law included EU law (or vice versa, whether EU law encapsulates generally accepted principles of law) or whether it deemed EU law to be applicable at all. Eastern Sugar Award, 196.

[26] Article 8 (6) of the Dutch-Czech BIT reads: “[t]he arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.”

First and foremost, every arbitral tribunal has an obligation to determine what the applicable law is in the case before it. If an investment tribunal finds that there are conflicting provisions contained in the applicable law, i.e. that certain obligations under the BIT clash with certain EU obligations for example, then it has to decide which legal order will prevail. It should be emphasized however, that the former is a question of whether a tribunal should refer to EU law at all, whereas the second is the question of the supremacy of EU law.

On the other hand, whilst tribunals may have (or will in the future) struggle with the question of supremacy of EU law (and the proper ways in which it will be applied), the European Commission has been adamant as to which law prevails.

In 2009, the ECJ rendered, for the first time, three important judgments against Sweden,[27] Austria[28] and Finland.[29] The Commission in 2004 notified Austria, Finland, Sweden and Denmark that some of their extra-EU BITs might be in conflict with certain powers reserved for the EU.[30]

This approach not only illustrates that Community law in any case supersedes even prior international obligations of the EU Member States but, even more importantly, underlines the desire of the ECJ to ensure that no international court or arbitral

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[27] Case C-249/06, EC Commission v. Sweden of 3 March 2009.

[28] Case C-205/06, EC Commission v. Austria of 3 March 2009.

[29] Case C-118/07. EC Commission v. Finland of 19 November 2009.

[30] The most interesting aspect of the Commission's action was that it purported to eliminate any incompatibilities, even hypothetical incompatibilities, between BITs and EU law. The Commission requested that the BITs must be either brought into line with Community law or, if that proves impossible, be denounced. Member States, on the other hand, are obliged to take all appropriate measures to eliminate possible incompatibilities contained in international agreements concluded prior to their accession to the EU.

tribunal finds itself in the position of interpreting or applying Community law, thereby undermining the exclusive jurisdiction of the ECJ.[31]

The ECJ ultimately sided with the Commission in its 3 March 2009 ruling, in which it argued that, should the European Community decide to restrict capital flows, it would be impractical for Sweden and Austria quickly to resolve the conflict that would arise with respect to the commitments made to foreign investors under their bilateral investment treaties. Accordingly, the ECJ ruled that Austria and Sweden had not fulfilled their obligations under Article 307 TEC.[32]

It seems as though some Member States have taken the ECJ's hint and already started amending their investment agreements with non-members. For example, Hungary terminated its BIT with Israel, the Czech Republic concluded five protocols on the amendments to original BITs signed with third countries.[33] One should be mindful however, that the amendments of BITs, as instruments of public international law, are conditioned on the mutual agreement between both contracting parties.[34] It will be interesting to see whether or not non-EU BIT counterparties will be forthcoming with regard to any modifications in their respective bilateral treaties.

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[31] See W. Shan, S. Zhang, „The Treaty of Lisbon: Half Way Towards a Common Investment Policy“, European Journal of International Law, 21 2011.

[32] Interestingly, the ECJ explicitly held that its findings were not limited to the Member State which is the defendant in the present case. This appears to be a suggestion by the ECJ that the more than 1,100 EU Member State BITs may also be deemed to be in violation of the EC Treaty to the extent that they contain similar free transfer provisions. However, even though the foregoing cases concerned extra-EU BITs, one can see the EU had already purported to question the validity of intra-EU BITs, evidenced by the Eastern Sugar and Eureko cases. It is estimated that there are nearly 200 such BITs between pairs of EU Member States.

[33] For more detailed analysis see, UNCTAD ILA Monitor, Recent Developments in International Investment Agreements (2008-June 2009), www.unctad.org/en/docs/webdiaeia200098_en.pdf.

[34] Article 39 of the Vienna Convention.

3. ISSUES OF ENFORCEMENT

As mentioned in the previous chapter, European law can challenge investor-state dispute settlement both on jurisdictional and substantive grounds. These observations lead one to the ultimate tail-end of the ramifications the Lisbon Treaty may have on investment issues within the EU.

If a tribunal asserts jurisdiction with regard to a dispute arising out of a BIT that has been 'displaced' or 'superseded', any rendered award could be annulled. Article V(1)(a) of the New York Convention.[35] If, on the other hand, a tribunal fails to apply, or errs in the application of substantive law (not necessarily European law), a challenge can arguably be brought against such award on the grounds of public policy, i.e. Article V(2)(b) of the New York Convention.

However, whilst the issue of jurisdiction, i.e the validity of BITs, will hardly be settled to the detriment of these agreements, at least until the EU comes up with a different solution in its tentative common investment policy, the issue surrounding the application of EU law might prove difficult for arbitral tribunals. As speculated by authorities, tribunals may misinterpret EU law and come to erroneous conclusions regarding a breach of BIT provisions, or they may simply ignore the supremacy of EU law. Thirdly, they may deprive EU law of its *effet utile*.[36]

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[35] "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that...the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made..."

