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POLICY BRIEFING

The EU Investment Court Proposal in TTIP: ISDS 2.0

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SUMMARY

The potential inclusion of investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) has been a highly contentious issue, attracting the attention of commentators, non-governmental organisations (NGOs) and civil society groups. Giving foreign investors the opportunity to, in effect, sue investment host state governments caused such public outcry that the European Commission suspended negotiations on investment protection within the TTIP agreement in order to carry out a public consultation in Spring/Summer 2014[1]. In response to the criticisms of ISDS, the EU Commission proposed the establishment of an 'Investment Court System' (ICS) in September 2015[2]. More detail emerged on the proposal in November 2015 when the Commission published its draft text on investment in TTIP[3]. The Commission is brandishing the ICS as a highly innovative proposal which would cure most, if not all of the ills associated with ISDS. However, a close inspection of this text reveals that the ICS proposal does not constitute the radical reform of ISDS that the Commission is touting. Indeed, a comparison of the EU draft text on investment and the USA's 2012 model bilateral investment treaty (BIT)[4] (which represents the US favoured traditional approach to investment protection provisions) reveals a rather narrow gap.

US Model BIT 2012

The US model BIT constitutes the preferred terms under which the US enters into bilateral investment protection arrangements with other states. The US government last updated its model BIT in Spring/Summer 2012. However, the provisions contained therein are largely based upon the previous version of the treaty, the 2004 model BIT. The 2012 treaty does contain some updates (e.g. reference to labour and environmental protection), though crucially, there were no changes made to the substantive investment protections

[1] EU Commission ISDS Consultation May-July 2014, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179
[2] EU Commission Press Release 16 September 2015, http://europa.eu/rapid/press-release_IP-15-5651_en.htm
[3] EU Commission Draft Text on Investment 4 November 2015, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf
[4] A BIT is a treaty between two states essentially governing how their citizens will be treated if they invest in the territory of the other state i.e. the legal protections to which they will be entitled and how any arising disputes between the investor and the state would be settled

and only very minor tweaks to the ISDS arbitration clause.[5] The US model BIT includes what you might call the 'traditional' approach to ISDS and investment treaty arbitration. Such a traditional approach has been the subject of much criticism in the past few years, and for good reason. ISDS has been criticised by commentators for a lack of legitimacy, transparency, fairness and coherence[6].

What exactly is ISDS?

Essentially, traditional ISDS clauses (as contained in the US model BIT) allow disgruntled foreign investors to effectively 'sue' host state government if they believe that the said government has breached the obligations founds in the relevant BIT. Obligations include the right of foreign investors to be treated in the same way as national investors, the application of most favoured nation treatment and expropriation of property in limited circumstances and subject to compensation. Investors can initiate a dispute against the government if one of these or other treaty obligations are breached. The procedure of arbitration can vary significantly depending on if it is institutional or ad hoc. Institutional arbitration takes place under the auspices of an arbitration institution. For investment disputes, the most popular institution is the International Centre for the Settlement of Investment Disputes (ICSID)[7]. Arbitration institutions such as ICSID have established procedural rules and physical facilities to support the arbitral process. Ad hoc arbitration means that the disputing parties may exercise a high degree of autonomy over the process. They can select the rules which will be applicable to their dispute, as well as the location of the arbitration etc. In both cases (institutional and ad hoc), the disputing parties usually select the arbitrators who will hear and decide upon the outcome of the dispute. Traditionally, each disputing party selects one arbitrator and the third (usually the presiding arbitrator) is selected by the mutual agreement of the parties. The three arbitrators make up the tribunal. Arbitrators are selected by the parties at their discretion, and do not need to have any particular experience or qualifications. It should be noted that

[5] P Di Rosa, 'The New 2012 US Model BIT: Staying the Course' (1 June 2012) Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/ accessed 15 April 2016

[6] See for example J Billet, *International Investment Arbitration: A Practical Handbook* (2016) from page 84, S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decision' (2005) 73 *Fordham Law Review* page 1591 and J Kalicki and A Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (2015)

[7] See ICSID website https://icsid.worldbank.org

arbitrators are often lawyers and sometimes academics; being an arbitrator is not usually a profession in itself. Thus, arbitrator appointment is often criticised because arbitrators may have conflicts of interest and/or have an interest in pleasing their employing party/ies; i.e. repeat business through re-employment to serve as an arbitrator. Additionally, arbitrators are generally paid daily fees for the duration of the case; thus, arbitrators are often criticised for having a personal interest in cases dragging on.

Once established, the tribunal usually receives written submissions from the parties and hears oral arguments. The arbitrators consider these submissions and arguments, as well as the governing law in making a decision (which is termed the 'arbitral award'). The award, once rendered is final and binding. There is no general right of or process of appeal. There may be some limited right to review under the ICSID rules (an annulment process which is essentially limited to cases where there has been an abuse of procedure) or by way of national courts. It should be noted nonetheless that review procedures are limited. The US model BIT contains an article which makes reference to the establishment of an appeals process in the future, but nothing more concrete than that.

EU's Draft Text on Investment in TTIP

There have been many calls in recent years for an investment court to be established[8]. It has been argued that a court might address many of the concerns with ISDS, whilst still providing an effective mechanism for aggrieved investors to settle their disputes. Whilst this may be the case, the Commission's version of a court may not have been what commentators calling for a court envisaged.

