The Future of Intra-EU Investment Protection: An Urgent Call for a New Roof and a Level Playing Field

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Much has been written – on this page and elsewhere – about the future viability of investor-state arbitration based on intra-EU BITs in the aftermath of the CJEU's *Achmea* decision. In the authors' view, the May 2020 Termination Agreement concluded between 23 of the 27 EU Member States with the intention to terminate existing intra-EU BITs has rendered further discussion on this topic largely academic – with the exception of the impact on ongoing intra-EU arbitrations and the separate fate of the Energy Charter Treaty. This has become all the more true with the Agreement's recent entry into force between Denmark and Hungary, heralding the gradual phase-out of intra-EU BITs, along with their sunset clauses, that takes effect within one month after ratification by the relevant EU Member State(s). However, the pressing question remains: what is to be done?

The approach taken by the European Commission (EC) and majority of Member States has created the very gap in protection of cross-border investment within the internal market that many, including a number of prominent Member States, long insisted on preventing. Already in their non-paper issued in April 2016, Austria, Finland, France, Germany and the Netherlands acknowledged that, in parallel to terminating intra-EU BITs, it was necessary to afford European investors with modern guarantees on substantive and procedural investment protection so as to maintain a level playing field vis-à-vis their foreign competitors. The Termination Agreement has done the former, but not the latter. It has created a vacuum in investment protection for intra-EU investors and done nothing to fill that vacuum. Moreover, it is plainly insufficient to merely '*provide guidance on existing EU rules for the treatment of cross-border EU investments*', as the European Commission suggested with its 2018 Communication. This is why Luxembourg and Portugal, in their recent declarations to the Agreement, called upon the EC and Member States '*to start a process with the aim to ensure complete, strong and effective protection of investments within the EU and adequate instruments in this regard'* in line with the Declarations of Member States of 15 and 16 January 2019 and recital XVI of the Agreement. To this end, and as part of its initiative to strengthen intra-EU investment protection, the EC has been soliciting views of the European public on strengths or weaknesses of the intra-EU investment protection system.

Surely, many different solutions have been, and will be, offered by various stakeholders with various perspectives. We do not believe there is one sole, perfect approach. However, the goal is clear, and is shared by (nearly) all stakeholders: at the very least, EU Investors must receive as much protection – in practice and not just on paper – as investors from non-Member States. The big question is how to realistically achieve this goal in a manner that is consistent with EU law and acceptable to the EC, Member States and investors. In our view, a European answer needs to include innovations in both substance and procedure that build on the EU's efforts to reform investor-state arbitration in the international arena.

As a matter of substance, the modern protection standards developed by the EU in their new-generation FTAs should be incorporated into EU law. Procedurally, intra-EU investors should be able to avail themselves of these rights either (*i*) in a hybrid system combining elements of arbitration with a permanent appellate body; or (*ii*) before new specialised courts within the judiciary of Member States.

Substantive Protection Standards

The new-generation FTAs negotiated by the EU provide clearer and more reliable substantive protection standards than does the current EU legal framework. First, substantive investment protection granted under EU law is scattered, i.e. there is no clear body of norms protecting cross-border investments. Second, the scope of protection standards is unduly narrow, since they do not cover the entire life of the investment and provide less protection as compared to international investment law. For example, as both tribunals and academics have acknowledged, EU law does not entirely encompass the Fair and Equitable Treatment (FET) standard. Yet, the EU has entered into investment protection agreements with third states (*e.g.* CETA, EU-Singapore Investment Protection Agreement, EU-Vietnam Investment Protection Agreement) that contain the FET standard and provide for an exhaustive list of elements specifying its scope of protection. If such protection is warranted for these extra-EU investors, surely it is warranted for intra-EU investors as well. An EU regulation incorporating such standards would thus add greatly to legal clarity and create a level playing field, not just between investors from different Member States, but also vis-à-vis foreign investors. Moreover, as Nikos Lavranos has pointed out, their adoption through EU secondary law would have the advantage of immediately creating a harmonized system of investment protection within the EU without requiring any implementing acts.

Procedural Mechanism

Substantive standards alone, however, cannot guarantee effective redress when judicial recourse is limited to existing domestic courts. As even the EC itself recognises, the existing courts of at least certain Member States have shown themselves unwilling or unable to hold national governments to account and apply the law in a truly neutral and impartial manner. Moreover, investment disputes usually require specific sector skills and have significant interests at stake. Yet, the judicial systems of EU Member States often lack the efficiency and effectiveness required to render a timely and well-reasoned decision by competent adjudicators. Finally, foreign investors often face a language barrier when litigating disputes before domestic courts in the host State's language.

Therefore, an effective procedural mechanism must provide for certain critical elements, including: expert and experienced adjudicators; a reliable and impartial forum; a neutral procedural language; the support of domestic courts in enforcing preliminary measures and taking evidence; and the straight-forward enforcement of decisions. Proposals that have been made in this regard range from a safety net, in the form of a 'Unified Investment Court' in case domestic courts fail to dispense justice, to the creation of a separate adjudicatory body similar to the Iran US claims Tribunals or in the form of the (EU) 'Multilateral Investment Court'. Yet, the creation of a new international court with jurisdiction on intra-EU investment disputes would seem difficult to reconcile with the EU's constitutional order, most notably the conditions set by the CJEU's in its CETA opinion. Under the present circumstances, the authors see two potential options for "threading the needle" and creating a mechanism which would bring about real protection for intra-EU investors, while respecting the lines already drawn by the CJEU.

One way to strike this compromise would be a hybrid system comprised of *ad hoc* adjudicatory bodies (allowing for the delivery of timely decisions and the appointment of adjudicators with specific sector skills) while providing for an appeal mechanism for manifest errors of law to a permanent body embedded within the EU judicial system. Such 'European investment court' could be conceived, as proposed by Paschalis Paschalidis, either as a specialised chamber of the EU's General Court in Luxembourg or as a common court to all Member States. Envisaged as part of a hybrid mechanism, the court would maintain a preselected roster of arbitrators authorised to hear the investment dispute and, at the same time, operate as an appellate court for setting-aside decision. This could establish the necessary link to the judicial system of the Member States and the EU – a link which the CJEU held was crucially missing for current arbitral tribunals.

A second, alternative approach could be the creation of new specialised courts within the judiciary of the Member States along the lines of the Singapore International Commercial Court (SICC), the Astana International Financial Centre (AIFC) Court or the Dubai International Financial Centre (DIFC) Courts. To be clear, the SICC, AIFC and DIFC were designed to handle commercial disputes rather than as a forum for investor-state arbitration. Yet, they offer well-designed court-based mechanisms with competent, internationally experienced judges (in the case of DIFC even drawn from various jurisdictions), time efficient case management, flexible procedural rules and English-language proceedings. In this regard, they may serve as a model for the creation of domestic courts specialised on intra-EU investment disputes. Ideally, this process would be spearheaded and coordinated by the EC, in order to ensure a coordinated and consistent approach across the Member States.

Outlook

Before tearing down one's old house, it is a good idea to build a new house first. While the EC and EU Member States have unfortunately not followed this common-sense approach to intra-EU investment protection, it is not too late to start building. The EC should, therefore, take to heart the concerns expressed by investors and stakeholders in the recent survey and drive the initiative toward a tangible proposal for the future of intra-EU investment protection: A regulation incorporating the substantive guarantees of the EU's new-generation FTAs and the creation of an apt procedural mechanisms for intra-EU investors. It is our hope, that with these goals in mind, European investors will not be left out in the rain long, but soon have a new roof over their heads and a level playing field under their feet.