



bilateral investment treaties (BITs): ensuring the protection of intra - European investments

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Intra-EU

Key points:

- I.** The European Commission should ensure that all intra-EU investment arbitration proceedings which have been finalized so far remain in force, which includes sustaining full legal force of arbitral awards or settlements rendered as their result.
- II.** The European Commission should provide adequate grandfathering provisions for pending arbitration proceedings and resulting arbitral awards or settlements, thus guaranteeing legal certainty for those investors which have already taken actions in order to protect their investments by means of investment arbitration.
- III.** The European Commission should come forward with specific proposals for the establishment of an adequate intra-European investor-to-state protection framework that is fully compatible with the EU Treaties and at the same time provides for the same level of substantial protection and efficiency as the prior framework questioned by the Achmea judgment.

Background:

For decades, European companies made significant investments across borders within the Single Market. Such investments were encouraged by sound investment protection frameworks that include dispute settlement provisions. The existence of BITs not only encouraged investors but also created their legitimate expectations as to the availability of an impartial, effective and efficient system of protection of their investments. Investors which were over the years investing mostly in the Central and Eastern Europe markets, prior to these countries joining the EU, were much encouraged to do so also by the fact legal protection had been granted under the terms of the BITs. At the time of investment and even, in number of cases, at the time international arbitration proceedings had been instigated, BITs were undoubtedly considered binding public international treaties, entered into between sovereign states, a number of which were not even EU MS at the time, i.e. they were still not participating in the single market and were not bound by its rules. BITs were both at the time of investment and at the time of the proceedings commencement bona fide considered a fully reliable and valid legal tool, available under the public

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international law with the highest international arbitration standards in case investor protection would appear to be needed.

Currently, some investors (including banks) conduct arbitration proceedings seeking compensation for unfair and inequitable treatment by a Member State. Also, investments in potential future EU Member States are made in comfort of appropriate protection frameworks under public international law. Today, some of these investments are threatened.

As a consequence of the Achmea judgement of the Court of Justice of the European Union¹, Member States signed a political declaration on 15 January 2019 reaffirming their commitment to terminate all BITs between Member States ('intra-EU BITs').

Yet, both the practical experiences of investors, as well as various studies such as the EU Justice Scoreboard², the World Bank Group flagship publication Doing Business², or the Corruption Perceptions Index of Transparency International³ suggest a wide divergence between judicial systems of the EU MS as well as the existence of certain deficits inherent

¹ Slovak Republic v. Achmea B.V. (Case C-284/16). ² 2019 EU Justice Scoreboard with factsheets is available at: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf.

² Doing Business 2019 is available at: <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB19Chapters/DB19-Overview.pdf>.

³ Corruption Perceptions Index 2018 is available at: <https://www.transparency.org/cpi2018>.

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in domestic judicial systems of many EU MS. There are various concerns: national judicial systems can give rise to concern in terms of length of proceedings, quality of the judiciary and judicial neutrality. Court actions pursuing all instances (national and EU level) are costly for both, the public and the investor.

At the same time, arbitration – as a highly specialized form of dispute resolution – offers the possibility of resolving investment disputes in a professional, efficient, timely and neutral manner. It should also be underlined that an arbitral award eventually leads to a directly enforceable title for the investor. The functioning of intra-EU investment arbitration prior to the *Achmea* judgment generally confirms the said advantages and positive features of arbitration.

The unsubstituted termination of intra EU-BITs results in a gap in the protection of crossborder investments within the internal market. Even ongoing arbitration proceedings or their execution are at risk. Paradoxically, third country investors (i.e. Chinese or Canadian investors) would benefit from higher protection standards than EU investors if their home countries entered into BITs with the EU or (some of) its Member States.

