

The Influence of EU Common Investment Policy on the System of International Investment Law

Abstract

Extending exclusive European Union (EU) competence to foreign direct investment (FDI) in the Lisbon Treaty has had profound implications. The EU began to develop its own investment policy, including negotiating either international investment agreements or comprehensive trade and investment agreements with third parties. Taking into account the magnitude of the EU economy and the fact that EU Member States have concluded almost 1 400 bilateral investment treaties (BITs) out of roughly 3 300 in force worldwide, the potential of European influence over the system of international investment, based principally on BITs, is enormous. The aim of this dissertation is to assess how and in which way the new EU competence changes the system.

The EU investment policy has developed a specific approach towards investment protection and investment dispute mechanism which does not envision content declared at its beginning. According to initial documents such as the European Commission's Communication Towards a comprehensive European international investment policy, the Union should have followed the available best practices of the Member States. Nevertheless, during the first bilateral negotiations with Canada and Singapore, commentators rather identified a process of "NAFTALisation" in the EU approach. The pivotal moment in constituting the EU investment policy came with the public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) with the United States. In response to results of the public consultation the European Commission was forced to change its approach to ISDS radically and envisaged "the path for reform" with its ultimate goal – a Multilateral Investment Court (MIC) replacing the current system of investor-state arbitration.

Under the dissertation project, the content of EU comprehensive trade and investment agreements as well as current EU negotiation with third countries, e. g. with the United States, China, India, Indonesia, Myanmar, Mexico, Chile or Tunisia, are examined and compared to "traditional" Member States' or US approaches. It is evaluated how the EU is successful in promoting its reform approach in investment protection, including an establishment of bilateral

investment court systems (ICS) and obligation to future multilateralization of dispute settlement system. The focus is therefore also devoted to the EU efforts at multilateral level as in 2018 the Council of the EU gave the European Commission a mandate to negotiate the creation of a new multilateral court for investment disputes. This decision is particularly important in the context of the UNCITRAL process where discussions on a reform of investment arbitration, including the possible establishment of a MIC, take place since 2017. For this reason, the dissertation closely follows the multilateral development under the auspices of the UNCITRAL and analyses the EU proposal for an institutionalised form of investor-state dispute settlement and for the design of an MIC which remains unclear. In addition, other international organisations such as the OECD, the ICSID and the UNCTAD are a part of this study since they are also involved actively in the reform of international investment law and the EU influences their activities.

In conclusion, the EU is successful in shifting a paradigm in the debate about the reform of the global system of investment protection. Firstly, it imposes bilaterally its approach, including investment court system, to its partners such as Canada, Singapore, Vietnam and Mexico. Secondly, the UNCITRAL process, which may become a watershed moment for the system, is a result of (not only) EU efforts and the EU together with its Member States vigorously participate in an ongoing discussions. However, the multilateral investment court, proposed by the EU, is not the only possible result of the process. Other international standing courts currently face different challenges and it is questionable whether under present circumstances States will have an appetite for another international adjudication body.

Keywords

European Union; international investment law; Common commercial policy; bilateral investment treaties; BIT; investment protection, investor-state dispute settlement; ISDS; investment court system; multilateral investment court