

THE REGIME OF BILATERAL INVESTMENT TREATIES BETWEEN GREECE AND NON EU COUNTRIES OF SOUTHERN AND EASTERN EUROPE: THE PERSPECTIVE OF A NECESSARY REFORM

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***Abstract:** The Bilateral Investment Treaties (BITs) concluded mainly between developed and developing countries are the main instrument of international investment protection. The EU Member States have concluded with third countries about half of the above agreements which provide, as is well known, primarily for the establishment of standards of treatment of foreign investors and foreign investment in the territory of the host state. Among them, Greece is a contracting party to bilateral agreements of this kind with most countries of Southern and Eastern Europe which are not EU members. These agreements have some key features common to all BITs. The EU member states BITs will gradually be replaced through a long process, by EU Investment Agreements in the framework of the implementation of the new comprehensive EU policy in the field of international investment. The development of this policy is founded on new competences conferred by the Treaty of Lisbon to the EU in this field. Until the aforementioned replacement process is completed, transitional arrangements are in force at EU level. These rules define the conditions according to which the existing member states BITs may continue to apply. Moreover they allow these states to opt to modify their BITs by setting the conditions under which they may be authorized to do so. In view of this development, the present study attempts to identify and analyze the main negative elements of the main provisions of BITs concluded by Greece, mainly in the 1990s, with third countries of Southeastern Europe. At the same time suggestions to improve these provisions are formulated, so as to achieve the difficult and delicate balance between the protection of foreign investment and the need to ensure the right for regulatory intervention by the host states.*

Key words: Key Greece; international investment; investment treaties.

JEL Classification Codes: F21, F53, K33.

1. INTRODUCTION

It is acknowledged at international level that foreign investment, both outward investment made by nationals of a State abroad and inward investment made by nationals of other states in the territory of the former state, contribute significantly to the economic development of nations. For this reason, most states of the world and among them the EU member states sought to create an appropriate legal framework to attract foreign investment and promote investment abroad. The conclusion of Bilateral Investment Treaties (BITs) is the main instrument to achieve the aforementioned objective. Their importance resides precisely in establishing a favorable climate for foreign investment by contributing to legal certainty for foreign investors.

Greece actively participated in this process by concluding BITs with a large number of countries. During the 1990s, the political developments that took place in the countries of non EU Southern and Eastern Europe have enabled the economic approach with them¹.

A key component of this approach was trade and economic activity liberalization in the relations between Greece and most of these countries. In the field of investment, this liberalization is based on the negotiation and conclusion of agreements for their promotion and reciprocal protection (Stangos, 2005).

2. THE FUNDAMENTAL CHARACTERISTICS OF GREECE BITs WITH SOUTHERN AND EASTERN EUROPE COUNTRIES

The large increase in the number of BITs covered about four decades (1960-2000). It is noteworthy that each developed country (eg USA, Germany France etc) established its own BITs network with many developing countries. The EU member states have concluded about 1400 BITs (Eilmasnberger, 2009). Germany has concluded most of them. It is noteworthy that a large number of EU member states BITs are intra-EU BITs concluded mainly between the "old" member states and the "new" member states that joined the EU in 2004 and 2007 (Germany-Poland BIT, Greece-Hungary BIT). About 200 intra-EU BITs are in force and among them Greece BITs with Romania, Bulgaria, Hungary and Slovenia.

As far as southern and eastern Europe countries that are not EU members (third countries) are concerned, Greece has concluded bilateral agreements on the promotion and reciprocal protection of investments with most of them, namely Albania², Serbia³, Bosnia-Herzegovina⁴, Moldova⁵, Armenia⁶, Georgia⁷, Ukraine⁸, Russia⁹, Azerbaijan¹⁰.

