

Public consultation on an intra-EU investment protection and facilitation initiative

Veblen Institute and FNH Position Paper¹

The recent termination of intra-EU bilateral investment treaties (“BITs”) following the Court of Justice’s Achmea decision have created an opportunity to restore a level playing field between EU economic actors, and to put an end to a “*parallel treaty system overlapping with single market rules*”² which have proved highly detrimental to EU Member States.

The Commission itself has long criticised such system. As such, in 2015, it stressed that intra-EU BITs had become unnecessary, created discrimination based on nationality and were incompatible with EU law:

*“Since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments. [...] By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.”*³The Commission reaffirmed its position in 2018:

*“Intra-EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the principle of non-discrimination among EU investors within the single market under EU law.”*⁴Therefore, the whole initiative to recreate a parallel system granting extra protection to intra-EU investors seems **inconsistent with the Commission’s previous positions**. In addition:

Such initiative is **at odds with the current context and EU’s priorities (1)**.

As apparent from the text of the consultation, the initiative seems to be based on **various questionable assumptions** tending to overestimate the purported benefits of any type of private cross-border investments and to take for granted that **further investors’ protection would supposedly be needed (2)**.

As a result, the **outcome of the consultation seems already decided (3)** and **likely to lead to the proposition of new investment protection tools** which could hamper Member States’ capacity to implement the Green Deal and public interest measures **(4)**.

Finally, the Veblen Institute recalls a **number of safeguards** that shall be respected by any new instruments in order to limit their potential harmful effects if such instruments were to be put in place in spite of their risks **(5)**.

¹ The [Veblen Institute](#) for Economic Reforms is a non-profit think tank promoting the economic ideas and public policies needed to accelerate the ecological transition. Through its publications and actions it work for a fairer economy that respects the physical limits of the planet. Founded in 1990 by Nicolas Hulot, the [FNH](#) (Foundation for Nature and Mankind) is an apolitical, non-confessional organisation declared of public interest. Its mission is to work towards a fairer, more united world in the respect of nature and well-being of mankind.

² Communication from the Commission, Protection of intra-EU investment, COM/2018/547 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%253A52018DC0547>

³ Press release of the Commission, 18 June 2015, “Commission asks Member States to terminate their intra-EU bilateral investment treaties” http://europa.eu/rapid/press-release_IP-15-5198_en.htm

⁴ Communication from the Commission Protection of intra-EU investment, COM/2018/547 final.

1. The initiative is at odds with the current context and EU's priorities

The initiative which ultimately aims at granting any private operator⁵ making a cross-border investment in the EU additional legal tools and means to request financial compensation against Member States does not seem relevant in view of the **overwhelming rejection of such protection regimes** by the civil society⁶, and the **growing awareness that all investments have not the same impact on the economy and the society**. In this regard, the Commission has recently recognised that some foreign investments can have adverse effects if they lead to the loss of sovereignty on European strategic assets and resources⁷ and that investments in a number of identified sectors should be favoured over others to ensure the achievement of the EU's objectives regarding climate change and sustainable development⁸. In addition, in the present context where Member States and the EU are granting billions of euros in aids and loans to companies as part of covid-19 recovery plans, **the priority should be to ensure that those actors fairly contribute to a sustainable recovery in line with the European Green Deal promoted by the European Commission with:**

⇒ **The adoption of further mechanism to enable the enforcement of national and EU laws on tax, environment, human rights, labour law vis-à-vis transnational companies.** In this respect, it seems urgent that the Commission develop as soon as possible a proposal for a strong and binding EU corporate duty of vigilance legislation and collaborate actively with a view to finalise the draft of the UN Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises⁹. **The urgent renovation of the Energy Charter Treaty (ECT) or its termination** as it is uncompliant with both the Achmea decision (because of the intra-EU ISDS cases it allows) and with the ECJ's Opinion 1/17 deeming the traditional ISDS mechanism incompatible with EU law. The ECT is also an insurmountable obstacle to the energy transition. Indeed, according to a recent report:

*“The continuation of ISDS mechanism to protect fossil fuels, until 2050, under the ECT regime would potentially increase this cost to €1.3 trillion out of which 42% should be paid by EU taxpayers. This is slightly above the estimated investment need to finance the European Green Deal”*¹⁰. **The protection of the EU and its Member States from possible investor complaints that might emerge against the exceptional measures developed by States against the health, economic and social crisis linked to the Covid-19 epidemic**¹¹.

