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Transatlantic Trade and Investment Partnership (TTIP) and a Paradigm Shift from Arbitration to Investment Law Trial?

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The last four months of 2015 have been significant for the design of future investor-state dispute settlement (ISDS), at least as far as political will goes for the European Union's (EU) international investment policy. The European Commission's May 2015 concept paper on 'Investment in TTIP and beyond – the path for reform' publicly expressed the Commission's desire to explore the creation of an international investment court. In September 2015, the Commission took observers by surprise when it disclosed a negotiating proposal for the Transatlantic Trade and Investment Partnership (TTIP) that includes the establishment of a permanent two-tiered international investment court.[1] In November 2015, the European Commission's proposal, now officially endorsed by the Union, was tabled for discussions in the 12th TTIP negotiating round between the European Union and the United States (hereinafter EU proposal). In early December 2015, the conclusion was further announced of negotiations on a comprehensive free trade agreement (FTA) between the European Union and Vietnam, in which Vietnam agreed to the Union's proposal for an international investment court. TTIP is of course still under negotiation, the United States' official reaction to the EU proposal is not yet known and the text of the EU-Vietnam FTA is not released at the time of writing, but it is clear that the EU is setting the stage for unprecedented changes in the field of investment law. The ensuing paragraphs will focus on one of these changes, in light of the likely impact of the European Commission's proposal.

The European Union's model text of 12 November 2015 constitutes the first official, publicly disclosed, negotiating proposal for an international investment court. With its political weight, the EU confers unparalleled legitimacy on the criticisms levelled at the current system of investor-state dispute settlement, and this whether the United States accepts the EU proposal or not.[2] But the EU is not the only actor to have considered the establishment of a permanent investment court. The creation of an international court for the settlement of investment disputes has for instance equally been put forward by the German Federal Ministry for Economic Affairs and Energy through the 'Model bilateral investment treaty with investor-state dispute settlement for industrial countries, giving consideration to the U.S.', prepared by Markus Krajwski. It was further included as a reform option in the *2015 World Investment Report* of the United Nation's Conference on Trade and Development (UNCTAD) and in the 2015 update of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD). Wittingly or unwittingly, these *de lege ferenda* considerations and proposals do more than attempt to change a mode of dispute settlement. They reach deep into the functioning and perceptions of the existing system to suggest a paradigm shift

from a discipline that has kept a foot in private international law to one of (purely) public international law.

So far, international investment treaty disputes have been essentially resolved through investment arbitration in a system that has the characteristics that we all recognise. Among them, one counts private adjudication of international investment disputes, party autonomy in the selection of arbitrators, and a recurrent possibility of increased confidentiality of proceedings. The choice of international arbitration, and the features that go with it, as a mode of resolution of investment disputes is not surprising in view of the existing system's inception and background. A confluence of more or less haphazard factors, including the elaboration of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in an international legal setting considerably different to ours today, the fact that some of the first known investment disputes were contract-based, and that Aron Broches, 'principal architect' of the ICSID Convention,[3] had been conversant with private international law,[4] led to modelling investment dispute settlement on commercial arbitration.

And yet, international investment law *is*, at least in its origin, public international law. It forms part of international economic law. It concerns the conduct of sovereign states and international organisations, and it governs their relations inter se and, especially, their relations with natural or juridical persons. Simpliciter, it is treaty law (*ius inter gentes*). The fact that it can also cover other relations, such as those based on investment contracts, does not alter this observation; the overwhelming majority of known international investment disputes are treaty-based. International investment law bears a great resemblance to international human rights law. Both fields draw their legal sources from international treaties concluded between sovereign subjects of international law (respectively, investment treaties and human rights treaties) that protect third parties (investors or individuals). The latter often enjoy not only substantive protections but also procedural remedies, which allow them to bring international claims against the sovereign party whose conduct comes under scrutiny.[5]

But while in international human rights law, such as in the framework of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and that of the American Convention on Human Rights (Pact of San José), disputes are judged by permanent international courts, investment treaty disputes are adjudicated by arbitral tribunals constituted *ad hoc* to hear each case. And this is where the complexity of the matter lies. Because, international investment law, a public law discipline, was granted a private mode of dispute resolution. This in its turn blurred the distinction for international investment law between private and public international law, and the field came to be considered in some jurisdictions as 'hybrid', half public half private. This 'hybridity', or the two-hats of investment law, is particularly evident in countries with a strong tradition in commercial arbitration, such as France, where international investment law is often taught by academics specialising in private international law. It should not astonish that an ISDS proposal made by France in May 2015 focused on a hybrid institution called a 'court' with 'arbitrators', where broadly the first instance control resembled arbitration and the second instance control public trial. But in other countries where there is no particular tradition in international commercial arbitration, such as Germany, investment law is taught as a public international law topic.

Determining whether investment law belongs to the field of public or private law is not without consequences and its alleged 'hybridity' does not make things easier. If investment law belongs to the field of private law, then arbitration is appropriate. If investment law belongs to the field of public law, then investment law *trial* is. Indeed, it is uncertain why a tribunal drawing its jurisdiction from an international treaty, judging the conduct of a sovereign state or an international organisation under rules of public international law, should operate under commercial litigation norms rather than public law trial.[6]

Revealing this dilemma is an important contribution of the EU proposal. Of course, the TTIP court has not been created yet. If the US negotiators agree to it, challenges remain, such as those concerning enforcement of the court's decisions and the compatibility of ISDS with EU law.[7] At the same time, the creation of the TTIP court will not significantly affect arbitration at the global level, given that less than one third of EU member states have an investment treaty with the United States.[8] But the change that the EU proposal can bring about is a deeper one. It is one of questioning the appropriateness of the current ISDS system for public international law disputes.

* This post draws in part on a theme discussed in the working paper 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead', 5 January 2016, available at https://ssrn.com/abstract=2711943.

[1] For an overview of the proposal, see Catharine Titi, The European Commission's Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court, *Transnational Dispute Management* 6, 2015.

[2] Robert Howse, Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes (forthcoming, on hold with the author).

[3] Christoph Schreuer et al. (2009), *The ICSID Convention: A Commentary*, 2nd edition, CUP, p. 2.

[4]Robert Howse, Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes (forthcoming, on hold with the author).

[5] Catharine Titi, The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead, Working paper, 5 January 2016, available at https://ssrn.com/abstract=2711943.

[6] Robert Howse, Courting the Critics of Investor-State Dispute Settlement: the EU proposal for a judicial system for investment disputes (forthcoming, on hold with the author).

[7] On remaining challenges, see Catharine Titi, The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead, Working paper, 5 January 2016, available at https://ssrn.com/abstract=2711943.

[8] *Ibid*.

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