

Regulating for Globalization

Trade, Labor and EU Law Perspectives

Increasing importance of the transitory mechanism regulating EU Member States' BITs with third countries: good intentions but problematic implementation?

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Need for a transitory mechanism

In 2009, the EU acquired exclusive competence to regulate foreign direct investment (FDI) – which previously rested with its Member States – through the entry into force of the Lisbon Treaty. Since then, the European Commission has been engaging in the negotiation of international investment agreements (IIAs) and investment chapters in free trade agreements (FTAs) with several third countries to protect the rights of foreign investors in the EU as well as those of EU investors in third countries.

In its Opinion 2/15, the CJEU ruled, however, that all Member States must sign and ratify any new international agreements that include provisions on non-direct foreign investment and investor-State dispute settlement. This need to conclude mixed agreements, in combination with the public opposition to foreign investment protection, means that it might take decades for the EU to achieve a network of IIAs and FTAs that covers the same scope as, and can hence replace, the nearly 1,400 existing Bilateral Investment Treaties (BITs) of EU Member States with third countries.

As a result, foreign investment protection in the EU will continue, for the foreseeable future, to be regulated by those EU Member States' BITs. Consequently, a transitory mechanism has been worked out to govern these agreements during the exceedingly long 'gap' period before EU-wide agreements enter into force, allowing the Commission a measure of control over Member States' foreign investment policies. Because this transitory period will last considerably longer than estimated at first, the importance of the transitional arrangements stipulated in Regulation No. 1219/2012 cannot be underestimated.[1] This Regulation entered into force on 9 January 2013, so after five years, an evaluation of its functioning is appropriate.

Content of the transitory arrangements

The Regulation aims to address “the status of the bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements”. [2] BITs between EU Member States and third States are divided into three groups based on their date of conclusion or entry into force: the more recent the agreement, the more influential the role of the European Commission.

In addition, Regulation No. 1219/2012 imposes transparency requirements on the EU Member States vis-à-vis the European Commission with regard to meetings, representations and impending disputes, and on the European Commission vis-à-vis the European Parliament and the Council regarding authorisations and motivations for refusal of new Member State BITs. It also establishes the Committee for Investment Agreements (CIA) to assist the Commission. Upon Member States' request within the CIA framework, the European Commission clarified particular provisions of the Regulation so that an emerging *modus operandi* can be identified.

Potentially problematic effects

The Regulation's application has engendered effects beyond the scope of the transitional arrangements – as well as new problems. The first such effect relates to treaty negotiations where it is unclear whether a recommendation from the Commission to open negotiations at EU-level implies that Member State negotiations have to be discontinued, or, whether parallel multilevel negotiations are possible. Also, in case Member State negotiations are to be discontinued, there is confusion as to whether this has to be a formal termination or a *de facto* suspension.

The second, potentially problematic, effect occurs with regard to the conformity of existing BITs with EU law. In this regard, doubts exist regarding the correct interpretation of the obligation for Member States to renegotiate or terminate non-conforming BITs. An illustration is the right to freely transfer funds: this is guaranteed under most BITs but can be subjected to restrictions under EU law. Notably, the Commission has authorised Member States to incorporate the much-discussed investor-State arbitration mechanism in their new BITs, including those signed after 2013.

Outstanding interpretation and application questions

Overall, the Regulation seems to be having the desired effect of providing a stable and predictable investment environment for Member States and foreign investors in the EU, while removing barriers to the EU's conclusion of IIAs and BITs with third States. However, some questions relating to the interpretation and application of the Regulation need to be ironed out, which might require a more active approach from the Commission. The Commission's initiative to organize discussions in 'dedicated technical meetings' has been welcomed by some Member States as an opportunity to share their experience of re-negotiating incompatible BITs within a small and confidential setting, while others called for a broader discussion in the Council. Arguably, more transparency is needed – although a renegotiation strategy may also benefit from a certain measure of confidentiality.

Moreover, the actual level of scrutiny that the CIA imposes upon decisions of the Commission is limited as it would seem that few substantive issues are raised by Member States. Accordingly, the CIA tends to give a positive opinion by consensus (i.e. a blank check) on all draft implementing decisions submitted by the Commission. This very extensive interpretation of Commission powers, even in cases where the Commission has no alternative agreement ready, risks raising concerns in many Member States. At a time when the Commission's broad interpretation of its powers is under fire, as exemplified in the Brexit saga, both the Commission and the Member States should keep in mind, and be guided by, the Regulation's duty of cooperation.

In conclusion

The Commission is expected to tread lightly in its interactions with Member States who are re-

negotiating incompatible BITs as well as concluding new treaties. This is demonstrated, for example, by its tolerant approach towards the inclusion of investor-State arbitration clauses in post-2013 BITs. In the long run, however, such leniency might undermine its efforts to set up a permanent bilateral or even multilateral Investment Court System (ICS), or to adopt a uniform foreign investment policy altogether. Perhaps such an EU-wide policy is, in the present age, simply a bridge too far. In that case, the transitory mechanism of Regulation No. 1219/2012 offers the Commission an important and functional means, in spite of certain implementation problems, to influence – but not dictate – investment protection and dispute settlement in the EU.

[1] Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, *OJEU* 2012 L 351/40. For a more extensive analysis, see Baetens, F., “Attention à la marche! L’importance des dispositions transitoires pour les traités d’investissement bilatéraux conclus entre les États membres de l’UE et les États tiers”, *Cahiers de droit européen* (2017) 3.

[2] Art. 1(1), Regulation No. 1219/2012.

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This entry was posted on Thursday, December 21st, 2017 at 11:37 am and is filed under [A Bilateral Investment Treaty \(BIT\)](#) is an international treaty signed between two states, the home state and the host state. The latter being the one where the private investment by a company or individual will take place. The aim of a BIT is to encourage and protect foreign investment by laying down mutual and favourable conditions that can be relied upon in international arbitration dispute settlement. By doing so foreign investors are provided with more legal security which increases the chance that they will enter the host state market.“>BIT, Brexit, The Court of Justice of the European Union (CJEU) is an EU institution that was established in 1952 and has its seat in Luxembourg. The CJEU consists of the Court of Justice, that deals inter alia with preliminary references, and the General Court, that handles various actions for annulment. The main task of the CJEU is interpreting EU law, thereby making sure that it is applied uniformly in all Member States. Moreover, it settles legal disputes between Member States and EU institutions, such as the European Commission.“>CJEU, EU, EU law is the body of law, consisting of primary and secondary legislation, that relates to the European Union. Primary legislation most importantly refers to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Secondary EU legislation, such as Directives and Regulations, is based on the principles and objectives as laid down in the Treaties (TEU and TFEU).“>EU Law, Free Trade Agreement

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