The European Union in International Investment Governance: a Hybrid Approach to Dispute Settlement

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Abstract: *Investor-state dispute settlement and arbitration, in particular, stands at the centre of a process intended to reform the global regime of international investment treaties. The mechanism's negative impact on public decision-making processes and its inherent shortcomings, such as an absence of transparency and a lack of arbitrator independence, have impelled moves to redesign the system. As a leading actor in the international investment landscape, the European Union (EU) has proposed replacing traditional arbitration with a specific court system for each bilateral agreement containing investment arrangements. However, the proposed system retains key aspects of classic arbitration whilst posing as yet unresolved issues in relation to the interaction with the EU Court of Justice and the current institutions of international arbitration. Nevertheless, the EU's initiative is intended merely as a transitional remedy, ultimately leading to a multilateral judicial institution that would bring greater consistency to the resolution of investment disputes. Though important for the contribution it makes to the current debate, the EU's proposal has faced criticism for some crucial deficits. Therefore, if the EU's project is to prosper, it must first be discussed and agreed upon as part of a broader agenda of investment governance reform at a global level.*

Keywords: *investment treaties, investor-state dispute settlement, arbitration, court system, multilateral investment institution.*

Introduction

Investment treaties have traditionally been negotiated between developed and developing countries. More recently, however, developing countries have begun signing investment treaties with one another. Among developed countries, investment treaties are still rare, but this situation too appears to be changing (UNCTAD, 2013).

Despite the proliferation of such treaties, there is no multilateral treaty governing international foreign investments. The rules and norms governing parties' commitments are provided by the investment treaties themselves. Although there are significant differences between them, it is possible to identify certain core provisions in the different texts. For example, they all include a number of provisions establishing a suite of basic rights and guarantees for foreign investors, such as compensation for expropriation, fair and equitable treatment, non-discriminatory treatment and the fair transfer of income (Dolzer and Schreuer, 2008: 89-194).

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Investment treaties also provide procedures for settling disputes, either between the parties to the treaty or between the investors and the State. In the latter case, the investor-state dispute settlement (ISDS) mechanism enables investors alleging a violation of their rights under the treaty to refer the dispute to arbitration, normally at the International Centre for the Settlement of Investment Disputes (ICSID)[2]. The inclusion of these ISDS mechanisms marks a substantial departure from traditional rules of International Law, in that it places the investor on equal terms with the State. The possibility of avoiding domestic courts and submitting the dispute to an arbitration body as a more neutral, independent procedure is generally accepted. This guarantee to the investor is further backed by the host State's anticipated consent to such arbitral settlement in most investment treaties. This private arbitration arrangement has sparked particular controversy due to a significant increase in disputes and the ability of foreign investors to lodge multimillion-dollar claims against a wide range of host State actions, such as the introduction of new environmental and public health measures and tax increases (Titi, 2014: 363-365). The strongest criticism levelled against investment treaties is therefore related to their impact on national governance, which is leading some States to change their legislation on foreign investment (Bonnitcha, 2017: 7-8).

Since the Treaty of Lisbon came into force on 1st December 2009, the EU has had jurisdiction over foreign direct investment. Drawing on its new powers, the EU has been negotiating international investment agreements and investment chapters in large free trade agreements ever since. Both kinds of international instrument include protection and enforcement mechanisms to tackle potential disputes, including both state-state and investor-state arbitration (ISA). As yet, there have been no cases of ISA at EU level, but the European Commission initially advocated strongly in favour of this arrangement, for example in its negotiations with Canada on the Comprehensive Economic and Trade Agreement (CETA); with the United States (US) on the Transatlantic Trade and Investment Partnership (TTIP) and with Singapore on a large Free Trade Agreement (FTA). However, in response to growing public opposition to the investments provisions in the TTIP, and ISA in particular, in 2015 the European Commission changed its stance, proposing substitution of ISA by a permanent investment court for each EU agreement. Beyond this proposal, however, the European Commission's ultimate goal is to create a multilateral investment institution under the umbrella of a broad global international agreement.

This paper analyses the EU's proposals for an investment judicial system and assesses its contribution to current governance in international dispute settlement. After examining the real extent of EU power and policy on foreign investment and the current international framework of ISDS, the paper goes on to argue that the EU's initiative for redefining the system is not actually so innovative, given that the proposed permanent investment court shares many aspects with ISA, while the project for a multilateral institution ignores substantive issues concerning investment protection. The paper concludes that despite the

[2] The ICSID is currently the leading institution of investor-state dispute settlement provided by most international investment treaties and in numerous investment laws and contracts. It was created by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, in force since 14 October 1966. It now has 153 Contracting Parties. More information is available at https://icsid.worldbank.org/en/Pages/about/default.aspx (accessed 16 October 2018).

important EU impulse, multilateral consensus will be required within a global forum on the priorities and actual extent of the system reform.

