

WORKSHOP ON INTERNATIONAL INVESTMENT COURT PROPOSALS

Introduction to the Workshop

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Current State of Play

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Development of the EU Model of Investment Tribunals

- June 2013: EU-US negotiations open Transatlantic Trade and Investment Partnership (TTIP)
- March-July 2014: EU online public consultation re TTIP
- Sept. 2014: CETA 'final' text released (no investment court)
- Jan. 2015: EU report on public consultation ("further improvements should be explored," including "the review of ISDS decisions through an appellate mechanism")
- May 2015: FTA text with Singapore released (no investment court)
- May 2015: EU concept paper on multilateral investment tribunal released
- Nov. 2015: EU Transatlantic Trade and Investment Partnership (TTIP) proposal to U.S. (with investment court)
- Jan. 2016: FTA text with Vietnam released (with investment court)
- Feb. 2016: "Scrubbed" version of CETA released (with investment court)

Development of the EU Model of Investment Tribunals

- Oct. 2016: CETA signed
- Dec. 2016: EU/Canada Joint Statement on CETA:
 - Self-described “radical change in investment rules and dispute resolution”
 - **“It lays the basis for a multilateral effort to develop further this new approach . . . into a Multilateral Investment Court. . .once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.”**

Summary of EU Model of Investment Tribunals

- Replaces *ad hoc* arbitral structures with standing tribunals established specifically to decide claims and hear appeals on issues of law and fact under each of the EU's new treaties.
- State party control of over members of the tribunals and appellate bodies is heightened, establishing new requirements for nationality, qualifications, and ethical obligations.
- Recourse to the EU's new system is made exclusive – even though the treaties do continue to allow investors some choice as to the procedural rules which will be used.

Summary of the New EU Model

- Provisions designed to foreclose challenges to the applicability of the ICSID Convention and the New York Convention to EU model awards.
- Aimed to ensure that 3rd states will carry out obligations under ICSID Convention (Art. 54), when presented with EU model awards, and will feel constrained in their review of such awards under Article V of the New York Convention.

EU Investment Tribunals: Structure

- 2-tiered: Tribunal and Appeal Tribunal
- “Members” selected by the States Parties – nationals and non-nationals.
 - TTIP: Tribunal (15); Appeal Tribunal (6)
 - Vietnam: Tribunal (9); Appeal Tribunal (6)
 - CETA: Tribunal (15); Appeal Tribunal (tbd)
- No party appointments. Only State-selected Members may sit on Tribunals or Appeals Tribunals.

➤ TTIP Proposal, Art. 9-10; EU-Vietnam Art. 12-13; CETA Art. 8.27-8.28

EU Investment Tribunals: Membership

- **Pre-selected roster of tribunal members**
 - CETA: 15 Members appointed by Joint Committee, each sitting for 5-year terms (renewable once); 7 of 15 extended for 6 yrs
 - 5 Canadian, 5 EU, 5 non-national
 - EU-Vietnam: 9 Members appointed by Trade Committee, each sitting for 4-year terms (renewable once); 5 of 9 terms extended for 6 yrs
 - 3 EU, 3 Vietnam, 3 non-national
- Each side may appoint up to 3 non-nationals, which will be considered their nationals

➤ EU-Vietnam Art. 12-13; CETA Art. 8.27-8.28

EU Investment Tribunals: Qualifications of Members

- Tribunal Members:
 - same qualifications as for appointment to judicial office, or be jurists of recognized competence.
 - “demonstrated expertise in public international law”
 - “desirable” to have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or trade agreements

➤ TTIP Proposal, Art. 9(4); EU-Vietnam, Art. 12(4); CETA, Art. 8.27(4).

EU Investment Tribunals: Ethics and Code of Conduct

- “chosen from persons whose independence is beyond doubt”
- “shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.”
- Subject to written Code of Conduct addressing disclosure obligations, confidentiality obligations, and duties with respect to independence and impartiality, including the reasonable appearance of impropriety or bias.

EU Investment Tribunals: Additional Requirements

- Tribunal Members start part-time (on-call basis) on monthly retainer
 - Amount unknown (to be determined by Joint/Trade Committee)
 - TTIP: European Commission first proposed €2000/month retainer (€7000 for President & Vice-President)
- Eventually move to salaried full-time, judge-like tenure once the Tribunal and Appellate Tribunal have full caseload
- Prior to full-time, Members have a duty to remain available at all times and on short notice (but may take on other arbitral appointments)

➤ EU-Vietnam, Annex II; Art. 14.

