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TPP AND TTIP: PARALLEL PATHS FORWARD IN ISDS

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The European Union has a clear vision for the future of investor-state dispute settlement (ISDS), albeit a revolutionary one. This vision was expressed in the EU Parliament's resolution of 8 July 2015: "to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives".

Encapsulated within this statement are, on one hand, several longstanding criticisms of the existing ISDS framework and, on the other, the EU's desire to resolve these issues and achieve renewal by establishing new public legal machinery in the form of a standing Investment Court System (ICS).

The proposal, long-ago foreshadowed, materialised into a tangible model and has been put to the US for discussion at the 12th round of negotiations over the Transatlantic Trade and Investment Partnership (TTIP) to be held in Brussels from 22 to 26 February 2016. The debate surrounding the model (the text of which was publicised on 12 November 2015) evokes issues of profound political, economic and social importance.

This article considers the merits of the proposal, relative to recent treaties such as the Trans-Pacific Partnership (TPP), and the greater question of whether complete renewal is necessary, or whether amending the system incrementally is an effective approach to reform (as is currently the case).

Criticisms of the existing system

Criticisms of the current system of ISDS are many and varied, but primarily relate to two themes; the first is legitimacy and the second is utility assessed by reference to considerations of time and cost.

First and foremost, is that inconsistent decisions are sometimes reached by tribunals presiding over ISDS cases. This is a consequence of the fragmentation of similar investor claims among numerous tribunals and the lack of a cohesive body of investment law bearing precedential authority to bind them together.

Second, is the lack of transparency in a system which rhetoricians portray as a secret undemocratic system that subverts public interests for private interests. The imbuing of private tribunals with authority to render judgment on the propriety of public policy-making of sovereign states and the 'regulatory chill' that results is a subject of public sensitivity, particularly in light of the fact that adjudicators presiding in these cases are not publicly appointed.

Third, is the potential for forum shopping by opportunistic investors who initiate parallel and multiple proceedings in different tribunals. The consequence of this is not only to multiply costs and waste

dispute settlement resources, but it also carries the risk of rendering conflicting decisions and awards, resulting in international business disputes becoming more unpredictable.

Fourth, are issues relating to the time and cost of proceedings. If obtaining justice in the form of an arbitral award is not readily achievable for aggrieved investors, the utility of the system in achieving investor protection is significantly reduced, particularly for smaller investors who may find ISDS wholly inaccessible.

Two paths moving forward

Recent efforts to amend the ISDS system come against this backdrop of issues. Until recently, reform has entailed incrementally tailoring solutions in response to the system's perceived shortcomings, as seen with the recent TPP which adopts several innovative amendments to previous investment treaties. The ICS model under the TTIP is considered by some as an option for major restructuring of the current ISDS system with the potential to yield improvements in addressing the issues outlined above. It is submitted here that the two alternative models have more in common than many care to admit.

Despite the establishment of new public machinery under the ICS proposal, the form of proceedings in the ICS bears resemblance to proceedings before ICSID tribunals. Article 6 of the ICS proposal mirrors Article 9.18(4) of the TPP, to the extent that it enables the submission of claims under the ICSID or UNCITRAL rules, or otherwise ad hoc rules agreed between disputing parties. This leaves intact the principle of party autonomy that is fundamental to the current system of ISDS. The ICS model does not, at this stage, propose to develop an independent set of procedural rules.

As to the issue of forum shopping and clashing decisions, Article 14 of the ICS proposal and Article 9.20 of the TPP both bar claims from being filed by investors who simultaneously seek redress for their grievances before any other domestic court or tribunal (subject to the right to seek injunctive or declaratory relief in certain circumstances). Additionally, both the ICS and TPP permit the consolidation of claims involving common issues of fact or law. These measures are commendable and go a long way towards redressing what have been long regarded as the most dire issues in ISDS. The approaches under the two models are, however, notably similar.

The ICS rules governing transparency under Article 18 have also been lauded as an improvement on the current system, as they give effect to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration and makes provision for the publication of case materials (subject to redaction of confidential information). The TPP provisions on transparency, however, largely run in parallel to this, given that provision is made under Article 9.23 for the holding of public hearings and the prompt publication of case materials, but for the point of difference that the adoption of the UNCITRAL Rules on Transparency is left to the choice of disputing parties.

Mediation in ISDS has been explored as a potential alternative process with the potential to yield substantial time and cost savings. It is particularly attractive to smaller investors seeking to pursue a claim but lacking the resources to engage in protracted arbitration proceedings. The mediation procedure under Article 3 of the ICS proposal, though commendable, is again mirrored by ICSID's conciliation facilities which have seen a total of seven cases registered over the years.

Conclusions

There is a need to avoid the rhetoric of ISDS being a secret undemocratic system which merely serves to undermine the legitimacy of what is, in reality, a sophisticated system of resolving international disputes.

Instead, there is a need to objectively consider the merits of the ICS model. As this article has endeavoured to illustrate, the differences between the two in practical terms are not as large as some perceive to be the case.

The real divergence between the two models is arguably more fundamental, and may derive from political tensions and public sensitivity over the use of public-private machinery and the subjection of public policy to the judgment of private arbiters. It is primarily due to this aspect of TTIP – the appointment of public officials to preside over issues of public importance – that the ICS proposal is to be regarded as desirable, as well as its contribution to the development of a uniform body of investment law. It is therefore to these aspects of the debate that the focus ought to be turned.

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