EU Powers on Foreign Investment: a New Emerging Policy

Under the Lisbon Treaty, Member States surrendered their power to conclude investment agreements to the EU. This new competence was framed within EU trade policy, an area in which it holds exclusive power under Article 3 of the Treaty on the Functioning of the European Union (TFEU). This extended the EU's external trade powers to include 'foreign direct investment' as a relevant issue of the common commercial policy[3].

However, since its introduction, the actual extent of the EU's new power has been a cause for dispute, since Article 207.1 explicitly refers to 'foreign direct investment' (FDI), thus suggesting that the new power is limited to this kind of investment and does not extend to foreign portfolio investment. According to EU case law, FDI includes 'investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control', while portfolio investment involves 'investment in the form of 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 undertaking'[4]. According to the interpretation of the EU Court of Justice (EUCJ), therefore, in an FDI an investor creates or acquires a company in another country. In portfolio investment, an investor buys equity in or debt of a foreign company, without having a long-term interest in the firm or any influence over its management.

Until mid-2017, the European Commission, as the EU's main external trade actor, advocated for full power over investment, arguing that portfolio investments were implicitly covered by the EU's internal power on capital and payments (Articles 63-66 TFEU) (European Commission, 2010: 8). Some Member States, however, held that the EU's power was strictly limited to direct investment. In 2014, the European Commission itself finally referred the disputed dimension of EU power to the EUCJ, pursuant to Article 218.11 TFEU, during talks on the FTA with Singapore, the first comprehensive EU trade agreement including investment provisions to be negotiated following the Lisbon Treaty. In its Opinion of 16 May 2017, the EUCJ finally determined that 'the power to regulate foreign investments depends on whether the investment qualifies as an FDI or a portfolio investment. The FDI belongs to the EU's common commercial policy, which is within its exclusive legislative competence, so the EU has the right to conclude international agreements and adopt autonomous measures with regard to FDI'. The Opinion further

[3] Article 207.1 TFEU provides that 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements related to trade in goods and services, the commercial aspects of intellectual property, foreign direct investments, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

[4] See, *inter alia*, Case C-171/08, Commission v. Portugal, Judgement of 8 July 2010, paragraph 49, ECLI:EU:C:2010:412.

stated that 'investments that do not qualify as FDI, i.e. non-direct or portfolio investment, constitute movements of capital on the internal market for the purpose of Article 63 TFEU and they therefore fall under the shared competence between the EU and the Member States'[5].

With the border clearly demarcated between FDI —which falls under common trade policy as an exclusive power of the EU— and non-direct foreign investments as a shared power, another competence issue that arises is to determine whether the EU's exclusive competence to regulate FDI include the right to bind Member States to subject such investments to screening mechanisms for national public security reasons. FDI screening procedures are quite common in many developed countries, and are provided for by some international organizations, such as the World Trade Organization (WTO) and the Organization for Economic Cooperation and Development (OECD) (Wehrlé and Pohl, 2016). Screening involves a review by the State authorities, which may restrict or impede foreign investments, usually on grounds of national security. Many EU Member States perform such screenings, albeit the extent and the procedures vary considerably (Grieger, 2017: 7). However, there is as yet no EU-wide FDI screening system. What is clear, however, is that an EU mechanism of this kind would only be applicable to FDI and not to portfolio investments, to judge by the EUCJ's Opinion of May 2017. Making use of the EU's competence on FDI, in September 2017 the European Commission proposed a Regulation on this matter. The chief aim of the Regulation is to introduce a common approach to FDI screening by improving cooperation and coordination between Member States when reviewing transactions affecting security or public order. It would still be up to the individual Member States to assess what comprises a national security concern, but this appraisal would be subject to a form of cooperation. The proposal also enables the European Commission to issue opinions and screen direct investments to businesses receiving support from the EU funding (European Commission, 2017).

It therefore seems unlikely that the proposed EU screening mechanism for FDI would shift any existing power from Member States to the EU, although this will be confirmed in subsequent developments of the proposal.

