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The Protection of Intra-EU Investments: Putting the EU's Rule of Law to the Test

Abstract

With the 2018 *Achmea* ruling, the European Court of Justice declared investment arbitration in the intra-EU setting to be inadmissible. As a result, the Member States have cancelled more than 190 bilateral investment protection treaties between themselves. Critics fear a high level of legal uncertainty for intra-EU investments. The EU Commission, on the other hand, believes that the existing law of the internal market provides 'adequate and effective protection' for such investments without further ado. Both sides invoke the rule of law. After an overview of the developments, individual elements of the protection of investments within the EU, namely the rights of investors, the balance between them and public interests, the legal means available and the question of compensation, are analysed comparatively. In the end, it emerges that both positions can lay claim to different elements of the rule of law. The rule of law does not require maintaining investment protection with bilateral treaties and investor-state arbitration. However, it is questionable whether the existing law in the internal market does adequately protect investments in the European Union. With the abolition of traditional international investment protection, the European Union faces major challenges with regard to the further improvement of the rule of law, the importance of which goes far beyond the issue of investment protection.

Keywords: Investment law, intra-EU investments, EU Charter of Fundamental Rights, ECHR, *Achmea* ruling of the CJEU

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I Introduction

In 2018, the European Court of Justice (CJEU) ruled in *Achmea* that the investor-State dispute settlement (ISDS) system is incompatible with the autonomy of the European legal system.[1] Afterwards, Member States have cancelled more than 190 bilateral investment protection agreements between themselves.[2] As a result, the application of international investment law (IIL) to investments made by investors from the European Union (EU) within the European Union territory has come to an end. These developments have been sharply criticised. It is feared that this will significantly jeopardise the investment climate in the European Union. The European Commission (Commission), on the other hand, believes that the application of international investment law manifestly contradicts key principles of the rule of law and that 'adequate and effective'[3] protection of such investments is essentially guaranteed by existing EU law.[4] Both positions invoke the rule of law as justification.[5] As will be explained below, they are, however, invoking different aspects of the rule of law.[6] For a closer look, it is necessary to consider the various sub-elements of investment protection. These include the rights of investors, the balancing of these rights against public interests, the available remedies and the availability of effective compensation. The overall view will show that adequate protection of investments does not necessarily require the applicability of international investment protection law and its standards. On the other hand, it is equally doubtful that existing European Union law is sufficient in itself to ensure such adequate protection.[7] Adequate protection for investments within the European Union must take into account the various elements and aspects of the rule of law as they are put forward in the discussion. This is a task for the European Union, the significance of which goes far beyond the question of investment protection.

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1 Case C-284/16 *Slovak Republic v Achmea BV,* EU:C:2017:699.

2 See, for example: *Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union* [2020] OJ L/1 169.

3 European Commission, 'Protection of Intra-EU investment' COM (2018) 547 final, p. 26.

4 Keynote speech by Commissioner McGuinness at the forum on protecting and facilitating investment in the single market, Brussels, 28 June 2022, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_4182> accessed 15 December 2023, '[…] the evidence we gathered does not suggest […] to warrant specific legal action at EU level'.

5 See Dimitry Vladimirovich Kochenov, Nikos Lavranos, 'Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2022) 14 Hague Journal on the Rule of Law 195–219, DOI: https://doi.org/10.1007/s40803-021-00153-7, 199: 'Implications of the case in the context of the rule of law are truly dramatic: deterioration of the rule of law in some Member States, which the EU does not have the tools to effectively counter, when combined with the outlawing of the BITs results in a simple cancellation of the whole idea of judicial protection in the places where it is needed the most'.

6 See Peter-Tobias Stoll, 'International Investment Law and the Rule of Law' (2018) 9 (1) Goettingen Journal of International Law, Special Ed. Holterhus, 267–292.

7 See Ecorys and Deloitte, *Impact assessment study on investment protection and facilitation in the EU* (European Commission 2022) <https://ec.europa.eu/finance/docs/policy/210101-study-investment-protection-facilitation_en.pdf> accessed 15 December 2023.

