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Affaire suivie par : RELEX
Patrick LE GAUTHIER
Mél : patrick.le-gauthier@sgae.gouv.fr
Tél. : 01 44 87 16 89
Réf. : RELEX/2016/NAF 080

NOTE

pour la Représentation permanente
de la France auprès de l'Union européenne
À l'attention de François Riegert et Eftihia FRAGER

Objet : API intra-communautaires - non-papier conjoint (AT-DE-FI-FR-NL)

Réf. : RELEX/2016/NAF 080

P. J. : Non-papier « *Intra-EU Investment Treaties* »

Vous voudrez bien transmettre aux services de la Commission (DG FISMA et DG Commerce) le non-papier ci-joint, cosigné par les délégations allemande, autrichienne, finlandaise et néerlandaise et relatif aux accords de protection des investissements (API) intracommunautaires.

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Le Chef de secteur

Jonathan GINDT

INTRA-EU INVESTMENT TREATIES

Non-paper from Austria, Finland, France, Germany and the Netherlands

1. Further to the informal technical meeting held on the 1st of October 2015, the Delegations from Austria, Finland, France, Germany and the Netherlands (hereinafter referred to as "the Delegations") hereby submit the following observations with the view to reach a compromise solution for the termination of bilateral investment treaties (BITs) in force between the Member States (hereinafter referred to as "intra-EU BITs").

2. Without prejudice to their respective views and positions regarding the alleged incompatibility of intra-EU BITs with EU Treaties, the Delegations are of the view that the current situation is highly detrimental to both EU Member States and European investors, and more generally to the internal market as a whole, and should be therefore tackled in a mutually satisfactory manner. As further detailed below, the Delegations would propose, as a possible compromise solution, the conclusion of an agreement among all EU Member States in order to organize the phasing out of existing intra-EU BITs (1) and to afford European investors operating within the internal market appropriate guarantees, both as a matter of substantive and procedural protection (2), further to the dismantling of those treaties.

(1) Phasing out of existing intra-EU BITs

3. As a matter of principle, the Delegations would favor a **coordinated termination of intra-EU BITs**, instead of parallel unilateral or bilateral processes of denunciation. From a legal/technical perspective, such a coordinated termination could be achieved through the conclusion of a multilateral agreement among the Member States (hereinafter referred to as "the Agreement") which would replace and supersede pre-existing intra-EU BITs. This would be in accordance with Article 59 of the Vienna Convention on the Law of Treaties, whereby "[a] *treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and [...] it appears from the later treaty [...] that the matter should be governed by that treaty*".

4. The Delegations would also be prepared to **immediately (i.e. without sunset clauses) terminate all intra-EU BITs** upon the entry into force of the proposed Agreement. As a matter of fact, terminating intra-EU BITs while leaving the sunset clauses in place for existing investments would not be satisfactory as it would significantly delay the phasing out process for several years, depending on the duration provided by the sunset clauses. In order to avoid this, the Agreement should accordingly provide that intra-EU BITs in force between the Member States (which would be listed in a relevant annex to the Agreement) are immediately and entirely terminated upon its entry into force and their sunset clause would also not apply. In order to achieve a complete phasing-out of intra-EU BITs, the Agreement should also provide that those treaties (which would also be listed in a relevant annex) which were already terminated, but which are still applicable for a certain duration by virtue of their sunset clauses, are no longer applicable upon its entry into force.

5. The Delegations are also of the view that any provision terminating intra-EU BITs shall not affect **pending investor-to-State dispute settlement proceedings** initiated in accordance with those treaties. Detailed and appropriate procedural arrangements (e.g. through specific time limits) should however be considered in order to avoid a peak of intra-EU investor-to-State claims prior to the entry into force of the proposed Agreement. Specific provisions should also be envisaged in order to make sure that awards issued under pre-existing intra-EU BITs in relation to cases initiated prior to the entry into force of the Agreement are consistent with EU law and are accordingly enforceable within the EU. Put differently, the Member States would provide, through the proposed Agreement, an interpretative declaration reaffirming that intra-EU BITs shall be applied in conformity with EU law in relation to those remaining pending cases.