Another area of controversy relates to investment protection. There has been wide debate as to whether EU powers extend to this area —i.e. certain standards of protection in the post-investment phase such as fair and equitable treatment, protection from unlawful expropriation— or whether it is limited to investment liberalization (e.g. pre-established market access and national treatment). Bilateral investment treaties concluded by Member States include provisions guaranteeing protection in the post-investment phase. The Commission has always held that the EU's new power on FDI extends to both investment liberalization and investment protection, enabling the EU to conclude bilateral investment treaties and trade agreements that include investment arrangements. Some Member States, however, have argued that EU competence is limited solely to investment liberalization, while power over investment protection remains in the hands of Member

[5] EUCJ Opinion 2/15 of 16 May 2017, paragraphs 80, 84 and 227, ECLI:EU:C:2017:376. As a result of the Court's Opinion, the European Commission presented an amendment of the initial agreement with Singapore in April 2018. Concretely, it drafted two separate instruments: a free trade agreement and an investment protection agreement. Only the last instrument will require ratification by Member States (European Commission, 2018).

States. Most legal experts agree with the European Commission's view, based on the rationale that the Union's competence over the trade of goods and services is not confined to market access issues (e.g. tariff or import quotas) but also extends to post-importation aspects, such as the granting of national treatment and most-favoured nation status in respect of taxes and other internal laws and regulations. Therefore, limiting EU power to investment liberalization would impair the effective development of EU policy on FDI (Waibel, 2013:16). In its Opinion of 16 May 2017, the EUCJ has also brought clarity to this aspect, confirming that the EU's exclusive competence includes 'market access in the area of investment and investment protection as far as it concerns foreign direct investment' (paragraphs 77 and 109). Indeed, the Court's Opinion identifies only two investment-related issues as shared competences, to wit, portfolio investment and investor-state dispute settlement (paragraph 305).

The EUCJ therefore appears to have definitively clarified the allocation of competences between the EU and Member States in trade policy, particularly with regard to investment. However, the fact is that there is as yet no EU bilateral investment treaty in force. The EU is currently negotiating treaties of this kind with China and Myanmar, but these will probably take some time to be concluded. Until such time as EU bilateral investment treaties come into force, the around 1,400 bilateral investment treaties concluded by individual Member States remain in force, providing protection to EU investors abroad and to investors in the EU. Until they are replaced by EU treaties, Regulation EU 1219/2912 provides transitional rules for all such treaties[6]. The Regulation, which came into force in January 2013, requires Member States to notify the European Commission of any bilateral investment treaties signed prior to 1 December 2009, when the Treaty of Lisbon came into force. Articles 5 and 6 empower the European Commission to evaluate the treaties and demand that the Member States remove any 'obstacle' identified. Under Article 9, the European Commission can also review bilateral investment treaties signed by Member States after 1 December 2009, as well as negotiations on future treaties.

However, the EU has also been exercising its new power over investments by including specific chapters on this issue in the major trade agreements it has been negotiating with third countries in recent years. Treaties with Canada, India, Egypt, Japan, Jordan, Libya, Malaysia, Morocco, Tunisia, Thailand, Vietnam and the US include investment protection clauses on fair and equitable treatment, full protection and security, national treatment and most-favoured nation, as well as guarantees against uncompensated expropriation[7]. As for the procedure used for addressing investor-state dispute settlement, an aspect that EUCJ Opinion 2/2015 considers to be of shared competence[8], the EU's preferred mechanism appears to be ISA.

Although there is as yet no experience of ISA, given that most of these agreements have yet to come into force, the exception being the CETA signed with Canada, which has been

[6] Regulation EU 1219/2912 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investments agreements between Member States and third countries, OJ L351/40 of 20 December 2012.

[7] A detailed overview of the trade agreements and investment treaties negotiations is available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 16 October 2018).

[8] Instead, state-to-state dispute settlement falls within the EU's exclusive power. See paragraphs 285-305 of Opinion 2/15.

provisionally in force since September 2017 (European Commission, 2017a), the reality is that there is nothing new about ISA in the EU. As a contracting party to the Energy Charter Treaty[9], the EU accepted ISA as a tool for settling investment disputes, albeit to date no case has been brought against the EU. On the other hand, some Member States, such as Italy, Spain or the Czech Republic have been involved in cases relating to cutbacks on solar energy subsidy programs (Reinisch, 2016). Notwithstanding, the ISA clauses of the Energy Charter Treaty have provided useful experience and inspired EU legislation on the allocation of financial burdens arising from ISA awards, especially in situations where both the EU and its Member States' actions may be challenged[10].