II International Investment Law and the Termination of its Application in the EU

The rule of law, or a perceived lack of it, has driven the development of international investment law from the very beginning, in the 1950s and 1960s. In order to provide for legal security, international standards of protection and ISDS have been established to take the sensitive issues of the treatment of foreign investors out of a possibly highly politicised national context in a state hosting the foreign investment. In these early stages of emergence, international investment law was understood as an economic policy tool to attract foreign investments.[8] In the emerging system of IIL and, as a stereotype, arbitrators, law firms, investors and a part of academia understand the rule of law to be about protecting the rights of investors against undue interference including significant compensation to be awarded swiftly by way of international arbitration producing effectively enforceable awards (titles).

Now, with countries being confronted at home with a system of investment protection that they had propagated, as to fix rule of law deficits abroad, harsh criticism of the system ensued. Legislators, governments, courts and the general public, often taking note of the system for the first time, were alarmed about three arbitrators chosen by the parties to discuss the merits of a seemingly domestic legislative and administrative action, in an international procedure. They were also alarmed about the amount of compensation awarded by those three arbitrators, and their exorbitant fees. Also, they worried about their own enterprises, which, when facing the same measures, had to rely on national rules and remedies. Last but not least, they worried about their legislators and governments being discouraged from adopting important regulations. In one way or the other, this criticism involves legitimacy, due process and non-discrimination and thus can be said to be well founded in the rule of law discourse as well.[9] In 2018, the Court of Justice of the European Union held that investment arbitration between an EU investor and an EU Member State is inadmissible under the European Union legal order.[10] Many rightly saw this as the end of the use of international investment law in the intra-EU setting. Looked upon more closely, it becomes apparent that the Court's ruling is probably only the tipping point in a larger process of pushing back the application of international investment law within the EU, for reasons which go far beyond the admissibility of investment arbitration.

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[8] For more information on historical origins of International Investment Law: Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards and Treatment* (Kluwer Law International BV 2009, Alphen aan den Rijn) 3–18.

[9] See Peter-Tobias Stoll, Till Patrik Holterhus and Henner Gött, *Investitionsschutz und Verfassung. Völkerrechtliche Investitionsschutzverträge aus der Perspektive des deutschen und europäischen Verfassungsrechts* (Mohr Siebeck 2017, Tübingen) 7 et seq.; Peter-Tobias Stoll and Till Patrik Holterhus, 'The "Generalization" of International Investment Law in Constitutional Perspective' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016, Oxford) 339–356. DOI: https://doi.org/10.1093/acprof:oso/9780198738428.003.0015

[10] Case C-284/16 *Slovak Repbulic v Achmea BV,* EU:C:2017:699 paras 55, 56.

Within the European Union and its Member States the criticism outlined above has resulted in various activities. The Commission had taken steps to persuade Member States to end bilateral investment agreements between themselves.[11] With the early exception of Ireland, Finland, Austria and Sweden, Member States terminated their agreements by agreement of May 5, 2020 – the non-complying States soon followed, putting an end to some 190 agreements.[12]

III Investors' Rights and Property

With these developments, IIL, an international law instrument specifically designed to address the protections of investors and their investments, has ceased to apply. Such protection now relies on the more general rules applicable in the EU, the Union's rulebook itself, as well as the European Convention on Human Rights (ECHR), which is closely tied to the law of Member States, altogether often referred to as 'EU law' in a more general understanding. At first glance, this EU law may appear to be unprepared to fill the gap, as EU treaties scarcely refer to investors or investments explicitly or indeed even implicitly.[13] However, this hardly means that the drafters of the treaties have neglected this economic activity and the legal structures needed for it to unfold. On the contrary – from the early days of the EEC, European integration was about a common market including all economic factors and all related activities. This integration was spearheaded by the introduction of four fundamental freedoms of the EU's single market, which cover the freedom of establishment, the free movement of capital, and the additional rights to the free movement of goods, persons and the free provision of services.[14] In so far as we see investment as an activity including establishment, operations and exiting, EU law is likely to be more encompassing than IIL, as the latter only refers to some of these activities, such as activities in the pre-investment phase, capital transfers and payments and more indirectly covers others by way of the standard of fair and equitable treatment and non-discrimination.[15]

However, investing and operating an investment is not only an ongoing activity, but also entails assets. Originally drawing from the customary international rules on the minimum protection of foreigners and their belongings and on the conditions for expropriation and

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[11] E.g. European Commission, Communication from the Commission to the European Parliament and the Council, 'Protection of Intra-EU investment' COM(2018) 547 final, 2, 3.

[12] *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union* [2020] OJ L 169/1.

