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SHAPING OF THE EU FOREIGN DIRECT INVESTMENT POLICY AND LEGAL FRAMEWORK: THE LATEST DEVELOPMENTS

Abstract

The Lisbon Treaty provided the European Union (the “EU”) with exclusive competence in the field of foreign direct investment, as part of the EU common commercial policy. Early on, concerns were raised as to the exact scope and consequences of this new EU exclusive competence, including with respect to its effect on existing BITs of the Member States. One other challenge related to transferring the given competence to EU was related to settlement of disputes arising out of the new generation of the BITs, which issue could be resolved either by EU’s potential access to the International Centre for Settlement of Investment Disputes (ICSID) or by introduction of an alternative dispute resolution forum. Since 2015 the European Commission has been working on the establishment of the Multilateral Investment Court (the “MIC”) as a major departure from the system of arbitration-based investor-to-state dispute settlement procedure. As compared to the arbitral tribunals, which are sometimes perceived as insufficiently transparent and predictable, the MIC will offer a higher degree of transparency and consistency in solving investment disputes. A decade after the entry into force of the Treaty of Lisbon, the transfer of direct foreign investment into EU’s exclusive competence seems to be a well-founded and economically justified decision, considering relevant indicia, benefitting all the relevant stakeholders in this field.

Keywords: EU, foreign direct investment (FDI), Bilateral Investment Treaty (BIT), Multilateral Investment Court (MIC), Georgia

1. Introduction: Regulation of the cross-border investments in the EU since the Lisbon Treaty

Before adoption of the Lisbon Treaty,² the European Union (the “EU”) did not have specific legal regulations concerning the foreign direct investments. The Lisbon Treaty, one of the most important treaties in the history of the EU, amending the Maastricht Treaty (1992, known in updated form as the Treaty on European Union, or the “TEU”), as well as the Treaty of Rome (1957, known in updated form as the Treaty on the Functioning of the European Union, or the “TFEU”), aimed to establish stronger governance with simplified decision-making system and an effective foreign policy. Lisbon Treaty, amongst other changes, expanded the EU competences in the field of external commercial relations, including providing EU an exclusive competence in foreign direct investments.³

Considering that before adoption of the Lisbon Treaty the EU already had competence in the field of freedom of establishment and free movement of capital, conferring the entirely new competence to EU has raised questions and triggered controversies as to the precise scope and consequences of such amendment,

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² Treaty of Lisbon, initially known as the Reform Treaty, signed by EU member states on 13 December 2007, entered into force on 1 December 2009, available at <http://eur-lex.europa.eu/jOHtml.do?uri=OJ:C:2007:306:SOM:en:HTML>, last visited on 20 January 2024.

³ Article 207(1) of TFEU.

as well as the possible compatibility issues of the Member States' Bilateral Investment Treaties (the "BITs")⁴ with the EU law. Furthermore, irrespective of EU regulating the area of foreign direct investment, the EU would still enjoy the shared competence to regulate capital movements as the relevant Lisbon Treaty article does not confer the EU competence over portfolio investments. The latter is defined by the European Court of Justice (the "ECJ") as the acquisition of shares "*solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking.*"⁵

It should be noted that not all Member States have met this change with a great deal of enthusiasm, since generally foreign direct investment is an important factor for economic growth and financial independence of any country. Immediately after entry into force of the Lisbon Treaty, concerns were raised about the consequences of this new EU competence and its effect on existing BITs of the Member States. Such questions were posed with respect to both Intra- and Extra-EU BITs,⁶ considering also that the TFEU respects the Member States' existing international obligations vis-a-vis third states in case of their conflict with the EU law.⁷ Also, the new exclusive competence would affect the Member States' ability to define the foreign investment policy freely, due to the EU becoming an international actor in the field of foreign direct investment, including negotiating its own investment agreements (the "EU BITs") with the third countries (most importantly, with China and India). Furthermore, since the EU did not have exclusive competence with respect to portfolio investment, conclusion of such EU BITs by the EU would only be possible as mixed agreement together with the Member States.⁸