The European Parliament and the Council, as institutions actively involved in the process of negotiating and concluding international agreements, have also initially shown themselves to be positive towards ISA, thus supporting the European Commission's stance. The European Parliament, in particular, was endowed by the Lisbon Treaty with new powers in the field of EU international agreements, including the right to give consent in five specific categories of agreements. These include 'agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the Parliament is required' (Article 218.6 (a) TFEU). This means that investment arrangements included in trade or investment agreements are also currently subject to stronger public scrutiny at EU level. The European Parliament has had no hesitation in using its new power, as it did in 2012 when it vetoed the conclusion of the Anti-Counterfeiting Trade Agreement (Duncan, 2012).

Whether such a rejection had an impact on the European Commission remains uncertain, but the fact is that in 2014, following the institutional changes after the European elections, Cecilia Malmström, the new Commissioner for Trade, announced a different approach to ISA. In a speech to the European Parliament in March 2015, she stated that ISA was 'not fit for purpose in the 21st Century', and that she wanted 'the rule of law, not the rule of lawyers' (Malmström, 2015). At the time she made her statement, the EU was negotiating the TTIP with the US, an agreement which included ISA as the main settlement mechanism for investor-state disputes. This marked a turning point in the EU's position on ISA, lining up with other opponents who feel that the system primarily protects the rights of investors over the public interests of the host country. The controversy at EU level was merely a reflection of a broader international debate on how investment protection should operate.

The International Framework for Investor-State Dispute Settlement: Redefining the Current System

The concept of ISDS has grown in importance in recent decades as a result of the promotion and protection of investments in the international trade and global economy.

[9] The consolidated version of this Treaty and related documents are available at http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (accessed 30 January 2018).

[10] Specifically, Regulation EU 912/2014 of the European Parliament and of the Council of 23 July of 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, OJ L257/121 of 23 July 2014.

Of the settlement arrangements available, arbitration is the most widely used in both bilateral and multilateral investment treaties, but its practice has allowed investors to challenge sovereign government acts. This state of affairs is now changing, with many States and some regions taking action to redefine the role and rules of ISDS.

The Arbitration System: Investment over Public Interest

In essence, the arbitration mechanism provided for in investment treaties entitles private investors to initiate legal proceedings against the host State of their investment if they consider that their rights have been violated through expropriation or other measures that prevent them from benefiting from their investment.

One of the key ideas behind arbitration settlement is to guarantee investors' rights in developing countries, which generally have a poor democratic culture and high levels of corruption. Investors' claims are not heard before domestic courts, which are seen as being biased in principle, nor can they be brought before an international court, since private actors do not have access to such jurisdiction. Instead, proceedings are brought before an arbitration panel, intended as a neutral forum, comprising international business lawyers chosen by common accord between the parties to the dispute and in accordance with the provisions of the investment treaty (Alvárez *et al.*, 2016:28).

Increasingly, however, arbitration-based ISDS has been considered to be more favourable to private investors to the detriment of States' interests. One of the criticisms made concerns the privileged path the system affords private investors, a path that is not available to nationals of the host State and which has the potential to discourage the host States from exercising their right to regulate (Aisbett and Mc Ausland, 2013). Indeed, the prospect of foreign investors' challenging government decisions on the grounds that they are harmful to their economic interests might deter national authorities from adopting laws or defining rules on matters of public interest, such as public health, environmental protection, labour laws and consumer-protection regulations. This self-censorship by the competent authorities could potentially reduce the government's policy space. While there has been little research to date into the extent to which investment treaties reduce government policy space, it is certainly true that developing countries are more exposed to such impacts than developed countries, since they are net capital importers and have less legal capacity to assess the implications of investment treaties and respond to the threat of arbitration provisions established by foreign investors (Bonnitcha, 2017: 10-11).

Another major criticism levelled against arbitration settlement is the alleged lack of independence and impartiality of the arbitrators, given that as the principal claimants, the investors are directly involved in appointing the members of the arbitration panel that will hear their dispute. The result is that investors tend to pick arbitrators who are most likely to decide in their favour (Investment Treaty Group, 2016: 53-54). Another related criticism involves the so-called 'double hat' — the situation whereby an individual acts as a counsel in one international investment case and then as an arbitrator in another related to a similar issue. It is obvious that the arbitrator might sway the settlement of the dispute towards a decision that will later be favourable when they act as counsel in another case dealing with a similar issue (UNTACD, 2014: 27-28).

The net result of all these controversial aspects is a regime controlled primarily by investors, their lawyers and their arbitrators, making States increasingly vulnerable to allowing corporate interests to override public interests and democratic processes (Bernasconi-Osterwalder and Rosert, 2014). The number of ISDS cases has increased steadily since the late 1990s peaking up to around 817 in 2017, with more than one hundred States having faced claims from investors. The potential and impact of ISDS have stirred up a storm in some EU Member States —particularly Germany, France and Austria— even if to date EU companies have in practice been the chief users of arbitration settlement[11].