[13] With rare exceptions like Art. 206 of the Treaty on the Functioning of the European Union (TFEU) on a common policy regarding foreign direct investment.

[14] Which were first established in the 'Treaty establishing the European Economic Community' [1957] and still in force today in Art. 28 TFEU et seqq.

[15] Dominik Moskvan, *Protection of Foreign Investments in an Intra-EU Context: Not One BIT?* (Edward Elgar 2022, Cheltenham) 23. DOI: https://doi.org/10.4337/9781800880382

compensation, international investment law is particularly strong in defining a protection of property rights on investments.

However, in the EU and the legal order of the Member States, property is protected as well.[16] This is explicitly stated in Article 1 of the 1952 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1 First Protocol ECHR). The fundamental rights under the Convention forms part of the constitutional traditions common to the Member States and this way constitute general principles of the Union's law according to Article 6(3) of the Treaty on European Union (TEU). This is good law ever since the *Hauer*[17] case of the CJEU. Moreover, today, Article 17(1) of the EU Charter of Fundamental Rights (CFR) contains a right to property, which applies to the EU and Member States, when implementing EU law. Under Article 52(3) of the Charter, the meaning and scope of this right shall be the same as the one laid down in the Convention. These European standards inform the respective rights enshrined in the law of Member States, which might come into play as well.

When looking closer, some significant differences must be noted in comparative view:[18] In detail, the notion of expropriation is more expansive in IIL, as it is more receptive to cover *de facto* or indirect expropriations, while EU law can be understood to draw a more explicit line between the taking of property and the regulation of its use.[19] Also, EU law protection of property is a composite structure built on the aforementioned components, which might be difficult to navigate sometimes. Moreover, some of those components as well as rules have not been applied or adjudicated upon very frequently. Seen from some more distance, it can be concluded that an investor's right to the investment as the core concern of IIL is taken care of under EU law as well. It may also be observed that the EU's economic integration and liberalisation dimensions are much more strongly developed, whereas the protection of assets and property have not enjoyed the same priority for many years, possibly due to the existence of IIL.

IV Proper Balancing of Investor's Rights and Public Interest / Right to Regulate

Rights and freedoms can hardly be guaranteed without limits. Their justification and disciplines for related measures are key concerns of IIL as well as of EU law in general. They are reflected in mechanisms that provide for a proper balance of individual rights

16 Ibid 118 et seq.

17 Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz,* EU:C:1979:290.

18 See generally: Moskvan (n 15).

19 See Agata Daszko, 'Humanising European Investors: BITs Are Dead, Long Live the ECHR? A Look to RWE v. The Netherlands' (2023) European Yearbook of International Economic Law (forthcoming). DOI: https://doi.org/10.1007/8165_2023_103

and public interests and the right to regulate.[20] More generally, they relate to the questions of the exercise of public authority, which is a key aspect of the rule of law. International investment law has come a long way and achieved an elaborate set of principles and rules to spell out the essentials of legitimacy of regulation and measures in public interest and to determine to what extent individual rights may be legitimately limited with or even without compensation. The issues of police powers *vis-à-vis* expropriation and legitimate expectations *vis-à-vis* the standard of fair and equitable treatment[21] are key in this regard.

In a long line of adjudication, the CJEU too has dealt with quite a number of such public policy objectives.[22] This includes the protection of the environment, of consumers and workers, the planning of land uses and the proper allocation of agricultural lands. Further examples are the proper functioning of the tax system and the protection of creditors and minority shareholders on the financial markets. Of course, the list of legitimate public purposes and policy objectives can hardly be said to be exhaustive. It is a legitimate right and even the task of Member States as well as the EU to define public purposes as they may deem appropriate in order to fulfil their tasks.

Nevertheless, this discretion of legislators, regulators and administrators comes along with a number of disciplines and restrictions. First of all, the requirement of justification must be mentioned, which can be considered a precondition of any rational public governance in a constitutional system. Second, the principle of non-discrimination plays a fundamental role in this regard.