(2) Investment protection after the phasing out of intra-EU BITs

6. The Delegations consider it necessary that **the proposed Agreement also guarantees an appropriate level of substantive and procedural protection for EU-investors** so that the phasing-out of intra-EU BITs do not result in any gaps in the protection of cross-border investment within the internal market. The Delegations are of the view that the following arguments call for such an appropriate level of investment protection being provided by the proposed Agreement:

- *Firstly*, it is the Delegations' view that such an alternative regime would allow the Member States to overcome the legal and procedural constraints resulting from **intra-EU BITs' sunset clauses**. It should indeed be reminded that the very purpose of those provisions is to ensure that investors who have legitimately relied upon a BIT when investing abroad do not lose the protection provided by such treaty overnight. It is accordingly not excluded, in case a BIT is terminated in contradiction with the terms and conditions of its sunset clause, that its contracting parties face claims from their own investors. In order to avoid this, the Member States would therefore need to engage in a presumably complicated internal procedure, possibly involving their parliament, in order to remove the sunset clauses before terminating those treaties. By providing guarantees that an appropriate level of substantive and procedural protection would continue to be afforded to European investors operating within the internal market even after the termination of intra-EU BITs, the proposed Agreement would aim to avoid any potential financial liability of the Member States vis-à-vis their own investors, as well as the lengthy process of revising the terms of intra-EU BITs prior to their possible termination.
- *Secondly*, an outright termination of intra-EU BITs without an alternative mechanism could potentially affect the **Union's trade policy** by casting further doubts as to the need of provisions on investment protection in trade agreements, especially with developed partners. If one postulates that such provisions are not required within the EU due to the very nature of the internal market or to the level of development of EU Member States, it would then be even more difficult to argue in favor of investment chapters within the TTIP or other FTAs with developed countries. This would in turn seriously compromise the EU's efforts to promote an ambitious reform of the mechanism for the resolution of investment disputes within those trade negotiations.
- *Thirdly*, an outright termination of intra-EU BITs may have a negative impact on investment **treaties signed by EU Member States with third countries**. It would indeed send a negative signal and may create an adverse precedent on which third-country partners would rely in order to request unilateral termination of those BITs without sunset clauses being applied on the assumption that no specific guarantee is required as to the legal protection consequently afforded to foreign investors.
- *Fourthly*, replacing the intra-EU BITs by an alternative mechanism with appropriate guarantees on substantive and procedural investment protection would contribute to the **clarification and reinforcement of the whole investment protection regime in the EU** according to modern standards within a short time frame. Without such guarantees, the legal uncertainties resulting from potential intra-EU ISDS claims pursuant to intra-EU-BITs would continue to persist in respect of existing investments since the sunset clauses would have to be left in place, as explained above.
- *Fifthly*, modern guarantees on investment protection are necessary to the **level playing field for EU-investors vis-à-vis their foreign competitors**, to ensure the continued availability of competitive financing terms for EU-investors and to promote intra-EU investments. The dismantling of intra-EU BITs will be perceived by investors, banks and creditors alike as an overall decrease in the legal protection for EU investors and create a competitive advantage for foreign investors who can rely on clearly defined and uniform protection standards under the forthcoming EU agreements or on Member States' BITs. If EU investors are not afforded comparable protection as their foreign competitors, incentives for EU investors to locate their foreign investments outside the EU will be created and the functioning of the internal market will be compromised.
- *Finally*, by providing adequate guarantees on substantive and procedural investment protection after termination of intra-EU BITs, the proposed Agreement would clearly contribute to the **implementation of the third pillar of the European Commission's Investment Plan of 2014** which aims at creating an investment friendly environment by providing investors with a clear, predictable and stable legal framework.

7. As regards the substance of those investment protection guarantees the proposed Agreement should provide for, the Delegations submit the following considerations and proposals.