Given its conspicuous flaws, the ISDS system is currently subject to redefinition at a global level.

Towards Enhanced Processes and New Mechanisms

Many States and some regions are currently mobilizing to improve the existing ISDS regime. The new approaches can already be seen in some national and regional investment treaties (UNCTAD, 2018).

Different degrees of reform can be observed. Some countries have chosen to retain the current arbitration system, introducing only minor improvements. The US and Canada, for example, have implemented transparency rules, since investment arbitration tends to be a very secretive procedure. The US has also included provisions on a potential appellate mechanism for ISDS in some treaties. Along the same lines, some regional organizations, such as the Southern African Development Community (SADC), have made it a requirement for an arbitrator not to act simultaneously as a counsel on another international investment case. Another procedural improvement introduced by SADC is the requirement for investors to exhaust all local remedies before instituting claims against States. This condition has also been incorporated by India in its bilateral investment treaties (Bernasconi-Osterwalder, 2015: 2-3).

Other reforms entail returning to other existing conflict resolution alternatives, such as state-state dispute settlement. This mechanism may rely on arbitration or on existing judicial remedies, such as the International Court of Justice or the regional courts. Australia, the US and Brazil are among the States that have incorporated state-state dispute settlement in their recent bilateral investment treaties. Other alternatives currently being promoted at national and multilateral level include conciliation and mediation[12]. Morocco, Egypt and Thailand already include mediation among the means of dispute settlement available in their model treaties. The EU has also introduced mediation provisions in the CETA with Canada and the FTA with Singapore (Fernández Masiá, 2015: 38-39).

However, some discussions at multilateral level go beyond applying patches to the

[11] For example, German firms initiated 57 proceedings, while the country was a defendant in only three cases in 2017. In France, 41 cases were brought by private enterprises in the same year and only one against the State. In Austria, the ratio was 17 to 1 (UNTACD, 2017).

[12] Conciliation is a formal procedure whereby a third party monitors the proceedings and issues a recommendation to the parties to the dispute. Mediation is a more informal procedure, in which a third person helps the parties to find a feasible solution by meeting them and facilitating dialogue (UNCTAD, 2010: 55-60).

current regime, recommending instead a more in-depth reform. Some of the more important initiatives include proposals for an Investment Dispute Resolution Facility and an International Dispute Settlement Agency for Transboundary and other Investments (Berbasconi-Osterwalder, 2015:5; IISD, 2016: 3-4). Both proposals agree that the new, alternative mechanism for resolving disputes should not be restricted to one particular form of negotiation and one particular way of resolving disputes. Rather, it should include and address relationships between a wider set of stakeholders (investors, governments, individuals and local communities), providing opportunities to resolve disputes by various means.

On its side, the EU has also contributed to the debate on new mechanisms for dealing with investment-related disputes; in 2015 it proposed the creation of an investment court system. The purpose of this new remedy is to discontinue the tradition of using arbitral tribunals to solve investor-state disputes. In practice, however, the proposed system has proved not to be so innovative or definitive either, since it turns out to be part of a transition towards a more permanent, multilateral solution.

The EU's Proposal for a Multilateral Investment Court

In September 2015, during talks on the TTIP with the US, the European Commission put forward a detailed proposal on creating an investment court system to handle future investment disputes. The proposal was not intended to be limited to the TTIP, but to apply to all future EU trade agreements including investment chapters. Despite the name 'court system', the mechanism actually shares a number of features with arbitration, making it a hybrid settlement procedure. In any event, the investment court system is intended as a transitional regime whose long-term goal is to promote the establishment of a truly multilateral investment court.

The Investment Court System: a Bilateral Hybrid Mechanism

Specifically, the design of the investment court system is set out in Section 3 of the draft text of the TTIP (European Commission, 2015). The proposal is intended as a response by the EU to growing criticism of the ISDS in bilateral investment treaties and investment chapters of free trade and economic agreements. It also responds to the European Parliament's resolution on TTIP of July 2015, which contained a mandate to replace ISDS by a new system that was more 'court-like', composed of 'independent professional judges' and equipped with an appellate mechanism[13]. Besides the TTIP, the new settlement regime is also mentioned in the CETA with Canada[14], in the FTA with Vietnam[15], as well as in the

[13] European Parliament. 2015. 'Resolution of 8 July 2015 containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', at paragraph 2d (XV). Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN (accessed 30 January 2018).