These two basic requirements and disciplines form the basis, on which the so-called general principles of Union law operate. These, in turn, are the principles of proportionality, legal certainty and legitimate expectations. Proportionality can be understood to mean that the measure is suitable to achieve the intended objectives and does not exceed what is necessary to attain those objectives. Furthermore, and as is well known, proportionality entails also that no other less restrictive measure is available.[23]

The principle of legal certainty implies that rules should be clear, precise and predictable, something which would equally apply to standards and administrative decisions. In European case law, it has been highlighted that this legal certainty is particularly required where private individuals or undertakings may be affected.[24]

The principle of legal legitimate expectations entails that expectations of the addressees of the measure are duly taken into account, where they are legitimate and the addressees

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20 See Stoll, Holterhus, Gött (n 9) 24 et seq., 106 et seq.

21 Moskvan (n 15) 63 et seq.

22 For example: Joined Cases C-52/16 and C-113/16 *SEGRO,* EU:C:2018:157; Case C-349/07 *Sopropé,* EU:C:2008:746; Case C-230/18 *PI v. Landespolizeidirektion Tirol,* EU:C:2019:383; Case C-235/17, *Commission v. Hungary (Usufruct Over Agricultural Land),* EU:C:2019:432.

23 E.g, Joined Cases C-52/16 and C-113/16 *SEGRO,* EU:C:2018:157, para 76. See also Case C-577/10 *Commission v Belgium,* EU:C:2012:814 para 44.

24 E.g. Joined Cases C798/18 and C799/18, *Anie and Others,* EU:C:2021:280, para 41. See also Case C-322/16 *Global Starnet,* EU:C:2017:985, para 46.

are prudent.[25] The principle can be also said to require in general that new rules should be accompanied by adaptations for affected individuals or undertakings that have had such legitimate expectations.

Altogether, these well developed and structured disciplines on measures which affect the rights of investors may be said to balance individual rights and public interest appropriately. These disciplines are firmly and clearly set out in EU law and affirmed and developed by a large body of jurisprudence of the CJEU. While a concise comparison cannot be offered in the confines of this paper, it can be concluded that international investment law and EU law have much in common at this point and that EU law appears to be at least as appropriate, if not even more elaborate, in view of enabling and disciplining measures in the public interest.

V Effective Remedy: Access to Justice and Enforcement

Another important dimension of the protection of investors and investments concerns the availability of an effective remedy. Indeed, it is one of the essential elements of the rule of law that an individual right, such as the rights of investors, can be effectively enforced.[26] An effective remedy includes procedural elements such as access to justice, effective enforcement of decisions and, in substantive dimensions, may entail compensation, as will be discussed below.

Effective remedies are of critical importance in the case of foreign investments and their promotion. Doubts about the effectivity of legal systems and courts in host States are the *raison d'être* of international investment law and, more particularly, its investor-State dispute settlement regime. Arbitration and the facilitated enforcement of awards are key components of a remedy, which, in terms of effectivity, is unparalleled.

Now that this option is not available any more for investment undertaken within the EU, EU investors will have to turn to the general system of adjudication and enforcement. Both, Articles 13 and 6 ECHR as well as Article 47 CFR and EU law, as for instance Article 19(1) subparagraph 2 TEU contain an individual right to an effective remedy.

While, by and large, these rights are complied with, defending investor's rights in the EU and Member States may be burdensome. The applicable law may vary and, accordingly, different courts may come into play. Thus, not only the courts of Member States may get involved but the CJEU or the ECHR may also be charged with the matter, depending on the circumstances of the case. Procedures may be complex, diverse and sometimes lengthy and inefficient. There is little doubt that pursuing investor's rights in ordinary courts is a lot more burdensome and time consuming that investor-State arbitration.

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[25] Developed by the CJEU in Case 111/63 *Lemmerz-Werke,* EU:C:1965:76 as a 'constitutional' principle.

[26] See for more detail: Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016, Cambridge) 282–338. DOI: https://doi.org/10.1017/CBO9781316687123.012

