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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Maree Newson (mareenewson@gmail.com)

The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court?

by
John Gaffney *

In November 2015, the European Union (EU) formally presented to the United States (US) its proposal for a new system for resolving investor-state disputes under the Transatlantic Trade and Investment Partnership (TTIP): the Investment Court System (ICS).[1] Alongside the ongoing EU-US negotiations, the European Commission aims to establish an International Investment Court with the objective of replacing all investor-state dispute-settlement (ISDS) mechanisms in EU agreements, in EU member states' agreements with third countries and even in investment treaties concluded between non-EU countries.

The EU proposes a court system comparable to domestic and international courts in terms of its structure and composition: the ICS would be composed of a Tribunal of First Instance (Investment Tribunal) and an Appeal Tribunal. The Investment Tribunal would be composed of 15 judges appointed jointly by the EU and the US, of which five would be EU nationals, five US nationals and five third country nationals. The Appeal Tribunal would be composed of six members jointly appointed for a six-year term.[2]

The concept of an investment court (or tribunal) is not new. The Unified Agreement for the Investment of Arab Capital in the Arab States (Unified Agreement)[3] established an Arab Investment Court (AIC) over 30 years ago, with jurisdiction to settle investment disputes arising from the application of the Arab Investment Agreement (AIA).[4] The AIC is composed of at least five serving judges, each with a different Arab nationality that must not be the same nationality as either of the parties to the dispute.

While the AIC enjoys compulsory jurisdiction over disputes involving investors, member states and public entities, its jurisdiction nonetheless is subsidiary. Recourse to the AIC is only allowed if disputing parties fail to agree to submit it to conciliation or arbitration, if the conciliator fails to reconcile the parties or if the arbitrator(s) fail to make a ruling

within the specified period. Thus, it is possible for parties to arbitrate disputes relating to the AIA.

The AIC renders judgments, rather than arbitral awards. Article 34 of the Unified Agreement provides that AIC judgments shall, "have binding force only with regard to the parties concerned" (Article 34(1)); "be final and not subject to appeal" (Article 34(2)); and "be enforceable in the state parties, where they shall be immediately enforceable in the same manner as a final enforceable judgment delivered by their own competent courts" (Article 34(3)).

One commentator has suggested that "judgments rendered by the AIC have failed to reach the level of coherence and authority of the case law developed by international arbitral tribunals constituted under bilateral and multilateral investment treaties".[5]

Three principal lessons of immediate relevance to the ICS' design can be drawn from this experience:

- Consideration should be given either to reformulating the ICS as a system having subsidiary jurisdiction, i.e., either allowing the parties recourse to the ICS where they failed to agree to submit investment disputes to arbitration, or affording investors the discretion to submit disputes to arbitration or to the ICS. While, akin to the AIC's experience, this is likely to reduce the ICS' potential caseload, it would help ensure a smooth transition from the long-established ISDS system to the ICS.
- The EU proposal purports to classify the proposed international court structure as a commercial arbitral process. Article 30 provides that "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". This is highly questionable. The EU seems to want to have it both ways: to be perceived as moving away from international arbitration as a means of resolving investment disputes, in light of public criticisms, and yet retain one of its principle advantages, i.e., international enforcement under the New York Convention. The Unified Agreement adopts a more intellectually honest approach than the EU proposal. In opting for a new court system, complete with an appeal process, the EU ought not to dress up the resulting judgments as New York Convention arbitral awards.
- It is essential for ICS judges to establish a body of coherent, credible and persuasive case law, if the ICS is to enjoy international legitimacy. This presupposes the participation of suitably qualified and well-experienced judges. Moreover, ICS judges should draw on the case law developed by international arbitral tribunals constituted under bilateral and multilateral investment treaties, notwithstanding misplaced public criticism of the role of such tribunals.

The AIC's experience thus should not be overlooked by the EU and the US in finalizing the structure and procedural functioning of the ICS in resolving investment disputes.

[*] John Gaffney (j.gaffney@tamimi.com) is a Senior Associate with Al Tamimi & Co., specializing in international arbitration. The author is grateful to Walid Ben Hamida, Hamed El Kady and Sophie Nappert for their helpful peer reviews. The views expressed are personal to the author and do not represent the views of Al Tamimi & Co. or its clients. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] European Commission, "EU finalises proposal for investment protection and Court System for TTIP," Press release, Nov. 12, 2015, available at http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

[2] EU's proposal for Investment Protection and Resolution of Investment Disputes, Nov. 12, 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.

[3] Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394.

[4] Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2390.

[5] Walid Ben Hamida, "The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court," *International Journal of Arab Arbitration*, vol. 6 (2014), p. 12.

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