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The European Commission's draft TTIP and the proposed Investment Court System

Arbitration analysis: Steven Finizio of Wilmer Cutler Hale Pickering and Dorr discusses the EU's draft Transatlantic Trade and Investment Partnership (TTIP) including the proposed Investment Court System.

The TTIP between the European Union and United States has been the subject of substantial interest. The TTIP negotiations have occurred at a time when there has been growing criticism of the use of arbitration in investment treaties. While some of this criticism has related to complaints from developing countries of perceived inequalities within the current system for investor-state dispute settlement, the criticisms relating to TTIP have focused on a perceived threat to regulatory sovereignty through the use of arbitral proceedings to address claims brought by foreign investors.

Draft Text on Investment Protection and Investment in the TTIP

On 16 September 2015, the European Commission released a 'Draft Text on Investment Protection and Investment in the TTIP'. In contrast to most investment treaties, which provide for arbitration between the investor and the host country as the mechanism for resolving disputes, the draft TTIP proposes an 'Investment Court System. The current draft text is not a formal proposal to the US, and the Commission will consult with the EU member states in the European Council and discuss the matter in the European Parliament before its proposal is officially sent to Washington, DC. However, because the draft includes a proposal for such a significant departure from current approaches to dispute resolution in most international investments treaties, we highlight details of the draft below.

Framework of the Investment Court System

More than two-thirds of the draft TTIP relates to the proposal to create the Investment Court System as the mechanism for resolving claims that an investor's rights under the treaty have been violated. Section 3 (Resolution of Investment Disputes and Investment Court System) provides the framework for this proposed system and appears to be intended to respond to or acknowledge a number of the criticisms of the current approach to dispute resolution in investment treaties, including issues such as:

- the consistency of decisions between tribunals
- party appointment of arbitrators
- the possibility that arbitrators may wear 'two hats' because they may also appear as counsel in other investment treaty disputes
- the role of third-party funding of claims, and

- the ability of interested third parties to be informed of and intervene in proceedings

The draft also includes alternative dispute resolution requirements and mediation rules, and provides for a committee created under the TTIP framework to play a role in those steps.

Section 3(1) addresses questions of scope and definition. As in many bilateral and multilateral investment treaties, the dispute resolution process in the draft TTIP contemplates a dispute between a private investor (a natural or judicial person) domiciled in the US or EU and a sovereign or supra-sovereign, ie, the US, the EU or a member state of the EU. Under the TTIP, an EU-domiciled investor may only bring a claim against the US and vice versa.

Section 3(2) addresses alternative dispute resolution and consultations. The draft TTIP requires that the parties attempt to amicably resolve any dispute through negotiations or mediation and that a 'mutually agreed solution' be notified to a committee that will 'keep under surveillance' its implementation. Section 3(3) provides for the possibility of mediation at any time (including after proceedings commence) under mediation rules provided in an Annex to the TTIP. It also provides that the committee will establish a list of six mediators available for such mediations.

If the parties are unable to resolve their dispute, the party alleging a breach may submit a 'request for consultations', which must include, among other things, the legal and factual basis for the claim and the requested relief. Consultations must be held within 60 days of such a request.

The draft TTIP includes certain time periods for bringing claims in s 3(2)(5)-(7). The request must be submitted within three years from when the claimant first acquired or should have first acquired knowledge of the treatment it claims breached the protections provided by the treaty or within two years of exhausting or ceasing to pursue local remedies, and, in any event, within ten years.

Section 3(3) addresses the submission of a claim. If the dispute cannot be settled with 90 days of the request for consultations, the investor may bring a claim. If the claim concerns an EU country, the matter must first be referred to the EU to determine whether the EU as a supra-national organisation, or the particular state in question will act as respondent.

Section 3(3)(6)(2) provides that the claim may be submitted under a number of different dispute settlement rules, including the ICSID Convention, the ICSID Additional Facility, the 2010 UNCITRAL Arbitration Rules or any other rules as agreed between the disputing parties. It is important to note, however, that s 3(3)(6)(3) provides that '[t]he rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter'. As described below, this means that, under the proposal, while aspects of the designated rules may apply to the dispute, the tribunal will not be constituted under those rules, but under the very different approach set out in s 3(4) of the draft TTIP, and other aspects of the designated rules may be superseded by the procedural rules in s 3(4) and 3(5). It is not clear whether this mixture of rules will cause problems in practice.

