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The Case for an EU Protagonist Role on Third Party Funding Regulation

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The Lisbon Treaty has enlarged the EU's competences in external investment policy. The EU could thus increase its protagonist role in third-party funding (TPF) regulation in a manner analogous to its achievements in the investment regime, where the EU managed to rally the member states behind DG Trade's vision. A treaty-based analysis combined with a political evaluation suggest the EU is expanding its field of competences either when it has a clear mandate or by establishing a modus vivendi as it has been the case with its external relations, particularly at the United Nations. There is therefore a case to be made that the EU would have the competence and the interest to expand its investment reform leadership to encompass TPF regulation. Hong Kong and Singapore have added provisions on TPF in their respective national arbitration legislation explicitly allowing TPF as part of a neoliberal strategy to attract arbitration while ignoring the risk of increased forum shopping. In contrast, the EU CETA and EU-Vietnam Treaties are the only treaties to conceptualize and impose a disclosure of TPF, which nevertheless falls short of addressing concerning the adverse consequences of TPF in ISDS.¹

1. A Treaty-based Rationale for Increased EU Intervention in TPF Regulation

1.1. A treaty-based analysis of the EU's external investment policy

The EU's lead in external investment policy has been established by the Treaty of Lisbon, Articles 206 and 207 TFEU bring 'foreign direct investment' (FDI) « under exclusive EU competence as part of the Common Commercial Policy (CCP) »². Article 206 and 207.1³ establish the Common Commercial Policy while article 207.2 and 207.3⁴ assign the competences: the Parliament and the Council have the competence to initiate regulatory activity, they give the Commission the negotiation directives. The Commission also has the possibility to start negotiations by transmitting a recommendation to the Council as it has done for the Multilateral Investment Court⁵.

Advocate General Sharpston's Opinion⁶ on the EU-Singapore Trade and Investment Treaty, followed by the EU Court of Justice Decision,⁷ adds nuance to the EU/Member States competence question by clarifying that dispute resolution is a competence that the EU and its Member States share "in concert," a view which actually strengthens the EU's legitimacy when representing the 28.

1.2. A treaty based rationale for an EU protagonist role on regulation of TPF

1.2.1. EU regulation on TPF as a measure against Forum Shopping

On the one hand, The EU has started to regulate TPF in its “new generation” investment treaties, CETA and the EU-Vietnam Treaty contain a clause that conceptualizes and imposes disclosure of TPF, while on the other hand, Member States have not regulated TPF in their legislations. For those rare countries like Singapore and Hong Kong who have added TPF to their legislations it was to allow TPF without restrictions. Other countries like the Netherlands although no legislation is in force, notoriously allow TPF in jurisprudential practice.

This creates a pattern of regulatory fragmentation and invites Forum Shopping within the EU, contrary to the Common Commercial Policy of articles 206, 207.1, as well as the principle of Enhanced Cooperation within Title III of the Lisbon Treaty.

1.2.2. EU expertise in external relations through a sui generis observer status

The EU represents the 28 Member States in International Economic Institutions⁸ such as the OECD, the IMF, WTO, World Bank and the UN General Assembly. The Lisbon Treaty reshaped EU visibility by creating the External Action Service which leads the external relations.

The EU is a sui generis entity in foreign relations regarding its unique composition—there is no equivalent entity as other economic organizations are composed or mandated by its member states. The composition of the EU External Action Service is hybrid as it counts with diplomats of member states deployed for the EU and EU officials from other EU institutions. Council Decision 2010/427/EU of 26 July 2010 establishes “the organization and functioning of the European External Action Service (EEAS)” combined with Article 27.3 of the Treaty of the European Union (TEU)⁹. The EU is thus represented in its external relations by the EEAS Head Quarters and its 143 Delegations. The uniqueness of EU external representation lies in its hybrid nature coupled with a higher level of expertise. Article 27.3. details the External Action Service counts with 1/3 of Member States Diplomats, while Delegations are composed of said diplomats (« Seconded National Experts » (SNE)), European Commission and European Council Officials.

The EU could be best placed to take a lead in TPF regulation regarding its “know-how” in external relations negotiations, with DG Trade, DG Devco handling economic development and DG Justice (DGJust) expertise combined with the External Action Service diplomatic *savoir faire*¹⁰.

2. A modus vivendi to expand the EU’s leading role

Aside from a Treaty based rationale there is a case to be made for an EU initiative beyond textual considerations.

The EU has proved its ambition by acting even without a clear mandate, by creating a *modus vivendi* or precedent to establish its *sui generis* observer status. This has been particularly the case within UNCITRAL Arbitration Group II.

2.1. The example of UNCITRAL Arbitration Group II

The EU has used its special observer status at the United Nations General Assembly (UNGA) (as set forth in UN General Assembly Resolution 65/276 of May 2011) to expand its influence within UNCITRAL Working Group II on Arbitration due to its proximity with the UNGA Legal Committee (also known as Sixth Committee) and the EU Commission's practice of taking the floor as the "EU" and not as the European Commission.

The Member States finally rallied behind the European Commission on the 20th of April 2018 by authorizing the European Commission to negotiate within UNCITRAL a Multilateral Investment Court (MIC) which seemed unforeseeable to states and academics two years ago.

A similar analysis is in order for the Mauritius Convention on Investor Treaty Transparency, strongly supported by the EU, which entered into force last year.

