

WORKSHOP ON INTERNATIONAL INVESTMENT COURT PROPOSALS

Reconciling an Investment Treaty Court with Existing Instruments of the Investment Treaty Regime

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EU Investment Tribunals: Jurisdiction & Procedure

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: 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).

Compatibility with the ICSID Convention?

- “Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” (Art. 26)

- “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” (Art. 53)

Article 41
Agreements to modify multilateral treaties between
certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty, or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Applicability of the New York Convention

- **Investment Treaty Awards as “Commercial” Arbitral Awards?**
 - NY Convention, Art. 1(3).
 - Cf. *United Mexican States v Metalclad Corporation*, 2001 BCSC 664 (British Columbia Sup. Ct. 2001).
- **EU Model Awards as “Arbitral Awards”?**
 - NY Convention, Art. 1(2).
 - Iran-US Claims Tribunal practice

Applicability of the New York Convention

- **Limitation of Grounds for Review under New York Convention Article V?**
 - EU-Vietnam FTA, Art. 30(1): Final awards “shall not be subject to appeal, review, set aside, annulment or any other remedy.”
- EU’s treaties cannot bind 3rd states with respect to their obligations under the NY Convention (or the application of their national law).
- State practice is variable on the effectiveness of waivers, especially of Art. V(2) grounds.

The Challenge to ICSID

- If states establish a multilateral investment tribunal to replace ICSID Convention arbitration – what is left for ICSID as an institution to do?
- Assuming that the ICSID Convention is not open for amendment, can ICSID establish its own instrument creating a new multilateral ISDS mechanism outside of the ICSID Convention?
- Even without a new ICSID instrument, can ICSID and its secretariat serve as the international organisation onto which a new mechanism might be docked?

Can ICSID Establish an Investment Tribunal Protocol?

Administrative Council's Adoption of the Additional Facility in 1978

- Broad power of Administrative Council acting under ICSID Convention Art. 6(1).
 - *“the proposal does not contemplate an extension of the jurisdiction of the Centre, but merely an extension of the activities of its Secretariat and this would appear to be within the powers of the Administrative Council.”* (Broches, 1977)
- Administrative Council appears to have the power to act under Art. 6(1) to bring forward an optional, standalone protocol to the ICSID Convention providing for the establishment of a multilateral investment tribunal.
 - Not an extension of the jurisdiction of the Centre under the ICSID Convention; an extension of activities of the Centre

Does the Secretariat have the Competence to Administer Non-ICSID Proceedings?

- Evolving scope of the Secretariat's competence to administer non-ICSID proceedings
 - Dozens of cases administered under non-ICSID rules (UNCITRAL, PCA)
 - Cases not involving investment disputes
 - Similar to the support provided to ICSID Convention and AF proceedings.
- Secretariat could provide administrative services in proceedings under a new instrument for the establishment of a multilateral investment tribunal
 - Regardless of whether the instrument is brought forward through the Administrative Council or by some other means.