

Investment Court System put to the test: Does ICS address the fundamental problems with investor protection?

Nathalie Bernasconi-Osterwalder

GROUP DIRECTOR, ECONOMIC LAW & POLICY

International Institute for
Sustainable Development

18 OCTOBER 2016, BRUSSELS

ISDS: The most controversial component of CETA and TTIP



Why so much controversy?

1. Introducing a parallel system of adjudication in democracies with well-functioning judicial systems
2. Providing rights of action to one group of economic actors
3. Granting greater rights to foreign investors
4. Fear of losing policy space, limiting the right to regulate for the public interest
5. Discontent with arbitration system, perceived as opaque, lacking independence, unpredictability

The EU's new ISDS mechanism



What is it?

Investor-State arbitration with judicial elements

Integrated in 4 EU texts:

September 2015 EU Internal Proposal:

Investment Court System; Tribunal of First Instance; Appeal Tribunal

November 2015 EU TTIP Proposal to US:

Investment Court System; Tribunal of First Instance; Appeal Tribunal

February 2016 EU-Vietnam texts:

Investment Tribunal System; Tribunal; Appeal Tribunal

February 2016 CETA (revised) texts:

Resolution of investment disputes between investors and states; Tribunal; Appellate Tribunal

The EU's new ISDS mechanism



Main features

New:

- Departs from party-appointed arbitrators, using rosters and third party appointments
- Strengthens certain aspects of ethical standards
- Introduces appellate review process
- Puts caps on duration

Old:

- Follows investor-versus-state model
- Does not require exhaustion of local remedies
- Reserves right of action to foreign investors (as opposed to domestic investors or other interested actors)

Long term goal stated:

- To establish multilateral dispute settlement mechanism

Feature 1: Departure from party-appointed arbitrators



Main elements (CETA Article 8.27)

- The first instance tribunal is based on a permanent roster of tribunal members appointed by the CETA Joint Committee from which three will be chosen to decide each case.
- Tribunal members will serve up to two five-year terms (CETA).
- The President of the tribunal will appoint members to hear a case on a rotational and random basis.
- Payment is a basic monthly retainer and a daily fee for the days spent on specific cases based on ICSID fees. Possibility to convert arrangement into salaries to offer the tribunal members.

Potential concern: Unlike salaried judges, the most significant source of income of tribunal members will be based on daily fees. This might influence jurisdictional decisions and number of days spent per case.

Feature 2: New ethical standards



Main elements (CETA Article 8.30)

- Individuals appointed to the permanent rosters “... shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.”
- The challenges to tribunal members are not dealt with by remaining arbitrators on a panel, but by the President of the ICJ.

Potential concern:

- Tribunal or appellate members may still act as arbitrators in parallel proceedings in which arbitrators are party-appointed.
- There is no cool off period after term ends: tribunal and appellate members can immediately act as counsel.

Feature 3: Appellate Review



Main elements (CETA Article 8.28)

Appellate Tribunal may uphold, modify or reverse an award of the first instance Tribunal in case of:

- errors in the application or interpretation of applicable law; or
- manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law: or
- ICSID grounds for annulment.

Potential concern:

- CETA Joint Committee still to set out all administrative and organisational matters.
- Questions on recognition and enforcement of awards to be fleshed out.

Feature 4: Long term goal: To establish multilateral dispute settlement mechanism



Main elements (CETA Article 8.29)

Parties commit to pursue with other trading partners the establishment of a 'multilateral investment tribunal and appellate mechanism'.

Potential concern:

- Multilaterizing investor-versus-state dispute settlement would be too narrow, not inclusive
- Lack of clarity on how to move from bilateral roster systems to a multilateral mechanism



Investment Court System put to the test: Conclusion

Does ICS address the concerns identified?

1. Concerns about introducing a parallel system of adjudication in democracies with well-functioning judicial systems - absence of exhaustion of local remedies?
2. Concerns about providing rights of action to one group of economic actors - absence of investor obligations?
3. Concerns about granting greater rights to foreign investors – procedural and substantive rights ?
4. Concerns about the fear of losing policy space – the issue of legitimate expectations?
5. Discontent with arbitration system, perceived as opaque, lacking independence, unpredictable?