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Analyzing Features of Investment Court System under CETA and EUVIPA: Discussing Improvement in the System and Clarity to Clauses

Shilpa Singh Jaswant (OP Jindal Global University, India) · Friday, February 8th, 2019

An intriguing feature of Investment court system ("ICS") of resolving disputes in Comprehensive and Economic Trade Agreement ("CETA") and the European Union-Viet Nam Investment Protection Agreement ("EUVIPA") is the amicable resolution of disputes to avoid long and expensive burden of Investor-State Dispute Settlement ("ISDS") (*see* Art. 8.19 (1) CETA and Art. 3.39 EUVIPA). Another exceptional feature of the agreements is transparency to limit confidentiality and privacy as UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available here ("Transparency Rules") (*see* Art. 8.36 CETA and Art. 3.46 EUVIPA). Confidentiality is pertaining to the access of information like written submissions, a record of the hearing, award of the tribunal, whereas privacy excludes the participation of unauthorized third parties or even observing the hearing.

Compared to adversarial processes, the conciliation and mediation mechanisms under CETA and EUVIPA envisage a more flexible evidentiary process aiming to provide a fair and independent system. Unlike under CETA, EUVIPA provides for detailed rules concerning mediation. There is a mandatory six-month cooling period before a claim can be submitted for arbitration. During this period, the parties should engage in a consultation followed by mediation or conciliation. A party can submit a notice of arbitration only upon expiration of the cooling period. Otherwise, the claim will not be admissible.

Both Treaties envisage similar procedures in terms of submission of a claim, constitution of a first instance and appellate tribunal, and envisage the same rules on transparency. These common features are further described below.

Submitting a Claim

To submit a claim for a dispute under either Treaty, it is necessary to determine a respondent. Under CETA, a notice is sent within 90 days of the submission of the request for consultation to the EU concerning the alleged breach by the EU or a Member state (Art. 8.22(1) CETA). The procedure is slightly different under EUVIPA; the claimant may send a notice of intent to arbitrate within 90 days of the submission of the request for consultations, which automatically triggers the determination of a respondent by the EU within 60 days of the notice of intent (Art. 3.32).

Both instruments allow an investor to make a claim for breach of the obligations in the agreements

(Art. 8.18(1) CETA; Art. 3.33 EUVIPA). An investor can submit a claim only with regard to a breach of obligations under provisions of Chapter 8 in CETA and Chapter 2 of EUVIPA. Moreover, there is substantive protection of "market access" but this is excluded from the jurisdiction of the Tribunal and thus a claim cannot be submitted against this.

Under both CETA and EUVIPA, the parties have a choice to submit claims under the rules prescribed in the agreement; the rules of ICSID Convention and Rules of Procedure for Arbitration Proceedings, ICSID Additional Facility Rules if the former do not apply, UNCITRAL Arbitration Rules or any other rules agreed the parties.

Constitution of First-instance Tribunal and Appellate Tribunal

The European Commission calls it an ICS as done in for the first time under CETA and Transatlantic Trade and Investment Partnership. As a matter of fact, under both CETA and EUVIPA, the tribunals constituted are *ad hoc* established for the purpose of dispute dissolution. The court system that the Commission envisaged comprises of a tribunal and an appellate tribunal.

Under CETA, ICS is not explicitly mentioned as a permanent body but there are diverse opinions that the intention is to create a permanent tribunal empowered with exclusive competence to hear claims. The tribunal, as envisaged by the Commission, is a semi-permanent body where a roster of judges is chosen from members of the tribunal who are not appointed on a full-time basis. For now, the Tribunal in CETA consists of 15 members appointed by each, i.e., 5 members from Canada and other 5 from the EU with remaining 5 neutral members appointed by the Joint Committee for a term of 5 years. Under EUVIPA system, a tribunal consists of 9 members: 3 members from Viet Nam, 3 from the EU, and 3 neutral members, all appointed for a 4-year term. The adjudicators are *ex-ante* selected by the state parties to the investment agreements.

The dispute is heard in a division of 3 members, appointed by the President of the Tribunal, where one of the members shall be national of a Member state of the EU, one from Canada/Vietnam and one from a third country chairing the division. The assignment of cases is "random and unpredictable" and with the possibility of being heard by a sole arbitrator who shall be from the third country. What is important to find is that the members of the Tribunal are paid a monthly retainer fee contributed by both parties of the agreement ensuring independence and impartiality of the members. The issue of conflict of interest is addressed under Article 8.30(1) CETA, and Article 3.40 (1) EUVIPA as members are not allowed to act as counsel or party-appointed expert in pending or new investment protection dispute in this or any other agreement which may ensure independence "beyond doubt" and avoids direct or indirect "conflict of interest".

Another feature pertinent to find among these agreements is the establishment of an appellate tribunal to review awards if the Tribunal based on the grounds fora challenge (Art. 8.28 CETA; Art. 3.54 EUVIPA). The Commission envisages the appellate mechanism that might "increase legitimacy both in substance and through institutional design by strengthening independence, impartiality, and predictability". This is a permanent body under Article 3.39 (1) EUVIPA but no such permanency is found explicitly in CETA. However, the lack of word "permanent" in CETA does not infer that it is not permanent since the Commission envisioned of creating a "permanent multilateral appeals" in future. Members of Appellate Tribunal, in both FTAs, are paid a retainer fee. Under Article 3.39 (8) EUVIPA appeal to be heard in a division of three, one from the EU, one from Viet Nam and one from the third country and it shall be chaired by the national of a third country. However, in Article 8.28 CETA no such restriction on nationality is found but left to the

Joint Committee to adopt a decision on administrative and organizational matters.

Transparency of Proceedings

In 2013, the Transparency rules, applicable to CETA and EUVIPA, introduced a large degree of publicity in the arbitral proceedings. The rules introduced provisions, *inter alia*, for public disclosure of commencement of the arbitration proceeding and also the notice and response of arbitration with written submissions from the parties and non-disputing third parties, transcripts of hearings, awards, and decision while allowing open hearings and submissions by non-disputing parties. However, expert reports, witness statements, and exhibits are made available upon request to the arbitral tribunal.

Transparency is assured to limit confidentiality and privacy and making documents available for public irrespective of arbitration rules chosen under CETA and EUVIPA. Moreover, hearings are public, and it is a matter of right of a non-disputing third party to attend under Article 3.51 (2) EUVIPA. The public disclosure of the award would improve predictability and consistency in the jurisprudence of the Tribunal creating precedents for future decisions. However, the availability of documents in public is subject to redaction of confidential or protected information, like business secrets and classified government information of respondent. Much burden lies on the Tribunal to determine on confidentiality of information and in cases when legible confidential information is disclosed could damage the interest of the disputing parties and may be a cause to appeal the award. The Tribunal can also accept or invite the non-disputing party to submit an interpretation of a particular provision of the treaties, a significant opportunity for academic and practitioners to scrutinize and contribute to the interpretation of the agreements.

Where next?

In sum, ICS introduces a new regime by assuring transparency, independent members of tribunals who are not appointed by the disputants, and importantly an appellate mechanism. The mechanism provides for mandatory resolution of disputes through amicable settlement. With an optimistic outlook of these features, criticisms have developed on its drawbacks especially the provisions to challenge award, jurisdictional issues and power of the Joint Committee/Trade Committee of the agreements. What is certainly expected from the Commission to push for the mechanism in the future agreements and thus the outcome of the Court of Justice on its compatibility could deeply affect and inspire changes.

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