8. Regarding the **substantive protection** for intra-EU investors and their investments, the Delegations note that rights of EU investors are currently not codified at the EU level in a single framework but scattered around in various legal instruments, such as the EU Treaties, the Charter of Fundamental Rights, international treaties to which Member States are parties, such as the European Convention on Human Rights, Member States' constitutions and legislations and national and European courts' jurisprudence. The Delegations are of the view that, as a matter of substance, the legal order of the European Union and Member States recognize the general need to protect investments pursuant to the principles of fair and equitable treatment, full protection and security or compensation in case of

expropriation. However, in view of the difficulties in ascertaining and applying these common principles, the proposed Agreement, as part of the EU acquis, should restate and codify them in order to clearly inform investors about the substance and scope of their rights and enable judges to apply such principles consistently and predictably. The wording of such principles should be as precise as the EU investment policy developed for TTIP and should also reaffirm EU Member States' right to regulate, in line with the EU's new approach in the field of trade policy.

9. Regarding the **procedural protection** that should be afforded to intra-EU investors, the Delegations acknowledge that investment disputes should usually be subject to the **Member States' domestic courts**, while also providing for alternative mechanisms in case the dispute cannot be solved through national litigation or where an out-of-court settlement would be more suitable.

10. Consequently, the Delegations would definitely support the institution of an appropriate **investor-to-State mediation scheme** through the proposed Agreement, which would help parties to an investment dispute to reach amicable settlement solutions. The Delegations would at this stage favor an *ad hoc* mechanism, to the exclusion of those options that would require creating new or significantly amending existing institutions or frameworks (*i.e.* creation of an EU agency or integrating a mediator in OHIM). It is the Delegations' view that such options, which may however be further explored subsequently, would significantly delay any compromise among the Member States for the conclusion of the proposed Agreement. The latter may accordingly set up a mediation board on an *ad hoc* basis through a list of mediators approved by the Member States. As also envisaged in the past, and subject to a further legal assessment, a network of national investment contact points may also be established by the proposed Agreement, using national administrations or other existing structures, such as SOLVIT.

11. While mediation should clearly be one cornerstone of the proposed Agreement, the Delegations are of the view that a voluntary scheme alone would not allow EU investors to have adequate means of exercising and enforcing their rights within the internal market. Accordingly, the Delegations consider that a **binding and enforceable settlement mechanism** for investment disputes, as a last resort to mediation and domestic litigation, is necessary. The need for such a dispute settlement scheme which would strengthen the Union system of legal remedies is underlined, among other things, by:

- the EU Justice Scoreboards which states that "*national judicial systems can give rise to concern in terms of length of proceedings, quality of the judiciary and the perception of judicial independence*";
- Commission Staff Working Document, dated 26 November 2015, on the *Challenges to Member States' Investment Environments* (SWD(2015) 400 final), elaborated within the framework of the third pillar of the Investment Plan referred to above, which reveals that the same concerns may also apply to the public administration and the business environment of EU Member States; or
- the significant proliferation of intra-EU investor-to-State dispute settlement proceedings. According to UNCTAD and ICSID statistics, a hundred intra-EU cases (involving sixteen different EU Member States acting as respondent and investors originating from 23 EU Member States) have indeed been initiated, representing 15% of publicly known investor-to-State arbitrations as of today. It is also worth mentioning that a vast majority (74%) of ICSID arbitration proceedings involving EU Member States (69 cases) have been initiated by European investors (see, *The ICSID Caseload – Statistics, Special Focus on the European Union*, April 2015, available at <https://icsid.worldbank.org>).

12. At this stage, the Delegations have identified three main options in order to introduce such a binding and enforceable investment dispute settlement mechanism through the proposed Agreement:

- A first option would be to rely upon Article 273 TFEU in order to confer jurisdiction to the **European Court of Justice** on intra-EU investment disputes. Under that article, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement. Although the Court has admittedly adopted a large interpretation of this provision (see, *Thomas Pringle v. Government of Ireland*, C-370/12, spec. §§ 170 and seq.), it is not sure, subject to a further legal assessment, that this option would work in the context of investor-to-State disputes.
- A second option would be to model the proposed dispute settlement system on the **Unified Patent Court**. The Patent Court precedent and the related opinion of the European Court of Justice (Opinion 1/09 dated 08.03.2011, as well as subsequent case law) would provide clear guidance in order set up such a permanent investment court. The Delegations are of the view that this option, while providing for the technically most well rounded solution, would however most probably not be reached within a reasonable timeframe, therefore significantly delaying the phasing out of intra-EU BITs.