The essential features of these Greece's BITs are the following:

(i) they are international agreements concluded on the basis of reciprocity, between two states (intergovernmental agreements), providing for treatment standards of investment made by nationals or companies of one state (the state of origin) in the territory of another State (host state),

(ii) they are binding for both contracting states under public international law,

(iii) they are public law agreements in the sense that they create in the relationship between an individual who is the foreign investor and the host state, obligations which impose international restrictions on the exercise by that State of its sovereignty¹¹,

¹ This study covers the relations in the field of investment between Greece and some countries of Southern Europe and Eastern Europe whose common characteristic is the fact that there are EU Member States. For purposes of the following analysis the term southern European countries includes certain countries of the Western Balkans (Serbia, Bosnia, Albania) while the term Eastern Europe includes specific countries that emerged from the dissolution of the Soviet Union and formed the Commonwealth of Independent States (Russia, Armenia, Ukraine, Moldova, Azerbaijan). It is clear therefore that the term "southern and eastern Europe" is not identical with the term "Southeastern Europe" solely concerning the Balkan countries that are not EU members but not the countries of the Commonwealth of Independent States (CIS).

² The Greece-Albania BIT was signed on 1-8-1991 and came into force on 4-1-1995.

³ The Greece-Serbia BIT was signed on 25-6-1997 and entered into force on 13-3-1998.

⁴ The Greece-Bosnia-Herzegovina BIT that had been signed on 13-12-2000, was ratified by the Law 3012/2002, FEK 101/A/1-5-2002 and came into force on 15-6-2007.

⁵ The Greece-Moldova BIT was ratified by the Law 2660/1998, FEK 269/A/1-12-1998 and came into force on 27-2-2000.

⁶ The Greece-Armenia BIT was ratified by the Law 2269/1994, FEK 228/A/23-12-1994 and came into force on 28-4-1995.

⁷ The Greece-Georgia BIT was ratified by the Law 2376/1996, FEK 35/A/7-3-1996 and came into force on 3-8-1996. Georgia officially withdrew from the CIS on 18.08.2009.

⁸ The Greece-Ukraine BIT was ratified by the Law 2317/1995, FEK 125/A/19-6-1995 and came into force on 4-1-1997.

⁹ The Greece-Russia BIT was ratified by the Law 2248/1994, FEK 187/A/10-11-1994 and came into force on 23-2-1997.

¹⁰ The Greece-Azerbaijan BIT was ratified by the Law 3291/2004, FEK 229/A/26-11-2004 and came into force on 3-9-2006.

¹¹ From the fundamental principle of state sovereignty derives the power of the sovereign state to determine the policy to be implemented in the economic field and formulate the operational framework of the national economy. In the field of investments,

(iv) they create mutual obligations to the detriment of both contracting states. In particular the BITs impose on public authorities of the contracting states a number of obligations regarding the treatment of foreign investors and their investments. In particular they provide for a legally binding level of protection ensuring to investors a number of guarantees consisting in : (a) the application of the principle of fair and equitable treatment (FET), (b) the application of the principle of non-discrimination including the Most Favored Nation (MFN) clause and the national treatment (NT) clause, (c) protection against expropriation by the host State, (d) the free transfer of capital relating to the investment and (e) the obligation to provide full protection and security.

(v) Of particular importance is the establishment of a dispute settlement system between investors (nationals or companies) of one state and the other (host) state (investor-to-state dispute settlement / ISDS). More specifically, these investors may have recourse against that state to international arbitration, usually under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), claiming that the host state has breached its obligations deriving from the treaty.

According to their title, the BITs concern the promotion or encouragement of investment as well. However it is undisputed that the two parts (protection-promotion) are not of similar weight. For this reason we can assert that the agreements in essence are mainly investment protection instruments and much less investment promotion instruments.

Like the BITs of the other EU Member States, the BITs of Greece emphasize on providing protection to investments once they have been admitted (post-admission, post-establishment). They don't provide for a specific binding framework regarding the conditions of entry or admission of a new investment. They don't impose clear obligations regarding access to investment market nor on Greece neither on third countries.

Specifically, BITs contain a clause of promotion of foreign investment. By virtue of that clause, each of the parties promotes, in its territory, investments of investors of the other Contracting Party and admits these investments in accordance with its legislation. This obligation assumed by each state has more the value of a political declaration and less the value of a clear legal commitment. The means of encouraging foreign investment are not clarified so that each state has broad discretion on this issue.