The EU Commission has heralded its ICS proposal (contained within the draft text on investment[9]) as a sort of new era for investment dispute settlement; a panacea to answer all the criticisms of the traditional ISDS. However, a careful reading of the Commission's proposals for ICS in TTIP reveals that the proposed court would differ from the traditional

[8] See for example M Goldhaber, 'Wanted: a world investment court' (2004) 3 *Transnational Dispute Management* and G van Harten, 'A case for an international investment court' (2008) https://www.iisd.org/itn/2008/08/07/commentary-a-case-for-an-international-investment-court/

[9] The ICS is also contained in the EU-Canada agreement (CETA) and EU-Vietnam agreement, both of which were concluded last year but are not yet in force – both agreements will need to be ratified by the Council of the European Union and the European Parliament before entering into force

approach to investment arbitration/dispute settlement as contained in the US model BIT in reality in three main ways:

i) Name – court vs tribunal

The selection of the title 'court' is a very deliberate move on the part of the EU Commission, in order to silence the TTIP ISDS critics. However, in this case, the title 'court' is a little misleading. The ICS proposal describes a process which is still very similar to traditional ISDS procedures and which is heavily reliant on arbitration instruments such as the ICSID rules and the New York Convention[10].

ii) Appointment of judges

Rather than three arbitrators being selected by both disputing parties (the investor and the respondent host state), the EU Commission proposes that a standing roster of 15 judges should be selected by the US and EU authorities. Five judges should be US nationals, five judges should be EU citizens and the remaining five judges should be nationals of third countries. Judges will be selected for a six-year term which is renewable once. A pre-requisite to become a judge is that the candidate must be eligible for appointment to judicial office in their own state or be "jurists of recognised competence"[11] with expertise in public international law. This requirement is problematic, as in some states becoming a judge is a separate career (as opposed to states in which lawyers progress to become judges). This may exclude a significant number of suitable potential candidates.

Additionally, judges will be paid a monthly retainer fee as well as a daily rate; this will be funded by the US and EU authorities equally. Such state funding might be tough to secure and to predict, given that the caseload of the new system is an unknown quantity. Similarly, paying judges to do nothing would be a waste of the tax payer's money. Furthermore, with the retention of daily fees, judges are still likely to have an interest in a case dragging on. Furthermore, with an ethical code of conduct heavily limiting what other work judges can undertake, the job is likely to be unattractive to many well qualified 'jurists' who will be able to earn much more as counsel for example.

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[10] Convention on the Enforcement and Recognition of Foreign Arbitral Awards 1958 text available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

[11] Article 9 EU Commission Draft Text on Investment 4 November 2015, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

iii) Possibility of appeal

Under the ICS proposal, a tribunal of 'first instance' (comprised of three judges) will issue a decision in a particular case. If one, or indeed both parties are unhappy with the decision they will be able to apply for appeal on issues of law, fact or on the grounds abuse of procedure (as contained in Article 52 of the ICSID Convention). This is an extremely wide set of grounds on which appeal may be launched, and this may result in the losing party simply appealing every case as a default. This could lead to lengthier and more expensive proceedings, as well as a backlog of cases due to a potentially heavy appellate caseload.

In terms of the procedure, the appeal will be heard by an appeal tribunal which will consists of three appellate judges. Judges will be selected from a permanent appeals tribunal roster of six members (two US nationals, two EU nationals and two nationals of third countries). Appeals tribunal members will be elected for six years with a once renewable term. Appeals tribunal members must have the same qualifications/standing as members of the tribunal of first instance and are paid in the same way (monthly retainer and daily fee). The same problems as above could be repeated in terms of appeal member qualification and payment.

Conclusions

The ICS proposal put forward by the EU Commission in its draft text on investment does not represent a fundamental departure from the 'traditional' system of ISDS as contained in the US model BIT 2012, despite the assertions of the EU Commission otherwise. The criticisms of the ISDS system are not adequately addressed in the ICS proposal. Indeed, the proposal is probably best described as 'ISDS 2.0', representing relatively minor tweaks to the traditional ISDS system, and adding new problems to the mix. Civil society groups should therefore be weary of the ICS and not be swayed by the EU Commission's PR campaign for its proposal.

As the traditional ISDS mechanism and the proposed ICS proposal are not radically different, it is therefore envisaged that around the negotiating table, the US and EU will probably not be as far apart as one might have first thought. The negotiators will undoubtedly need to focus on the three issues outlined above, which are likely to be the

sticking points on investment dispute settlement (name, appointment of judges and appeal issues).

REFERENCES AND ADDITIONAL READING

J Billet, *International Investment Arbitration: A Practical Handbook* (2016)

S Franck, 'The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decision' (2005) 73 *Fordham Law Review*

J Kalicki and A Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System* (2015)

ICSID website https://icsid.worldbank.org

M Goldhaber, 'Wanted: a world investment court' (2004) 3 *Transnational Dispute Management*

G van Harten, 'A case for an international investment court' (2008) https://www.iisd.org/itn/2008/08/07/commentary-a-case-for-an-international-investment-court/

Convention on the Enforcement and Recognition of Foreign Arbitral Awards 1958 text available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

EU Commission ISDS Consultation May-July 2014, http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

EU Commission Press Release 16 September 2015, http://europa.eu/rapid/press-release_IP-15-5651_en.htm

EU Commission Draft Text on Investment 4 November 2015, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

P Di Rosa, 'The New 2012 US Model BIT: Staying the Course' (1 June 2012) Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/2012/06/01/the-new-2012-u-s-model-bit-staying-the-course/ accessed 15 April 2016

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