⁵ Private investors using investment protection regimes are usually multinational groups, holding companies and wealthy shareholders. SMEs only account for 30% of FDI and only half of them make several investments. Most of the SMEs making FDI come from Luxembourg, Cyprus and the UK – see E. Rytter Sunesen, et al., *The World in Europe, global FDI flows towards Europe FDI by European SMEs*, ESPON EGTC, March 2018.

⁶ e.g. In 2015, 88% of 150,000 respondents opposed the inclusion of an ISDS system in the TTIP.

⁷ See Communication, C(2020) 1981 final, *Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets*, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf

⁸ See par. 9 of the preamble, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment mentioning a mechanism fostering “*the channelling of capital flows towards sustainable investment*”.

⁹ See <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>

¹⁰ See Y. Saheb, *Modernizing the Energy Charter Treaty, A Global Tragedy at a High Cost for Taxpayers*, OpenEx, January 2020 ; see also <https://www.iisd.org/blog/how-energy-charter-treaty-could-have-costly-consequences-governments-and-climate-action>

¹¹ Serious concerns have been expressed in this regard. The United Nations Conference on Trade and Development has alerted States of an increased risk of disputes in the current period (cf. UNCTAD, Investment

2. The public consultation refers to various questionable assumptions

(i) *The public consultation seems to overestimate the purported benefits of any type of private cross-border investments*

The consultation attributes various purported benefits to private cross-border investments which would supposedly “generate *sustainable economic growth*”, enable the creation of “*new infrastructures connecting remote communities*” and be necessary to enable the EU to “*meet the commitments related to climate change and digitalization*”.

Such assumption is contradicted by the fact that **the benefits of private investments on the economy, health, people and climate change depend on multiple factors**: type of investments and sectors in which private investors invest, behaviours of private investors and their compliance with internal tax, environmental and labour rules, human rights etc. Therefore, **only investments that are consistent with the Green Deal should be actively encouraged**.

In addition, it is **paramount to safeguard the EU’s and Members States’ rights to regulate** to allow them to implement such necessary measures to conduct the Green Deal, protect the citizens’ health and meet their climate targets even where this might imply changes in regulations and the frustration of some investors’ expectations of profit.¹² Furthermore, as recently demonstrated by the Covid-19 crisis, public investment in infrastructure, health, education, and R&D remains key so that it is **essential to maintain the EU and Member State’s capacity to request private investors to fairly contribute to the public funding through compliance with tax rules**.

In light of such priorities, which have become more evident during the Covid-19 crisis, the creation of a system granting private cross-border investors additional tool to sue States wishing to impose necessary and public interest measures appears to be dangerous and could **increase citizens’ distrust towards the EU institutions and their independence vis-à-vis corporate interests**.

(ii) *The initiative seems to rely on various questionable assumptions lacking serious and verifiable basis*

policy responses to the covid-19 pandemic, Investment policy monitor, special issue n°4, May 2020). In an appeal published by the Columbia Center on Sustainable Investment, several personalities, including Olivier De Schutter and Jeffrey D. Sachs called for a moratorium on all pending arbitration claims and a permanent restriction on all arbitration claims related to government measures targeting the health, economic and social dimensions of the pandemic and its effects (see P. Bloomer, J. P. Bohoslavsky, C. Correa, O. De Schutter, K. Kennedy, J. D. Sachs, M. F. Espinosa Garcés, Call for ISDS moratorium, May 2020). Lastly, experts at the International Institute for Sustainable Development recommended that States adopt steps to protect themselves through announcing that they withdraw their consent to ISDS or through joint statements to suspend this mechanism for all measures related to the Covid pandemic (see N. Bernasconi-Osterwalder, S. Brewin and N. Maina, Protecting Against Investor-State Claims Amidst COVID-19: A call to action for governments, IISD, April 2020).

