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REFORMING ISDS – THE EU’S INNOVATIVE PROPOSAL FOR A MULTILATERAL INVESTMENT COURT

AN EU PROPOSAL TO REFORM A GLOBAL ISSUE

Laurence Marquis

SUMMARY

Arbitration or Investor State Dispute Settlement (ISDS) has been at the heart of controversies for years. Hailed as unfair, one-sided and biased in favor of host States, ISDS has caused unrest and dispute in the negotiation of Free-Trade Agreements (FTAs). The EU in 2014 proposed an internal reform by way of introducing the Investment Court System (ICS) in its FTAs to replace ISDS. Now that the CJEU has given its approval to the ICS, recognizing it is compatible with EU law, the next step is for the EU to successfully export this model on an international stage.

Since 2017, the EU has been promoting the creation of a Multilateral Investment Court to respond to ISDS criticism worldwide. These efforts have been enshrined in the treaties signed by the EU, and debated before the UNCITRAL Working Group III tasked with tackling the reform of ISDS.



This development emphasized the tension between the internal challenges that the EU must face in the implementation of its investment policy and the interactions between the institutions involved, on the one hand, and the external impacts that this policy has on the regional and multilateral investment agreement networks, on the other. A 2017 ruling in Opinion 2/15 of the CJEU has confirmed that investor-state dispute settlement and portfolio investment are shared competences. The compatibility of the investor state system with EU law was also confirmed by the CJEU in 2019 (Opinion 1/17).

The international trade order is in crisis, and the EU has the opportunity to play a crucial part. Following Opinions 2/15 and 1/17, the Commission has now successfully integrated a new innovative proposal for a permanent investment tribunal (ICS) in agreements with Canada (CETA), Vietnam, Singapore and Mexico. In April 2018, the Commission announced that trade and investment would be now be included in different agreements to ensure there would be no further potential issues with investment.

INTRODUCTION

In 2009, the Lisbon Treaty consecrated “foreign direct investment” as an EU exclusive competence (art. 207(1) TFEU), within its Common commercial policy (CCP). Foreign direct investment however remained a field to be further defined, and the EU investment policy has known many evolutions since.

Definitions

ISDS – Investor State Dispute Settlement, a private dispute resolution mechanism providing for arbitration between foreign investors and host States, has been included nearly systematically in bilateral investment treaties (BIT) and free trade agreements since the first 1959 BIT.

ICS – Investment Court System, the new EU proposal for a permanent court, and which features, professional, independent judges bound by a strict code of conduct, hearings held in public and publish documents relating to cases, clearly-specified grounds on which an investor can challenge a state, as well as an appeals level.

MIC – Multilateral Investment Court – the equivalent of the ICS implemented through an opt-in multilateral convention at the international level.

WGIII – UNCITRAL Working Group III on ISDS Reform, since 2017 and with an unprecedented level of attendance, the reform discussions and initiatives are now at the last stage wherein a concrete proposal for reform should be selected. As of yet, no clear consensus has emerged between proponents of a new system (the EU ICS), those who submit it can be reform through incremental fixes, and those in favor of a complete abolition of any dispute resolution mechanism remotely resembling ISDS.

KEY FINDINGS

The EU has been proactive, innovative and successful in aligning its investment policy within the Common commercial policy, to ensure it could take on its role as a leader in international trade negotiations.

The scope of the EU's work on ISDS reform is to be noted. It has, at every opportunity, attempted to lead efforts to revisit and revamp both its internal policy, and the international approach to ISDS.

In particular, the EU's work before WGIII has been key to advancing the discussions within the group. Although there is no consensus on the solution championed by the EU, its central work has allowed the WG's travaux to rapidly proceed to an in-depth scientific examination of the issues central to ISDS reform and potential solutions.

A remaining question is whether the new proposed EU MIC sufficiently resolved issues pertaining to ISDS, or whether it is just an edulcorated and reformatted proposal which still centers around the key principles of arbitration and ISDS.

POLICY RECOMMENDATIONS

- The EU must show flexibility in its design of a new judicial body. While a new permanent investment tribunal and even a multilateral investment court have gathered broad support, there are equally compelling arguments (and advocates) for reforming ISDS through alternative means;
- An opt-in multilateral convention for the multilateral investment court, as currently envisaged and advocated by the EU; and
- An "à la carte" appeal body, available to any party who might wish to include a reference in its treaty, this option providing a middle ground where ISDS supporters and reformer can meet, as a solution that can be attractive and easily implemented.

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Laurence Marquis is completing her thesis within the framework of an MSCA-funded GEM-STONES European Joint Doctorate between the LUISS Guido Carli di Roma (IT) and Université Laval (CA).

laurence.marquis@gem-stones.eu

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