One court to rule them all? The EU's proposal for a world investment court

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The most salient feature of the current international investment law framework is the use of international arbitration to resolve disputes between investors and States. Although arbitration has a longstanding pedigree in resolving international disputes at both the State-State and investor-State levels, it was not until the 1960s that investor-State arbitration provisions (ISDS) started to be included in bilateral investment treaties. Just over 50 years later, the vast majority of the 3,000 plus bilateral investment treaties contain standing offers by signatory States to resolve investment disputes with foreign investors through binding arbitration.

Arbitration is the quintessential feature of the modern investment law framework. Many of the substantive standards of investor protection in investment treaties have precursors and complementary standards in customary international law. However, it is the right given to investors in investment treaties to have investment disputes resolved before arbitral tribunals that are constituted on a case-by-case basis (as opposed to before national courts) that gives investment treaties real practical utility for investors.

A key feature of this framework is party autonomy – the right of the parties to investment treaty disputes and (namely the investors and the States) to select the arbitral tribunal that will adjudicate the dispute. In the majority of cases, this is done by each party appointing an arbitrator and the third tribunal member being agreed upon jointly by the parties or the party-appointed arbitrators, or selected by an appointing authority (often an arbitral institution).

EU member states have been particularly prominent in the establishment of this investment treaty framework and in placing investor-State arbitration at the core of it. Indeed, EU member states are parties to almost half of the total number of investment treaties in force worldwide. It is therefore notable that the EU trade commissioner, Cecilia Malmström, recently called for the creation of a world investment court to resolve investor-State disputes. Given the major role that the EU plays as a host and maker of foreign investment, this proposal is potentially far-reaching and significant notwithstanding the considerable legal and practical difficulties of establishing a world investment court.

The European Commission proposal

The background to the EU Commission's proposal of a world investment court is the ongoing negotiations between the EU and the United States for a trade and investment deal, known as the Transatlantic Trade and Investment Partnership or TTIP.

In the context of the EU's public consultation on the TTIP and ISDS in the TTIP, the EU is exploring proposed reforms to ISDS, including the possibility of appeals from ISDS decisions. The establishment of an investment court would be the most far-reaching of all of these proposals.

Specifically in a concept paper that the EU Commission published in May 2015, the EU Commission proposed that:

> *"…the EU should work towards the establishment of an international investment court and appellate mechanism with tenured judges with the vocation to replace the bilateral mechanism which would be established [in the TTIP]. This would be a more operational solution in the sense of applying to multiple agreements with multiple partners but it will require a level of international consensus that will need to be built. It is suggested to pursue this in parallel with establishing bilateral appeal mechanisms. These changes are intended to be the stepping stones towards a permanent multilateral system for investment disputes."*[2]

Following on from the EU Commission's proposal, on 8 July 2015 the European Parliament approved a resolution proposing the replacement of investor-State arbitration provisions in the TTIP with a dispute resolution system before *"independent professional judges in public hearings"*.[3]

The variables of a world investment court

Given the instrumental role that EU member states have played in the creation of the global investment treaty and arbitration architecture, the explanation given by the EU Commission for its proposal of a world investment court is instructive.

The EU Commission has described its proposal as being driven, inter alia, by concerns about potential conflicts of interest from arbitrators who also serve as counsel on ISDS disputes, public perceptions regarding the ad hoc nature of the appointment of arbitrators and a desire to 'break the link' between the parties to the dispute and the arbitrators.

However, consideration of these variables does not necessarily lead to the conclusion of the inevitable establishment of a world investment court. As regards conflicts of interest, parties often agree to the application of the International Bar Association (IBA) *Guidelines on Conflicts of Interest in International Arbitration of 2014*, which address conflicts issues. Such guidelines are often periodically updated[4] and could be adapted further to address conflicts and perceived conflicts issues. Furthermore, the perception that the ad hoc nature of arbitration is itself problematic may be open to doubt. As arbitrators do not

enjoy security of tenure in the way that a judge does, their professional reputation is the best guarantor of a successful career. This could indeed be considered a positive feature of arbitration. The security of tenure enjoyed by judges in some jurisdictions does not always result in the highest quality of decision making.

Finally, it may be questioned whether it is necessarily positive to 'break the link' between parties to the dispute and the arbitrators in the sense of preventing parties from being involved in the constitution of arbitral tribunals. This feature of party autonomy in the choice of arbitral tribunals is a core aspect of international arbitration, the loss of which would apply both to investors and States.

Moreover, the coordination and costs requirements for establishing a world investment court would be significant. With over 3,000 bilateral investment treaties in force, the vast majority of which provide for ad hoc arbitration of disputes between investors and States, it would likely take considerable time and careful calibration in order for a world investment court to gain serious global traction. For example, according to the United Nations Conference on Trade and Development (UNCTAD) over 40 investment treaty arbitrations were commenced in 2014 and a new investment treaty was signed every other week that year.[5]

Furthermore, a key decision in the creation of a world investment court would be whether it was to be established within the framework of a multilateral organisation, such as ICSID - the World Bank investment arbitration centre – or created as a self-standing body. The EU Commission paper states that *"work has already begun on how to start this process, in particular on aspects such as architecture, organisation, costs and participation of other partners."*

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If established, an investment court would be unlikely in its early years to have jurisdiction over a majority of ISDS disputes, still less over all of them. International arbitration of ISDS disputes is therefore unlikely to disappear from the investment arbitration landscape any time soon. However, the establishment of a world investment court would add a new possibility for the resolution of ISDS disputes to the current alternatives of arbitration and submission to the jurisdiction of local courts. The legal and practical challenges to establishing a world investment court should not be underestimated and the likelihood of it materialising in the next few years may yet remain fairly low.

Nevertheless, with its announced desire to create a world investment court, the EU Commission has taken a significant and potentially far-reaching step towards the establishment of a multilateral body to resolve ISDS disputes in the future. ■

1. The views expressed in this article do not necessarily reflect the views of Withers LLP or its clients.
2. "Investment in TTIP and Beyond: The Path for Reform", European Commission Concept Paper,5 May 2015, p. 4, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF
3. "Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)£, European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the TTIP, 8 July 2015, para. 2 (d) (xv), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN
4. The previous version of the IBA Guidelines on Conflicts of Interest was issued in 2004.
5. "Recent Trends in IIAS and ISDS", IIA Issues Note No.1, UNCTAD, February 2015, p. 1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf