Detailed report

Info Point on the termination of intra-EU BITs

FR representative informed about the agreement of MS on a plurilateral treaty, which implements the commitments from the January 2019 Declarations. It mentioned that the agreement includes transitional measures for pending cases (ad hoc mediation + access to national courts). FR noted that this was a treaty by MS and for the MS, but that COM was a very efficient facilitator, which helped reach the consensus.

Panel I: Discussion on substantive rights:

(WKO/AT) stressed administrative and judicial problems for SMEs and (AFEP/FR), later on supported by representatives from EBF, confirmed the problems even for large companies with specialized lawyers. The core substantive rights for investors under BITs are fair and non-discriminatory treatment and effective compensation based on investment value, while under EU law the main remedy is annulment of incompatible measures. There are gaps because EU law does not protect from violations of national measures and MS liability under EU law arises only under a sufficiently serious breach. Substantive EU rules (notably on compensation) are very general, scattered and hard to identify even for lawyers and there are too many discrepancies in their implementation. (Erasmus University, NL) argued that investors were already well protected under EU substantive rules and BITs undermined the rule of law and led to abusive practices. On behalf of civil society, and referring to the TTIP debate and populist tendencies in Europe, questioned the need for privileged treatment of investors. (Ministry of Justice, NL) argued that there should be a general push for rule of law and judicial reform to the benefit of all.

Panel II: Discussion on dispute resolution and procedural rights

(lawyer, Council of Bars and Law Societies/EU) argued that Achmea was a “catastrophe for business”, as in the absence of arbitration, investors had to rely on national courts (and largely national rules), with possible access to the European Court of Human Rights, to obtain compensation. COM could not easily help where a MS refused to pay and interim measures were even more difficult to obtain. The notion of public interest used in compensation mechanisms can diverge. (Raiffeisenbank/AT -for EBF) argued for an alternative binding mechanism to BITs and explained the difficulties of relying on 28 different regimes on damages and procedural rules. (BusinessEurope/EU), supported by Windeurope, stressed that European companies were competing in a global environment and that when investing in the EU’s mature markets, they expected to take low risks, as the profit margins were lower and investment protection was one of aspect companies look at. Abrupt changes in law without proper compensation can ruin long-term investments. The withdrawal of one investor has wider impacts, even in the case of SMEs: loss of business along supply chains, loss of jobs and reputational damage to the host country. A reliable transparent system including
compensation was imperative, even if companies objective is to prevent disputes and avoid going to court. (DIHK/DE) acknowledged some merits in mechanisms such as SOLVIT+, mediation or ombudsman, but argued that they should be backed up by a binding dispute resolution mechanism, because only if MS know that there is a risk of a binding decision + compensation, will they implement investors rights. Some business representatives noted that the EU Justice Scoreboard illustrated the big difference among national courts and these differences could not be bridged in the short term (e.g. going through 3 judicial instances could take 10 years and meanwhile the investment would collapse). Windeurope stressed that the costs of capital are becoming even more important for all types of investment and these are driven by the faith in regulatory stability. On the other hand, (Legal Service) cautioned about the difficulties in setting up a supra national court or specialized chamber in CJEU, which could necessitate treaty change, notably because CJEU is not directly competent for investor-to-state disputes. The Benelux court and the Patent court are relevant examples, but the second one is not operative yet. For now investors are stuck with “national courts”, but harmonization of substantive rights is possible, as well as of elements of national procedural laws applied by national courts. (JUST) referred to the DG JUST work on effective justice, including the European Semester, EU Justice Scoreboard and forthcoming annual Rule of Law reports for all MS.

Panel III: Discussion on making investments easier (investment promotion and facilitation)

DG GROW presented the Single Digital Gateway (one EU entry point for information, key procedures online and assistance services). DG ECFIN presented InvestEU (projects funded, advisory hub, platform). (Eurocommerce/EU) presented difficulties cross-border investors face in interaction with national authorities: more inspections and more and higher fines for foreign investors as well as legislative measures aimed to benefit local providers (tax rates based on turnover, regulation of B2B relationships, competition rules). Often there was no dialogue with national authorities. A possible solution could be a task force led by COM where businesses/associations could go to notify concerning developments and where COM could work with different services to enter into a dialogue to resolve the issue at an early stage, while currently COM usually gets involved once problematic legislation is adopted through infringements. “Prevention is better than cure” for business and dialogue would be beneficial.

(SK) and (EE) presented how national investment promotion agencies improve the investment environment. The SK agency spoke to business to identify problems post establishment and then brought up issues to key ministries. This led to 3 “anti-bureaucratic” packages including legislative changes. There were also match-making events for innovative SK companies and foreign investors. EE presented their initiatives on digitalization of national administration, simplification of administrative procedures and regional cooperation with FI authorities. (DG GROW) explained how SOLVIT resolves cross-border disputes with administrative authorities, with a success rate of 80%. SOLVIT often can help, but would have to be beefed up with a specialized network of “investment authorities” in order to prevent investment disputes at an early stage.