The European Commission in its pursuit to terminate all intra-EU BITs has inadvertently lowered the level of protection for European investors as compared with investors from third countries, while at the same time announcing its ambition to promote investments in the EU. The European Commission justified this situation by alleging that EU law would afford investors similar or even better protection than intra-EU BITs. This is unfortunately counterfactual, as under EU law an investor would have to file a lawsuit against the host Member state that wronged him before the courts of that same Member State and in many such Member States a fair judicial proceeding cannot be expected as the European Commission itself recognises. Moreover, the investor has no right to go directly before the ECJ to ensure that the ECJ decides any question of EU law giving an investor protection and has no right to force the European Commission to protect his interests, in case the courts of the host Member State that caused damages to the investor fail to do so. Additionally, currently only international arbitration proceedings guarantee comparatively quick proceedings that lead to directly enforceable awards in all members states of the New York Convention or the ICSID Convention.

Thus, the EU cross-border investor clearly lacks adequate protection compared to the past. This lack of protection may induce EU companies to invest outside the EU, where they find better protection, which would contradict the spirit and interests of the common market. The following is to be noted:

First, the standards of protection contained in intra-EU investment treaties have no equivalent protections under EU law. Indeed, investment protection under EU law is primarily focused on ensuring access to the market of another Member State. Once an investment is made, the protection available under EU law is significantly more narrowly confined than that afforded by investment treaties. Importantly, the purpose of investment treaties is to offer protection against all State conduct that is proved to be in breach of international law. In contrast, the types of governmental measures that can be challenged on the basis of EU law are more limited. In particular, certain governmental measures cannot be challenged under EU law where they concern matters which do not come under the EU Treaties (e.g. direct taxation, financial stability, criminal measures).⁴

⁴ Opinion of Advocate General Wathelet, delivered on 19 September 2017 in Case C-284/16, *Slowakische Republik v. Achmea BV*, paras. 181-191.

Secondly, EU law grants investors no equivalent right to bring a claim directly against an EU Member State. While it is possible for a private investor to claim damages from a Member State concerning a breach of the rights afforded to it under the rules of the internal market, such claims need to be brought before the domestic courts of the State where the investment is located. In contrast, investment treaties provide investors with access to a more neutral forum of dispute resolution in an effort to de-politicise these types of disputes and in recognition of the fact that domestic courts tend to be biased against foreign investors particularly when it comes to judging the conduct of the State of which they form part. As the Commission's EU Justice Scoreboard indicates, it is far from guaranteed that all Member States have an equally developed and efficient judicial system in place to guarantee the protection of investors against their own governments. While useful, the possibility of filing a complaint with the Commission against a Member State for breach of EU law is not a replacement for the protection afforded by investment treaties as the Commission is not obliged to initiate infringement proceedings against the Member State and the outcome of those proceedings is not payment of damages compensating the investor.

The EU legal order is therefore no adequate replacement for investment protection. If investors believe that the legal systems of EU Member States do not provide adequate protection (and are deprived of the additional protections offered by investment treaties), they will choose to invest elsewhere or will be forced to channel their investments through vehicles established outside the EU that would still benefit from investment treaty protection, leading to reduced capital inflows into the EU and tax income. Either way, we are concerned that the investment climate within the EU will be negatively affected, leading to higher risk premiums being applied, which will, in turn, increase prices ultimately paid by consumers. Moreover, dismantling the investment treaty protection regime for EU investors while maintaining the protection for investments from outside the EU may also be perceived by EU investors as discriminatory. In particular, the dismantling of intra-EU investment treaties may be perceived by investors, banks and creditors as a decrease in legal protection and create a competitive advantage for foreign investors (who will continue to be protected by investment treaties).

All of the abovementioned circumstances lead to the conclusion that the ongoing actions of the European Union concerning – as it has to be understood – the new model of protection of intra-European investments should:

- at one hand: guarantee legal and economic stability by recognizing mechanisms of protection of intra-EU investments used up to this moment, which inter alia means sustaining full legal force of arbitration proceedings conducted so far and arbitral awards or settlements rendered as their result;
- on the other hand: guarantee that the new intra-EU investor-to-state protection framework is enacted quickly and is fully compatible with the EU Treaties and at the same time provides for the same level of efficiency as the prior framework questioned by the Achmea judgment.

