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"Court-Packing" and Proposals for an EU Multilateral Investment Court

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The *Presidential Commission on Supreme Court of the United States*, established earlier this year by President Biden, released a draft Report last week assessing recent proposals to restructure the U.S. Supreme Court. Readers from outside the United States, as well as many within, can be forgiven for seeing no apparent connection between that Report and either international arbitration or on-going debates about the European Union's multilateral investment court. Despite that appearance, however, there are important observations in the Commission's draft Report which provide instructive perspectives on the EU's controversial proposals for abolishing international arbitration as a means of resolving cross-border investment disputes and instead creating new, state-selected panels of judges in such investment disputes. In particular, many of the draft Report's critiques of court-packing proposals apply, often with greater force, to the EU's plans.

President Biden's Supreme Court Commission was established in April 2021 in order to consider and assess proposals, most recently originating from the left of the U.S. political spectrum, to expand the size of the Supreme Court. These proposals, sometimes referred to as "court-packing", would alter the Court's size, by increasing the number of Justices, for the implicit, and sometimes explicit, purpose of changing the substance of future decisions of the Court and ensuring that "progressive" legislation will be upheld, rather than struck down or narrowly interpreted. In the words of Senator Ed Markey, court-packing proposals will "restore balance to the nation's highest court after four years of norm-breaking actions" by its current membership, which, in the eyes of some proponents of court-packing, was improperly selected by manipulation of the judicial appointment and confirmation process.

The Supreme Court Commission's draft Report was issued on October 14, and contains detailed discussions of recent court-packing proposals in the United States. Some observers have described the Commission, whose members were selected by President Biden, as weighted in favor of the current Administration's Democratic Party constituents. Despite those criticisms, the Report's authors include a relatively broad cross-section of contemporary American constitutional law scholars and practitioners. The bulk of the Commission's draft Report voices sympathy with concerns about the politics of past Supreme Court appointments, but is nonetheless sharply critical of court-packing proposals. The Report concludes that, while Congress likely has the authority to expand the size of the Supreme Court, such proposals "are likely to undermine, rather than enhance, the Supreme Court's legitimacy and its role in the constitutional system." (Draft Report, at 11)

In particular, in a thoughtful section putting U.S. court-packing proposals in a comparative perspective, the Report reasons that "[c]ourts cannot serve as effective checks on government officials if their personnel can be altered by those same government officials." (Draft Report, at 19) The Report also observes that "[a]uthoritarian political leaders of various stripes have frequently consolidated their own power and weakened the effective constitutional checks on their power by expanding the size of the judiciary", listing, as examples, the (left-wing) expansion of Venezuela's constitutional court by Hugo Chavez and similar (right-wing) actions in Turkey and Hungary. (Draft Report, at 19) The Report concludes that "[s]table democracies since the mid-twentieth century, however, have not tended to make such moves," which can "weaken national and international norms against tampering with independent judiciaries." (Draft Report, at 19)

Although made in a domestic American context, the Supreme Court Commission's draft Report and its observations are highly pertinent to proposals by the EU (and other states) regarding investment arbitration. Like U.S. court-packing plans, those proposals originated on the far left and right of the political spectrum (in particular, with the Osgoode Declaration and public statements by Hugo Chavez, Evo Morales and others), but later found a measure of centrist support in the EU. And, like U.S. court-packing plans, critics of investment arbitration objected to the substance of decisions by investment tribunals; as Morales pithily, if inaccurately, summarized hostility to investment arbitration, "transnational corporations always win investment arbitrations,"[1)] warranting, in the eyes of critics, a new means of adjudication.

The EU proposals for an investment court seek to provide such a means; those proposals have been discussed, and criticized, in detail elsewhere. In summary, they would involve abolishing the long-standing, nearly universal use of three-person international arbitral tribunals, with independent and impartial arbitrators selected jointly by investors and host states, to resolve investment disputes. Instead, the EU proposes to substitute a new, multilateral investment court, with judges selected (and re-selected) by states, without involvement by investors.

The EU's proposals regarding investment arbitration and a multilateral investment court originated from the same extremes of the political spectrum as domestic American court-packing plans, and share many of the fundamental objectives of those plans. Unsurprisingly, therefore, the EU proposals are also subject to the same criticisms, and threaten many of the same underlying values, as American court-packing proposals. Those criticisms are well-stated in the Supreme Court Commission's draft Report.

First, contemporary investment arbitration is designed as a check on arbitrary and discriminatory governmental actions against foreign investors – including the expropriation of property without compensation, arbitrary discrimination against foreign parties, and denials of fair and equitable treatment. Investment arbitration, with independent and impartial arbitral tribunals, selected jointly by investors and states, was designed to ensure a de-politicized and objective resolution of disputes regarding compliance by state officials with the protections provided by international law against such actions.

