

European Commission

The EU's external investment policy has in recent years been subject to a significant public policy debate to determine the direction it should take. The path forward is now clear.

The EU views it as vital that the broad Free Trade Agreements and Investment agreements which it negotiates includes robust but reformed investment protection and investment dispute settlement systems. There are three main angles to this.

First, confirmation but clarification of the substantive standards to leave no doubt that the right to regulate is preserved. For example, exceptions apply which may justify a breach of the most-favoured nation or national treatment obligations. The fair and equitable treatment standard has been clarified, as has the expropriation standard. It needs to be clear that the protection of investment does not interfere in the right to regulate.

Second, reform of dispute settlement. Some of these changes are changes which have been discussed for some time. These include, for example, ensuring full transparency, preventing parallel claims, dealing with frivolous claims. As regards transparency, the EU has been a strong proponent of the UNCITRAL Transparency Rules, and is providing financing to the UNCITRAL Transparency Repository, where documents will be made available on-line.

However, the key changes are those which have been proposed in 2015. The EU proposes to create in its bilateral agreements a permanent tribunal, where the members of the tribunal hearing a particular case are selected from nominations by the Parties to the agreement and at random. They will also be subject to very strict rules on ethics. Another key change is the direct establishment of an appellate mechanism in the agreement, setting down both the conditions for appeal and the systems for having it in place.

Third, in the Commission's statement of its plans on trade policy, released in October 2015 (the "Trade for All" Communication), the Commission confirmed its intention to move towards the establishment of a standing multilateral tribunal with an appeal function for investment disputes. The objective is to have the tribunal be potentially applicable to all agreements, both future and existing. The instrument creating such a tribunal would be open to all actors to join.

That new bilateral system has already been included in the agreements which the EU has negotiated with Canada and Viet Nam. The EU will seek to include it in all of its ongoing and future negotiations. Finally, the EU is now seeking to move forward on preliminary discussions on the multilateral court initiative.