Nevertheless, the fact that the Member States had in place more than thousand of the BITs did not come without consequences under the public international law and the cases of possible incompatibilities between such BITs and EU law has been addressed by the ECJ in several cases. In 2018, the landmark decision on *Achmea B.V* by the ECJ has finally confirmed the fate of Intra-EU BITs, ruling that that the arbitration clause contained in the 1991 Netherlands-Slovakia BIT were incompatible with the EU law, since the latter already contained the complete system of judicial remedies.⁹ It follows that as long as the Member States' BITs were in substantive conflict with the EU law, the Member States had either to re-negotiate there BITs or terminate them. Following *Achmea* judgement, on 24 October 2019, the European Commission (the "Commission") announced that the EU Member States have reached agreement on a plurilateral treaty for termination of all (about 190) Intra-EU BITs. The agreement was eventually signed on 5 May 2020 by 23 EU Member States to terminate their BITs (the "Termination Agreement").¹⁰ Irrespective of existing Sunset clauses in the BITs, aiming to extend the effects of the relevant treaty after its termination, the Termination Agreement was designed to expressly annul all such Sunset clauses of the Intra-EU BITs still in force, as well as in previously terminated Intra-EU BITs.¹¹

One other challenge related to transferring competence in the foreign direct investment to EU was related to settlement of disputes arising out of the EU BITs, which issue could be resolved either by EU's potential access to the International Centre for Settlement of Investment Disputes (ICSID) or by introduction of an alternative dispute resolution forum. Since 2015 the Commission has been working to establish the Multilateral Investment

⁴ There are currently about 3,000 bilateral investment treaties in force globally, more than 1,400 of which are concluded by EU Member States. See at the European Commission Official Website, Investments, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes_en, last visited on 20 January 2024.

⁵ Joined Cases C-282/04 and C-283/04, Commission of the European Communities v Kingdom of the Netherlands, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62004CJ0282&from=NL>, last visited on 20 January 2024.

⁶ The Intra-EU BITs refer to the bilateral investment treaties concluded between two EU Member States, while Extra-EU BITs are the BITs concluded between an EU Member State and a third State.

⁷ Article 351 of TFEU.

⁸ Prof. Dr. Christoph Herrmann, "The Treaty of Lisbon Expands the EU's External Trade and Investment Powers, ASIL Insights", Volume 14, September 21, 2010, available at <https://www.asil.org/insights/volume/14/issue/29/treaty-lisbon-expands-eu%E2%80%99s-external-trade-and-investment-powers>, last visited on 20 January 2024.

⁹ Slovak Republic v. Achmea B.V. (Case C-284/16), available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057>, last visited on 20 January 2024.

¹⁰ Nikos Lavranos, "The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One", Kluwer Arbitration Blog, 1 December 2019, available at <https://arbitrationblog.kluwerarbitration.com/2019/12/01/the-eu-plurilateral-draft-termination-agreement-for-all-intra-eu-bits-an-end-of-the-post-achmea-saga-and-the-beginning-of-a-new-one/>, last visited on 20 January 2024.

¹¹ Valerio Letizia, "The EU Termination Agreement and Sunset Clauses: No 'Survivors' on the (Intra-EU) Battlefield?", Kluwer Arbitration Blog, 22 June 2022, available at <https://arbitrationblog.kluwerarbitration.com/2022/06/22/the-eu-termination-agreement-and-sunset-clauses-no-survivors-on-the-intra-eu-battlefield/>, last visited on 20 January 2024.

Court (the “MIC”) as a major departure from the system of arbitration-based investor-to-state dispute settlement procedure, having key features of domestic and international courts adjudicating the investment disputes.¹² The MIC is planned to consist of a first instance court and an appeal body, offering transparency in dispute outcomes and staffed by the highly-qualified adjudicators, which will be chosen and remunerated by the Member States and assisted by the secretariat. The final design of the MIC will be determined through ongoing international negotiations.

All these considerations created complex legal, economical, and practical difficulties at the time of adoption of Lisbon Treaty. Nevertheless, it was argued that the advantages of EU regulating foreign direct investment consistently on its entire territory would exceed the potential inconveniences, by attracting more foreign direct investments to EU than ever before. Since 2009, the EU has been negotiating the investment treaties and defining the foreign direct investment policies on behalf of its Member States, as part of the EU common commercial policy.¹³ As a result, the economic benefits indeed surpassed the imposed legal burdens, since nowadays the EU is considered to be the largest recipient of foreign direct investments globally, and EU Member States as the most open jurisdictions to cross-border investments.¹⁴