[14] The full text of the EU-Canada Free Trade Agreement can be found at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 16 October 2018).

[15] The text of the EU-Vietnam Free Trade Agreement, after the conclusion of negotiations in December 2015, is available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (accessed 16 October 2018).

new investment protection agreement with Singapore[16].

However, the design and features of the proposed investment court are not entirely novel. Although some aspects are indeed new, it shares several elements with the current ISDS system. The most innovative feature of the European Commission's proposal is the creation of a tribunal of first instance and an appeal tribunal to hear investment claims under the TTIP and other future EU agreements. Both instances will be made up of 'judges', serving for terms of between six and nine years, renewable once. The permanent nature of this court system, contrasting as it does with the 'ad hoc' appointment in the arbitral system, brings it closer in line with the functioning of judicial organs. However, these bodies will make 'awards' which will be enforceable under the rules of the arbitration norms of United Nations Commission on International Trade Law (UNCITRAL)[17] or any other rules agreed by the disputing parties. This reliance on international conventions to enforce arbitration awards therefore appears to indicate that the proposed system is still essentially arbitral. Likewise, the usual remedies of ISDS, such as monetary compensation and restitution are also maintained (Lévesque, 2016:3).

Nevertheless, a key difference between the new regime and the ISDS is the absence of the parties' autonomy in selecting the adjudicators. Both the TTIP proposal and the agreements with Canada, Vietnam and Singapore provide that the treaty parties should make appointments by way of 'a committee'. This procedure is entirely at odds with the principle of the autonomy of the parties and is intended to ensure the tribunal's impartiality. Another significant new feature intended to reinforce the Court's impartiality is the Code of Conduct which will be binding upon judges. Its ethical guidelines contain the usual requirements provided in ISDS, but in the EU court system, they become binding, going beyond the traditional soft-law nature of ISDS standards of conduct (Deli and Marceddu, 2015: 4-5).

Article 11.1 of the TTIP likewise provides that appointed judges 'shall refrain from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law'. This provision clearly aims to prevent new court members' from wearing two hats, i.e. serving as adjudicators and also as advisers in other cases (Kalicki and Joubin-Bret, 2015:411). Nevertheless, apart from this ban on acting as counsels, members of the court will not be prevented from holding any other positions. To ensure their availability, they would all be paid retainers equivalent to one third of the amount paid to WTO Appellate Body members, as provided by Article 9.12 of TTIP. Finally, if the number of cases should so require, the tribunal could be made into a permanent court. In this event, the judges would be barred from having any other occupation, and would receive a regular salary to be set by the appointment Committee (Article 9.15 of TTIP). How the costs deriving from the court system will be met over time has yet to be fully clarified, but experience with the WTO Appellate Body and other international courts shows that States are generally reluctant to provide sufficient financial

[16] The text is available at http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156731.pdf (accessed 16 October 2018).
[17] UNCITRAL Arbitration Rules (as revised in 2010). 2011. Available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (accessed 16 October 2018).

resources (Tiedje, 2015).

As regard to qualifications for appointment, they resemble those of other international courts and tribunals. Article 9.4 of TTIP provides that 'Judges shall possess the qualifications required in their respective countries for appointment to judicial office or be jurists of recognized competence'. The provision also requires that they have specific knowledge and expertise in the field, particularly in international investment law, international trade law and the resolution of disputes within international investment or international trade agreements.

One of the key aspects of the new investment court system is the possibility of appeal. Under Article 29.1 of TTIP, each disputing party will have 90 days to appeal a provisional award to the Appeal Tribunal. The mechanism combines elements of the current ISDS with new aspects, such as the possibility of reviewing not only errors in the interpretation of applicable law, but also errors in assessment of the facts, including assessment of relevant domestic law.

Unlike the ICSID annulment procedure, the Appeal Tribunal in the new system will also have the final say in deciding the dispute and may modify the award in part or in its entirety (Reinisch, 2016: 26).

In principle, the Appeal Tribunal is intended to correct errors of law and ensure a consistency of decisions within the specific agreement for which it is created. However, it is easy to see that an Appeal Tribunal for each agreement to be concluded by the EU might undermine the consistency of international investment law in general (European Federation for Investment Law and Arbitration, 2016: 38-40).

Many issues also arise with regard to interactions with other international regimes, given that under the EU mixed agreement, the ICSID Convention and other international instruments could still be called upon by EU Member States and other parties (Lévesque, 2016: 12-17). Potential interactions also include the EUCJ. It is still uncertain whether it will accept an international investment tribunal as a competing judicial remedy within an EU agreement, which is EU law. To this respect, in September 2017, Belgium requested the EUCJ's opinion on the compatibility of CETA's investment court system with EU law and, in particular, with the exclusive competence of the EUCJ to provide definitive interpretations of EU law[18].