In addition, the admission of the investment must be made in accordance with the procedural and substantive rules laid down by national law of the host state. In practice therefore the above clause operates as a means to control the entry of foreign investment. Under this clause foreign investments are subject to the terms and conditions of the host State's law.

3. THE FUTURE OF GREECE BITs IN THE LIGHT OF NEW EU INVESTMENT POLICY POWERS

It should be stressed that BITs of Greece (as well as those of other EU Member States), cover entirely or partly the area of FDI, which, under the Treaty of Lisbon, is explicitly included in the scope of the common commercial policy (Kujper, 2010). Consequently, EU has in this area, exclusive competence.

Under the new status developed by the Treaty of Lisbon concerning the competence for policy-making in the field of international investment, the EU now has the power to conclude agreements with third countries on the promotion and protection of FDI (Shan & Zhang, 2010). This development has caused concern within the EU in relation to the impact it could have on member states BITs including the Greece BITs.

the sovereignty of the state lies in the power to adopt rules governing foreign investment in its territory, and to investments of its own nationals abroad, and to impose on foreign investors to comply with its own national laws and regulations.

It is obvious that the development of EU international action in the framework of implementation of the common policy especially in the field of FDI, would lead to the conclusion of EU investment agreements with third countries that will gradually replace member states BITs with these countries.

The process of concluding these EU agreements will take a long time. During this long transitional period it is necessary to ensure the management of the new EU competences system on international investments, so as not to disrupt the context of legal security that is necessary for the formation of an environment conducive to investment.

For this purpose, the Regulation (EU) No 1219/2012 adopted by the European Parliament and the Council of 12.12.2012¹² constitutes the instrument of management of relations between member states BITs and the new EU investment policy. Specifically it sets out the conditions and procedures for maintaining them in force.

The Regulation seeks to cover the possible situations that may arise in respect with the Member states BITs.

Firstly, it establishes the conditions and procedures relating to the maintenance or the entry into force of the BITs signed before 12.01.2009 (date of entry into force of the Treaty of Lisbon) or before the date of accession of member states to the EU if the accession occurred after the 12.01.2009.

Greece was obliged to notify the Commission any BIT regarding which it wished to remain in force or to come into force. The notified Greece BITs with third countries may continue to apply or begin to apply pending the entry into force of EU investment agreement. This provision, however, is without prejudice to the obligations of Greece under EU law and in particular without prejudice to its obligation to take the necessary steps to eliminate any incompatibilities existing between the EU law and BITs concluded with third countries. Greece notified the Commission the BITs with Albania, Bosnia, Armenia, Azermpaitzan, Moldova, Georgia, Serbia, Russia, Ukraine¹³.

As the Court of Justice of the EU (CJEU) held in its judgment of 03.03.2009 in Case C-205/06 and C-249/06 and the judgment of 19-11-2009 in Case C-118/07, the specific provisions of BITs concluded by Austria, Sweden and Finland were incompatible with the EC Treaty and the concerned MS had not taken the appropriate measures to remedy that incompatibility (Neframi, 2010). The same or similar clauses are contained in other BITs concluded by other member states before or after their accession to the EU.

The provisions of the Regulation confer on the Commission the power to make an assessment of the notified BITs. Specifically it focuses on the question whether they contain provisions which constitute a serious obstacle to the negotiation or conclusion of the EU investment agreements. In the event that the Commission decides that a notified BIT contains at least one provision which constitutes a serious obstacle to the negotiation or conclusion of an agreement between the EU and a third country, then, under the duty of loyalty, the Commission and the relevant member state immediately hold consultations and cooperate with a view to define the appropriate measures to be taken to address the problem.

