Building an efficient EU wide mechanism for investor-state dispute settlement within the EU

Overcoming negative consequences of the „Achmea" judgment of the European Court of Justice and the joint declaration of Member States from 15 January 2019

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The above organisations represent French and German cross-sectoral capital markets oriented companies. The comments below respond to the judgement of the Court of Justice of the European Union in the Achmea case of 6 March 2018 (C-284/16), the communication of the European Commission published on 18 July 2018 and Member States' joint declaration of 15/16 January 2019.

AFEP and Deutsches Aktieninstitut are deeply concerned as to negative consequences arising from the judgement of the European Court of Justice (ECJ) in the Achmea case of 6 March 2018 (C-284/16) and the Member States' declarations of 15 January 2019 on the matter.[1]

The ECJ 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 because of the violation of the autonomy of EU law. Following the judgment, the European Commission released a communication on 18 July 2018 urging Member States to terminate all intra-EU BITs with immediate effect, as regard both arbitration mechanisms and substantive rules[2].

In a declaration co-signed by 22 Member States including France and Germany, adopted on 15 January, as well as in further commitments of other 6 Member States signed on 16 January, signatories committed to the conclusion of a plurilateral treaty for a coordinated termination of existing BITs, including the halt of on-going arbitration proceedings and restrictions for courts not to enforce panels awards.

Both associations are of the opinion that the declaration of the Member States following the EU Commission`s communication will be detrimental to investor protection in Europe if no transitional contingency measures are taken and a new legal regime will be adopted, replacing the current safeguards offered by the BITs.

[1] https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.
[2] COM(2018)547.

1. Termination of bilateral investment treaties within the EU without appropriate substitutes will leave EU investors without adequate mechanism for the settlement of disputes arising with host member states within the internal market

Safeguards for investors are essential when investing cross-border, especially to address and mitigate political risks. Investor-state arbitration provisions in the almost 200 existing BITs within the EU ensure that European investors' rights are effectively enforced against discrimination, expropriation, unfair treatment and arbitrary measures stemming from the host Member State.

If those mechanisms were to be removed without adequate substitute, EU investors would suffer a significant decrease of investment protection in Europe: Even if EU law provides for a similar level of protection as in the substantive parts of BITs, these principles are still not all codified, giving clear legal certainty to investors and national administrations and courts regarding specific rights.

Furthermore, investors would have to bring cases allegedly breaching EU law before national courts. However, unlike specialised arbitration courts under existing BITs, national courts often lack expertise in investment protection cases; many judges do not have sufficient knowledge on EU and investment law. Furthermore, they are often overwhelmed with workload, leading to overly-lengthy procedures: For instance in Italy, court of first instance procedures in public law cases lasted on average more than 1000 days in 2016[3]. Furthermore, in some Member States national courts face criticism as regards to their independency and impartiality, which can also be to the detriment of European investors. Surveys and studies such as the World Justice Report[4], the Corruption Perception Index[5] and Ease of Doing Business[6] confirm that there is still a lack of legal protection and judicial independence as well continuous discrimination and corruption in several EU Member States.[7] The Commission itself is criticizing this and requests the Member States to improve their national legal systems, for example in the country specific recommendations[8] or within the rule of law proceedings concerning Poland and Hungary or the verification proceedings against Bulgaria and Romania[9].

[3] „EU Justice Scoreboard" from 27 May 2018, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en.
[4] https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018.
[5] https://www.transparency.org/cpi2018.
[6] http://www.doingbusiness.org/en/rankings.
[7] See hereto als survey conducted by DIHK on central and eastern EU Member States, https://www.dihk.de/ressourcen/downloads/dihk-survey-intra-eu-bits-eng/at_download/file?mdate=1509957765771.
[8] COM(2018) 400.
[9] See e.g. EU Communications on Polish judicial system from 20 December 2017, http://europa.eu/rapid/press-release_IP-17-5367_en.htm and 2 July 2018, http://europa.eu/rapid/press-release_IP-18-4341_en.htm. On the Cooperation and Verification Mechanism for Bulgaria and Romania: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en.

Last, if European investors had to revert to national courts, a competitive disadvantage to third country investors would be caused: The latter would still be able to make use of dispute resolution mechanisms under BITs concluded between a Member State of the EU and the third country in which the investor is established.

Against this background, it is of utmost importance

a) **that on the short term, Member States adjust their course when jointly negotiating the treaty on orderly termination of BITs, endeavouring to better protect EU investors' legitimate interests**

   and

b) **that on the mid-term, EU policy makers work on the establishment of an EU legal framework for investment protection in Europe**

2. Treaty on orderly termination of BITs should aim at protecting EU Investors' legitimate interests:

Against the background of the importance of BITs arbitration clauses explained above, AFEP and Deutsches Aktieninstitut deem it crucial to provide safeguards for investors having already invested in EU Member States under the current BITs regimes, trusting in the continued existence of the BITs arbitration clauses at the time of their investments.

BITs stand as international law instruments and, as such, have granted individual rights to investors. It would be extremely burdensome to invoke those rights before national courts and- as a last resort measure, before the European Court of Human Rights.

