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Challenges on the road toward a multilateral investment court*

by

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Growing criticism over investor-state arbitration has triggered demands for reforms of the existing framework from countries, international organizations and civil society groups. In the recently concluded EU-Canada Comprehensive Economic and Trade Agreement and EU-Vietnam Free Trade Agreement, the contracting parties replaced the *ad hoc* system of investment arbitration with standing bilateral bodies composed of first-instance and appellate tribunals. In a further move, in December 2016, the European Commission launched a public consultation on a "multilateral reform of investment dispute resolution."[1] In addition, discussions are taking place on a global scale at the UN Commission on International Trade Law (UNCITRAL), where the reform of investor-state dispute settlement may be tabled as future work.[2] This *Perspective* addresses one reform option, the creation of a multilateral investment court, and reviews the main challenges that the establishment of such a court would have to master to be successful.

A crucial challenge lies in the composition of the new court. The appointment process must ensure the selection of impartial and independent decision-makers with expertise and experience in the field, through a transparent process unaffected by political considerations. How to achieve this? Some think that appointments made only by states entail the risk that "pro-state" individuals be selected; others consider that at least some states will view themselves as both potential respondents and home countries of prospective claimants and thus choose balanced personalities. Here one may ask whether investors also should be involved in the selection, for instance through consultations or in the context of establishing a panel from a roster of decision-makers. Whoever makes the initial selection, an advisory panel could screen candidates to ensure the quality of the persons and the transparency of the process, following the trend in modern international courts. Other issues are the term of office and its renewability, which are key to judicial independence. A longer term without renewal likely better protects judges from interference. Whatever the modalities, what ultimately matters is that the composition of the new body be perceived as legitimate by all stakeholders.

What law will govern the proceedings? Certainly, the treaty creating the court. Beyond, it will depend whether the proceedings remain arbitration-like or are exclusively court-like. If the former, proceedings could either be subject to a domestic *lex arbitri* or be completely delocalized, similarly to proceedings under the ICSID Convention. Whatever the choice, it will need to be articulated clearly to avoid uncertainties when it comes to national court

interference, post-award remedies and enforcement. By contrast, if the new dispute-resolution body is deemed an international court subject only to public international law, the issue of the law governing the proceedings will be resolved insofar as national law will, by definition, play no role.

A further question is what controls there would be over the decisions of the court: Limited annulment to guarantee finality like for arbitral awards? Or a full-fledged appeal on law (and possibly facts) to ensure consistency of the jurisprudence (as the current system is criticized for its lack of consistency)? Or lighter alternative control mechanisms to reconcile finality and consistency?

Another challenge is ensuring the new system's ultimate effectiveness, that is, the enforceability of its decisions. Presently, parties can rely on the enforcement rules contained in the ICSID and New York Conventions. Will the New York Convention be available for the enforcement of the court's decisions? The answer depends again on the nature of the new dispute-resolution process. If it is considered arbitration, it will benefit from the New York Convention system. If not, the treaty creating the court will have to provide for an enforcement regime binding contracting states. Enforcement in non-contracting states will by contrast be uncertain; it will depend on national law as no international rules exist ensuring the enforcement of judgments of international courts.

Finally, how will disputes become subject to the jurisdiction of the new court? For disputes arising from *new* investment treaties, states will be able to refer to the court in that *new* treaty. But what about the 3,300+ *existing* investment treaties? Here, two options are available. Governments could renegotiate existing treaties. Alternatively, a multilateral convention, modelled on the Mauritius Convention on Transparency, could allow states to opt into the court regime for their existing treaties (or some of them). An opt-in convention would allow states to effect the envisaged modifications at once, releasing them from the potentially burdensome and long treaty-by-treaty renegotiations. An opt-in convention would also have the advantage of following the approach successfully tested in respect of transparency, although the treaty law challenges involved in a broader reform of the investor-state arbitration regime will be substantially more complex than the introduction of a transparency standard in investment treaties.

To master these challenges, a reform would be elaborated best in a forum such as UNCITRAL that is global; inclusive; state-run, yet open to other stakeholders; and has procedures in place for writing international instruments.

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[1] *See* European Commission, "European Commission launches public consultation on a multilateral reform of investment dispute resolution," December 21, 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610.
[2] *See* UNCITRAL, "Report of the Commission session on the work of its forty-ninth session (A/71/17)," paras. 187-195, http://www.uncitral.org/uncitral/en/commission/sessions/49th.html.

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