SCWP SCHINDHELM

RESOLUTION OF INVESTMENT DISPUTES AND THE PLANS OF THE EUROPEAN UNION

Discussions and deliberations on the establishment of a European Court of Justice for the settlement of investment disputes have come to the fore since the – ultimately failed – negotiations between the European Union and the USA on the TTIP free trade agreement. The "private" legal protection in the form of arbitral tribunals, which was provided in the TTIP agreement, was criticised – mostly by bilateral investment protection agreements between states ("BIT", Bilateral Investment Treaties). The focus of the criticism was – in addition to the chlorine chicken – the dispute resolution mechanism, since it would only benefit large international corporations that would exploit countries, their population and the environment; there was talk of a parallel justice system. But is that really true? Why is there any investment protection through arbitration at all? And why (and what) does the European Union now plan for settling investment disputes?

I. NEED FOR INVESTMENT PROTECTION – WHY?

A company invests (e.g. by expanding its healthcare or energy supply) in a country other than its country of residence, and after the investment, the legal framework changes, making the investment (partially) worthless (e.g. by expropriation without compensation). At the latest, the question arises about the protection of the investor in this foreign country. If there were no investment protection agreements, the company would be referred to the state courts of the investment country. This was (and is) not perceived as satisfactory by many investors. The courts of the country of investment would have to assess the legality or illegality of state action (usually through legislation) in proceedings, or the legal system of the country of investment is considered inefficient or politically motivated, as susceptible to corruption or at least not completely independent and impartial.

In order to allay investors' fear of investing in states with "shaky" legal protection and still making investment appealing, the countries decided to conclude investment protection agreements. These are contracts between the investor's country of domicile and the country of investment (and, therefore, bilateral state treaties). In these treaties, dispute resolution mechanisms – investment arbitration – are usually agreed as an alternative to state jurisdiction. In addition, bilateral investment protection agreements offer protection against discrimination, uncompensated expropriation, unreasonable and unfair treatment as well as the guarantee of free movement of capital.

The first such BIT was already concluded in 1959 between Germany and Pakistan, i.e. such agreements are not all that new, even if the TTIP opponents only noticed this in 2015/2016. There are more than 3,000 investment protection agreements worldwide – Austria alone is

the contracting party of 60 BITs and Germany has concluded approx. 130 such state agreements.

II. WHAT IS NOW UNDERSTOOD BY INVESTMENT ARBITRATION JURISDICTION?

Investment arbitration means proceedings between a foreign investor and a state before an international arbitral tribunal. A claim is made for damages incurred by the investor on the basis of a state action. An essential prerequisite for the access of an investor or a state to investment arbitration jurisdiction is the existence of a BIT between the investor and the investment state and a dispute resolution mechanism contained therein (alternatively in addition to the state courts), usually in the form of an arbitration clause. The arbitration clause may provide for the processing of the proceedings according to the rules of a specific arbitral tribunal institution [for example, the United Nations Commission on International Trade Law (UNCITRAL), the International Centre for Settlement of Investment Disputes (ICSID) or the International Chamber of Commerce (ICC)] and/or by an ad hoc arbitral tribunal.

In the event of a dispute, access to an independent and neutral arbitral tribunal is made possible by a functioning investment protection system. A functioning investment protection, therefore, ensures an increase in global direct investments, which in turn strengthens the global value chain.

III. WHY IS THE EUROPEAN UNION CONSIDERING ESTABLISHING AN INVESTMENT COURT?

For decades, it was the practice between the (current) EU Member States to conclude investment protection agreements, called intra-EU BITs. However, 2018 led to the turning point. The reason was the decision of the Court of Justice of the European Union (ECJ) in the "Achmea" case. The arbitral tribunal provided for in the intra-EU-BIT between the Netherlands and Slovakia issued an arbitration award in favour of the investor in proceedings of a Dutch investor against Slovakia. In the subsequent annulment proceedings initiated by Slovakia, the ECJ was asked, inter alia, whether an arbitration clause in an investment protection contract – involving a country – ensures the full effectiveness of European Union law or not. The ECJ denied this since decisions by arbitration tribunals constituted in this way were beyond the control of the ECJ and, therefore, "uniformity in the interpretation of European Union law" is not guaranteed.

As a result of this decision, 130 of the treaties concluded between the EU member states were terminated. This leads to great uncertainty among investors. Calls for effective investment protection at European level have again been made.

