Towards a Post-Arbitration Age: The European Commission's Fast-Track Reform of Investment Dispute Settlement

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The European Commission ("EC") has recently taken another step in its efforts to replace the traditional investor-state-dispute-settlement ("ISDS") mechanism which underlies the approximately 1,400 bilateral investment agreements in force between EU Member States and third countries. On 13 September 2017, the EC issued, based on Article 218(3) of the Treaty on the Functioning of the European Union ("TFEU"), a Recommendation for a Council Decision authorising the EC to open negotiations on behalf of the European Union for an international convention establishing a multilateral court for the settlement of investment disputes (the "Recommendation").[fn] Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes dated 13 September 2017, COM (2017) 493 final.[/fn]

With the Lisbon Treaty (Article 207 of the TFEU) foreign direct investment ("FDI") became part of the common commercial policy of the European Union, which lies within the EU's exclusive competence. Recently, in the context of the free trade agreement with Singapore, the Court of Justice of the European Union ("CJEU") has

clarified that the competence regarding ISDS in relation to both FDI and non-direct investment is shared between the EU and its Member States, insofar as they are required to act as respondents in certain disputes.[fn]Opinion 2/15 dated 16 May 2017, para 285 et seqq.[/fn]

The EC has long considered FDI a *"new frontier for the common commercial policy."*[fn] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy, dated 7 July 2010, COM (2010) 343 final, p 4.[/fn] Indeed, shortly after the entry into force of the Lisbon Treaty, the EC started its efforts to develop a consistent, unified and effective investment policy. In 2010, the EC published the communication *"Towards a comprehensive European international investment policy"*,[fn] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy, dated 7 July 2010, COM (2010) 343 final.[/fn] which explored the characteristics of a new investment policy genuinely established by the European Union. The communication also identified the need for more transparency, consistency, predictability and an appeal system in ISDS. Remarkably, while the EC invoked the need for reforms of the traditional ISDS system, it still considered acceding to the ICSID Convention. In this respect, the EC even noted the need for an amendment of the ICSID Convention to allow the accession of the European Union.[fn] Ibid, p 10.[/fn]

Yet, given the public outrage that erupted in the context of the EU's trade negotiations with the US and, more generally, the global controversy over the legitimacy, consistency and transparency of ISDS following high-profile investment cases (e.g. *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12), the EC's views on ISDS seem to have changed considerably. The EC's strategy has shifted from promoting reforms within the framework of the existing ISDS system to pushing for a replacement of the ISDS system by a formal court system.

Devising a new investment dispute resolution mechanism

The EC's move towards the establishment of a court mechanism for investment dispute resolution goes back to **March 2014**, which saw a public consultation on

investment protection and ISDS. Since then, the EC has – quite contrary to the aspirations expressed back in 2010 – engaged in promoting fast-track reform:

– In **May 2015**, also in the context of the then ongoing trade negotiations with the US, the EC published the concept paper *"Investment in TTIP and beyond – the path for reform"* which called for a *"profound reform of the traditional approach to investment protection and the associated ISDS system"* and, accordingly, aimed at *"moving from current ad hoc arbitration towards an Investment Court."*[fn] Concept paper *"Investment in TTIP and beyond – the path for reform"* dated 5 May 2015, p 1.[/fn]

– In **October 2015**, the EC published the communication *"Trade for all"*, which again highlighted the EC's endeavours *"to build consensus for a fully-fledged, permanent International Investment Court."*[fn] Communication Trade for all – Towards a more responsible trade and investment policy, COM (2015) 497 final dated 14 October 2015, p 22.[/fn]

– In **November 2015**, the European Union published a reformed approach on investment protection and investment dispute resolution for the Transatlantic Trade and Investment Partnership with the US, which not only envisaged the establishment of an investment court system, but also the replacement of the bilateral investment court system upon the entry into force of an international agreement providing for a multilateral investment tribunal.[fn] European Union's proposal for Investment Protection and Resolution of Investment Disputes, tabled for discussion with the United States and made public on 12 November 2015.[/fn]

– In **August 2016**, the EC launched an impact assessment for a multilateral reform of the investment dispute settlement system, including the establishment of a multilateral investment court.[fn] Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution dated 1 August 2016.[/fn]

– In **October 2016**, the European Union, its Member States and Canada agreed on a Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement ("CETA") noting that *"CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems in the European Union and its Member States and Canada."*[fn] Joint

Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States dated 27 October 2016, p 6.[/fn]

– In **December 2016**, the EC together with Canada published a non-paper on the establishment of a multilateral investment dispute settlement system.[fn] Establishment of a multilateral investment dispute settlement system dated 13/14 December 2017, a non-paper published by the EC and the Government of Canada.[/fn]

