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EU companies' call for a new intra-EU investment protection framework
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The dismantling of bilateral investment treaties will have a clear negative impact on intra-EU cross-border direct investment projects with further detrimental implication for the EU economy

- As a follow up to the « Achmea » ruling by the Court of Justice of the European Union, the plurilateral treaty on the termination of Bilateral Investment Treaties (BITs) between EU member states agreed on 24 october 2019 **will leave existing cross-border direct investment projects without any dedicated protection except for judicial proceedings before national courts and/or the avenue of mediation for some pending cases**.
- Given the information provided by the EU Commission`s Judicial Scorebord of 2018 as well as initiated infringement proceedings against various Member States, national courts at times don`t provide necessary independance. They also often lack efficiency which translates into overly lengthy judicial proceedings ,. **Such a reality is very likely to expose numerous large European companies and SMEs to significant financial losses in case of discriminatory measures of the host state., short of being awarded an appropriate compensation within a reasonable time period**
- Moreover, this situation might **prevent EU companies, in the near future to run high-maturity projects for which investors require a sound legal environment and, especcially, effective and swift remedies against dramatical and discriminatory policy changes.**
- This scenario may therefore **penalise on the mid-run the inflow of direct investment in Member States that rely the most on cross-border investments** within the internal market for their growth, short of a large financial domestic market. In addition, it **will provide an unfair competitive advantage to third country investors that can benefit from investment protection mechanisms enshrined** in EU bilateral FTAs or in bilateral investment agreements concluded by Member States before the Lisbon Treaty.
- Last, the dismantling of intra-EU bilateral investment treaties can result in three major risks for the EU economy : (1) **underinvestment within the internal market** whilst at the same timethe transition towards a green economy needs to be heavily funded, (2) **increased dependancy of some Member States on third country investments** and (3) **incentivisation for EU investors to invest outside of the EU** to equally benefit from BITs with non-EU countries.

EU companies need a new EU-wide investment protection framework to pursue their investment projects

- EU companies consequently request that the incoming European Commission tables a set of legislative initiatives in order to **establish a revamped and harmonised EU-wide framework for the protection of intra-EU direct investments** in 2020 or 2021 by the latest, to **make sure that new pieces of legislation are in force within five years.**
- In line with DG FISMA-suggested path in the aftermath of the « Achmea » ruling, the rebuilding of a protective environment implies **a piece of EU legislation consolidating investors' substantive rights in the event of a dispute with host states** (cases for direct and indirect expropriation, cases for granting damages, rules for calculating damages including reference date and interest rates). These rights are already recognised in principle by the CJEU caselaw

or Member States legislation but **there are still significant discrepancies between Member States and EU law tends to be paradoxically less specific than rules enshrined in EU or Member States BITs with third countries**.

- The other pillar of this legislative package should be **the set-up of a dispute-settlement mechanism being independent from host states and effective enough to bring an end to disputes within a 2-to-3 year time period, at least in first instance. The need for effectiveness implies in particular that rulings returned by the dispute settlement body are binding for both parties, even though they could be challenged before an appeal body.**
- EU companies would be naturally inclined to promote arbitration proceedings as a flexible and swift way to settle litigations. Given legal constraints attached to the « Achmea ruling » (notably the requirement that only judicial bodies can refer a preliminary question to the CJEU), **they now recommend that the EU legislator creates a judicial framework at the EU level, bespoke to investors-host State disputes.**
- This could take the legal shape of a specialised EU juridiction within the EU court system or a dedicated chamber within the Tribunal of first instance. Such a new court-circuit **could be established via an Article 257 TFEU regulation without any change in the EU treaties and would hear all or most investors/host states litigations with the capacity to resort to expedited proceedings in order to sort out rapidly pending disputes**.
- With a view to settling a large number of disputes before even entering the judicial phase, **the EU-wide framework could also promote a prior mediation step**. For litigations that would remain in the remit of national courts, a directive based on Article 114 TFEU could, following the approach taken for remedies in the field of public procurement, **lay down harmonized rules for proceedings on investors/state disputes, regarding the independance of judicial bodies, the powers of judges as well as the rapidness of proceedings.**

NB : the attached document presents the EU companies' detailed proposal for the establishment and the content of an EU-wide investment protection framework.

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Possible EU business targets for a legislative framework

for intra-EU investment protection to be developed as a substitute to Individual BTIs

Substantive rights guaranteed to investors	Possible Features of a renewed Investors-Member States dispute settlement mechanism (EU- and nationwide)
The EU should legislate on substantive rights for EU investors within the internal market with the following objectives: • Substantive rights guaranteed to EU investors should result, as a base, in offering an equivalent level of protection as granted under the EU most recent investment protection chapters under EU bilateral FTAs or EU bilateral investment treaties with third countries (for instance: EU-Mexico FTA).	<u>Overall pattern</u> The legal framework for dispute settlement should give investors choice between judicial remedies at EU level and judicial remedies at national level, the latter being harmonised by an EU legislative instrument to ensure a high degree of impartiality and fast-track proceedings.