Secondly, the Regulation covers the case in which Greece, like any other EU member state, seeks to enter into negotiations with third countries in order to amend an existing BIT or to conclude a new BIT. Specifically it defines the conditions and procedures under which the Commission may authorize Greece to modify existing BIT or to conclude a new one. For this purpose, Greece is obliged to notify to the Commission its intention to enter into negotiations to amend an already existing BIT five months before the official opening of negotiations.

¹² 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, OJ 351/20-12-2012.

¹³ List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012, OJ C 169/5-6-2014.

The notification must contain reference to the BIT provisions under negotiation. In order to ensure consistency with EU policy in the field of international investment as well as compatibility with EU law, the Commission may request the Greece to include or exclude from the negotiations and future BIT certain provisions. Once negotiations are completed, the Greece should first inform the Commission about the outcome and forward to it the text of that agreement. The Greece is not allowed to sign and conclude this agreement, without the authorization of the Commission.

The same procedure should be followed in the event that Greece decided to conduct negotiations on amending the BITs with the aforementioned countries of Southeastern Europe.

4. THE NECESSITY TO PURSUE THE MODIFICATION OF GREECE – SOUTHERN AND EASTERN EUROPE BITs

A general observation on the BITs is that their provisions, particularly as regards investment standards protection are neither clear nor detailed allowing the arbitrators to which the investors have recourse to have a wide margin of discretion for the interpretation of those provisions. Therefore, it is a challenge to seek to introduce clear rules for both the essential investments treatment standards and the procedure relating to the investors-to-state dispute settlement.

4.1. THE DEFINITION OF THW SCOPE OF BITs PRIOVISIONS

A crucial issue that is directly related to the implementation of the provisions of bilateral treaties concerns the determination of the scope they cover. This is because this definition clarifies (a) what forms of economic activities constitute investments and are protected by those provisions and (b) which companies fall within the concept of investor and consequently are beneficiaries of the standards of treatment and in particular have access to investor-state dispute settlement.

It should be stressed that all Greece-SEE BITs have provisions containing a broad definition of investment and of investor.

As far as investments are concerned, each of the agreements in question contains an asset-based definition of the investment. The agreements simply state that the term "investment" includes any asset of the investor, such as goods, rights and interests of any nature, giving an indicative, not exclusive list of forms which investment can take. The aforementioned term means every kind of asset invested by an investor of one party in the territory of the other party and in particular, but not exclusively, includes movable and immovable property and any rights in rem, shares, stock and any other form of participation in a company or enterprise, claims to money or to any performance under contract having a financial value, intellectual property rights, rights conferred by law or under contract to carry out economic activity related to an investment, including rights to search for, cultivate, extract or exploit natural resources (Archontaki & Simsive, 2013).

In our view, the concept of investment falling within the scope of the provisions of these agreements should be delimited more clearly and more precisely. One option would be to focus on the concept of FDI which constitute the most important form of investment. For this purpose it could be used as a model the definition of FDI contained in the jurisprudence of the CJEU. According to this jurisprudence, the concept of direct investment concerns investments made by natural or legal persons which serve to establish or maintain lasting and direct links between the investor providing the capital and the company to which that capital is made available in order to

carry out an economic activity¹⁴. As regards shareholdings in new or existing undertakings, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him to participate effectively in the management of that company or in its control¹⁵. It would also be useful to define the concept of portfolio investment given that according to modern practice most international investment agreements cover comprehensively both FDI and portfolio investment. The CJEU has ruled that portfolio investments are investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking¹⁶.

In any case, any bilateral agreement should determine certain characteristics which an asset owned or controlled by an investor must have in order to be considered as an investment falling within the scope of the provisions of the agreements. Specifically, this should have the characteristics of an investment, mainly duration, freezing of funds or other resources, benefit or profit expectation or assumption of risk. The determination of these conceptual features is an important innovation in comparison with the status of existing BITs.

In contrast, the rule stipulating that only investments made in accordance with the legislation of the host country are covered by the Agreement should be maintained in force.

