Deutsches Aktieninstitut

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For the attn. of
Mr Christian Burgsmüller
Member of Cabinet Commissioner Malmström
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

Art. 4.1(b)

4 July 2018

"Achmea"-judgment of the European Court of Justice- concerns of publicly traded companies and investors

Dear Mr Burgsmüller,

Deutsches Aktieninstitut, the association representing interests of publicly traded companies and investors, takes great interest in the facilitation of cross-border investments. This includes the provision of appropriate safeguards to protect investors and their investments.

In this context, I am writing to express concerns as to potential negative consequences arising from the judgement of the European Court of Justice (CJEU) in the "Achmea" case of 6 March 2018 (C-284/16). The CJEU holds in its decision that the investor-state arbitration provisions in the bilateral investment treaty ("BIT") between the Netherlands and the Slovak Republic are invalid, as they are deemed incompatible with EU law.

First of all, the decision of the CJEU has the potential to fundamentally harm the conditions for investments in Europe: Safeguards for investors are essential when investing cross-border, especially to address and mitigate political risks. Investor-state arbitration provisions ensure that investors` rights are effectively enforced. If those mechanisms were to be removed, investors would be left with in many cases insufficient access to justice and overly-lengthy processes in the courts of certain (Member) States. Even worse, in cases such as under Article 8 of the Netherlands-Slovak Republic BIT, where the dispute settlement provision of the treaty does not provide for recourse to national courts, investors would no longer have any means to enforce the substantive rights and protections of their investments under the BIT. This would place non-EU investors benefitting of investment treaty protection in the EU in a far more advantageous position than EU investors.

Secondly, against the background of the above mentioned negative impact, we request that the EU Commission releases a legal opinion on the consequences of the CJEU decision in order to seek clarity for investors and Member States as to the different investment protection regimes currently in force. The statement would foster certainty as to which agreements will be contested by the EU Commission following the Court`s decision.

In this context, we emphasize that in our opinion, the decision of the CJEU cannot be applied to the following situations:

a) Energy Charter Treaty (ECT)

In its ruling, the CJEU explicitly stressed the competence of the EU to conclude international agreements, which "necessarily entail the power to submit to the decisions of a court" as regards the interpretation or application of these agreements, provided that the autonomy of EU law is respected. Following the Court`s line of argumentation we are convinced that the ECT, which has also been signed by the EU as a party, is not affected by this ruling.

Moreover, as a signatory, the EU itself has given its unconditional consent to the submission of a dispute to international arbitration under Article 26(3)(a) ECT. In doing so, it has also ratified the same consent given by the individual EU Member States that are signatories. Therefore, the EU has already agreed, on an international level, that disputes falling under the ECT are to be dealt with by way of arbitration, effectively carving such disputes out from the jurisdiction of the CJEU. Any CJEU ruling that sought to undermine this would be undermining the political will of the signatories, and arguably also (as an institution of the EU) acting contrary to the EU's obligations under the ECT.

To remove uncertainty investors are currently facing, the EU Commission should state that to its understanding, disputes under the ECT are not covered by the judgement of the CJEU.

b) Extra EU BITs

We do not see any legal grounds to apply the judgment to an extra EU BIT situation. The decision does not by its terms address investor-state arbitration clauses in investment treaties concluded between an EU Member State and a third country.

Clarification by the EU Commission that extra EU Bits are not addressed by the judgement is needed in order to seek certainty for European investors.

Thirdly, and most importantly, the CJEU ruling makes it clear that there is an urgent need to establish an EU-wide legal framework for investment protection as regards to intra-EU investments. Investments are one of the core tools to guarantee growth, jobs and employment in the EU. If investors and their investments are not sufficiently protected in the EU, investors may likely consider seeking opportunities in third countries - to the detriment of the economic development of the European Union. By creating an EU-wide legal framework for investment protection for intra-EU investments, the required legal certainty for investor protection could be guaranteed on a permanent basis. Intra-EU investment protection agreements should therefore be transferred to a yet to be established new legal regime. This applies also to dispute settlement under the ECT.

In our view, the EU's objective should be an instrument providing for substantial investment guarantees and an enforcement mechanism designed to secure effective protection of investors. An investment protection instrument would not imply a major departure from existing law, and would primarily require the combination of substantive guarantees with an enforcement mechanism to allow investors to enforce their rights in a neutral forum without recourse to the courts of the host state. It is worth noting that a policy paper from Austria, Finland, France, Germany and the Netherlands, the so-called "Non-Paper", shows that some of the EU Member States are willing to contribute to a modernized system of investment protection in Europe (the paper is available online at https://www.bmwi.de/Redaktion/DE/Downloads/I/intra-eu-investment-treaties.pdf?__blob=publicationFile&v=4 ). Ideally, a multilateral instrument would create a uniform level of substantive and procedural guarantees for intra-EU investors.

It is therefore of utmost importance to us that the EU seeks a comprehensive legal solution and we would appreciate your efforts in promoting it.

I stay at your disposal for any questions you might have.

Yours faithfully

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CC: Mr Jean-Luc Demarty, Director-General DG Trade