Probably in awareness of these flaws and with the aim of leading reform of the traditional ISDS at a global level, the EU is currently proposing the creation of a multilateral dispute settlement mechanism. This would also consist of a multilateral investment tribunal and a multilateral appellate body, but under the umbrella of a multilateral international agreement. Upon its entry into force, this multilateral judicial institution would replace any other dispute settlement mechanisms included in investment treaties of EU Member States or in investment treaties between third countries (Schill, 2016: 20).

[18] 'CETA. Belgian Request for an Opinion from the European Court of Justice'. Available at https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf (accessed 27 September 2018).

Towards a Multilateral Permanent Body on Investment Disputes

In contrast to the bilateral nature of the investment court system, in which each court only applies to the parties to a specific agreement, the multilateral court proposed by the EU would comprise one single international institution. It would hear investment-related disputes between any investors and States that had previously accepted its jurisdiction over their bilateral agreements. In practice, the multilateral investment court is intended to be to investment dispute settlement what the WTO is to trade dispute settlement, thus adding to a multilateral rules-based system (European Commission, 2017b:2).

In reality, the EU's project for multilateral investment dispute settlement is not new. It emerged during public consultation on investment protection held by the European Commission in 2014. As a more effective means, some stakeholders suggested reforming the ISDS at a global level rather than through bilateral reforms. Subsequently, in its Concept Paper of 5 May 2015 on 'Investment in TTIP and beyond — the Path for Reform', the Commission announced that in parallel to the reform process undertaken in bilateral EU negotiations, work would commence on setting up a multilateral system to address international investment disputes (European Commission, 2015a:4). In its Communication 'Trade for All', the European Commission envisages the establishment of a permanent multilateral investment court as an objective for working with partners to build consensus for a unified and coherent policy on investment dispute resolution (European Commission, 2015b: 21-22).

The proposal for a permanent multilateral institution is largely based on the investment court system provided in the agreements with Canada, Vietnam and the US, which also make reference to it. Similar references are also being incorporated by the EU in its ongoing negotiations involving investment. As key features, the multilateral investment court would also have a tribunal of first instance and an appeal tribunal. The exact number of judges will depend on the number of participating countries and cases the court will have to hear. In all events, both bodies will have tenured, highly qualified judges, bound by the strictest ethical standards. As in the investment court system, the disputing parties will not be able to choose which judges will hear their case. The multilateral court is thus aimed to be a permanent body, ruling on disputes arising under future and existing investment treaties and providing for effective implementation of its decisions (European Commission, 2017b: 1-2).

With this proposal, the EU is clearly seeking to take the lead in the reform of the international system of investment dispute resolution. It is also intended to address the criticisms raised against the ISDS and, more recently, against the investment court system. However, despite the EU's best efforts, the new project has not been free from controversy. In particular, the proposal for a multilateral judicial institution has been criticized for failing to overcome the existing shortcomings of the ISDS, though the European Commission's stated intent is to address the 'perceived limitations' of investment arbitration in terms of legitimacy, legal correctness and other concerns. However, the Commission's proposal does not address the substantive provisions in international trade and investment agreements. Instead, it clearly states that protection standards 'will not be affected by the negotiations on the multilateral investment court' (European Commission, 2016: 6). One may therefore conclude that the rights granted to investors —such as fair and equitable treatment— and the lack of any enforceable obligations —such as compliance with human labour rights and environmental laws— remain unaddressed in the EU's proposal. In addition to its failure to protect the regulatory power of national government on behalf of the public interest, the multilateral institution project has also been criticized for ignoring the fact that foreign investment operations now involve a wide range of policies on trade, labour, land rights, health and the environment, national security, taxation and many others. This oversight is most evident when the European Commission establishes that the multilateral court members should be 'highly qualified and experienced individuals in public international law and international investment law'. This narrow approach is considered to prioritise only the protection of investors' economic interests, as arbitral tribunals do. The proposal has also been criticized for reinforcing the arbitration system in favour of international investors when failing to enable local governments, domestic investors, trade unions, individual citizens and other groups from civil society to bring a claim or become a party to an investment-related dispute (CIEL, 2017: 2-4).

