CHAPTER 10

Lights and Shadows of the WTO-Inspired International Court System of Investor-State Dispute Settlement

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Abstract

This paper was written by several authors, including individuals who are not affiliated with the European Federation for Investment Law and Arbitration (EFILA). Its original purpose was to provide a reasoned commentary to the proposal, advanced by the European Union (EU), to include in the Transatlantic Trade and Investment Partnership (TTIP) a new system of investor-state dispute settlement based on permanent courts instead of arbitration (the investment court system or ICS). This study was first presented at the EFILA conference in February 2016 and was subsequently updated to reflect the more recent developments, namely the inclusion in the Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement of a system that follows closely the EU’s proposal for TTIP. The aim has been to ensure that the different perspectives and expertise of the contributing authors are reflected in the analysis. The main aim of the report is to present an in-depth analysis of the ICS in the context of the existing investment regime, as well as comparing it with the dispute settlement system of the World Trade Organization.

1 Introduction

This Task Force has been established to respond with an in-depth analysis of the investment court system (ICS), which envisages a two-tier court system with a permanent Appeal Tribunal that would adjudicate investment disputes.

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This system is already enshrined in the Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement (EU-Vietnam FTA), and was proposed by the European Commission (EC) for inclusion in the Transatlantic Trade and Investment Partnership (TTIP).

The aim is to analyse, beyond the usual superficial public debate, the pros and cons of this system and to compare it with others already in force – within the field of international investment law and beyond it.

The idea of creating an appeal mechanism for investment arbitration is not new, although more concrete proposals are a recent phenomenon. The draft text of the CETA, before the sudden inclusion of the ICS, already included the possibility of considering the establishment of an appeal mechanism. Also, the US model BIT text of 2012 contains a similar reference.

Since the ICS appears to be inspired by the features of the World Trade Organization (WTO) dispute settlement system, it is appropriate to review that system and consider which lessons, if any, can be learned. It may also be helpful to look at other international legal fields, which have established court systems.

Accordingly, the structure of the analysis is as follows.

Part 1 analyses not only the ICS as such, but also the process that preceded the initial proposal prepared by the Commission. This is important in order to understand the political context in which the proposal was embedded. This Part discusses critically certain aspects of the ICS and raises a number of issues which the Task Force considers worth of attention, in particular in the framework of the TTIP negotiation.

Part 2 provides an extensive overview of the already existing forms of appeal and annulment of investment awards. It also highlights the reform efforts in this regard by the Permanent Court of Arbitration (PCA) and the International Centre for the Settlement of Investment Dispute (ICSID) Secretariat. This overview provides a detailed picture of the status quo (including both the mechanisms and methods of operation), from which the ICS departs. This analysis also draws critical attention to features or elements of the current system of investor-state dispute settlement (ISDS) which could be addressed in developing or fine-tuning the ICS.

Part 3 turns towards the WTO dispute settlement system, by first explaining the features of the appeal system and, then, by examining to what extent this system could successfully be transplanted into the ICS.

Finally, Part 4 wraps up the analysis by providing some general conclusions as to matters which require consideration by the TTIP Contracting Parties in developing the ICS model further. In particular, the issues highlighted concern the methods of selection of the judges (and the implications of a move towards a system whereby the claimant loses out in the appointing stage), the size of