¹² Examples of regulations in favour of a green transition: the green taxonomy to redirect finance to green sectors, regulation of cars emissions, the carbon tax project, the EU directive project on duty of vigilance (in this regard, a study shows that only one company out of three in the EU demonstrates “*due diligence*” with regard to the respect of human rights and the impact on the environment – see L. Smit et al., *Study on due diligence requirements through the supply chain*, European Commission, January 2020).

First, the consultation contains **various assumptions relating to the need to improve private investors' protection to stimulate cross-border investments in the EU**¹³ but provides no clear evidence - including in the reports referred to in the consultation - that such additional protection would be of a nature to prompt cross-border investments in the EU.

On the contrary, there is **growing evidence that the existence of investment protection regimes (or lack thereof) does not substantially affect investment flows**¹⁴. Studies suggest that the link between BITs and FDI is rather a correlation than a causality, since the key risk factors for investors lie in political stability, infrastructure development, corruption and the rule of law¹⁵. Moreover, Double Taxation Agreements and Tax Information Exchange Agreements might have as much importance as BITs in FDI flows towards developed countries.

Second, the consultation refers to **various statements relating to alleged "concerns"** raised by "*some investors*" and "*some stakeholders*" notably over an alleged deterioration of the "*investment climate*", a "*loss of trust in the effective enforcement of their rights*" and alleged "*shortcomings in the protection of investments*".

Those very general and vague "concerns" from non-identifiable nor verifiable sources **lack serious justification to constitute the central assumption on which the whole initiative is based**. While it is not surprising that some business organisations continue to lobby for more protection against a risk of stringer regulation and any risk of "*sudden and unforeseeable changes in the regulatory framework*", it is highly problematic that the consultation does not reflect the views of other stakeholders to counterbalance those alleged concerns.

As regards the business concerns allegedly expressed, the following comments can be made:

- ⇒ **No tangible evidence** is provided to support the aforementioned "concerns". On the contrary, as acknowledged by the Commission in its Communication on intra-EU investment protection, EU law provides adequate protection to private investors. Unlike some developing countries, the EU Member States offer a reliable judicial system for investors to seek remedies in case of damage caused by public authorities. Investors can thus expect all the guarantees implied by the rule of law as enshrined in both national and supra-national law. In addition, claimants in the EU may resort to the EU Court of Justice (preliminary question mechanism) or the ECHR (as a last resort) in case of discontent with the decision rendered by a national administration or court.
- ⇒ As regards a **supposed need for greater clarity of the provisions protecting investors against States**, whereas making the law more accessible, clear and transparent is a worthy purpose, **private investors are not a priority target** (compared to citizens, consumers, vulnerable populations and NGOs). On the contrary, private investors which

¹³ See for example: "*investors' low confidence in the rules protecting their cross-border investments, as well as in their effective enforcement, can play an important role in holding back citizens and businesses from investing in another Member State*"; "*The level of cross-border investments may further decrease if no action is taken*".

¹⁴ See Pohl, J. (2018). Societal benefits and costs of international investment agreements: A critical review of aspects and available empirical evidence. Documents de travail de l'OCDE sur l'investissement international, n°2018/01. Publications de l'OCDE. <https://doi.org/10.1787/e5f85c3d-en>; Bonnitcha, J. (2017, septembre). Assessing the impacts of investment treaties: Overview of the evidence IISD <https://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence>

¹⁵ See M. Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*, World Bank, DECRG, June 2003 and J. P. Walsh and J. Yu, *Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach*, IMF Working Paper WP/10/187, July 2010.

are likely to use investment protection regime are **among the few actors with sufficient financial resources to use specialised international law firms** to assist them in analysing the EU legal framework and case law and it is exactly what they already do when regulations go against their interests¹⁶. In addition, those specialised law firms are very proactive in recalling private investors of their rights towards States and even in prompting them to sue States as they are currently doing over the measures implemented to cope with the pandemic¹⁷, and as they did with the economic crisis and Brexit¹⁸.

