DOI: 10.36719/AEM/2007-2020/52/47-50

Aytan Shamshir Aliyeva
Baku State University
eayten888@gmail.com

PROTECTION OF FOREIGN INVESTMENT IN THE EUROPEAN: EU INVESTMENT LAW SOURCES

Key words: *European Union, acquis communautaire, foreign direct investment, TFEU, TEU, court decisions*
Açar sözlər: *Avropa İttifaqı, acquis communautaire, xarici birbaşa investisiya, AİFM, AİM, məhkəmə qərarları*
Ключевые слова: *Европейский Союз, acquis communautaire, прямые иностранные инвестиции, инвестиционное право, TFEU,TEU, судебные решения.*

Introduction

The regulation of foreign investment is one of the most relevant and controversial topics in European Union law and international investment law. The EU Foreign Investment Law is becoming a critical issue, especially after the introduction of the EU competence in foreign direct investment after the Lisbon Treaty and the recent successful problem of the compatibility of bilateral investment treaties of the Member States with EU law. Within this framework, the purpose of the article is to determine whether and to what extent the EU has become an international player in foreign investment. Studying the existing regulatory framework regarding the scope and use of the EU competence and its legal consequences. She examines the foundations on which the EU investment policy is based and which will be based in the future. Recent years have witnessed a growing backlash against foreign direct investment (FDI) across several of the world's biggest economies. The United States, Canada, Australia, and the European Union have all amended existing laws or proposed new legislation for screening FDI in key industries. (1)

A series of blocked or abandoned deals demonstrate that recipient countries have stepped up their enforcement and changed the international deal landscape in fundamental ways. Countries that historically have made little effort to distinguish between domestic and international investors have strengthened their defenses against foreign parties. Meanwhile, countries that already subject investments to review have revamped their laws and broadened the scope of review to capture transactions structured to circumvent the review process. Legislative proposals have emphasized the need to protect emerging technologies like artificial intelligence, wireless communications, and military technology. (8)

The claims relating to norms of an international law of foreign investment can be accepted as principles of international law only if they are based on an accepted source of public international law. These sources of international law are stated in Article 38 (2) of the Statute of the International Court of Justice. It will be useful to indicate the sources available to build up the principles of an international law on foreign investment.

Treaties

There have been several regional treaties on foreign investment. The strongest provisions are those contained in Chapter 11 of the North American Free Trade Agreement (NAFTA). The provisions of this chapter largely track the model bilateral investment treaty of the United States. It creates a framework for the free movement of investments within the NAFTA region (the United States, Canada and Mexico). The treaty provides for a strong investor–state dispute resolution mechanism, giving the investor a unilateral right to invoke arbitration against the state.

The ASEAN Treaty on the Protection and Promotion of Foreign Investment contains strong provisions, but, since only approved investments are protected by the treaty, there is sufficient room provided for regulatory control over the entry of foreign investment.

Other regional treaties, such as the Mercosur Agreement, create similar regional arrangements with protection granted in varying degrees to the foreign investment of the participating regional states. The most spectacular of them, if it comes about, is the Free Trade Agreement of the Americas which would cover the whole of North and South America. (9)

TEU and TFEU as sources of European investment law.

The EU is the world's main provider and the top global destination of foreign investment. Foreign direct investment stocks held in the rest of the world by investors resident in the EU amounted to €7,412 billion at

the end of 2017. Meanwhile, foreign direct investment stocks held by third country investors in the EU amounted to €6,295 billion at the end of 2017.

The entry into force of the Treaty of Lisbon in 2009 marked an important milestone in the elaboration of international investment treaty norms within (and without) the Union. By virtue of Article 207 of the Treaty on the Functioning of the European Union (TFEU), foreign direct investment has come under exclusive EU competence as part of the Union's common commercial policy. This transfer of competence was born out of a wish to offer a robust basis for the Union's external economic action and in order to enhance its role in the elaboration of international investment norms. (2)

Several changes to the Common Commercial Policy (CCP) effectuated by the Treaty of Lisbon extend the competences of the Union and are thus in line with this development. (4)

Article 207(1) TFEU regulates EU's competence in the field of CCP and adds FDIs, since the entering into force of the Lisbon Treaty, to the list of EU's treaty-making powers: The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

As follows from the Articles there is no definition of the scope and application of EU's new competence, i.e. the term of FDI. The Commission defines FDI as to "include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity". In such a system, EU would replace its Member States as the respondent in the potential dispute.(10)

Investment arbitrations have become more complicated lately where internal bilateral investment treaties (BITs) between Member States of the European Union (EU) have created questions about the relationship of investment treaties and EU treaties. The fundamental principles of EU law, such as the principles of primacy and supremacy are in conflict with the requirement of unconditional enforcement of International Centre for Settlement of Investment Disputes (ICSID) arbitral awards.(1)

The actions of the EU is triggered by the Micula award according to which Romania has to pay compensation to Swedish investors for breach of the Sweden-Romania BIT, a compensation, if paid, would constitute illegal state aid under EU law. Thus, the question of the relationship of intra-EU BITs and EU law still remain sunanswered. (14)

That common framework is without prejudice to sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests in accordance with Article 346 TFEU. (11)

In 2010, the European Commission took a position against the adoption of an EU model investment agreement. It explained that adopting a 'one-size-fits-all model' would be 'neither feasible nor desirable' and that the Union would need to take into account the particularities of each negotiation, including the interests of its stakeholders and the level of development of its partners. (5) The divergence between concluded member state BITs was noted by both the Commission and the Parliament and the latter, in particular, called on the Commission 'to reconcile these divergences to provide a strong EU template for investment agreements'. However, the Parliament specified that this template or model would also be adjustable according to the level of development of the partner country'. (7)

Despite the uncertainty surrounding the exercise of the new competence and the final shape of EU investment agreements, the EU is formulating an investment policy that goes beyond the new generation of investment agreements, and it is the novelty of this approach that underlines the advent of a new standard. The Union wishes to improve its investment agreements in a twofold approach that targets substantive and procedural standards. (6)

International customary law.