Notably, s 3(3)(6)(5) prohibits claims from being submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf.

The Investment Court System

Section 3(4) sets out the details of the proposed Investment Court System. As noted above, while s 3(3)(8) provides that a number of different dispute resolution rules may be used, the tribunal will not be constituted according to those rules. Rather, s 3(4)(9) and (10) create a Tribunal of First Instance and an Appeal Tribunal to hear claims under the TTIP.

The Tribunal of First Instance

Under the proposed Investment Court System, when the TTIP enters into force, 15 judges will be appointed to the Tribunal of First Instance. Five are to be nationals of EU member states, five are to be US nationals and five are to be nationals of other countries. The Tribunal of First Instance will have a President and Vice-President drawn by lot from among the judges from third countries and appointed for two years.

Section 3(4)(9)(4) sets out certain qualifications for the tribunal's judges (which go beyond those found in the arbitration rules usually used in investment treaty arbitrations). It provides that:

> 'The Judges shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements'.

The judges are to be appointed for six-year terms, renewable once. To ensure their availability, the judges are to be paid a monthly retainer fee, and are expected to effectively be 'on call' and to 'stay abreast of dispute settlement activities' under the TTIP (Draft TTIP, s 3(4)(9)(11)-(13)).

Cases will be heard in 'divisions' of three, made up of one national from the EU, one from the US and one from a third country (who will chair the division). However, if the parties agree, a dispute can be heard by a single judge, who will be a national from a third country appointed by the President of the Tribunal.

The President of the Tribunal will allocate disputes to divisions on a rotation basis, 'ensuring that the composition of the divisions is random and unpredictable', so that parties have no influence on which judges will hear a particular case (Draft TTIP, s 3(4)(9)(7). Section 3(4)(10)(9) provides for a similar mechanism with respect to the Appeal Tribunal.). This contrasts markedly with the approach under the arbitration rules that apply in most treaty arbitration, which usually allow each party to appoint a member of the tribunal and to play a role in selecting the presiding arbitrator.

The Appeal Tribunal

Section 3(4)(10) establishes the Appeal Tribunal, which is to be comprised of six members--two from the EU, two from the US and two from third countries--who will be appointed for six-year terms, renewable once. (However, pursuant to s 3(4)(10)(5), the terms of three of the six judges appointed initially will be extended to nine years, determined by lot--presumably to ensure some form of institutional memory in the Appeal Tribunal's early years.) The qualifications for members of the Appeal Tribunal and its organisation is similar to those for the Tribunal of First Instance described above.

An appeal will be heard by division consisting of three members appointed by the President of the Appeal Tribunal and will be chaired by the member who is a national of a third country.
ICSID Convention, Regulations and Rules

The provision of the Appeal Tribunal is another distinct departure from the current approach to treaty arbitration. Most arbitral rules do not provide for a second instance tribunal (and the grounds to challenge an award in a state court is very limited). While the ICSID Rules do provide for a form of second instance--through the annulment process--the authority of an Annulment Panel is limited under art 52 of the ICSID Convention ie:

- that the tribunal was not properly constituted
- that the tribunal has manifestly exceeded its powers
- that there was corruption on the part of a member of the tribunal

- that there has been a serious departure from a fundamental rule of procedure, or
- that the award has failed to state the reasons on which it is based

The grounds for appeal under section 3(4)(29)(1) of the draft TTIP expressly incorporate those set out in art 52 of the ICSID Convention, but also include certain errors of fact and law, which may not fall within the scope of art 52.

Notably, in addition to creating standing panels of judges for both tribunals, and requiring that those judges shall 'stay abreast of dispute settlement activities' under the TTIP, the draft TTIP also provides in section 3(5)(13) that '[w]here serious concerns arise as regards matters of interpretation' of relating to the investment protections provided under the treaty, the dispute resolution or the Investment Court System, the Committee may adopt decisions interpreting those provisions, which 'shall be binding on the Tribunal and the Appeal Tribunal'.

