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Fit for purpose? The EU's Investment Court System

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On 12 November 2015, in the context of its negotiations for the Transatlantic Trade and Investment Partnership (TTIP) and in a bid to address growing criticism of investment treaty arbitration, the European Commission made a formal proposal for a reformed approach to investment protection and an apparently more transparent system for the resolution of investment disputes. To that end, the Commission suggested, amongst other things, the establishment of a permanent court to hear investment disputes (the "Investment Court"). The Investment Court aims to safeguard states' right to regulate and create a court-like system with an appeal mechanism based on clearly defined rules, with qualified judges and transparent proceedings.

A previous Arbitral Women blog post (December 2015) outlined the main innovative features of the EU's proposal in the context of TTIP, including clarifications to the protections to be afforded to investors, and the next steps in the TTIP negotiations. This post will examine in more detail the proposed Investment Court system and consider its potential strengths and weaknesses, particularly in light of the recent inclusion of the Investment Court system in the EU-Vietnam FTA and CETA and the EU's commitment to seek to include such a system in all future negotiations with its trading partners.

The EU's proposal is for a two-tier court system – a clear departure from the traditional treaty-based arbitration, providing instead for the establishment of a semi-permanent quasi-judicial body. If amicable resolution of an investor's dispute is not possible, under TTIP the investor may request consultations. If, after six months, those consultations have not resulted in a resolution of the dispute, the investor can file a claim with the Tribunal of First Instance (TFI).

The TFI will be comprised of 15 judges, five from the US, five from the EU and five third country nationals, all of whom must have demonstrated expertise in public international law and qualifications that make them eligible for appointment to judicial office in their respective countries, failing which they can be "*jurists of recognised competence*." These judges must be available at all times and on short notice, in consideration for which they will receive a monthly retainer. If they are employed on a full-time basis, they will receive a salary and will be prevented from engaging in other professional activities, save with the Tribunal President's permission, to be granted exceptionally. Those judges not retained on a full time basis are free to engage in other professional activities, provided there is no conflict with their TFI appointment, although they

cannot act as counsel in other investment treaty disputes.

Subject to the disputing parties' agreement that the case be heard by a sole judge, cases are heard by three-member panels, chaired by the third country judge in each case. The TFI's "*provisional*" award must be rendered within 18 months of submission of the claim, failing which the TFI must issue a decision justifying the delay. "*Provisional*" awards that are not appealed within 90 days become "*final*."

The Appeal Tribunal (AT) will be comprised of six members – two US, two EU and two from third countries – who sit in three-member panels and must qualify for the highest judicial office in their respective countries or be "*jurists of recognised competence*." The grounds for appeal are broad and include errors in the interpretation and application of the relevant law, manifest errors in the appreciation of the facts (including, where relevant, domestic law) and the grounds listed in Article 52 of the ICSID Convention. Appeals should be concluded within 180 days and, in the event of delay, in no more than 270 days. If the AT modifies or reverses the TFI's provisional award then the TFI must revise its provisional award, as appropriate. Final awards of the TFI are not subject to any appeal mechanism. Final awards are expressed to be "*arbitral awards*" relating to claims "*arising out of a commercial relationship or transaction*" for the purposes of enforcement under the New York Convention and to qualify as awards under the ICSID Convention.

One of the most striking contrasts with the existing investor-state dispute settlement (ISDS) regime, is the imposition of pre-selected TFI and AT members. One of the distinctive features of ISDS is the parties' autonomy when it comes to the choice of arbitrators. As currently proposed, the members will be appointed in each case by the President and the investor claimant has no say in the selection of the TFI and/or AT members. As well as depriving the claimant investor from influencing the selection of the arbitral tribunal, one obvious consequence of this feature of the EU's proposal is the potential for arbitrator appointments to become largely political, with member states choosing to appoint members they consider to have a pro-state bias. This could result in an ISDS system skewed heavily in favour of respondent states. Conversely, however, it could be argued that the contracting parties will appoint pro-investor members, out of concern to ensure their own investors are given a fair hearing when a dispute arises.

Furthermore, although at first glance it seems there is a distinction in the qualifications required for TFI and AT members, the alternative qualification that permits an appointee to be a "*jurist of recognised competence*" blurs this distinction. It is not in fact clear from the proposal what qualifies a person as a "*jurist of recognised competence*" anyway and, arguably, the dual requirements that an appointee be both qualified for appointment to judicial office in her home jurisdiction and have demonstrated expertise in public international law could be said overly to restrict the pool of qualifying members.

Another point of note is the absence of a provision addressing diversity in the appointment of members to both the TFI and the AT. In view of the current focus on, and effort in ensuring, diversity in international arbitration, the lack of a provision requiring the contracting parties to ensure diversity in their appointments is particularly disappointing.

Another interesting feature is the requirement that the party lodging an appeal provide security for the costs of the appeal and the amount awarded. Statistics show that respondent states are far more likely to prevail in investment treaty arbitration. As a result, it seems more likely for the claimant

investor to be the appealing party. The effect of this provision would therefore seem to be to deter unsuccessful claimant investors from appealing, thereby benefitting respondent states. It will also be interesting to see whether in light of this provision, and a more general power to order security for costs, the TFI and AT are more inclined to make costs shifting orders, as opposed to the current practice of ordering each party to bear its own costs. There is also a requirement that a party in receipt of third party funding notify the other side and the tribunal (or, if not yet constituted, the President of the Investment Court).

Finally, where the claimant is a US investor, the EU's proposal allows for a determination of the respondent at the EU's sole discretion. The proposal provides that before submitting a claim, a US investor must send a request for determination of the respondent to the EU and, where the treatment in question involves a member state, to that member state. The EU will then determine whether it or the member state in question shall be the respondent in the proceedings and the claimant investor must submit its claim on that basis. Crucially, the TFI and AT are bound by the EU's determination. Although the EU's proposal makes clear that "*neither the European Union nor the Member State concerned may assert the inadmissibility of the claims, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper respondent should be or should have been the European Union rather than the Member State or vice versa*," this self-determination as a respondent is bound to cause difficulties. For example, the TFI or AT might conclude that there has been a breach of the investor's protected rights and that compensation is due but find itself unable to award damages on the basis that the respondent cannot be held liable for the harm suffered. As the AT and TFI are bound by the EU's determination, they would be powerless to resolve the situation. Another obvious consequence for a claimant investor if the EU were to determine that it was the proper respondent in place of a member state, is the limit this would place on the investor's enforcement options, as the ICSID Convention could not be applied, making enforcement a much longer and more cumbersome process.

All in all, the EU's Investment Court proposal contains some interesting features. Whilst the aims of an appellate system and a more transparent procedure can easily be appreciated, there is no guarantee that the EU's proposals will be successful in addressing ISDS's greatest perceived flaws – inconsistency in decisions and awards that over-compensate claimant investors. And in the meantime, there are several areas that would seem certain to raise more questions.

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