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Article

A Case for an International Investment Court

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The European Union's proposal for the establishment of an Investment Court System (ICS) has amplified the discussion about the future of investor-state dispute settlement (ISDS). The proposal aims to address the perceived flaws of the current system by establishing standing tribunals instead of arbitration tribunals that are established on a case by case basis.

By way of example, the EU proposal for the Investment Protection Chapter of the Transatlantic Trade and Investment Partnership (TTIP)[2] provides for the establishment of a Tribunal of First Instance and a permanent Appeal Tribunal. Even though negotiations on TTIP are on hold at the date of writing this article, it is worthwhile to take a closer look at its proposal for an ICS. The Tribunal of First Instance would consist of fifteen judges: five EU nationals, five US nationals and five nationals from third countries.[3] Cases would be heard in divisions consisting of three judges, one EU national, one US national and one a national of a third country, who would also act as chair. The Appeal Tribunal would consist of six judges, hearing appeals in divisions of three judges composed in the same manner as the Tribunal of First Instance. A proposal for the establishment of an ICS can also be found in the proposed texts of the free trade agreement between the EU and Vietnam (EU-Vietnam FTA, January 2016).[4] Similarly, the finalised text for the Comprehensive Economic and Trade Agreement between Canada and the EU provides for ICS as means of dispute resolution (CETA, February 2016), although the treaty parties agreed upon excluding ICS from the scope of the provisional application of CETA.[5]

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[2] European Union proposal for Investment Protection and Resolution of Investment Disputes, dated 12 November 2015 (EU Proposal). The proposal concerns Section 2 ("Investment Protection") of Chapter II ("Investment") in the title on "Trade in Services, Investment and E-Commerce" in TTIP. See http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

[3] EU Proposal, Article 9(2). Appointments would be made by a joint committee whose composition has not been addressed in the submitted proposal.

[4] See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

[5] See http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

The proposals show two key differences from the current state of ISDS. First, it changes the established way of appointing tribunal members. Whereas tribunal members are currently appointed by the investor and the state party on a case by case basis, ICS tribunal members would be appointed by the treaty parties (*i.e.* the states) only, and instead of being appointed for a single case they would be acting for a specific term, *ex ante* of the occurrence of the dispute. Second, the proposed ICS sets out an appeal mechanism by establishing a second instance tribunal. The appeal tribunal is supposed to correct errors of law and ensure a consistent body of case law. Both changes aim at overcoming current deficits of ISDS, in particular the (perceived) lack of legitimacy, transparency and consistency of decisions.

However, the proposal fails to address the issue of fragmentation within ISDS case law, which thwarts the predictability of decisions and thus the legitimacy of ISDS. The proposed appeal tribunals will only ensure consistency of decisions within a particular agreement. Although establishing a system of precedent, such case law will only be decisive with regards to one specific treaty. Albeit a step forward, it is insufficient to truly overcome the deficiencies of the current system. Interpretations (and thus decisions) will be consistent within an agreement, but will inevitably still vary between treaties and ISDS will further lack consistency, predictability and transparency.

What is needed, rather than furthering the fragmentation of investment treaty law, is the establishment of *one* appeal tribunal, which will hear appeals stemming from as many investment treaties as possible. Such appeal tribunal could be composed along the lines of the EU Proposal for TTIP, *i.e.* comprised of one judge from each treaty party and chaired by a national from a third country. This would necessarily mean a larger roster of judges hearing individual cases. Establishing such tribunal should be done by concluding *one* treaty, permitting states to join the treaty at a later stage.

States should be permitted to submit their existing treaties to the jurisdiction of the appeal tribunal. If two or more states agree upon submitting their mutual investment treaties to the new treaty, substantive and procedural provisions of previous treaties will cease to exist and the new treaty will apply to all future investment disputes. UNCITRAL is ideally positioned to develop such multilateral treaty. In particular, an opt-in system as provided by the UNCITRAL Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) provides the ideal procedure for establishing such treaty. Coherence and consistency will unlikely be achieved quickly, but an incremental application as envisaged by the Mauritius Convention will ensure incremental improvements. Such treaty would also be compatible with the EU's current ICS proposals, since Article 12 of the EU Proposal for ICS in TTIP foresees the possibility of multilateral dispute settlement mechanisms including appellate mechanisms. Pursuant to this provision, the mechanism set out by TTIP ceases to apply as soon as a multilateral treaty provides an adequate dispute resolution mechanism.

Gabrielle Kaufmann-Kohler and Michele Potestà recently authored a detailed analysis on a reform of ISDS along the lines of the Mauritius Convention,[6] providing a blueprint for replacing existing treaty-based ISDS with a multilateral opt-in convention. However, it suggests that a

[6] *Kaufmann-Kohler/Potestà*, "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?", CIDS (2016).

multilateral court merely serves as an *additional* forum and, even more importantly, it avoids the standardisation of substantive protections. Thus, it again risks further fragmentation and an and ever-expanding lack of legitimacy for the sake of pursuing a path of less resistance.

Although similarly ambitious ventures have failed in the past (e.g. the OECD proposal for a multilateral investment agreement in the 1990s), the current discourse and proposals could provide the hummus for a modernisation and harmonisation of ISDS. Rather than further fragmenting it, the establishment of a truly international standing tribunal would provide the means for establishing a coherent body of case law that can ensure the reconciliation of a state's police powers with the legitimate interests of foreign investors. The establishment of a multilateral system of consistent adjudication and precedent would develop an international consensus and ultimately promote the transparency, predictability and legitimacy of ISDS.

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