2. Further developments of the foreign direct investment legal framework in the EU

Apart from the Intra-EU BITs, the Lisbon Treaty created uncertainty concerning the legal status of existing Extra-EU BITs, as well as regarding the ability of Member States to enter into new BITs in the future. In order to resolve the mentioned uncertainty, Regulation No. 1219/2012 was adopted, which is in force since January 9, 2013 (the “Grandfathering Regulation”)¹⁵. The Grandfathering Regulation created the following three regimes for Extra-EU BITs: firstly, the BITs concluded before 1 December 2009 (date of entry into force of the Treaty of Lisbon) or before the date of accession of the signatory Member State, whichever later, should remain in force, subject to case-by-case review by the Commission, until they were replaced by an agreement between the EU and the third country counterparty; secondly, the BITs concluded between 1 December 2009 and 9 January 2013 (date of entry into force of the Grandfathering Regulation), could be maintained upon permission of the Commission, and thirdly, the negotiation of the future BITs (after the entry into force of the Regulation) should be monitored by the Commission, with its conclusion being subject to Commission’s final authorization before signing of the respective BIT.¹⁶

Another important EU legal act adopted after Lisbon Treaty concerning foreign direct investments is Regulation No. 2019/452 (as amended, the “FDI Regulation”),¹⁷ adopted in March 2019 and came into force on 11 October 2020, which regulates screening mechanisms for foreign direct investment. The FDI Regulation intends to protect the national security interests by controlling investment in strategic undertakings and provides

¹² The European Commission Official Website, section “Investment Disputes”, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes_en, see also section “Multilateral Investment Court project”, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en, last visited on 20 January 2024.

¹³ The European Commission Official Website, section “Investments”, available at https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en, last visited on 20 January 2024.

¹⁴ See for instance the OECD report, “FDI in Figures”, April 2020, available at <https://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf>, last visited 20 January 2024. See also the European Commission Official Website noting that “The EU is the world’s largest exporter and importer of foreign direct investment”, available at https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en, last visited on 20 January 2024.

¹⁵ 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, into force since January 9, 2013, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R1219>, last visited on 20 January 2024.

¹⁶ “Legal Instruments and practice of arbitration in the European Union”, the European Parliament publication, Study for JURI Committee 2015, p.243, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf), last visited on 20 January 2024.

¹⁷ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at <https://eur-lex.europa.eu/eli/reg/2019/452/oj/eng>, last visited on 20 January 2024.

the cooperation mechanism for investment project reviews by the EU Member States. In fact, apart from the obvious benefits of the foreign direct investment, it also creates significant threats to the countries, such as industrial espionage, technology transfer, and the foreign state-controlled enterprises (especially Chinese enterprises) taking over national companies. As a result, the FDI Regulation addresses the given technological and geopolitical challenges and the related legal and practical implications of restrictions of free movements.¹⁸ Accordingly, the Member States are obliged to cooperate and share the requested information to each other and the Commission. “Screening” and “screening mechanisms” refer to procedures allowing to assess, investigate, authorize, condition, prohibit or unwind the foreign direct investments on the grounds of security or public order.¹⁹ The FDI Regulation imposes a number of requirements on the Member States regarding the mentioned screening procedures such as ensuring transparency on timeframes, protecting confidentiality and adopting the principle of non-discrimination with respect to the third countries. For that reason, the Member States and the Commission may issue comments and opinions on transactions involving foreign direct investment in another Member State’s territory and the respective Member State shall consider such comments and opinions. However, the Member State in question with take the final decision regarding outcomes of the performed screening, since the national security matters fall under the sole responsibility of each EU Member State.

3. EU-supported internal and external investment programs and initiatives

Apart from adopting relevant regulatory acts, the EU has launched several important programs supporting internal and external investments. One of them is the “InvestEU Programme”, also known as the European Fund for Strategic Investments (the “EFSI”)²⁰ or the “Juncker Plan”, which is an initiative of European Investment Bank (the “EIB”) Group and the Commission and aims mobilization of private investments for the EU’s top policy priorities, such as the green, and digital transition, innovation and social investments and skills.²¹ The “InvestEU Programme” also supports the “REPowerEU Plan” as the EU’s response to the global energy crisis caused by Russia’s war against Ukraine.

After the “Juncker Plan” has triggered more than € 294 billion of investment, in 2017, the EU launched another ambitious program for external investment mobilization, called “External Investment Plan” (the “EIP”), focusing on a number of priority investment areas, including the sustainable energy and connectivity, micro, small and medium size enterprises financing, sustainable agriculture, rural entrepreneurs and agroindustry, sustainable cities and digitalization for sustainable development.²² On 21 March 2018, the EU presented the EIP at a regional launch event in the Georgian capital Tbilisi, as a plan to mobilize investments from the public and private sector for more than 70 economies around the world, including Georgia and the other Eastern Partner countries, in order to boost investment and support more inclusive and sustainable development in these countries.²³ The EIP, the “InvestEU Programme” and the “REPowerEU Plan” demonstrate the EU’s complex investment architecture, which attempts to attract additional resources for investment not only in EU Member States, but also in partner countries.²⁴

¹⁸ Bas de Jong, Wolf Zwartkruis, “The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?”, *European Business Law Review*, Volume 31, Issue 3 (2020) pp. 447 – 474.