- Most intra-EU BITs provide for **sunset clauses**, extending investors right to arbitration proceedings for a **supplementary period of 15 to 20 years** after the termination of these BITs. EU companies have carried out investment projects over the last thirty years in newly acceded Member States **with the due expectation that they could rely on these arbitration mechanisms during the entire project living cycle**. The determination that such arbitration mechanisms are not compliant with EU primary law **does not discharge Member States from their liability towards each other and towards individual companies under international public law** and **does not exempt them from abiding by EU law general principles either**, such as the protection of **legitimate expectations** or **legal certainty**. In this respect, **anticipated termination with immediate effect – depriving EU businesses from the benefit of sunset clauses – does break these two key principles**.
- Moreover, **the European Court of Human rights has recognized in several cases that arbitral awards are likely to create property rights to the benefit of investors** and,

consequently, that deliberate obstacles set by States or domestic jurisdictions to the enforcement of these awards **make up for a breach of their property right. Such violations may result in Member States being condemned to pay damages following a respective judgment of the European Court of Human Rights**.

- EU companies are therefore entitled to expect **transitional measures aimed at providing for a « soft » phasing out arbitration proceedings**. The **plurilateral agreement** under which Member States signatories of the joint declaration will agree upon should **fully protect pre-existing cases (recognition of adjudications already awarded and on-going proceedings).**
- Alternatively, Member States should negotiate bilaterally with each other to strike termination clauses to their BITs with the same objective, meaning the protection of investors in pre-existing cases.

In order to make such transitional measures compliant with EU primary law, negotiations could result in **imposing arbitration panels constituted for pending cases to refer preliminary questions concerning the interpretation of EU law via the competent national courts to the ECJ** and **binding them to abide by the ECJ's opinions.**

3. EU wide legal framework for investment protection in Europe should be established as soon as possible!

Thirdly, the ECJ 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 internal market. 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 should therefore be **dealt with by a yet to be established new legal regime**. This should also apply to dispute settlement in intra EU cases under the Energy Charter Treaty (ECT), with necessary adjustment to rules applying for disputes between Member States.

In our view, the EU's objective should be an instrument providing for substantial investment guarantees and a binding 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 clear 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**.

Regarding substantive rules, the **mere codification of pre-existing case law of the ECJ is not likely to provide for a sufficient protection in comparison with the framework offered by previous**

BITs in terms of cases leading to damages. Legislative initiatives should therefore aim at reconstituting an equivalent level of protection, precisely to keep the EU an attractive location for EU investors. EU law needs to protect explicitly not only against discriminations and restrictions but also against direct and indirect expropriation, unfair treatment and the violation of legitimate expectations.

When it comes to enforcement, It is worth noting that the declarations from 15/16 January shows that the EU Member States are willing to contribute to a modernized system of investment protection in Europe as it has been proposed already by the Council in 2017[10] as well as by the Non-Paper from Austria, Finland, France, Germany and the Netherlands[11].

Based on the twofold solutions outlined in this paper, the **set-up of an EU arbitration court** or the use of existing international arbitration bodies such as the Permanent Court of Arbitration could be an option. This would be subject to appropriate arrangements to fulfil the ECJ requirements in Achmea in order to ensure that questions on the interpretation of EU law are decided by the ECJ, possibly by obliging the arbitration tribunals to refer questions on the interpretation of EU law to the ECJ.

The establishment of a **new EU court** possibly modelled after the Unified Patent Court **or a specialised ECJ court chamber dedicated to intra-EU investment disputes** could be an alternative in order to ensure that questions on the interpretation of EU law are decided by the ECJ. However, the proceedings must be efficient and fast **to avoid lengthy procedures as before national courts. Interim/interlocutory proceedings should be foreseen.**

In order to evaluate and discuss the different options, a large consultation should be organised between the European Commission, Member States and stakeholders to **explore how to set up a legally sound intra-EU dispute settlement body that would meet the criteria of the ECJ case law** in terms of preserving the autonomy of EU law, the unity of the EU court system and the loyalty between Member States and well as effective protection of intra EU investments and a good investment climate in the internal market. The consultation in 2017 did not allow to discuss all necessary questions, particularly concerning a binding dispute solution mechanism. Furthermore, after the Achmea judgment more legal aspects need be considered.

The setup of a new EU wide dispute settlement mechanism should therefore be listed among the priorities of the new EU Commission.

[10] Council conclusions of 11 July 2017, https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/conclusions-mid-term-review-capital-markets-union-action-plan/pdf.
[11] https://www.bmwi.de/Redaktion/DE/Downloads/I/intra-eu-investment-treaties.pdf?__blob=publicationFile&v=4.

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AFEP *is the French Association of Large Companies. It represents 115 of the largest companies operating in France. It takes part in public discussions by providing pragmatic solutions to foster the development of a competitive French and European economy.*

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Deutsches Aktieninstitut *represents the entire German economy interested in the capital markets. Its about 200 members are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut keeps offices in Frankfurt am Main, Brussels and Berlin (www.dai.de).*

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