2.2. A European Commission initiative on TPF regulation: innovation and legitimacy

The Commission and thus the EU has reinforced its front runner capacity and its legitimacy by being backed by the states at the Council and by the European Parliament.

2.2.1. Innovation

The EC could potentially take a lead on TPF as it has done with the MIC and the new type of Investment Treaties. As mentioned above the only Investment Treaties containing provisions regulating TPF are CETA and the EU-Vietnam Treaties. States so far have not regulated TPF; moreover, a state-by-state approach would be fragmented and inefficient. An EC lead in those issues could be backed up by states, similarly to other aspects of the investment regime such as the consideration of developing states, and transparency.

The Commission has positioned itself as a strong entity, and DG Trade has anticipated the criticisms of the investment regime ahead of states¹¹ by pushing for new generation treaties and now an institutional reform. Overall the EU is keen on maintaining its lead as an investment destination,¹² and by being a predictable hub it would increase security for investors.

2.2.2. Legitimacy

The expertise of the EU institutions set out in para 1.2.2. contributes to the legitimacy of an EU initiative to regulate TPF. Another aspect of the EU's legitimacy derives from its balanced view, in other words not "pro investor" or pro "TPF funder." The EU takes into account transparency and sustainability in ISDS reform by advocating for the UNCITRAL

Transparency Convention as well as being a leader on sustainability. The Sustainable Development Goals negotiations by the EU Delegation to the UN were considered by the think tank European Council on Foreign Affairs as the highest achievement of the EU: “throughout 2015, the EU’s delegation to the UN pushed for UN reform and for a more comprehensive, less atomized European approach to the body.”¹³

The EU also takes into account public opinion, by communicating extensively on all its initiatives.

For its endeavors to be legitimate the EU has to count on the Member States approval, which is the case now concerning the Multilateral Investment Court negotiations. The inclusion of TPF within that mandate could be foreseeable.

Finally, since the Treaty of Lisbon the European Parliament (EP) is a co-legislator within the limits of article 218 TFUE.¹⁴

The EP has sided with the EU Commission (EC) on Investment Treaties by backing the TTIP and CETA negotiations. Both the EP and EC are European Union Institutions, while the Council has both European Union Officials and Member States in its composition. The Council tends to follow the EC and EP.

There is reason to expect that the EP/EU(EC) cooperation could continue and perhaps even be enhanced by jointly exercising leadership in the regulation of TPF.

¹ See Garcia et al., *The Case Against Third-Party Funding in ISDS: Executive Summary*, (Boston College Law School Faculty Paper Series, 2018), <http://lawdigitalcommons.bc.edu/lfp/1126>.

² EU Parliament Report “The EU approach to international investment policy after the Treaty of Lisbon”, October 2010

³ Article 206 (ex Article 131 TEC): By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

⁴ Article 206 reads in relevant part as follows:

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

⁵ On 13 September 2017, the Commission issued, based on Article 218(3) of the Treaty on the Functioning of the European Union (“TFEU”), a Recommendation for a Council Decision authorizing the Commission to open negotiations on behalf of the EU for an international convention establishing a multilateral court for the settlement of investment disputes (the “Recommendation”)

⁶ Luxembourg, 21 December 2016. Advocate General's Opinion in Opinion procedure 2/15 Press Release <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160147en.pdf> Last consultation 10th of April 2018

⁷ Opinion of the Court (Full Court) of 16 May 2017

[http://curia.europa.eu/juris/celex.jsf?celex=62015CC0002\(01\)&lang1=en&type=TXT&ancre=](http://curia.europa.eu/juris/celex.jsf?celex=62015CC0002(01)&lang1=en&type=TXT&ancre=) Last consultation on 10th of April 2018

⁸ E. CASTELLARIN, The European Union's participation in international economic institutions: A mutually beneficial reassertion of the centre. In M. Andenas & E. Bjorge (Eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Studies on International Courts and Tribunals, pp. 320-342). Cambridge: Cambridge University Press. doi:10.1017/CBO9781139979498.012. 2015

⁹ See more from B. Van Vooren, A legal-institutional perspective on the European External Action Service, CLEER, 2010 ; Manufacturing Esprit de Corps: The Case of the European External Action Service. / Pomorska, K.; Juncos, A. In: Journal of Common Market Studies, Vol. 52, No. 2, p. 302-319, 2014 ; Unveiling the anatomy of autonomy: dissecting actor-level independence in the European External Action Service. Henökl, Thomas / Jarle Trondal Externe Publikationen. in: Journal of European Public Policy 22 (10), 1426-1447. 2015

¹⁰ C. HERMANN et al, Trade Policy between Law, Diplomacy and Scholarship: Liber amicorum in memoriam Horst G. Krenzler, European Yearbook of International Economic Law, 2015

¹¹ A-K GRILL and S. LUKIC, Towards a Post-Arbitration Age: The European Commission's Fast-Track Reform of Investment Dispute Settlement, Kluwer Blog, 2017

¹² Conclusions on a comprehensive European international investment policy 3041st FOREIGN AFFAIRS Council meeting Luxembourg, 25 October 2010
https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf

¹³ European Council on Foreign Affairs Publication <http://www.ecfr.eu/scorecard/2016/issues>

¹⁴ Article 218 TFEU reads as follows :

« The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.
Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
(a) after obtaining the consent of the European Parliament in the following cases:
(i) association agreements;
(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(iii) agreements establishing a specific institutional framework by organizing cooperation procedures;
(iv) agreements with important budgetary implications for the Union;
(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. »