¹⁹ FDI Regulation, article 2, definitions.

²⁰ EFSI was established in 2015 through the Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R1017>, last visited on 20 January 2024.

²¹ The InvestEU official webpage, available at https://investeu.europa.eu/investeu-programme_en, last visited on 20 January 2024.

²² The European Commission Official Website, EU External Investment Plan Factsheet, available at https://commission.europa.eu/system/files/2019-11/factsheet_eip_en.pdf, last visited on 20 January 2024.

²³ The EU4Business Official Website, available at <https://eu4business.ge/en/news/eu-launches-new-external-investment-plan-in-tbilisi/>, last visited on 20 January 2024.

²⁴ Mikaela Gavas, Hannah Timmis, “The EU’s Financial Architecture for External Investment: Progress, Challenges, and Options”, Center for Global Development, CGD Policy Paper, 13 January 2019, available at <https://www.cgdev.org/sites/default/files/eus-financial-architecture-external-investment-progress-challenges-and-options.pdf>, last visited on 20 January 2024.

4. EU's supported investments in the third countries: example of Georgia

The EU and Georgia have long history of political and economic cooperation. Georgia, EU, the European Atomic Energy Community and Members States have signed an Association Agreement in June 2014, which entered fully into force in July 2016.²⁵ This agreement provides the foundations for political association and economic integration of Georgia with the EU, including in the field of investments. The EU and Georgia have also entered into a Deep and Comprehensive Free Trade Area (the “DCFTA”). Before that, in 2009, the Eastern Partnership, a specific eastern dimension of the European Neighborhood Policy,²⁶ was inaugurated as an initiative to help Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine increase economic, political, and cultural links with the EU. On 3 March 2022, Georgia presented its application for EU membership and year 2023 marked by granting the long-awaited EU candidacy status to Georgia. Thus, Georgia obtained historical chance to become a genuine member of the European Family and the coming years will be the decisive moment for Georgia to undertake the necessary reforms.

It is important to note that the EU is Georgia's largest trading partner and assisting the country on average over €100 million to Georgia annually.²⁷ The Neighbourhood, Development and International Cooperation Instrument – Global Europe (the “NDICI”) is the main financial instrument for the EU's cooperation with external partners, including Georgia.²⁸ Apart from grants, the EU also provides funding to Georgia in the forms of loans and guarantees. In the coming years, the EU will support Georgia with various investment projects.²⁹ At the moment of this article, the EIB has invested in twenty-three projects in infrastructure in Georgia, the private sector and climate action, including strategic highway to link Europe and Asia, Georgia's largest hydroelectric power plant, a wastewater treatment plant, and others.³⁰ The EIB provided lending portfolio for Georgia in the amount of €1.83 billion, which has made the country the main EIB lending beneficiary per capita in the EU Eastern Neighbourhood region.³¹

The Russia-Ukraine war has completely changed the European geopolitical and economic realities, including with respect to the European countries' dependence on Russian energy resources. In light of global energy market crisis, the EU showed readiness to provide financial and political support for the Black Sea Energy Submarine Cable project, running about 1,200 km between Georgia and Romania, mostly underwater, for exporting electricity from renewable sources from the Caucasus to the EU. The Commission President Ursula von der Leyen on 17 December 2022, attending the signing of a memorandum of understanding between Azerbaijan, Georgia, Hungary and Romania, noted that the project would bring the EU closer to its partners in the South Caucasus region, benefiting all parties.³² Consequently, the energy system of Georgia will be directly connected to the electricity system of Romania, from which electricity will be supplied to the rest of Europe via Hungary. In the case of the development of the underwater power transmission network connecting Georgia

²⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, dated 27 June 2014, available at [https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02)), last visited on 20 January 2024.

²⁶ The European Neighbourhood policy (ENP) governs the EU's relations with 16 of its closest eastern and southern partners. As a key element of the EU foreign policy, the ENP focuses on stabilising the region in political, economic and security terms. See at the Commission Official Website, available at https://commission.europa.eu/strategy-and-policy/policies/european-neighbourhood-policy_en, last visited on 20 January 2024.