Since the framework for current actions taken at the European Union level is based upon the Achmea judgment, it has to be remembered that the scope of legal effects of the said judgment is in some areas still under debate - for example: the uncertainties as to whether it applies to intra-EU arbitrations based on the ECT. In legal discussions concerning the Achmea judgment it can even be observed that there is a lack of uniform approach as to whether the said judgment should apply to all intra-EU BITs. Such situation derives from

the fact that in the Achmea judgment the CJEU based its reasoning on Article 8 of the Netherlands-Slovakia BIT, which stated that the arbitral tribunal shall decide on the basis of – inter alia - the law in force of the contracting party, thus meaning (according to the CJEU) that the arbitral tribunal might apply or interpret the EU law as it forms part of Member States’ domestic laws. However, it has to be observed that not all intra-EU BITs have similar provisions as regards the application of domestic law - some of them refer only to the provisions of a given BIT and general principles of international law. Such circumstance implies uncertainty as to whether the Achmea judgement should in fact be directly applied only to those intra-EU BITs which contain clauses similar to Article 8(6) of the Netherlands-Slovakia BIT.

Hence – regardless of the final decisions taken at the European Union level – the new model of protection of intra-European investments should be designed in a careful, detailed manner, taking into account the crucial need of guaranteeing legal and economic stability in terms of responsible, balanced and well-structured transformation of the prior intra-EU investment protection system.

Recent developments:

- Currently the Member States negotiate at expert group level the implementation of the political agreement of January 2019. They consider concluding a multilateral agreement on the termination of intra EU BITs. Furthermore, the agreement may include the following:
 - Past/decided arbitration proceedings shall remain in force. The Hungarian delegation, however, has questioned this.
 - A solution for pending arbitration proceedings:
 - ✦ Option 1: Member States will inform arbitration tribunals of the termination of intra EU BITs and advise them to hold their noncompetence. This Option is favoured by many Member States, in particular those currently subject to arbitration proceedings (e.g., HU, ESP, SK).
 - ✦ Option 2: Option 1 plus: i) cases where EU law infringement has already been ascertained shall receive special treatment and ii) pending cases shall be referred to national courts. This Option is preferred by fewer Member States (e.g., AT, FRA).
 - The negotiations of the multilateral agreement are very controversial and might take more time than expected.
 - In case the Member States fail to conclude a multilateral agreement, the Member States will terminate the intra EU BITs bilaterally and may enter into other bilateral, EU law compliant arrangements depending on their bargaining power.
- Discussions regarding the future of the Energy Charter significantly influence the intra EU BITs issue.

- Many Member States awaited with interest the ECJ decision in the case 1/17. Now that the opinion has been delivered discussions among EU MS should gain momentum.
- The multilateral agreement, however, will not provide for an alternative mechanism. This request will need to be included in the mandate of the next Commission.

As possible action the Commission should:

- i) Ensure that all intra-EU investment arbitration proceedings which have been finalized so far remain in force, which includes sustaining full legal force of arbitral awards or settlements rendered as their result.
- ii) Provide adequate grandfathering provisions for pending arbitration proceedings and resulting arbitral awards or settlements, thus guaranteeing legal certainty for those investors which have already taken actions in order to protect their investments by means of investment arbitration.
- iii) Come forward with specific proposals for the establishment of an adequate intra-European investor-to-state protection framework that is fully compatible with the EU Treaties and at the same time provides for the same level of efficiency as the prior framework questioned by the Achmea judgment. Such framework will need to ensure:
 - a. the access of investors to a neutral dispute resolution forum – preferably in the form of arbitration (as the ECJ in Achmea does not disqualify arbitration between individuals/companies and states in general);
 - b. the right of investors (and Member States) to have questions of EU law decided by the ECJ within the course of these proceedings;
 - c. the qualification of the proceedings and the resulting awards in a way that enables the enforcement of the award in all jurisdictions of the New York Convention and the EU.

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