In its next step, in September 2017, the European Commission requested authorization from the EU Council to open negotiations on a convention creating a multilateral court for the settlement of investment disputes (European Commission, 2017c). On 20 March 2018, the Council granted its authorization by adopting negotiating directives. Drawing on these directives, the Commission is currently discussing on the proposal within the framework of the UNCITRAL. For the moment, this international body has identified the EU's proposal as just one 'possible solution' for ISDS reform (UNCITRAL, 2018: 8). Similarly, the UNCTAD argues that dispute settlement reform cannot be carried out in isolation, but must address a broad spectrum of concerns, including the unforeseen legal and financial risks faced by host States. Specifically with respect to dispute settlement, a multilateral process should consider how public interest considerations could be better addressed, for example, by refusing jurisdiction over investors who have violated domestic or international laws relevant to the investment, or precluding claims against measures intended to contribute to public interest objectives (UNCTAD, 2017b: 3, 8-9).

None of these aspects appears to be addressed in the EU's proposal so far. It therefore seems unlikely that it will succeed in its current terms, which are considered to continue prioritizing investors' rights over public interest, like traditional ISDS. Therefore, although the EU's proposal reflects a major drive for review of ISDS, multilateral consensus will be required on the priorities for reform. Global efforts in this regard should address sustainable development as a primary focus, in keeping with the international community's commitment to the '2030 Agenda on Sustainable Development' (UNTACD, 2017b: 13-14). For the EU, in particular, sustainable development, as well as human rights, is a horizontal legal requirement to be addressed in all its policies, including trade and investment, as provided by Article 11 of TFEU and Article 2 of TEU, respectively. Therefore, any EU initiative to improve multilateral investment governance should first address these requirements.

Conclusions

The ISDS and, in particular, the ISA, has attracted growing criticism and public concern over the last two decades. It is broadly recognized that the current investment-dispute system has evident flaws on public decision-making processes and effects on policy space. Moreover, the mechanism has inherent shortcomings in terms of absence of transparency, lack of arbitrator independence and the precedence given to the final awards over their legal correctness.

Nevertheless, this state of affairs is currently changing and movements for reform are emerging at national, regional and multilateral level.

Among the ongoing discussions on redefining the current system, the EU is a regional actor that is making concrete proposals for reform, although its position has gradually evolved in recent years. Indeed, the EU's stance has shifted from endorsing ISA first as the main investment protection mechanism to reforming then the system by replacing it with a permanent investment court in EU agreements, which will in any event be a transitional remedy towards the establishment of a multilateral institution. The EU's changing stance reflects the criticism voiced against ISA, especially evident during the TTIP negotiations, as well as constant conflicting demands from Member States, different stakeholders and European investors, the latter having been the most frequent users of the arbitration regime.

The draft text of the TTIP, together with negotiations on the CETA with Canada and the FTA with Vietnam, provided the specific framework within which the EU proposed, in 2015 and 2016, a new system of courts to replace the old ISA. As discussed, the proposed system is not actually that new, apart from the form of appointment, tenure and Code of Conduct of the Court members, and the introduction of a tribunal of appeal. It retains elements of the arbitration system, raising doubts as to its compatibility with current international arbitration institutions and the EUCJ's exclusive competence on interpreting EU law. The EU's proposal also fails to address substantive issues concerning investors' rights and obligations, a shortcoming which has been criticized for serving the interests of European investors.

Largely building on the permanent investment court system, the EU's latest proposal suggests the future establishment of a multilateral judicial institution to replace any other dispute resolution mechanisms provided not only in EU agreements and its Member States' agreements with third countries, but in trade and investment treaties concluded between any non-EU countries previously accepting its jurisdiction. With this proposal, the EU seeks to lead the ongoing process of redefining international investment dispute settlement, while at the same time increasing its consistency and legitimacy.

It is not yet clear how or when this new alternative mechanism would be implemented at a global level, and whether the EU leadership will manage to overcome criticism of its proposal and the reforms already implemented in other countries. What is clear, however, is that the debate on a multilateral system must be broadened and brought to existing multilateral forums dealing with these issues, such as UNCITRAL and UNTACD. These two organizations have already proposed that any new alternative form of investment dispute resolution should involve the whole spectrum of stakeholders usually affected by investments, including individuals, domestic investors and local communities. In the same vein, with the aim of achieving complete and comprehensive reform, they advocate redefining not only the dispute settlement procedures, but also the substantive rights and obligations in treaties as well. In this regard, substantive provisions on parties' rights and duties should be aligned with the international community's commitments to sustainable development and human rights.

The EU's proposal does not address any of these dimensions currently being debated at a global level. It is therefore likely that the EU will have to amend its project in coming months if it wants to contribute actually to a multilateral consensus on more efficient international investment governance.

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