[36] M. Burgstaller, op. cit. fn. 21, 472.

At this point, it might be prudent to differentiate two scenarios, namely, whether investment arbitration proceedings have been initiated under the auspices of ICSID or a private forum for the settlement of disputes (by way of example, an ad hoc tribunal constituted under the UNCITRAL Rules, the ICC, etc). The relevance of this delineation lies in the fact that ICSID awards are not subject to scrutiny by domestic courts whereas awards rendered by 'private' arbitral tribunals have to pass the test of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention).[37]

On the other hand, awards that are issued by ICSID are subject to *numerus clausus* grounds for annulment,[38] whereas awards that are not governed by the ICSID convention may be subject to judicial review. In other words, unlike ICSID awards, any award rendered by a private tribunal will be subject to review under the

[37] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" awards refer to awards treated as "foreign", under the law of the state under the laws of which recognition and enforcement is sought, because of a foreign element in the proceedings. The most common example of a foreign element in proceedings is the application of another State's procedural laws.

[38] Article 52 of the ICSID Convention: "[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers;(c) that there was corruption on part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based...The Award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this convention...Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

arbitration law of the state where the arbitration had taken place – lex fori or scrutinized in light of Article V of the New York Convention.[39]

However, one of the fundamental systemic shortcomings of BITs that has become apparent as a result of the dispute settlement procedures of the past decade or so concerns the lack of consistency of decisions of investment arbitral tribunals and the existing difficulties in correcting inconsistent decisions.[40] This is due to the fact that,

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[39] Article 5 of the New York Convention reads: "[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article 11 were, under the law applicable to them. under some incapacity, or the said agreement is not valid under the law to which the parties had subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or(c) The award deals with a difference not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; o r(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Another critical difference between the ICSID annulment procedure and a set aside (or recognition) procedure is that an ICSID annulment is decided by an international tribunal similar to that which decided the original claim, whilst the set aside proceeding is decided by a judge of the state where the arbitration was situated. Furthermore, the grounds for setting aside are provided by the lex arbitri of the state where the set aside proceeding occurs and, in the absence of an international agreement on that matter represent a result of the unilateral assessment by the state where the arbitration took place, whilst the grounds for annulment are set forth exclusively by the ICSID convention and are agreed upon and accepted by all the signatories of the ICSID Convention. Therefore a domestic court might have to refer to the ECJ for a preliminary ruling with respect to some matters decided upon in the arbitral award, whilst the ICSID Anulment Committee, given that it is in essence another arbitral tribunal, would not be able to refer to the ECJ.

[40] See N. Lavranos, Bilateral Investment Treaties (BITs) and EU law.

inter alia, international investment arbitral tribunals are not bound by each other's case law or by the jurisprudence of any permanent court such as the International Court of Justice or the ECJ. In other words, each and every investment arbitral tribunal operates, in principle, completely independently and decides the case before it on the basis of what is prescribed in the BIT and in the rules of procedure.

For example, in the Eastern Sugar case, assuming the tribunal had concluded that EU law was not be applicable in that investor-state arbitration. Given the jurisprudence of the ECJ on the supremacy and effectiveness of EU law, the tribunal would probably have been fallacious, especially in view of the position taken by the ECJ in the Costa v. ENEL case.[41]

On the other hand, how any interpretation of EU law by arbitral tribunals to be reconciled with the ECJ's adamant position that national arbitral tribunals cannot be considered to be ordinary courts and tribunals in the sense of former Article 234 EC (now Article 267 TFEU) and therefore cannot request preliminary rulings from the ECJ? This is especially problematic given that arbitral awards that fail to apply Community law may not be executed by national courts of the Member States without proper examination and application of Community law.

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[41] The integration into the laws of each Member State of provisions which derive from the community and more generally the terms and the spirit of the Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Flaminio Costa v E.N.E.L, Reference for a preliminary ruling of 15 July, Case 6-64, 1964.

Authorities have offered a few solutions. Burgstaller has stated that there appear to be three options to secure the correct application of EU law by investment tribunals. The first option would entail granting international investment tribunals the status of a court or tribunal within the meaning of Article 267 of the Lisbon Treaty. This way, arbitral tribunals would be able to refer to the ECJ for a preliminary ruling. On the other hand this would also entail that the ECJ would have to change its jurisprudence, because under the Court's current case law, an arbitral tribunal is not a court or tribunal within the meaning of Article 267 of the Lisbon Treaty.