- ⇒ As regards a **supposed lack of “level playing field”**, the termination of intra-UE BITs will precisely restore the level playing field between EU investors as national investors wishing to challenge a national measure will have the same legal recourses against the Member State imposing the measure than investors from other EU Member States. This was not the case with intra-EU BITs which led the Commission to repeatedly raise concerns as to a discrimination based on nationality incompatible with EU law. The comparison with the situation of non-EU investors is much less relevant as EU investors will benefit from a reciprocal protection in non-EU countries as explained by ECJ’s Opinion 1/17 on the CETA (mentioned in footnote 3 of the consultation).

3. The outcome of the public consultation seems already decided

The unusually long “background” developments preceding the questions and the way the questions are drafted in a closed and directed manner, plus the fact that virtually all the questions are intended only to private investors and their legal advisers indicate that the consultation seems mainly a **mean to confirm already drawn conclusions** that:

- ⇒ There is a supposed need to attract EU private investors with a more favourable investment protection regime => see background to the consultation (p. 1 to 4)
- ⇒ Existing legal provisions that can be used by investors against Member States are supposedly not clear enough and need to be further “specified” => see preamble and virtually all the questions of Section II which convey that message.
- ⇒ Enforcement mechanisms supposedly need to be improved => See preamble of Section III which concludes that “*under certain conditions, damages caused by State measures breaching EU law may give right to claim damages. The effective enforcement of this*

¹⁶ Phytosanitary industry companies, in particular, are used to resorting to EU law principles similar to the ones used by investors in arbitration cases. For instance, in 2018, Bayer, Syngenta and others requested the annulment of a regulation relating to the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid. To this end, they claimed a breach of “*the principles of legal certainty, protection of legitimate expectations and respect for the rights of the defence, breach of the precautionary principle and of the principles of proportionality and of good administration, and infringement of the right to property and of the freedom to conduct a business*” (*Bayer, Syngenta and others v. Commission*, GC, May 17, 2018).

¹⁷ See [J. Doward, Global firms expected to sue UK for coronavirus losses, The Guardian, August 15, 2020](#) ; [Corporate Europe Observatory, Cashing in on the pandemic: how lawyers are preparing to sue states over COVID-19 response measures, 2020](#) and [M. Dupré, Les investisseurs étrangers vont-ils attaquer les plans de lutte contre le Covid-19 des Etats ?, Alternatives Economiques, April 2020](#).

¹⁸ See [Corporate Europe Observatory, Profiting from crisis - How corporations and lawyers are scavenging profits from Europe’s crisis countries, 2014](#) and [Brexit bonanza: Lawyers encouraging corporations to sue UK & EU member states, 2017](#).

right may, however, be difficult when investing cross-border.”

As a consequence, the **inevitable outcome** of the consultation seems to be the confirmation of these conclusions and thus of a supposed need to adopt new tools to enhance the protection of private investors towards States.

In this regard, the consultation states that “*Member States called on the Commission to **explore further actions** aimed at better ensuring complete, strong and effective protection of investments within the European Union*” making a reference to a Member States’ Declaration of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection. In fact, this declaration is more cautious than what is stated by the consultation as it calls for an “***assessment of existing processes and mechanisms of dispute resolution, as well as of the need and, if the need is ascertained, the means to create new or to improve existing relevant tools and mechanisms under Union law.***”

This means that Member States called on the Commission first to conduct an assessment of existing processes and of the eventual need of new tools and second, only “if the need is ascertained”, to assess the means to create such tools. The text of the consultation seems to consider that the preliminary assessment has already been completed whereas this is a central question deserving transparency towards all stakeholders.

4. The consultation points to new legal instruments likely to hamper Member States’ capacity to implement the Green Deal and public interest measures

In view of the foregoing, and of the Inception Impact Assessment, the consultations will likely lead the Commission to propose the following instruments to improve private investors’ protection against States:

1) Adoption of common EU rules on investors’ rights in the following areas: compensation for direct or indirect expropriation, safeguards for legal certainty and legitimate expectations, rights stemming from the principle of good administration... **The risk here is that such common rules result in an enhancement of investors’ rights mirroring the “standards” granted to investors by the former intra-EU BITs and by the ECT.**

As explained in the questionnaire, this risk is exacerbated by the consultation’s wording that tend to call for an **alignment of EU law standards on investment law ones**. In particular, an extensive interpretation of the very notion of investment¹⁹ and of standards such as legitimate expectations²⁰ and expropriation²¹ could result in more regulatory chilling effect for States.