- In several aspects, the EU legislation should be more specific/extensive than stipulated under these external agreements

Core rights recognized under EU FTAs/Investment treaties with third countries and to be potentialy extended

- Fair and equitable treatment
- Full protection and security
- Compensation for losses in case of requisition or destruction
- Limitation of direct or indirect expropriation to public purpose cases
- Prohibition of any discrimination when conducting an expropriation procedures and obligation to abide by the legal framework for expropriation
- Right to a "prompt, adequate and effective compensation" in case of expropriation (cf box 2)

Compensation in case of expropriation

- Right to be paid without delay
- fair market value of expropriated investment at the time immediately before the expropriation took place (not taking into account the fact that the intended expropriation would have become known earlier)
- fair market value being determined by reference to asset value and going concern value
- (be fully realisable and freely transferable without delay to the country designated by the investor)
- Right to int at a "commercially reasonable rate" from the date of expropriation until the date of payment (on this the EU legislation

Mediation

- Investors should be guaranteed the right to seek mediation in any circumstance (for cases pertaining to the jurisdiction of the specialised Tribunal or to the jurisdictions of national courts) or could be imposed to seek mediation before lodging a complaint (cf infra)
- Mediation should not affect the right of the disputing Parties to refer the case to the specialised Tribunal (in parallel or at a later stage if mediation is a prior requirement) and should result in suspending time limits for bringing a case before the specialised tribunal or national courts if any
- Mediators could be either appointed by agreement of disputing parties or by the president of the EU specialised tribunal after a request by disputing parties for cases pertaining to the jurisdiction of the specialised Tribunal
- A specific time period for mediation should be determined in order to prevent disputing parties from dilatory behaviours. An adequate period can be 60 days to be extended by 30 days with the consent of both parties

could be more specific as determined in the EU directive on payment delays in commercial transactions).	Specialised Tribunal (to be established by a regulation on the basis of Article 257 TFEU) • Mediation could be a prior requirement before bringing the case to the specialised Tribunal. In such case, rules on mediation as described above should apply • By contrast, no exhaustion of domestic remedies should be imposed as a prior requirement for bringing cases before the specialised tribunal • The same way, investors should be the choice between action before the specialised tribunal and national courts. • In order to handle the influx of challenges, the specialised tribunal should be given the possibility to apply accelerated/expedited proceeding for simple or small amount litigations • The specialised Tribunal should be endowed with the legal capacity to order interim measure of protection to preserve the rights of a disputing Party or to ensure that the specialised Tribunal's jurisdiction is fully effective • The specialised Tribunal should be endowed with the legal capacity to order interim measure of compensation when the damage can be regarded as certain and expropriation is no longer disputed • The specialised Tribunal should be endowed with the legal capacity to return judgments being immediately enforceable in Member States on: (a) Monetary damages and any applicable interest (b) Restitution of property

Notion of expropriation	Harmonisation of national remedies (to be established by a directive possibly on the basis of Article 114 TFEU used for the harmonisation of national remedies for public procurement – Directive 2007/66/EC)
• Requires an interference with a tangible or intangible property right or property right in an investment • Covers direct expropriation (investment being nationalised or otherwise directly expropriated through formal transfer of title or outright seizure) • Also covers indirect expropriation: measures by a Member State having an equivalent effect to direct expropriation, in that it deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure • Case by case analysis on indirect expropriation, taking into account (a) the economic impact of measures, the fact that measures have an adverse impact on the economic value of an investment not being sufficient to establish that an indirect expropriation has occurred (b) the duration of measures (c) the extent to which measures interferes with the distinct an reasonable expectations of the investors arising out of the investment and (d) the character of the measure or serie of measures, notably their object and context • Non-discriminatory measures designed and applied to protect legitimate policy objectives (protection of public health, social services, public education) do not constitute indirect expropriations, except in the rare circumstance when the impact of a measure is manifestly excessive in light of its purpose	• Member States should target a minimum level of harmonisation for their domestic procedures on compensation for expropriation • National courts should be endowed with the legal capacity to order interim protective measures to preserve the rights of a disputing Party or to ensure that the specialised Tribunal's jurisdiction is fully effective • National courts should be endowed with the legal capacity to order interim measures on compensation when the damage can be regarded as certain and expropriation is no longer disputed as such • National courts should be endowed with the legal capacity to return judgments being immediately enforceable in Member States on: (a) Monetary damages and any applicable interest (b) Restitution of property