The Supreme Court Commission's draft Report's criticism of court-packing plans, on the grounds that "courts cannot serve as effective checks on government officials" when those officials have the power to alter the composition of judicial bodies, applies with particular force to the EU's proposals: the EU's proposals would both abolish existing adjudicative mechanisms of investment arbitration, principally because of displeasure with the decisions of those bodies, and replace those mechanisms with courts whose judicial personnel are selected (and also reselected and

compensated) entirely by government officials. Those proposals thus envision almost precisely the same alteration of existing (and long-standing) adjudicative mechanisms, with the personnel of a new, successor court selected by state officials, as do American court-packing plans. As the draft Report's criticisms of court-packing proposals make clear, both sets of proposals therefore threaten to significantly undermine the ability of independent adjudicative bodies to check arbitrary or oppressive governmental behavior.

That is especially true because the investment court that the EU proposal envisions would not be a court of broad jurisdiction over multiple subject matters – like the U.S. Supreme Court and constitutional courts elsewhere – but would instead be a court with highly specialized mandates and jurisdiction. Such a multilateral investment court would resolve only a select set of claims of governmental abuse against foreigners. Proposals to allow government officials (sole) authority to select the members of courts with only this type of limited mandate raise even more pointed concerns about judicial independence and constitutional checks on governmental actions. In these circumstances, those selecting the members of a new court will be able, with greater and more targeted precision, to choose exactly those individuals whose views they wish the new court to adopt. That poses an even greater threat to the promise of both independent adjudication and the rule of law than does packing the membership of a court of broad general jurisdiction – especially when the very reason for the proposals is to procure more favorable decisions for states.

Second, the draft Report's observations that court-packing proposals have been adopted by authoritarian rulers, while being rejected by established democracies, are especially pointed in the context of the EU's proposals to abolish investment arbitration. Like court-packing plans, proposals over the past decade for shuttering investment arbitration tribunals have arisen from the far right and left wings of the political spectrum, generally where authoritarian instincts are most tangible. Those proposals also often share the same basic objective – that is, to reduce or eliminate international and independent adjudicative limits on the exercise of sovereign authority. Indeed, as already noted, the EU proposals target tribunals whose mandates are specifically focused on claims that such authority has been abused, and provide for state control over the selection of personnel of new bodies that would take over those mandates. In all these respects, even more than court-packing plans, the EU's proposals to abolish investment arbitration raise serious concerns regarding the rule of law and the risk of "weaken[ing] national and international norms against tampering with independent judiciaries."

Third, the draft Report also warns against domestic U.S. court-packing plans because "the American example in the world matters," and, in the Report's words, "politicians at home and abroad who might wish to control their nation's courts might find themselves emboldened to take such actions if the United States engages in Court expansion." (Draft Report, at 19) That is an entirely reasonable concern, which would apply as well to tampering with judicial institutions in other major democracies.

Importantly, however, there is another aspect of this concern: just as domestic U.S. actions might affect international or foreign conduct, so international proposals can affect the actions of the United States and other countries. Thus, the EU's proposal to shutter international arbitral tribunals and to substitute state-selected judicial panels can also affect domestic actions in individual countries – whether in the United States or elsewhere.

In this regard, one must wonder whether and how EU proposals regarding investment arbitration have affected political calculations and popular responses concerning judicial independence and

the rule of law in Hungary, Poland, Turkey and elsewhere. A disregard by the EU, and others, for long-standing, independent adjudicative mechanisms, and a willingness to tamper with the selection process for dispute resolution, breeds contempt for those mechanisms and the rule of law and emboldens authoritarian rulers around the world. That is again especially true where, as with investment arbitration, those adjudicative mechanisms are specifically designed to protect citizens against arbitrary state measures and governmental oppression.

As the Report observes, "[c]ourts across the globe – and in the United States – have seen their independence compromised in the wake of politically undesirable decisions." (Draft Report, at 19) That is true, of course, with respect to *Vattenfall* in Germany, *Yukos* in Russia and *Loewen* in the United States – all of which fueled populist hostility to investment arbitration. But, as the Report also correctly concludes, the threats to independent adjudication and the rule of law come at least as much from other quarters – and, in particular, from proposals to tamper with existing means of adjudication. And, in this regard, one cannot help but ask how EU proposals to abolish investment arbitration and replace it with less independent, more compliant judicial panels, may have inspired and emboldened attacks on independent judiciaries in some EU Members States and abroad.

The authors of the draft Report warned in clear terms of the costs and potential consequences of court-packing to the rule of law and protections against governmental oppression. Those warnings apply not just in the United States. They apply also to proposals, in Europe and elsewhere, to shutter international investment tribunals and to replace those tribunals with judges hand-picked only by states. One hopes that, in time, more measured and mature reflection will lead, as it led the authors of the Report, to a reconsideration and rejection of this variant of court-packing proposals.

References

?1 *See, e.g.*, European Parliament, Multilateral Investment Court. Overview of the reform proposals and prospects; Gary Born, The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?, 38 J. Int'l Arb. 417 (2021).

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