'Ethics', Code of Conduct for Arbitrators and the Standards of Independence

The draft TTIP addresses issues of the independence of members of the tribunals and some issues raised by critics of the current approach to investment-treaty arbitration.

In particular, in s 3(4)(11) (ethics) provides that the independence of the judges is to be 'beyond doubt' and that they shall not to be 'affiliated with any government'. In addition, the draft TTIP includes in Annex II a 'Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators', which further addresses independence and other conduct issues.

Section 3(4)(11) sets out the process for challenging judges. The President of the Tribunal of First Instance or the President of the Appeal Tribunal (as appropriate) will decide on any challenge (challenges to one of the Presidents shall be decided by the other President, as required, see s 3(4)(11)(3)-(4)).

Notably, s 3(4)(9)(15) and 3(4)(10)(14) contemplate the possibility that the membership in both the Tribunal of First Instance and the Appeal Tribunal could be converted into full-time positions. This would mean that the judges could not engage in other work unless expressly authorised to do so by the President of the Tribunal and Appeal Tribunal. This would ensure that judges and members of the Appeal Tribunal could not also work as counsel (including in investment treaty disputes under other treaties).

Conduct of proceedings and the final award

Section 3(5) sets out the rules for the conduct of proceedings. Among other issues, it addresses the applicable law, preliminary objections, strike out proceedings, interim measures and security for costs (Draft TTIP, s 3(5)(13)-(21)). Section 3(5)(27) also provides that disputes may be consolidated where there are common questions of law and fact and they arise out of the same events and circumstances. As noted above, however, s 3(3)(6)(5) expressly prohibits claims from being submitted in the name of a class or by a representative of a number of claimants who delegate authority to the representative.

In apparent recognition of concerns relating to regulatory sovereignty, s 3(5)(24) notes with regard to expert reports that the tribunal 'at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding'.

The Tribunal of First Instance is required (unless it decides to the contrary) to issue a provisional award within 18 months of the date of submission of the claim (Draft TTIP, s 3(5)(28)(5)). Awards are confined to monetary damages or the restitution of property (Draft TTIP, s 3(5)(2)(1)), and punitive damages are expressly excluded (Draft TTIP, s 3(5)(28)(3)).

A provisional award may be appealed to the Appeal Tribunal within 90 days (Draft TTIP, ss 3(5)(28)(5)-(6)). Section 3(5)(29)(1) set out the grounds for appeal. As noted above, the grounds include certain errors of law ('the Tribunal has erred in the interpretation or application of the applicable law') and fact ('the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law'). The grounds also include those set out in art 52 of the ICSID Convention (eg improper constitution of the tribunal, manifest excess of powers, corruption, serious procedural error and failure to state reasons) to the extent these are not considered to be an error of law or fact.

An appeal should be decided within 180 days as a general rule and in no case exceed 270 days. Once a provisional award is made final, either because an appeal has not been commenced within 90 days or after a decision by the Appeal Tribunal, the award is binding on the parties to the dispute. Once final, the award may not be appealed, renewed, set aside or annulled--and the state parties to the TTIP must recognise an award rendered pursuant to s 3 as the equivalent of a final judgment of a relevant domestic court.

Transparency, intervention and disclosure of third-party funding

UNCITRAL Transparency Rules

Section 3(5)(18) provides that the UNCITRAL Transparency Rules (see Practice Note: UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration) are deemed to apply to proceedings under s 3. In addition, s 3(5)(23) provides that any party with a 'direct and present interest in the result of the dispute' may intervene (at either instance) subject to certain conditions. The non-disputing state party (ie the EU or US) also may, if invited, give written or oral submissions (Draft TTIP, s 3(5)(22)). In addition to these rules on transparency and intervention by other interested parties, s 3(5)(8) provides that where a disputing party (which presumably will almost always be the claimant) is the beneficiary of third party funding, the other party and the tribunal should be notified.

Reflection of trends in treaty-drafting

Some other aspects of the proposal are potentially significant, but not as radical, and reflect a number of trends in treaty drafting. For example, s 2(2)(1) refers to the states' rights to regulate:

> 'within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity'.

Section 2(3)(2) purports to define the fair and equitable treatment standard in detail, setting out a list of six (apparently exclusive) categories wherein a violation of the standard may occur.

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