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Research Report

The EU investment court: challenges on the path ahead

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The EU investment court: challenges on the path ahead*

by

Julien Chaisse and Matteo Vaccaro-Incisa**

In September 2015, due to a specific political climate within EU institutions and member states, the EU Commission formulated a proposal to establish an investment court system (ICS) to be adopted in the Transatlantic Trade and Investment Partnership. The ICS was subsequently included in the agreements with Canada and Vietnam and has been tabled in the negotiations with Singapore and Japan. This *Perspective* addresses this bilateral ICS proposal and weighs it against the recent decision of the UN Commission on International Trade Law (UNCITRAL) to address investor-state dispute-settlement (ISDS) reform.

Firstly, in May 2017, the EU Court of Justice confirmed that any EU international investment agreements (IIAs) featuring ISDS fall outside the EU exclusive competence, thus requiring ratification by each member state. The Court's opinion, which went against the position maintained by the Commission, complicates the emergence of a unified EU investment policy, including the ICS, delaying indefinitely the entry into force of those IIAs already (or about-to-be) concluded. Unable to rely on an operational ICS to buttress its proposal with other partners, the Commission appears poised since July 2017 to drop investment protection from trade deals altogether, from ongoing negotiations (Japan)¹ to new draft mandates (Australia, New Zealand).

Secondly, recent IIAs introduced substantive limitations and clarifications aimed at shielding the exercise of state regulatory powers from qualifying as breaching foreign investors' rights (e.g., rephrasing of clauses, explanatory/interpretive annexes, addition/expansion/refinement of exclusions, exceptions). This is evident too with regard to international arbitration, with roadblocks to its access strengthened and the interpretive freedom of arbitrators constrained. This conservative trend (seen also in the investment treaty practice of, for example, the Association of South East Asian Nations, China and the US) constitutes a proper response to real (or overstated) pitfalls of international arbitration. In light of the focus of IIAs on compensation (as opposed to compliance), the EU concerns over the appropriateness of

arbitration as a means to deal with public policy aspects and the ethics of arbitrators (conflict of interest, double hatting, etc.) seem disproportionate.

Thirdly, keeping in mind that the EU is presently—if, perhaps, only formally—negotiating IIAs with the US and China, and that their cooperation is essential for the global reach of any ISDS reform, it appears that the ICS proposal is unsuited to their current stances on ISDS. The US is reportedly uninterested. China, besides currently emulating several US policy choices, is keen to protect its key investors abroad through the International Centre for Settlement of Investment Disputes and international economic institutions (where China has recently become a major contributor) tied to it. Moreover, China may hardly be interested in institutionalizing a (semi-)permanent neutral international forum that would facilitate foreign investors' claims against it.

Fourthly, the ICS proposal seems ill-timed, because it dismisses the international community's present stance *vis-à-vis* the creation of additional supranational adjudicatory bodies, especially by unilateral Western initiative (let alone in a perceived Western-based and/or driven international legal order). Indeed, several countries are expressing concerns about the legitimacy and/or cost of the existing mechanisms. Beside the failure of the mid-1990s OECD-backed Multilateral Agreement on Investment, current major examples are the South China Sea UN Convention on the Law of the Sea (UNCLOS) arbitration; the uneasy relationship between Russia and the European Court of Human Rights (and UNCLOS); and the relationship between several African countries and the International Criminal Court. On costs, the WTO Appellate Body's repeated—and unfruitful—calls for an increase of its modest budget stand out.

Fifthly, despite the EU attracting the world's highest FDI inflows and stock, there are relatively few claims against its members (mostly, anyway, arising out of intra-EU investment disputes) and, especially, damages awarded—against its member states.² The Commission's insistence on finding a procedural alternative to international arbitration seems an overreaction to domestic political shifts within EU members and vocal criticism from interest groups, including NGOs.

To conclude, the bilateral ICS initiative seems overly focused on EU interests and concerns, and thus is counterproductive to the goal of global ISDS reform. Multilateral discussions in UNCITRAL may facilitate, conversely, consensus on shared and far-reaching reforms, but they are unthinkable without the participation of new geopolitical heavyweights like India and Brazil. There, building on more than two decades of experience with investment arbitration, and benefitting from recent contributions of renowned experts,³ questions other than bilateral or multilateral courts may be dealt with (like sustainability, investment facilitation, investor obligations, arbitrators' ethic). Steps forward are possible, as the recent adoption of the Guiding Principles for Global Investment Policymaking by the G20 demonstrates,⁴ considering that current Western concerns over the sovereign exercise of “regulatory powers” are close enough to those on “sovereignty” long expressed by many other governments.

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¹ See, e.g., “Katainen suggests dropping investment from trade deals,” *Euractiv*, July 11, 2017, <https://www.euractiv.com/section/economy-jobs/news/katainen-suggests-dropping-investment-from-trade-deals/>.

² To deal with intra-EU investment disputes, the Commission announced plans for a “mediation system.”

³ See, e.g., Gabrielle Kaufmann-Kohler and Michele Potestà, “Challenges on the road toward a multilateral investment court,” *Columbia FDI Perspectives*, No 201, June 5, 2017.

⁴ Karl P. Sauvart, “China moves the G20 on international investment”, *Columbia FDI Perspectives*, No. 190, January 2, 2017.

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