Protecting investments within the EU in the absence of IIL is in urgent need of taking a large array of measures to facilitate, accelerate and streamline the procedures at hand, to better equip courts and to train judges. In some instances, this might require taking bold and effective measures against a few Member States, whose judicial systems suffer from long-standing and systemic failures, which have been ignored far too long. Obviously, protection of investors rights through ordinary courts would lag behind arbitral procedures, even where all these improvements are implemented, as court proceedings take their time and might possibly include an appeal or a constitutional complaint. Some observers will see this as confirmation of their assessment that the elimination of the applicability of international investment law has resulted in a loss of the rule of law. This might already be doubted because it largely fails to take into account the potential benefits of having a right to appeal or other means to bring the matter to another court for more accurate assessment. However, more importantly, it reflects an understanding of the rule of law that is focused on the effectivity of the protection of investors rights. Such a view fails to properly take into account that investor-State arbitration comes along with drawbacks, which are equally related to the rule of law, if seen in a more comprehensive context. At the very least, these drawbacks concern the autonomy of the EU legal order,[27] as relied on by the CJEU in *Achmea*, a reasoning which has been rightly questioned by quite a number of voices. More serious is the fact that IIL and treaty-based investment arbitration is only available for those investors who can rely on an international investment agreement, such as a BIT. The system thus discriminates against those who do not enjoy this privilege, as their home Member State did not conclude such an agreement, let alone domestic investors, who fail to enjoy this privilege already because of the fact that IIL in its entirety is about foreign investors only.[28] Also, general courts equipped with judges might be considered more suitable to hear investment disputes as these disputes concern the proper and legitimate exercise of public authority.[29] It shall be noted that, for these reasons, investor-State arbitration has rarely been permitted in a purely national context and that it has been the subject of agreements only in a number of selected cases.[30] In short, the legitimacy of the adjudicating body is at stake here and a court with judges nominated by way of a procedure, which vests them with legitimacy, seems to be more suitable for adjudicating cases, where the exercise of public authority is at stake.[31]

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27 For more detail on the Autonomy EU Law in ISDS see: Trajan Shipley, 'The Principle of Autonomy of EU Law in the Context of Investor-State Dispute Settlement: A Public Policy Norm?' [2023] European Yearbook of International Economic Law 239–246, DOI: https://doi.org/10.1007/978-3-031-41996-6_10

28 Stoll (n 6) 287 et seq.; Stoll, Holterhus, Gött (n 9) 132 et seq.

29 Stoll (n 6) 286.

30 Stoll, Holterhus (n 9) 342.

31 Stoll, Holterhus and Gött (n 9) 239 et seq.

VI Effective Remedy: Compensation

One of the most relevant and controversial issues about the protection of intra-EU investments after *Achmea* concerns the issue of compensation. International investment law has a reputation for providing for compensation easily and in considerable amounts. Some see this as a welcome achievement, others harshly criticise it. Both sides vehemently rely on the rule of law for their arguments. Looking closer, it becomes clear that the compensation issue is about more than the money involved. Compensation may be provided for under different sets of rules and depend on steps taken beforehand, such as exhaustion of other remedies in the EU context, or contributory fault in IIL. Different methods of calculation also have to be taken into account.[32]

1 Compensation for Expropriation

In view of the protection of investors, compensation may come into play in different ways. First, compensation may be afforded in the context of an expropriation. International investment law builds on customary international law standards at this point, which envisage that prompt, adequate and effective compensation be afforded in case of an expropriation.[33] Bilateral investment treaties as well as arbitral awards have specified this standard by including indirect expropriations, clarifying that compensation is also due for measures which result in deprivation of the investors of their ability to manage, use or control their property, without the direct transfer of the legal title to the State, and by adding details about methods of the calculation of the amounts due.

As far as the law in the EU is concerned, expropriation is addressed by the laws of Member States, which do differ to some degree. Under the ECHR and according to the Court's jurisprudence on the right to property under Article 1 of Protocol 1 ECHR, compensation and its amount is subject to a balancing between the individual right and the public policy purpose underlying the expropriation and might in exceptional circumstances be even denied completely.[34] As far as EU law is concerned, Article 17(1) of the CFR states, that '(n)o one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss'.

It is not the place here to delve into the details of those different concepts. However, it becomes clear already that international investment tends to be more extensive in taking

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[32] See generally: Moskvan (n 15) 135 et seq.

[33] First established as 'Hull rule'; see e.g. Markus Krajewski, *Wirtschaftsvölkerrecht* (5th edn, C.F. Müller 2021, Heidelberg) 189.

[34] ECHR 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of property' (31 August 2023) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_1_protocol_1_eng> accessed 15 December 2023, 37 para 182 et seq.; see also Daszko (n 19).

indirect expropriations into account as compared to the law within the EU, which would consider many such measures as 'control of use' or regulation. EU law also puts more emphasis on the public purpose as a limit or a balancing factor.