As a reminder, the most frequent host States subject to arbitral proceedings are Spain, Czechia and Poland, whereas the most frequent home States from which investors operate are

¹⁹ Whereas in EU law, this notion is framed by a nomenclature, it tends to be far more extensive in BITs and arbitral case law. For instance, the ECT defines investment as “*every kind of asset, owned or controlled directly or indirectly by an Investor*”, followed by an open-ended list of examples. Such wording can lead tribunals to qualify as investments a mere [sales presence](#) (S.D. Myers, Inc. v. Government of Canada, UNCITRAL) or [pre-shipment inspection agreement](#) (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13).

²⁰ The wording used by the consultation seems to add a “specific representations” criterion as defined by arbitration [case law](#) (Antaris v. The Czech Republic, ETC, PCA CASE N° 2014-01) and suggests the existence of a right to a stable and predictable regulatory environment, which does not exist in EU law.

Luxembourg, the Netherlands and Germany. About 83% of the intra-EU cases relate to the services sector, especially the energy sector. In particular, legislative acts related to the renewable energy sector were among the most frequently challenged measures of general application in intra-EU ISDS proceedings²². The pattern highlighted by these figures corroborates the fear that profit-driven operators might hamper necessary policy changes in more fragile States. Besides, even if about 40% of the cases settled on merits are in favour of States, one must not forget that the sole proceeding — or even the threat of proceeding — is a deterrent in itself (lawyers and arbitration fees, ...).

2) Creation of new mechanisms for the enforcement of investors' rights within the EU

As previously stated, a new mechanism would likely generate a breach of equality between European operators. Moreover, it is not certain that such mechanisms would be compatible with the EU treaty²³.

5. Necessary safeguards to limit the harmful effect of any new measures in favour of private investors

Should the consultation lead to the adoption of new measures to enhance the protection of intra-EU investors against States, they should in any event be subject to **various safeguards**:

- ⇒ Transparency and democratic debate shall be guaranteed throughout the process;
- ⇒ As regards any new common EU rules on investors' rights:
 - they should be assessed towards the Green Deal;
 - they should not grant any additional rights to investors compared to what is already provided by the EU courts' case-law. In particular, no additional protection shall be given against “indirect expropriations” nor right to a “predictable legal framework”;
 - they should go along with obligations such as a duty of vigilance to ensure the respect of human and environmental rights throughout the supply chain, with effective remedies for victims of violations and the recognition of the prevalence of international human rights law over investment law.
- ⇒ As regards any new enforcement mechanism:
 - It should provide for the possibility for States to submit counterclaims against investors, as well as to be claimant to a proceeding to ensure equality of arms;
 - Proceedings should be public and transparent, and third parties should be allowed to intervene as *amicus curiae* in pending proceedings, and as claimants in case of breach of the investors' duty of vigilance;

21 Here, the wording used by the consultation suggests the existence of a general and unconditional right to compensation in case of expropriation.

22 UNCTAD, *Fact Sheet on intra-European Union investor-state arbitration cases*, IIA Issues Note, Issue n°3, December 2018 (https://unctad.org/en/PublicationsLibrary/diaepcb2018d7_en.pdf).

23 See Article 344 TFEU and ECJ Opinion 2/15 of 16 May 2017, para. 292-293.

- The “clean hands doctrine” should be enshrined to exclude investors involved in human rights or environmental violations;
- Individuals judging investment disputes should be required to demonstrate international human rights law knowledge and skills.

Contacts :

Veblen Institute : Mathilde Dupré, Codirector, dupre@veblen-institute.org, +33 6 77 70 49 55

FNH : Samuel Leré, Policy adviser, s.lere@fnh.org, + 33 6 87 41 16 03