

Kluwer Arbitration Blog

The TTIP Negotiations: US versus EU Leadership in Global Investment Governance

Stephan Schill (General Editor, ICCA Publications; Amsterdam Center for International Law, University of Amsterdam) · Saturday, March 5th, 2016 · Institute for Transnational Arbitration (ITA), Academic Council

International investment law and investor-State dispute settlement (ISDS) are at a historic juncture as the United States and the European Union (EU) have started to address the content and contours of the investment chapter in the Transatlantic Trade and Investment Partnership (TTIP) in the latest negotiation round that took place in Brussels the last week of February 2016 (see the [Concluding Statement of the EU Chief Negotiator](#)). While largely agreeing on the need to ensure regulatory space, increased transparency, and tighter state control of ISDS, both sides come to the negotiation table with diverging ideas about the modes and institutional structure for ISDS.

Reformed Investor-State Arbitration versus Permanent Investment Court System

While no written proposals are available from the United States, its approach is likely based on the [2012 US Model BIT](#), which has clearly inspired the investment chapter in the recently concluded [Trans-Pacific Partnership \(TPP\)](#), the biggest mega-regional yet (see also the analysis of TPP by [Alschner/Skougarevskiy](#)). Given that TPP contains a reformed version of investor-state arbitration, it is not far-fetched to assume that a continuation of the loosely institutionalized system of one-off arbitration, although with additional safeguards and subject to transparency, is where US preferences lie for TTIP.

The European Commission, by contrast, has suggested, in the [Proposal](#) it tabled already in November 2015, to include a permanent investment court system in TTIP. This system has already found its way into the [EU-Vietnam Free Trade Agreement](#) of 2 December 2015 and, in quite a coup for the Commission, into the [Comprehensive Economic and Trade Agreement \(CETA\)](#) with Canada during the process of ‘legal scrubbing’, as [announced on 29 February 2016](#) immediately after the conclusion of the Brussels TTIP negotiations round. Europe therefore clearly aims at building new institutions for ISDS, while arbitration as a mode of dispute settlement seems almost out of the question.

Given the importance of the EU and the United States as global rule-makers in international investment law, the outcome of the TTIP negotiations is likely to influence the future architecture of global investment governance. Whose approach will succeed, that of the EU or of the United States, is not only a matter of bargaining power on both sides of the Atlantic; it will be key, too, whose vision for governing international investment relations is more persuasive to third parties.

Realpolitik versus Idealpolitik?

The United States, as is often the case in international politics, is taking a pragmatic and realistic approach. Concerns about ISDS and regulatory space are taken into account as one element in the much broader endeavor to integrate different national economies, including between developed economies, in order to create more open markets that benefit all participating actors. No doubt, US pragmatism on ISDS is also possible because North America has already had a controversial public debate about NAFTA's investment disciplines, which the New York Times called '[NAFTA's Powerful Little Secret](#)' as early as 2001, when the first NAFTA cases were coming in at the turn of the millennium. While investment arbitration is not uncontroversial in the United States today, the level of criticism is nowhere near that in Europe. The public criticism in many quarters in Europe, as illustrated by the [Stop-TTIP Initiative](#), is vast, highly polarized and chiefly focused on how best to preserve regulatory autonomy at home, with more open markets seemingly perceived as a threat rather than a boon for European interests.

The gap between two of the world's biggest economic powers could not be starker. While the United States is spearheading developments in international trade and investment negotiations, as illustrated in the successful conclusion of TPP, Europe still seems to be fighting to define the ultimate contours of its international trade and investment policy. At best, the European debate will result in a more principled, value-oriented and perhaps idealistic vision for global economic governance, if palatable to the United States. At worst, Europe is losing global normative power because its inward-looking perspective could hamper global leadership, although it has a comparable interest in global open markets.