2 Compensation as a Remedy for Unlawful Interference

Aside from the context of an expropriation, compensation may also be awarded as a remedy for the violation of the rights of investors in the course of the exercise of public authority. IIL may deal with it by way of a more extensive understanding of expropriation, which covers indirect expropriations as well as by separate standards, chiefly the standard of fair and equitable treatment. In EU law, where expropriation is often defined more narrowly, compensation will be afforded under the rules of State or EU liability – a very complex issue.[35] As is observed frequently, the EU's own liability is fairly limited by requiring that a breach of an EU rule has taken place, which is sufficiently serious and that a direct causal link exists between the breach and the harm suffered.

As far as it is applicable, Article 41(3) CFR envisages, that '(E)very person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States'. At first glance, this provision appears quite promising to those who have experienced losses due to some EU-related measures. However, the relevant case law of the CJEU points to a number of conditions that need to be fulfilled.[36] In addition to a breach of a rule of law, which confers rights to the individual at hand, such breach must be sufficiently serious and a direct causal link is required between the breach and the harm suffered.

Most observers agree that these conditions and their application by the CJEU are fairly restrictive.

As far as the ECHR is concerned, a violation of rights under the Convention might entail a just satisfaction to be afforded by the Court under Article 41 ECHR, which, however, will probably lag far behind the amounts to be expected as compensation in IIL.

3 The Relationship between Primary and Secondary Remedies

Compensation in the course of state liability has sometimes and rightly been labelled as a 'secondary' remedy, whereas challenging the respective measure at hand in court can be considered a 'primary' remedy.[37] The interrelationship between the two is crucial and

[35] See Andreas Biondi and Martin Farley, *The Right to Damages in European Law* (Kluwer 2009, Alphen aan Rijn).

[36] In accordance with Art. 52(2) CFR, the CJEU refers to Art. 340 para 2 TFEU and Art. 41(3) CFR simultaneously and therefore applies equivalent conditions. See e.g., Case C-45/15 P *Safa Nicu Sepahan,* EU:C:2017:402, paras 64, 73, 84 and 91.

[37] Anne van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Stephan W. Schill (ed), *International Investment Law and*

complex. In international investment law, it is somehow reflected by the requirement of the exhaustion of local remedies, which, however, may and is often waived. This requirement is seen as a device to safeguard the sovereignty of the State hosting the investment. In EU law, the requirement to challenge a measure before asking for compensation is more straightforward and has other connotations: it is driven by the desire to see the exercise of public authority being put to the test of legality in the public interest. This is sometimes framed as a principle of 'no acquiesce and liquidate'.[38]

4 The Calculation of Compensation

A striking difference between international investment law and the law and practice applicable in the EU, which cannot be overlooked and is often emphasised in practice, lies in the amount of compensation. The compensation awarded by arbitral tribunals on the basis of international investment law in the case of expropriations or a violation of other standards often amounts to large sums and plays a central role in criticising this law and its application. However, the practice of compensation under the law otherwise applicable in the EU is also criticised. The amounts are often much lower and are felt to be insufficient.

The differences result from the use of different rules and methods of calculation. Under IIL, the compensation is based on the potential value that the affected investment would have according to the reasonable expectations and business plans of the investor. On this basis and in most cases, the compensation is calculated according to the discounted cash flow method. The manifold standards and laws applicable in the EU in the absence of international investment law imply various different rules, methods and practices in view of compensation. Often, the cost incurred by an investor plays a crucial role and balancing may take place in considering the public interest, which has motivated the restrictions at hand. The many details of the calculation applied and the obvious differences certainly merit a closer look. Here, it is sufficient to note that all these rules, methods and practices are unlikely to match the amounts provided for under IIL and often lack transparency and legal certainty.

As has been observed frequently, there is ample room for improvement at this point.

However, beyond the obvious need for reform as such, the more general question arises as to what level of compensation should be considered appropriate.