A key amendment which should be introduced in the text of the BITs concerns the notion of investor. In most Greece-SEE BITs (Greece-Russia BIT, Greece-Albania BIT, Greece-Moldova BIT, Greece-Georgia BIT), the definition of the term “investor” refers to natural and juridical persons of the other contracting party without further clarification. Specifically this term shall mean with regard to either contracting party: (a) natural persons having the nationality of that party in accordance with its law, (b) legal persons constituted in accordance with the law of that party and having their seat within its territory. This situation allows enterprises having no effective economic activities in the country concerned to make use of a BIT provisions to raise claims against the host country before an ISDS tribunal.

It is necessary to avoid abuse and ensure that the protection provided by the BITs to investors does not extend to so-called “mailbox” companies. It should be clarified that in order to qualify as a legitimate investor of a contracting party, a juridical person, an enterprise is required to exercise substantive business activities in the territory of that party. Each of the above BITs should be amended so as to provide that the benefits arising from the investment protection provisions will extend to a juridical person set up under the law of Greece and whose head office or registered office is located in the territory of that country only if this person has a real and continuous economic link with the economy of Greece. Moreover, this specific wording “*effective economic activities*” is already contained in the other three BITs (Greece-Serbia, Greece-Armenia, Greece-Bosnia).

4.2. THE CLARIFICATION OF FOREIGN INVESTMENTS AND INVESTORS TREATMENT STANDARDS

4.2.1. THE FIAR AND EQUITABLE TREATMENT (FET) STANDARD

All Greece BITs provide for the fundamental fair and equal treatment (FET) standard. Its objective is to protect investors and their investments against host state treatment which is arbitrary, unfair or abusive. However those agreements simply state that investments by

¹⁴ Judgement of 17 October 2013, case C-181/12, Judgment of 10 November 2011, European Commission v Portuguese Republic, case C-212/09.

¹⁵ Judgment of 23 October 2007, Commission of the European Communities v Federal Republic of Germany, case C-112/05, 2007 I-08995.

¹⁶ Judgment of 22 October 2013, joined cases C- 105/12 to C- 107/12.

investors of a contracting party(Greece) shall, at all times, be accorded fair and equitable treatment in the territory of the other contracting party (Russia), without further clarifications.

The fact that FET standard is not clearly defined leaves unwelcome discretion to the arbitral tribunals to interpret it in a way that confers either too many or too few rights to investors. The broad interpretation of the principle of FET make it possible for foreign investors to launch claims against the host states challenging their right to legislate for the pursuit of legitimate public policy objectives.

It is necessary to clearly define the FET standard, namely to establish a closed list of actions or measures that can constitute a breach of the standard. In other words, any bilateral agreement should specify what is the host state behavior that is not allowed. In this way, this state would be held responsible for a breach of the FET standard only if it has adopted and implemented one of the specific prohibited measures. Among these measures should be included (a) the denial of justice, (b) the disregard of the fundamental principles of due process, (c) the manifest arbitrariness, (d) the abusive treatment such as coercion, duress or harassment, (e) the targeted discrimination based on race or religious belief.

Another crucial point to be clarified concerns the issue of investor's legitimate expectations. An investor can claim the payment of compensation from the host state simply arguing that this state has amended a law or adopted a measure in the exercise of its powers in order to achieve a legitimate objective relating to the protection of public order and security, the protection of public health, the consumer protection. To prevent this possibility, the BITs should provide that a violation of legitimate expectations exists only in the case where an investor made an investment just because the host state had made specific and clear promises on which the investor based his decision to make the investment and which, however, subsequently this state did not respect. In other words, the investor would not have made the investment if he had not given this specific promise by the host state.

4.2.2. THE PRINCIPLE OF NON DISCRIMINATION TREATMENT

The principle of non-discrimination should remain a key element of bilateral treaties. The clauses for the application of this fundamental principle, and particularly the national treatment clause and the MFN clause should cover comprehensively both establishment/admission of the investment and its subsequent operation. The definition of non-discrimination should be made more precise so as to stipulate that foreign and domestic investors must operate under like circumstances. Each contracting party shall grant to investors of the other party and to covered investments treatment no less favorable than the treatment accorded in similar circumstances to its own investors and investments (national treatment) or to investors and investments of any third country (MFN), as regards the establishment, acquisition, expansion, management, operation, management, maintenance, operation, use, and sale or disposal of their investments in the territory of the first party.