The important role of treaties in international investment law should not lead to an underestimation of the significance of non-treaty rules in investment disputes. Unlike the situation prevalent in many branches of international law, most rules of investment law are included in treaties. Although more than 2,600 treaties (mostly bilateral) regulate investment relations, customary rules of international law play an important role in numerous cases. They are particularly significant where the relations between the host state and the investor are not subject to an investment treaty. (3)

Even where certain treaties are being applied to a particular investment dispute, these treaties often do not regulate all specific questions arising in the particular dispute. Thus, in cases of lacunae, investment treaty rules are supplemented by rules of customary law. (12)

Article 38 (1) (b) of the ICJ Statute presents the two traditional elements of international customary law: general practice and *opinio juris*. As for the first (objective) component, in addition to physical acts, international tribunals often consider various non-physical acts as 'practice'. Such acts include diverse verbal acts (such as declarations) and domestic legislation. (13)

Practice alone cannot lead to the formation of customary law and a subjective element (*opinio juris*) is needed to establish a new rule of international law. The absence of a sense of obligation has led some scholars and tribunals to reject arguments that a series of similar investment treaties give rise to new customary rules. A sense of obligation (i.e. whether a certain behavior is considered as legally obligatory or not) may be manifested by various means, including states' declarations, resolutions of international organizations, international treaties and decisions of international tribunals.

Court decisions

Article 38 (1) (d) of the ICJ Statute provides that judicial decisions (along with scholarly writings) constitute 'subsidiary means for the determination of rules of law'. Though this provision indicates that judicial decisions play only a secondary role, international courts (and remarkably the ICJ) take part in the law-making process and significantly influence the development of international law. Judicial decisions are a subsidiary source of international law. Though stated to be a subsidiary source, the decisions of the International Court of Justice and its predecessor have had an immense influence in shaping the principles of international law. There are other decisions of the International Court of Justice which have peripheral relevance to the subject.

Conclusion

The relationship between intra-EU BITs is complicated and opinions vary depending on which view one takes, which is perhaps the reason why the Commission is asking its Member States to terminate their intra-EU BITs. However, most BITs contain a survival clause, meaning that even after the termination of a BIT, all of its provisions would remain in force and provide protection for investors and investments made before the termination, for a longer period of time, as in the case of Sweden-Romania BIT for twenty years after the termination. This would mean that even if all Member States of the EU would terminate their BITs, the provisions, including the one on investor-state dispute settlement would still remain in force and could be invoked by European investors for twenty years to come. Therefore the termination of the BITs would not solve the issues arisen in connection to the Micula award. They will probably reoccur and be discussed in the years to come.

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Avropadakı xarici sərmayələrin qorunması: AB investisiya hüququ mənbələri

Xülasə

Xarici investisiyaların tənzimlənməsi Avropa Ittifaqı hüququnda və beynəlxalq investisiya hüququnda ən aktual və mübahisəli mövzulardan biridir. Aİ Xarici İnvestisiya Qanunu, xüsusilə Lissabon Müqaviləsindən sonra birbaşa xarici sərmayələrə Aİ səlahiyyətlərinin tətbiq edilməsindən və üzv ölkələrin ikitərəfli investisiya müqavilələrinin Aİ qanunlarına uyğunluğu problemindən sonra kritik bir məsələyə çevrilir. Bu çərçivədə Aİ-nin xarici sərmayə qoyuluşunda beynəlxalq oyunçu olub olmadığını və nə dərəcədə müəyyənləşdirilməsidir. Aİ səlahiyyətlərinin miqyası və istifadəsi və onun hüquqi nəticələri ilə əlaqədar mövcud normativ bazanı öyrənir. Aİ investisiya siyasətinin əsaslandığı və gələcəkdə də qurulacağını araşdırır.

Защита иностранных инвестиций в Европе: источники инвестиционного права ЕС

Резюме

Регулирование иностранных инвестиций является одной из наиболее актуальных и противоречивых тем в праве Европейского Союза и международном инвестиционном праве. Закон об иностранных инвестициях ЕС становится критической проблемой, особенно после введения компетенции ЕС в области прямых иностранных инвестиций после Лиссабонского договора и недавней успешной проблемы совместимости двусторонних инвестиционных договоров государств-членов с законодательством ЕС. В этих рамках цель статья - определить, стал ли и в какой степени ЕС международным игроком в сфере иностранных инвестиций. Изучая существующую нормативно-правовую базу, касающуюся объема и использования компетенции ЕС и ее правовых последствий, она изучает основы. Которых основана инвестиционная политика ЕС и которые будут основываться в будущем.

Rəyçi: prof.Ş.Səmədova

Göndərilib: 14.03.2020 Qəbul edilib:17.03.2020