IV. IS THERE NOW AN INVESTMENT COURT AT THE EUROPEAN LEVEL?

Yes and no – investment courts at the European level are already planned, but not yet used:

Investment courts are provided for in the free trade agreements concluded by the EU (on behalf of the member states) with Canada (CETA), Singapore (EUSFTA) and Vietnam (EVFTA) (also called free trade agreements of the "new generation").

In the CETA Agreement, an investment court is

- a permanent establishment with two instances planned;
- 24 judges are to be active, whereby 15 judges are to be responsible for the first and 9 judges for the second instance;
- the judges, who are elected by the CETA Committee, should be one third citizens of EU member states, one third from Canada

and one third from a third country;
- the judge from the third country should be responsible for the chairmanship in the chambers formed specifically for the respective case;
- the decisions of the first instance should be made within one year;
- Rules of ICSID, UNICTRAL or rules mutually agreed between the parties to the dispute shall apply as rules of procedure.

How exactly this court works and who, for example, will select the judges in the CETA Committee is currently still unclear. To date, CETA has not yet been ratified by all EU member states – the provisional validity (since 21/09/2017) is not applicable to the investment protection part of the agreement.

V. WHAT INNOVATIONS DOES THE PLANNED EU INVESTMENT COURT PROVIDE?

In addition to the investment courts of the "new" free trade agreements, there have been plans by the European Commission for an investment court since 2015.

At that time (i.e. now six years ago), the European Commission submitted a proposal for a dispute resolution system for investors and states, which provided for the establishment of an investment court and an appeals court with publicly appointed independent and qualified judges. The proceedings were to be based on the national court systems and public. However, there was never an agreement and implementation of these plans. Since the "Achmea judgement" and the abolition of the intra-EU trade agreements, a consultation process has been initiated by the Commission and a working group has been formed with the involvement of the EU member states. In the course of this, the framework conditions for the introduction of an investment protection system were to be developed with an independent arbitral tribunal for investors. It can be assumed that the creation of this multilateral investment court for the settlement of investment disputes is oriented to the investment courts of the "new" free trade agreements and, therefore, a system would be created that will have little to do with the investment arbitration jurisdiction used to date.

As can be seen from the minutes of the meeting minutes of the Commission, investors could file their claims directly with the EU Investment Court in future and consequently receive binding decisions. Alternative dispute resolution options – such as a central ombudsman for investors – are also being discussed.

In general, according to the Commission an even more attractive investment climate could be created in the EU with the creation of an EU investment court . According to the assessment of the Commission, a first concept for the introduction of an EU investment protection mechanism (i.e. investment protection as a replacement of the arbitral tribunals provided for in the Intra-EU BITs) should be available by the end of 2021 and then be enforceable within the framework of a regulation in the EU member states.

VI. DEVELOPMENTS IN AUSTRIA

The International Arbitration Institution of the Austrian Chamber of Commerce ("VIAC") has now published its own arbitration regulations for investment proceedings, which came into force on 01/07/2021 and are applicable to all proceedings initiated after 30/06/2021. Parties can henceforth submit any dispute arising from a contract, law or agreement to which a state, a state-controlled institution or an intergovernmental organisation is a party to the newly created rules of procedure for investment disputes. The establishment of investment arbitration by the VIAC can be considered a significant step in the area of investment protection.

The Schindhelm Alliance has been advising customers for more than a decade with regard to direct investments abroad. If you have any questions about European and international investment protection law, the experts at Schindhelm Alliance will be happy to assist you at any time.

CONTACT

Austria:
Ria Kucera
R.Kucera@scwp.com

Bulgaria:
Cornelia Draganova
Cornelia.Draganova@schindhelm.com

China:
Marcel Brinkmann
Marcel.Brinkmann@schindhelm.com

France:
Maurice Hartmann
Maurice.Hartmann@schindhelm.com

Germany:
Christian Reichmann
Christian.Reichmann@schindhelm.com

Hungary:
Beatrix Fakó
B.Fako@scwp.hu

Italy:
Florian Bünger
Florian.Buenger@schindhelm.com

Poland:
Aleksandra Krawczyk
Aleksandra.Krawczyk @sdzlegal.pl

Romania:
Helge Schirkonyer
Helge.Schirkonyer@schindhelm.com

Spain:
Fernando Lozano
F.Lozano@schindhelm.com

Slovakia / Czech Republic:
Monika Wetzlerova
Wetzlerova@scwp.cz

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