

Why the European Union should not ditch bilateral investment treaties

With populists corrupting courts, foreign investors need safeguards



Dave Simonds

[Print edition | Leaders](#)

Jun 6th 2019

After the fall of the Berlin Wall and before central and eastern European countries began joining the European Union in 2004, officials in Brussels strongly encouraged bilateral investment treaties (BITs) between the bloc's members and their neighbours to the east. BITs are inter-governmental agreements that govern disputes between foreign investors and host states. Their purpose is to protect investors against discrimination and expropriation (disputes between companies are handled separately). The European Commission hoped they would stimulate investment in the region to the benefit of both investors and newly liberated former Soviet-bloc countries. They did. Thanks in part

to these treaties, inflows of capital soared. Germany, in particular, became a big investor in Hungary and the Czech Republic. bits have become a common way to seek redress in bust-ups originating in the region, with 145 cases filed since 1989.

Over time, however, the Eurocrats have grown cooler towards bits, primarily because they are unhappy with where they are resolved. Arbitration is conducted by the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank body based in Washington. The European Commission argues that this is the wrong forum for all-European investment disputes. It prefers local courts to rule on them, with the European Court of Justice (ECJ) as the last resort. Its stance received a boost in March 2018 when the ECJ decided against Achmea, an insurer that had sued Slovakia for breach of the Dutch-Slovak bit after a change in Slovak law prohibited the distribution of profits derived from private health insurance. A German court had referred the case to the ECJ, arguing that the arbitration clause in the treaty was incompatible with EU law. In the wake of the Achmea ruling the commission proclaimed that all of the more than 190 intra-EU BITs must end by December this year.

The desire to resolve disputes at home rather than in an obscure court across the Atlantic would be understandable if courts across the EU could be trusted. But they can't. In parts of central Europe the domestic judicial system is neither fair nor equitable, because it is increasingly under the influence of politicians. In Poland the governing Law and Justice party has subjugated courts by stacking the Constitutional Tribunal with its cronies and by letting parliament, rather than other judges, choose members of the National Council of the Judiciary, the body that handles judicial appointments. In Hungary the prime minister, Viktor Orbán, has amended the constitution to cow the country's judges. Last week he shelved plans to create a parallel judicial system, which would have handled cases brought against state bodies, only because he worried it would lead to his party's expulsion from the EU parliament's European People's Party (it is already

suspended). And the Czech prime minister, Andrej Babis, recently replaced the justice minister with a loyal foot soldier who he hopes will prevent or delay his indictment for the misuse of EU funds.

In light of the politicisation of the judiciary in much of central Europe, the thought of bits being dismantled at the end of the year fills many investors with dread. If the treaties disappear, so will much of the investment from western neighbours on which the region still heavily relies. Not surprisingly, Germany, France and Austria—all countries whose firms have big investments in central Europe—are opposed to the abolition of intra-eu bits, whereas Poland, the Czech Republic and Hungary are all for it.

One solution would be the establishment of an EU body, modelled on the ICSID, to specialise in investment disputes. But this would take years to set up. In the meantime, the EU should stick with BITs. If it does not, investors will either steer clear of countries with unreliable judicial systems or structure their deals from countries outside the bloc that have bilateral treaties with those within it. Either way, Europe would lose. ■

This article appeared in the Leaders section of the print edition under the headline "Treaty or rough treatment"

Vendeline von Bredow
European Business and Finance Correspondent
The Economist
Bundespressehaus 4413
Schiffbauerdamm 40
D-10117 Berlin
Telephone; +49-30 226 282 0
NEW GERMAN MOBILE PHONE NUMBER +49-160-98110138
Twitter @vahavb