– In **January 2017**, in the context of an informal ministerial meeting at the World Economic Forum in Davos, the Trade Commissioner Cecilia Malmström called for the *"[creation of] a single international dispute settlement system; a system that should not only get the balance right between the interests of states and investors, but also be seen as legitimate by ensuring independence, accountability and transparency."*[fn] *"In Davos, discussing investment disputes"*, a blog post published by Commissioner for Trade Cecilia Malmström on 19 January 2017.[/fn]

– In **February 2017**, in a speech delivered during a stakeholder event in Brussels, Ms Malmström again expressed antipathy towards the traditional ISDS system observing that *"ISDS is old-fashioned and [...] far from perfect."*[fn] *"Reforming investment dispute settlement"*, Speech by Commissioner for Trade Cecilia Malmström, Stakeholder event Brussels, 27 February 2017.[/fn]

– In **May 2017**, a reflection paper of the EC observed that investment disputes *"should no longer be decided by arbitrators under the so-called investor-state dispute settlement."*[fn] Commission Reflection Paper on Harnessing Globalisation dated 10 May 2017, COM (2017) 240, p 15.[/fn]

– In **September 2017**, the EC issued its Recommendation paving the way towards the establishment of a multilateral investment court (the "MIC").[fn] Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes dated 13 September 2017, COM (2017) 493 final.[/fn]

The EC appears to be taking a **two-step approach**. The first step was completed with the inclusion of investment court systems in bilateral trade and investment agreements. This is the case, for example, in CETA and the EU-Vietnam Free Trade Agreement. The most recent Recommendation of the EC forms part of the second

step, which is the formal establishment of a MIC system.

A convention establishing a MIC system

The Recommendation of 13 September 2017 sets out the process towards the conclusion and implementation of an international instrument (the "Convention") establishing a MIC system. The Convention will deal only with procedural matters. In turn, the applicable law will be subject to the respective investment agreement. The Convention will allow the European Union, the EU Member States, and third parties to submit to the jurisdiction of the MIC disputes arising under agreements to which they are or will be parties. However, as a footnote in the Recommendation shows, disputes arising from intra EU-BITs as well as disputes between an investor of a Member State and a Member State under the Energy Charter Treaty will be outside the scope of the Convention. Regarding the individual characteristics of the new investment dispute settlement mechanism, the Recommendation underlines, *inter alia*, that:

– the multilateral court system should be a two-tier system with a tribunal of first instance and an appeal tribunal competent to review decisions rendered by the first instance tribunal on the grounds of manifest errors of facts and errors of law;

– members of the MIC should be appointed for a fixed period of time with security of tenure and all necessary guarantees of independence;

– any proceeding conducted before the MIC should be transparent and include the right of third parties to file third-party interventions; and

– the MIC's decisions should benefit from an effective international enforcement regime.[fn] Annex to the Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes dated 13 September 2017, COM (2017) 493 final, p 2 et seq.[/fn]

As regards the negotiation process as such, the Recommendation highlights that the negotiations shall be conducted under the auspices of the United Nations Commission on International Trade Law ("UNCITRAL").[fn] Ibid, p 2.[/fn]

Outlook

The EC is determined to devise a new framework for the resolution of international

investment disputes that is (i) permanent, (ii) independent and legitimate, (iii) predictable in delivering consistent case law, and (iv) allows for appeals.[fn] Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes dated 13 September 2017, COM (2017) 493 final, p 2.[/fn]

These objectives are not only supported by national governments. The establishment of a multilateral investment system will likely be corroborated by the UNCITRAL Commission which, on 10 July 2017, adopted a broad mandate for its Working Group III which implies identifying (i) concerns regarding ISDS, (ii) whether reforms are desirable in light of the identified concerns, and (iii) if reform is indeed desirable, developing and recommending any relevant solutions.[fn] Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017), A 72/17, para 264.[/fn] It would therefore not come as a surprise if the UNCITRAL Commission supported the EC's proposal of establishing a multilateral investment dispute settlement mechanism.

In negotiating the envisaged Convention, the EC will have to safeguard that the new instrument is compatible with the legal order of the European Union. While there is no doubt that *"an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law,"*[fn] Opinion 2/13 dated 18 December 2014, para 182.[/fn] the EC will have to ensure that the Convention has *"no adverse effect on the autonomy of the EU legal order."*[fn] Ibid, para 183.[/fn] In particular, it will be crucial that the Convention does not adversely affect the powers of the CJEU, bearing in mind the CJEU's exclusive competence to provide final and authoritative interpretation of European law.

In this respect, helpful guidance is forthcoming: on 6 September 2017, i.e. precisely one week before the EC issued its Recommendation, Belgium requested the CJEU to provide its opinion on the compatibility of the CETA Investment Court System with (i) the CJEU's exclusive competence to provide the final interpretation of European Union law, (ii) the general principle of equality and the requirement of practical effect of EU law, (iii) the right of access to the courts, and (iv) the right to an independent and impartial judiciary. Without doubt, the CJEU will weigh in heavily when it comes to the EC's ambitions to reform – in the self-proclaimed "historic" manner – the world of investment dispute settlement.