EU Investment Tribunals: Jurisdiction

Claim may be submitted to the Tribunal under one of the following “rules on dispute settlement”:

- “the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);
- the ICSID Convention in accordance with the Rules on the Additional Facility. . . where the conditions for proceedings pursuant to paragraph (a) do not apply;
- the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,
- any other rules on agreement of the disputing parties.”

➤ EU-Vietnam, Art. 7. See also CETA, 8.23(2).

EU Investment Tribunals: Deadlines

CETA:

- 24 months for issuance of Final Award by First Instance Tribunal
- Appeals to be taken w/in 90 days

EU-Vietnam:

- 18 months for issuance of Provisional Award (on merits, or jurisdiction if bifurcated); if no appeal within 90 days, becomes Final Award
- Appeals to be decided within 180 (270) days.
- Additional time allowed *if* Tribunal gives reasons for delay

➤ EU-Vietnam, Art. 27-28. See also CETA, 8.28 & 8.39

EU Investment Tribunals: Appellate Jurisdiction

- Appeals available as of right from first instance awards.
- Grounds:
 - “(a) that the Tribunal has erred in the interpretation or application of the applicable law;
 - (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
 - (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).”

➤ TTIP Proposal, Art. 29(1); EU-Vietnam, Art. 28(1); CETA, Art. 8.28(2).

EU Investment Tribunals: Enforcement of Awards

“1. Final awards issued pursuant to this Section:

(a) shall be binding between the disputing parties and in respect of that particular case; and

(b) shall not be subject to appeal, review, set aside, annulment or any other remedy.

2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.”

➤ EU-Vietnam, Art. 31. See also CETA, Art. 8.41.

EU Investment Tribunals: Enforcement of Awards (continued)

“7. For the purposes of Article 1 of the New York Convention, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.

8. For greater certainty, where a claim has been submitted to dispute settlement pursuant to Article 6(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the [ICSID Convention].”

➤ EU-Vietnam, Art. 31(7)-(8). See also CETA, Art. 8.41(5)-(6).

Multilateralising the new EU Model

- Joint EU/Canada initiative
- To establish a “multilateral investment dispute settlement mechanism” with the aim of “increasing the legitimacy and acceptance of the international investment regime.”
 - European Commission and Government of Canada, “The Case for Creating a Multilateral Investment Dispute Settlement Mechanism,” Informal Ministerial Meeting, World Economic Forum (20 Jan. 2017)

Current State of Play

- UNCITRAL Working Group III

“(i) first, identify and consider concerns regarding ISDS;

(ii) second, consider whether reform was desirable in light of any identified concerns; and

(iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.”

- UNCITRAL Working Group III, Annotated Provisional Agenda (15 Sept. 2017)

Working Group III Membership

Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), **Indonesia (2019)**, Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), **Malaysia (2019)**, Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), **Philippines (2022)**, Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), **Singapore (2019)**, Spain (2022), Sri Lanka (2022), Switzerland (2019), **Thailand (2022)**, Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

Working Group III (Nov. 2017 Participation)

Members

Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Cameroon (2019), Canada (2019), Chile (2022), **China (2019)**, Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), **India (2022)**, **Indonesia (2019)**, Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), **Japan (2019)**, Kuwait (2019), **Malaysia (2019)**, Mauritius (2022), Mexico (2019), Nigeria (2022), Pakistan (2022), Panama (2019), **Philippines (2022)**, Poland (2022), **Republic of Korea (2019)**, Romania (2022), Russian Federation (2019), **Singapore (2019)**, Spain (2022), Switzerland (2019), **Thailand (2022)**, Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022) and Venezuela (Bolivarian Republic of) (2022).

Working Group III (Nov. 2017 Participation)

“States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations.”

State Observers

Albania, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Costa Rica, Croatia, Cyprus, Dominican Republic, Egypt, Estonia, Finland, Georgia, Iceland, Malta, Montenegro, Morocco, Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Portugal, Saudi Arabia, Serbia, Slovakia, South Africa, Sudan, Sweden, Uruguay and **Viet Nam**.

Non-State Observers (inter alia): European Union
