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TTIP: The French Proposal For A Permanent European Court for Investment Arbitration

Athina Fouchard Papaefstratiou (Independent Arbitrator) · Wednesday, July 22nd, 2015

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On 2 June 2015, the French Minister of Foreign Trade, Matthias Fekl, submitted to the European Commission a proposal regarding the Investor-State dispute settlement (***ISDS***) mechanism included in the project for a Transatlantic Trade Investment Partnership between the US and the EU (***TTIP***). The French Proposal is one further addition to the hot debate on the issue.

The French proposal purports to address the main causes of public mistrust towards investor-State arbitration: the alleged restriction of States' general regulatory power, conflicting awards, lack of transparency and arbitrators' conflicts of interest. It contains the following series of measures:

• provisions safeguarding States' power to regulate, such as a clarification that general legislation changes do not amount to a breach of an investor's legitimate expectations, or that non-discriminatory measures aiming at enhancing health or environment protection or security do not amount to indirect expropriation;

• provisions safeguarding States' power to sanction foreign investors for violation of national laws or regulations, and enabling States to bring counterclaims against investors in arbitration proceedings;

• creation of a permanent court that would establish and manage lists of arbitrators and act as an appellate court; and

• provisions aimed at enhancing the transparency and good functioning of the arbitral process, such as the application of a code of ethics for arbitrators, punitive damages against investors bringing abusive claims, enhanced transparency regarding third-party funding and provisions allowing the tribunal to deny jurisdiction in cases of treaty-shopping.

Certain of these measures, such as the proposal regarding a State's right to submit counterclaims before arbitration tribunals are both innovative and reasonable. Other measures deal with issues that have already been addressed in the draft CETA, the EU Free Trade Agreement with Canada. For example, the interplay between indirect expropriation and a State's right to regulate. Probably the most novel but at the same time most controversial proposal is the one regarding the constitution of a permanent European court which would handle investment arbitrations against the

EU or a EU member State (the ***EU Permanent Court***).

The mere question of the need for a permanent court has already divided the European institutions. It is for example reported that the main reason that the European Parliament postponed its plenary discussion and vote on a resolution on the TTIP on 10 June was exactly the question of the establishment of a permanent court for investor-State dispute resolution. (You may find out more on the background of the postponed vote in a previous post by Nikos Lavranos).

Let us turn now to the specifics of the French proposal for a permanent court. Pursuant to the French proposal, the EU Permanent Court would be vested with a double mission: (i) to establish and maintain a list of at least 15 arbitrators authorised to hear investment arbitration disputes and (ii) to operate as an appellate court for investment arbitration awards, as well as a forum for setting aside such awards.

The list of arbitrators, a measure purporting to address conflict of interest situations, is not a new proposal. The draft CETA also provides that the Committee on Services and Investment will establish and maintain such a list. The benefit of establishing a closed list of arbitrators is however doubtful, especially given that certain disputes require the tribunal to have experience in a particular industry or sector. Besides, limiting the parties' choice to a predetermined list of arbitrators has shown its limits, especially when political considerations may interfere in the establishment of such a list. It is noteworthy for example, that in 2012 the ICC amended its arbitration rules and granted the ICC Court more leeway in appointing arbitrators, by facilitating direct appointments and sidestepping selection from any lists established by the national committees. The French proposal takes a step further from the draft CETA by limiting the parties' choice to a list of "extremely qualified" arbitrators, who may be either judges or former judges (national or international), or academics. Lawyers or other law professionals appear to be excluded, which is likely to bar some of the most competent candidates from being considered.

Even more questionable is the EU Permanent Court's mission as appellate court and forum for the annulment of awards. The mechanism put forward in the French proposal is the following: (i) the arbitral tribunal (selected amongst individuals appearing in the list of the EU Permanent Court) issues a provisional award, which it communicates to the parties; (ii) either party may, within a short period, submit an application to the EU Permanent Court for the re-examination of the merits of the dispute, as to both factual and legal issues; (iii) the EU Permanent Court re-examines the case and issues a decision, either confirming the award, which then becomes final, or retransmitting the award to the tribunal, with specific recommendations as to its content. In this case, the tribunal issues a new, final, award, following the EU Permanent Court's recommendations – even though the French Proposal admits that within the ICSID system such recommendations cannot be binding; (iv) the parties may attempt to set aside the final award either having recourse to the system of *ad hoc* committees if the arbitration is an ICSID arbitration, or applying again to the EU Permanent Court, if it is not.

The proposed system raises several questions, the most obvious of which are the following:

• A unilateral solution: the French Proposal recommends the creation of a *European* court for investment arbitrations against the EU or EU member States, rather than a permanent US-EU court. The question therefore arises as to what will be the competent forum to hear investment disputes brought by European investors against the US. Will such disputes continue being heard by *ad hoc* or ICSID tribunals, as is the case today, or is there a need for another permanent court, a US

permanent court this time?

• A difficult interplay between the ICSID system and the EU Permanent Court: the EU Permanent Court is not put forward as an additional, opt-in dispute resolution mechanism alternative to ICSID or *ad hoc* arbitration. The EU Permanent Court would intervene even in ICSID arbitrations. However, elements such as the arbitral tribunal's issuance of a provisional decision, which would then have to be confirmed by the EU Permanent Court, would require an amendment of the ICSID Arbitration Rules. This is neither realistic (let alone in the control of the European Union), nor necessarily welcome, in light of the efficiency and wide recognition of the ICSID arbitration system.

• Legitimacy of the EU Permanent Court to set aside an award: pursuant to the French proposal, in non-ICSID arbitrations the forum for setting aside investment arbitration awards would be the EU Permanent Court. Given that the EU Permanent Court also has a function as an appellate court, it may happen that the EU Permanent Court would have to decide upon a request to annul an award, in the issuing of which it has participated, which would constitute a blatant violation of procedural fairness.

• A lengthier and more costly process: in addition to the above comments on the specifics of the proposal for an EU Permanent Court, introducing a second degree of jurisdiction leads in itself to a lengthier process. The French proposal indicates that the EU Permanent Court may issue a decision upon re-examination of a case within six months (or a longer period, if appropriate), but realistically a re-examination of the merits of an investment dispute would take much longer. A longer dispute resolution process entails by definition higher costs for the parties. Moreover, the establishment and operation of the Permanent Court would occasion additional costs for European States.

The French proposal lies in the antipodes of many arbitration practitioners' view that "*if it ain't broke don't fix it*." It appears however probable that if the TTIP is ever to come into effect, it would have to contain amendments to the ISDS mechanism as we know it. That mechanism is in any event improvable in many ways. The French proposal contains certain sensible suggestions. Nonetheless, the suggestion regarding the establishment of an EU Permanent Court appears to raise as many issues as it purports to resolve.

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