It is also necessary to lay down provisions introducing exceptions to the principle of non-discrimination, following the model of the Treaty on the Functioning of the EU and in particular Articles 51 and 52 of TFEU (Dimopoulos, 2012). Under these exceptions, a party (eg Greece) will be able to adopt and implement measures necessary inter alia: (a) for the protection of public safety, public morals or to maintain public order, (b) to protect the life or health of humans, animals or plants. Some areas of economic activity should also be excluded from the scope of the principle of non-discrimination. Among these areas are included (a) the procurement by government of goods and services made for governmental purposes and not for commercial resale, (b) audiovisual services, (c) activities related to the exercise of public authority.

4.2.3. THE CLARIFICATION OF FOREIGN INVESTMENT EXPROPRIATION FRAMEWORK

Another crucial issue on which it is necessary to establish clearly formulated rules regards indirect expropriation (a regulatory measure of the host state which even if it does not entail the direct transfer of the property right, it has an effect equivalent to expropriation). This is one of the most controversial notions of investment protection system.

The right to property is crucial to investors since the greater risk that they may incur in the territory of the host state is the risk of having their investment expropriated without compensation.

The investment agreement should provide for a detailed set of measures that will guide the arbitrators on how to judge whether a measure taken by the host state constitutes indirect expropriation. The aim is to establish a clear legal framework within which a foreign investor (company) will not be able to claim compensation based on the decrease in profit caused by a measure adopted by the host state to protect the public interest.

The majority of BITs simply states that the expropriation provisions also cover indirect expropriation without further clarifications.

It is necessary to introduce specific provisions which:

(a) clarify what constitutes an indirect expropriation in order to avoid claims against legitimate public policy measures. Direct expropriation occurs if an investment is nationalized or otherwise directly expropriated through the official transfer of property titles or the definitive seizure. Indirect expropriation results from measures adopted by the host state, which have a similar effect to that of a direct expropriation, only when there is substantial deprivation of an investor of the fundamental property rights relating to his investment, including the right to use, to exploit his investment without formal transfer of titles or definitive seizure.

(b) make compulsory the investigation/analysis, where appropriate step by step, to determine whether a measure adopted by the host state, constitutes an indirect expropriation. The object of this procedure should be mainly the economic effects of the measure, its duration and its nature.

(c) clarify that the measures adopted and applied by a host country to fulfill a legitimate objective of protection of the public interest, such as to protect the health, safety and the environment and which are not discriminatory, cannot be considered to be an indirect expropriation.

4.2.4. THE NEED TO ENSURE THE COMPATIBILITY OF THE TRANSFER CLAUSE WITH EU LAW

Like most BITs, the Greek BITs contain specific transfer clause under which each party guarantees to the investors of the other party the unrestricted transfer, without undue delay, in freely convertible currency, of various types of capital related to investment and in particular, profits, interest, amounts of liquidation of the investment, amounts corresponding to the repayment of loans or to the payment of expenses.

This clause is compatible with TFEU articles 63.1 and 63.2 on the free movement of capital and payments between member states and third countries, since they ensure transfer of funds related to an investment. However, the BITs do not introduce an exception to the above rule in contrast to TFEU articles 65 and 66 which provide for exceptions to the fundamental principle of free movement of capital. The CJEU ruled on specific cases (Denza, 2010) that some EU member states failing to adopt appropriate steps to eliminate incompatibilities concerning the

provisions on transfer of funds established by the BITs concluded with third countries, breached their obligations under TEC article 307¹⁷.

In order to ensure the compatibility of Greece BITs with the provisions of primary EU law, it is necessary to introduce exceptions to the general principle of free movement of capital and payments, following the model of Articles 65 and 66 of TFEU.