It is interesting to refer back to the Eastern Sugar case where the Czech Republic, in one of its alternative arguments for its intra-jurisdictional objection requested the tribunal refer to the ECJ for a preliminary ruling. The Slovak Republic interpreted the ECJ's case law regarding Article 234 of the EC Treaty for a preliminary ruling in the case of Denuit v. Transorient. The decision cited:

"*Under the Court's case law, an arbitration tribunal is not a „court of a member State" within the meaning of Article 234 EC where the parties are under no obligation, in fact or law, to refer their disputes to arbitration...*"[42]

The Czech Republic asserted that the forgoing decision must be understood to mean that only when two parties are under no obligation to refer their dispute to arbitration is an arbitral tribunal not "a court of a member state", and by contrast, where the parties are under an obligation to refer their dispute to arbitration, the arbitral tribunal may file a request for a preliminary ruling to the ECJ. In other words, because the BIT requires the Parties to go to arbitration the arbitral tribunal may request a preliminary

[42] Guy Denuit and Betty Cordenier v Transorient - Mosaïque Voyages and Culture SA, Case C-125/04 of 27 January 2005.

ruling by the ECJ.[43] The tribunal quickly discarded this exotic argument by stating that there is no such thing as compulsory arbitration, parties are free to agree to arbitrate and once they have, they are bound by that agreement.[44]

The second option according to Burgstaller is to threaten tribunals with Article 258 of the Lisbon Treaty. Namely, if Member States face infringement proceedings for complying with an investment award rendered in err of EU law, this might force tribunals to be mindful of applying EU law correctly.[45]

However, it is ubiquitously acknowledged that tribunals have to apply substantive law correctly, and their decisions are based on a careful assessment and comprehensive analysis of law that subsumes the factual matrix of each case. If it is, from the very outset, a tribunal's *duty* to properly apply substantive law, such a threat, as implied by Burgstaller, is redundant, even cynical.

The third option, according to Burgstaller, is dealing with discrepancies in arbitral awards in hindsight – namely at the enforcement stage.[46] As the ECJ in the Eco Swiss case held, a Member State faced with an application for the annulment of an arbitration award must grant that application if the award in question has failed to observe national rules of public policy.[47]

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[43] Eastern Sugar Award, 113.

[44] Ibid.,134

[45]M. Burgstaller, op. cit. fn. 21, 472.

[46] Ibid.

[47]Eco Eco Swiss China Time Ltd v Benetton International NV, Reference for a preliminary ruling of 1 June 1999, Case C-126/97: "[i]t follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application

The third option, notwithstanding the fact that it deals with the predicament on a corrective – not pre-emptive basis, seems plausible. Under Article V(2)(b) of the New York Convention, national courts may justify the refusal of enforcement of an award if deemed incompatible with public policy. However, this option is unhelpful when it comes to ICSID awards, which have a self contained review system.

4. CONCLUSION

Needless to say, in the era of globalisation and expansion of industry and trade, the Union's move to take the regulation of FDI in its own hands, prima facia, seems like a wise strategic decision.

However if, as the ECJ has advanced in the infringement proceedings brought against Austria, Finland and Sweden, the existing extra-EU BIT regime has been superseded by EU, the Union will have to prepare to endure an uproar from the international community (along with the displeasure of its own Member States).

Furthermore, an additional area of concern is the inconsistent approach the EU takes with regard to arbitration as a means of investment dispute resolution. Whilst the Union takes issue with dispute settlement provisions stipulated in intra-EU BITs, like in the Eastern Sugar and Eureko cases, it fully endorses them in the context of extra-EU BITs. To say that there is a potential threat of discrimination solely with regard to intra-EU BITs because they give investors the option to seek arbitration, therefore putting them in a better position than investors who do not have intra-EU BIT dispute settlement provision to rely on is unpersuasive.

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where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty".

Taken to an extreme, this would mean that EU investors would be better off investing in a third country than they would in another EU state. Hypothetically, a German investor would be able to rely on arbitration, for example, pursuant to the dispute settlement provision in a BIT concluded with Venezuela, whereas arbitration would be off limits if a dispute were to arise from an investment in Greece. This puts investors whose principal undertakings are outside the boundaries of the EU in a better position than EU investors who invest within the Union's boundaries.

All the while, arbitral tribunals, dealing with current investment disputes, exercising their jurisdiction from BITs, are dodging various challenges to their jurisdiction and/or competence to interpret substantive law.

Unless the EU, along with a common investment policy, establishes a *sui generis* model for the settlement of investment disputes, arbitration is the logical destination. Not only has the international community established a sophisticated arena specializing in this field, i.e. ICSID, but arbitration, an inherently denationalized forum, has been enjoying the confidence of investors for decades. Therefore, until the day the EU furnishes its Member States and global counterparts with its common investment policy arrives, the remaining system of treaties, and dispute settlement provisions therein, should remain in force.

Arbitrators, on the other hand, when encountered with EU law, should do as their duty obliges – interpret and apply. Taking into consideration the fears of the Commission that the application of EU law by tribunals may lead to the fragmentation of the Union's legal order and that the ECJ has a monopoly on the interpretation of EU law, the tribunal in the Eureko case properly put this issue into perspective by stating that

the ECJ solely has monopoly over the final and authoritative interpretation of EU law and that even domestic courts are not obliged to refer questions of EU law to the ECJ.

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