- A third option would then be to rely on the **Permanent Court of Arbitration (PCA)** and agree on a "Compromis", within the meaning of the 1907 The Hague Convention for the pacific settlement of international disputes, to which all EU Member States are contracting parties. By virtue of its Article 52, "*The 'Compromis' likewise defines, if there is occasion, the manner of appointing Arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed*". This provision would accordingly allow the EU Member States to agree, through the proposed Agreement, on a special "Compromis" dedicated to intra-EU investment disputes, the main features of which may be modeled on the recent EU proposal for an Investment Court System in TTIP and other EU trade agreements (permanent arbitrators, strict ethic rules, appeal facility, etc.). The important difference would be, that because the PCA already maintains a list of State-nominated arbitrators (called "members"), no new appointment of judges would be necessary and no retention fees would need to be paid. The "Compromis" in the Agreement could simply provide that the judges of the new intra-EU investment adjudication system should be the PCA-members appointed by EU Member States, thereby making such system not only quick to implement but also very cost effective.

13. Given the time and legal constraints deriving from the first two options described above, the Delegations consider that an alternative dispute settlement scheme built upon an already existing framework such as the PCA would be preferable in order to achieve the phasing out of intra-EU BITs within a reasonable timeframe. The Delegations are however of the view that a permanent court system, either through the ECJ or a specific mechanism modeled on the Unified Patent Court, would in principle be more in line with the EU's new trade policy on investor-to-State dispute settlement and should therefore be envisaged as a longer term perspective. Accordingly, the "Compromis" relying on the PCA, as envisaged above, could be a provisional scheme that would be subsequently replaced by a permanent solution for investment disputes within the internal market.

14. Needless to say, any alternative and last resort adjudication scheme, even provisional, will have to comply with the EU legal system, and more particularly, with the competence of the ECJ to finally interpret EU law. Therefore it is important to further explore ways to develop an EU-compatible mechanism. From the existing jurisprudence it can be distracted that there are possibilities to develop this system in an EU-compatible manner where, the "Compromis" envisaged above could allow tribunals constituted under this alternative adjudication system to directly address requests for preliminary rulings to the ECJ. It is the Delegations' view that several decisions from the ECJ (*Merck Canada Inc vs. Accord Healthcare Ltd et al*, 13.12.2014, C-555/13; *Parfums Christian vs. Evora BV*, 04.11.1997, C-337/95; *Dorsch Consult Ingenieurgesellschaft mbH vs. Bundesbaugesellschaft Berlin mbH*, 17.09.1997, C-54/96; or *Handels- og Kontorfunktionærernes Forbund vs. Dansk Arbejdsgiverforening for Danfoss*, 17.10.1989, C-109/88) suggest that an adjudication system which would be organized within the internal market along the lines of the Commission's proposal for TTIP would be seen as a court common to all Member States eligible to directly submit requests to the ECJ pursuant to Art. 267 TFEU. If this would not be possible, it could be envisaged that preliminary rulings could be obtained with the assistance from the national courts at the seat of the tribunal either during the arbitration proceeding (as envisaged in ECJ judgment dated 23.03.1982, C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG*) or during a subsequent setting aside procedure (ECJ judgment dated 18.02.1986, C-174/84, *Bulk Oil (Zug) AG v. Sun International Ltd. and Sun Oil Trading Co.*). Finally, appropriate provisions should also be envisaged in order to properly articulate this "Compromis" with national courts' jurisdiction, on the one hand, and infringement procedures by the European Commission, on the other hand.

15. In order to reach a compromise solution for the dismantling of intra-EU BITs without creating any gaps in the protection of cross-border investments within the EU, the Delegations would highly welcome the organization of a second informal technical meeting within a reasonable timeframe and would be ready to participate in the drafting of a legal text reflecting the propositions formulated in this non-paper, without prejudice to their final position on the eventual outcome of such an effort.

The Delegations reserve their right to submit, either individually or collectively, any additional comments or observations.