The Commission's proposal to create a permanent investment court system is a strong vision and the text presented constitutes the first concrete step towards practical implementation. While many tricky details remain—such as how to make the investment court system compatible with the [ICSID Convention](#), how to enforce resulting decisions, how to integrate domestic courts better, or how to keep multilateral processes open—the Commission's political courage and craftsmanship merit applause. The EU proposal breathes the right spirit: to transform investor-state arbitration into a truly public, fully transparent, more predictable and balanced system of global adjudication in line with the '[public law approach](#)' to international investment law that has been long called for in different quarters.

However, what some participants in the debate in Europe seem to forget is that the creation of a permanent investment court requires the agreement of partners, including the United States. If it becomes a deal-breaker for TTIP, Europe is likely to lose more global rule-making power, as the United States is already turning its head towards the Pacific. This does not mean that the idea of a permanent investment court should not be pursued. On the contrary, this idea is likely better suited to deal with the problems in investment governance than the current system of one-off arbitration. But fallback options—meaning a reformed version of investor-state arbitration, perhaps with a permanent appeals body—should not be categorically ruled out, given US hesitation vis-à-vis permanent international courts. To foreclose this way forward categorically could be a mistake, widen the transatlantic gap, and possibly lead European visions on trade and investment governance into a cul-de-sac.

The Investment Court System: Cure to an Ill or an Exciting New Ballgame?

Most critically, the permanent court is currently demanded above all by pointing to shortcomings

with investor-state arbitration. It is justified as a cure to an ill, rather than principally the foundation and lodestar of a new paradigm. At the same time, side effects and hangovers are too little considered. A permanent court could, much more than arbitration, develop its own institutional dynamics and become even more independent from government influence than is currently the case with investor-state arbitral tribunals. The court in Luxembourg, as Joseph Weiler has famously argued in ‘[The Transformation of Europe](#)’, is a perfect example of the far-reaching dynamics a permanent inter-/supranational court can develop in (re-)shaping entire polities. The Court in Strasbourg or the WTO Appellate Body are no different.

If a permanent investment court is no more than medicine, there are less fundamental ways of curing the ills investor-state arbitration has produced. The right cures are, in fact, already present in the EU’s approach in some of its trade and investment agreements, such as in [CETA as originally conceived](#) prior to legal scrubbing in September 2014 or in the [EU-Singapore Free Trade Agreement](#) of May 2015, which are similar to the dispute settlement provisions in TPP. They include full transparency of dispute settlement, the introduction of stricter ethics rules to ensure independence and impartiality of arbitrators, legislative counterweights in the form of committees that can issue binding interpretations, clarifications to substantive treaty standards, the introduction of numerous exceptions, and the commitment to discuss the establishment of an appeals mechanism. These elements are sufficient, but also necessary, to cure deficits with how investor-state arbitration has been running so far.

This notwithstanding, to make a stronger case for a permanent investment court as an independent global public good, more is needed than thinking of it only as medicine for introverted European sensitivities. It needs to be seen—and sold—as an entirely different ball game that can attract attention and excitement on both sides of the Atlantic (and beyond). It is a means to shape the future institutional infrastructure of the global economy in ways that are more in line with fundamental constitutional values, such as democracy, the rule of law, and the protection of economic and non-economic concerns, than the present system (for a development of such a framework see my [recent think piece](#) for the [E15 Initiative](#)). It is in emphasizing these constitutional elements in an outward-looking perspective that Europe can develop a decidedly value-oriented and perhaps idealistic, but no less realistic, vision for global investment governance that could put it back into a leadership position in shaping investment law’s global future.

To make sure you do not miss out on regular updates from the [Kluwer Arbitration Blog](#), please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Saturday, March 5th, 2016 at 6:39 am and is filed under [CETA](#), [EU-Vietnam Free Trade Agreement](#), [European Union](#), [ICSID Convention](#), [Investment agreements](#), [Investment Arbitration](#), [Investment protection](#), [ISDS](#), [TPP](#), [Transatlantic Trade and Investment Partnership](#). You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.