EU legislation and the European Parliament (EP) have voiced criticism in view of the compensation afforded to investors under IIL. For instance, recital (4) of Regulation 912/2014 on managing financial responsibility linked to investor-to-state dispute settlement states

Comparative Public Law (OUP 2010, online edn, Oxford Academic, 1 Jan. 2011) DOI: https://doi.org/10.1093/acprof:oso/9780199589104.003.0023

[38] See Attila Vincze, 'Dulde und liquidiere im Unionsrecht? – Zu den möglichen Folgen der Europarechtswidrigkeit und ihrem Verhältnis zueinander' (2023) 58 (1) Europarecht (EuR) 84–100, DOI: https://doi.org/10.5771/0531-2485-2023-1-84, 91 et seq.; see also for a fundamental decision of the German Constitutional Court on this principle: BVerfGE 58, 300 – Nassauskiesung.

that 'Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, but not a higher level of protection'.[39]

In its recent resolution on the future of EU international investment policy, the EP has voiced concerns about the discounted cash flow method to calculate compensation under IIL. In the resolution, the EP 'invite(s) the Commission to assess in depth and provide for corrective and transparency oriented rules and safeguards in relation to the provisions governing compensation in EU IIAs', 'call(s) for compensation to be capped at the level of sunk costs, reflecting the amount of eligible expenditure actually incurred by the investors' and 'underline(s) that balancing approaches should, as appropriate, determine compensation awards below this cap'.[40] While certainly the resolution addresses the international dimension, it must also be well understood to reflect the positions of the EP in view of the protection of investments taking place within the EU.

VII The Rule of Law as a More Encompassing Concept and the Way Forward

The discussion on the protection of intra-EU investments after *Achmea* often started out from the perspective of international investment law and practice with all related expectations. This has been helpful to fully appreciate the challenges ahead. The discussion has highlighted the need of investors for effective protection of their rights, which is ultimately an imperative of the rule of law. However, the rule of law is more encompassing than a narrow focus on the effectivity of the protection of individual rights of investors, as some would suggest. Next to this aspect, non-discrimination, the legitimacy of adjudicative bodies and the need to require the challenging of measures first, in front of courts in aid of the general interest, before asking for compensation have to be taken into account as well. This is why IIL, as it stands, can hardly serve as the only orientation to determine the adequate level of protection.

There is no comfortable trade-off between these different elements of the rule of law. Neither can the effectiveness of the protection of investor's rights be an excuse to allow for far-reaching discrimination and adjudication outside legitimate courts, nor can the latter two justify the weakening of investor's rights. Instead, the protection of rights, non-discrimination and legitimacy of adjudicators have to be improved and maintained in parallel.

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[39] Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party [2014] OJ L 257/121.

[40] European Parliament resolution of 23 June 2022 on the future of EU international investment policy (2021/2176(INI)), [2023] OJ C 32/96, para 34.

Here, a number of activities and measures will be helpful. Several cases can be expected to be brought and might allow for building up a more detailed and coherent jurisprudence on the matter. Proper resourcing of courts by the EU and Member States and adequate training of judges will be essential in this regard. Likewise, the legal profession will develop the skills and capacities to support clients in this new legal setting. Academia has a role to play too in reflecting, assessing, guiding and discussing the developments and in teaching and training. Given the uncertainties at hand, the number of policy questions involved and the need for more guidance and the relevance of the issue for individual rights in the system of European multilevel governance, legislative action might become an option, too, a consideration which should not be dismissed outright without further ado.

Altogether, the challenge ahead might appear to be overly ambitious. Indeed, with *Achmea* and the ensuing developments, the EU has left the comfort zone that IIL provides. However, every effort is worth the task, as it is about more than just the protection of investments. Improving investment protection under general rules and by ordinary courts will consequentially benefit more generally the rule of law and its implementation in the EU and this way significantly fulfil in a wider sense its mission to constitute an area of freedom, security and justice as envisaged by Article 3(2) TEU and 67 TFEU.

VIII Conclusion

International investment protection is an elegant and convenient solution to fulfil investors' expectations of legal protection. It does not force states to move out of their comfort zone and improve their rule of law. It does not require the potential host state to guarantee legal protection and the rule of law in its system. Instead, disputes are shifted to the outside and to international arbitration tribunals. An internal market cannot afford this convenience in the long term. It essentially rests on law and the rule of law. It must not allow discrimination and must rely on a high degree of effectiveness and legitimisation of sovereign power and its judicial review and encourage investors to seek legal protection in the general interest and require them to accept losses for justified public purposes. Referring European investors to existing European law and hoping for clarification of individual issues by the European courts is unlikely to be sufficient. Apart from some possibly necessary legislative measures, the far more difficult task is likely to lie in improving the rule of law as a whole. This is, of course, a task that has not only become necessary with regard to investment protection, but is also a high priority for the further development of the European Union in its entirety.