²⁷ EU External Action Official Website, Relations with the EU, available at https://www.eeas.europa.eu/georgia/european-union-and-georgia_en?s=221, last visited on 20 January 2024.

²⁸ The European Commission Official Website, Section “Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI – Global Europe)”, available at https://neighbourhood-enlargement.ec.europa.eu/funding-and-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_en, last visited on 20 January 2024.

²⁹ The European Commission Official Website, Section “European Neighbourhood Policy and Enlargement Negotiations (DG NEAR)”, “Georgia Factograph”, available at https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Georgia_factograph.pdf, last visited on 20 January 2024.

³⁰ The European Investment Bank, report “Georgia”, p.4, see the European Investment Bank website, available at https://www.eib.org/attachments/country/the_eib_in_georgia_en.pdf, last visited on 20 January 2024.

³¹ Ibid, p. 4.

³² EU Neighbours East Website, available at <https://euneighbourseast.eu/news/latest-news/eu-welcomes-initiative-to-lay-submarine-cable-under-black-sea/>, last visited on 20 January 2024.

and Romania, Europe will receive renewable energy produced both in Georgia and Azerbaijan. Saudi Arabia, which implements renewable energy projects in Azerbaijan, also expressed interest in the project. The project is also important for decarbonisation and energy security purposes, as Europe will acquire another reliable source of renewable energy.

As mentioned by Ursula von der Leyen on 17 December 2022, “[the Black Sea Energy Submarine Cable project] could bring Georgia, a country with a European destiny, great benefits as well. It could transform the country into an electricity hub and integrate it in the EU internal electricity market. Finally, the Black Sea electric cable could also help bring electricity to our neighbours in Moldova and the Western Balkans, and of course to Ukraine – it will help start rebuilding Ukraine’s energy system and the reconstruction of the country.”³³ The idea of developing Georgia into an energy hub has been around for many years, however, this idea was given a completely new perspective due to the given project. Despite Georgia’s aspiration to become a member of the European family, in view of its geographical isolation from the contracting states of the Energy Community, in energy sector it was still hard for Georgia to benefit from the main advantage of the European reforms – the single market. In the case of the construction of the Black Sea Submarine power transmission network, the reality changes, considering Georgia’s unique geographical location, strategically connecting the different parts of the Eurasian continent. Moreover, this project has further importance for Georgia, arguably accelerating its membership in the EU. This and other cooperation examples between the EU and Georgia demonstrate the importance of EU’s investments for developing strategic projects in Georgia and for improving the life of Georgian citizens. These illustrations also prove that with the changes of political influences in Eastern Europe and Caucasus and with the right legal and financial support mechanisms, Georgia can indeed become an important political and trade partner for the EU.

5. Conclusions

In summary, the Lisbon Treaty provided the EU with the competence to conclude investment agreements with the third countries and to launch a more modernized investment protection regime. Consequently, the new generation of the investment treaties shall no longer be negotiated and concluded by the Member States on their own, but by the EU, causing alteration of the entire international investment law architecture. Further, under the innovative dispute resolution system, the investors can refer to a new type of investment court, which deviates from traditional investment arbitration system due to characteristics of national and international courts. As compared to the arbitral tribunals, which are sometimes perceived as insufficiently transparent and predictable, the MIC will offer the higher degree of transparency and consistency in solving investment disputes.

To this end, a decade after the entry into force of the Treaty of Lisbon, the transfer of direct foreign investment into EU’s exclusive competence seems to be a well-founded and economically justified decision considering several factors, including subsequent growth of foreign investments in the EU and the existing competition with the economic giants such as China and India, making it necessary for the EU to become a global player in this field. Arguably, while some developing Member States lost possibility to use BIT as an investment attraction tool, the EU has stronger bargaining power with considerable third parties to obtain the better treaty terms as compared to developing states sitting at the negotiation table. Further, the EU’s exclusive competence in direct foreign investment has clearly positive impact on protection of foreign investors by establishing the unified standards on the entire EU territory. Hence, irrespective of the initial concerns of some Member States, conferring foreign direct investment to EU’s exclusive competence from today’s perspective seems to be a win-win situation for all the relevant stakeholders in this field.

³³ The European Commission Official Website, President von der Leyen: “Black Sea electric cable is a new transmission route full of opportunities”, available at https://ec.europa.eu/commission/presscorner/detail/en/AC_22_7888, last visited on 20 January 2024.

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