Specifically, each BIT should be amended to ensure the ability of Greece to take protective measures with regard to capital movements and payments, including transfer, provided that certain exceptional circumstances exist. In particular, Greece should be entitled to adopt measures if capital movements and payments, including transfer, prevent or threaten to prevent significantly the operation of economic and monetary union of the EU. The Greece should also be entitled to adopt or maintain restrictive measures concerning, inter alia, transfers related to investments in the case it faces or risks to face serious balance of payments difficulties and serious external financial difficulties.

Finally, the BITs should stipulate that a party may temporarily take the absolutely necessary safeguard measures affecting transfer on capital investments when in exceptional circumstances capital movements cause or threaten to cause serious difficulties for the implementation of its monetary or exchange policy.

4.3. THE INTRODUCTION OF IMPROVEMENTS TO THE ISDS SYSTEM

The Greece BITs establish an Investor-to- State Dispute Settlement (ISDS) system which is necessary for the effective enforcement of the protection accorded to investors. Disputes between an investor of a contracting party (Greece) and the other contracting party (Moldova) concerning an obligation of the latter under the relevant BIT in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way. If such disputes cannot be settled within 6 months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the contracting party in the territory of which the investment has been made or to international arbitration and more specifically either to the International Centre for the Settlement of Investment Disputes (ICSID) or to an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) (Koutoglidou, 2011).

It is necessary to introduce improvements in order to ensure the enforcement of investment treatment standards but also to prevent investors from having recourse in an abusive manner to the ISDS system.

In the framework of achieving that aim, the agreements should determine precisely the specific investment protection provisions the breach of which may give rise to the right of investors to have recourse to the system against the host state and to claim compensation. Among the improvements to be introduced, the establishment of the possibility of dispute settlement through alternative means, including consultations between the investor and the host party, and recourse by common agreement to mediation, occupies, in our view, an important place.

Conflicts of interest should be prevented through the adoption of a detailed binding code of conduct for arbitrators acting in an ISDS dispute. Each BIT should provide for a list of arbitrators pre-agreed by the disputing parties. If there is a disagreement between them the arbitrators should be selected from this list.

¹⁷ See Judgment of 03.03.2009 case C-205/06, Commission v. Austria, ECR. I-130, Judgment of 03.03.2009 case C-249/06, European Commission v. Sweden, ECR. I-133, Judgment of 19-11-2009 case C-118/07, European Commission v. Finland, ECR. I-10889.

The agreements should provide for the possibility to create an appellate mechanism for the examination, on legal questions, of the decisions of arbitral tribunals.

Finally the agreements should:

- include provisions establishing a fast track system of rejection of unfounded or frivolous claims of investors or seeking to discourage them from submitting such claims against the host party;
- clarify that the losing party must pay the costs. The investor whose claim was rejected is obliged to pay all the costs including those of the host country;
- promote the introduction of full transparency in ISDS disputes and especially, (should) provide for publication of documents and conduct of open hearings and ensure access or the possibility of third parties (NGOs, business associations, etc.) to make submissions.

5. CONCLUSION

It is undeniable that BITs create a legal framework appropriate for the development of investment activities. After all, their primary purpose has exclusively economic character since it consists in intensifying the economic cooperation between the contracting parties to the mutual benefit of both of them on a long term basis and (in) creating favorable conditions for investments by investors of either party in the territory of the other party.

Moreover, these agreements provide guarantees and rights to investors who can claim compensation from host states in any case they consider that they suffered losses due to a measure adopted by those states.

This exclusive economic dimension should be balanced by enshrining the regulatory right of the contracting states. In particular specific clauses should be introduced in each of the BITs. These clauses will underpin their ability to adopt measures promoting several objectives related to the defense of public interest, namely the protection of public order and safety, public health, the protection of consumers and environment.

It is necessary to establish clear and unambiguous rules so that neither the public authorities of the host country can adopt discriminatory and arbitrary measures causing losses to foreign investors nor those investors are entitled to claim compensation from host states for any measure adopted by them even if they pursue legitimate public policy objectives.

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