The Law Society

European Commission's proposal on Investment Protection and Resolution of Investment Disputes and the introduction of an investment court system

The Law Society response

December 2015

Introduction

1. The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

2. This paper has been prepared by the Trade Policy Working Party of the Society's International Issues Committee. It is a purely technical response on the detail of the Commission's proposal on investment protection and investor state dispute settlement (ISDS) and we have not sought to form a view on the merits of the proposal generally. UK firms have significant experience in this field and could contribute to the further development of the Commission's thinking at a later stage.

Summary

3. On 12 November, the EU formally presented to the US its proposal for a reformed approach on investment protection and a new and more transparent system for resolving disputes between investors and states: the Investment Court System.

4. The Society has previously noted the importance of ensuring that the proposal preserves the right to regulate for public policies. We therefore welcome Article 2 (Investment and regulatory measures/objectives) in Section 2 of the revised proposal, which in particular states that the provisions of the Investment protection section of the proposals:

    - "shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"; and
    - "shall not be interpreted as a commitment from a Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor’s expectations of profits."

5. While the Society does not support or oppose the introduction of an investment court, any new system must effectively address the problems which have been identified in the current system - notably its lack of transparency, the importance of publication of decisions and their rationale and its potential to impose inappropriate regulatory chill as a consequence of high damages awards. Furthermore, the cost implications of any new system are likely to be significant and. as work in this area is economically significant to the EU legal services market, it is important to consider carefully the impact of any new proposals. We urge the Commission to undertake and publish a thorough and impartial impact assessment to assess the likely costs and effects of the proposed new investment court system.

Scope of Investment Protection: General Observations

6. The Society notes that many of the criticisms levelled against the current practice of ISDS through arbitration relate to debate around the limits of investor protection.

7. The Law Society does not offer comment on the scope of protection. However, we note that the proposed text provides more detailed definitions of what constitutes a breach of a treaty than that found in other investment chapters and even BITs. It therefore reduces the scope for broad interpretation by tribunals of the breadth of the rights in question. This should reduce the risk of inconsistent decisions, identified by some as a problem with the current arbitration process. This should, in turn and over time, reduce the number of cases where parties would seek to appeal.

8. The Commission believes that the proposal retains the level of protection granted in CETA, and the Law Society notes that in terms of substance the text appears to be broadly similar. However, whether in practice the level of protection remains the same will depend on how the text of both FTAs is interpreted by tribunals. In particular, tribunals will need to take into account Article 2 (TTIP) and the preamble in CETA, which refer to the right to regulate.

9. We also note that the definitions contained in the substantive protections will mean that cases can only be brought in quite limited circumstances. However, where a claim is successful, it would be a clear indication that the State had breached the terms of the relevant trade agreement. They key balance to be built in is that decisions where regulatory interventions by a state might have led to findings against a state of breach of an agreement must not be made except in the context of the fullest analysis whether the state's regulatory intervention was justified to prevent an overall detriment to that states citizens.

Definitions specific to investment protection

10. The definition of "investment" is much narrower than that in a number of previous Bilateral Investment Treaties and Free Trade Agreements. This should reduce disputes concerning the parameters of what constitutes an investment.

11. The definition of the term "claims to money" is not sufficiently clear and should be refined. As noted in our response[1] to the public consultation on ISDS in the TTIP in July 2014, there is also a question as to the need for such a restriction. Where a claim to money otherwise complies with the criteria for determining whether an investment constitutes a covered investment, it is unclear why such a carve-out should operate at all.

12. In its response the Law Society also queried the exclusion of sale of goods and management contracts. As far as the Law Society is aware, these have not been excluded from the scope of investment protection in previous treaties. As such

[1] The Law Society's response is available here: http://communities.lawsociety.org.uk/international/regions/global/law-society-response-to-european-commission-isds-consultation/5046218.fullarticle

the proposed text could fall short of achieving the Commission's stated aim of retaining the levels of investor protection afforded in existing agreements.

13. The Law Society reiterates that the existence of shell and mailbox companies should not be regarded as abusive per se.

Section 2: Investment Protection

Article 2: Investment and regulatory measures/objectives

14. The Law Society believes that the Article as drafted largely maintains the level of protection in CETA but should offer more security and predictability. As noted above, whether the same level of protection is achieved in practice will depend on how both texts are actually interpreted by the tribunals. On the basis of the level of detail in Article 2 there is scope for tribunals to interpret the already more clearly defined protections more restrictively. Further, the level of protection has to be understood in the context of enforcement methods. The question is whether the differences in the dispute resolution provisions render the protections in the TTIP more difficult to enforce, even if they are in substance the same protections as in the CETA. If so, then the level of protection is indirectly affected.

15. With respect to Article 2(1) the Law Society notes that the right to regulate for key public policy concerns should accord greater room for host states and may foreclose a number of claims. It is worth noting that Articles 2(3) and 2(4) could prevent many investment claims based on the removal of renewable energy subsidies, a situation which has the potential to give rise to extensive litigation. However, there is an important policy consideration as to whether states should have more latitude in establishing subsidies without fear of reprisal.

Article 3: Treatment of Investors and of covered investments

16. The Society welcomes the further clarity given to the meaning of "fair and equitable treatment", which should result in greater legal certainty.

Article 5: Expropriation and Annex I: Expropriation

17. As set out in its previous consultation response, the Law Society supports the inclusion of protection against direct and indirect expropriation. It further supports the approach outlined in paragraph 2 of Annex I on Expropriation which necessitates a thorough examination of the facts to establish whether there has been indirect expropriation. It is potentially positive to introduce policy powers and not to class everything as expropriation. The definition of 'expropriation' included in this section, and in Annex I, is very similar to that in previous agreements, but with more explicit detail in the Annex on indirect expropriation.

18. However, the Society considers that further guidance is needed in relation to the use of the term "manifestly excessive" in Annex I and how and by whom this is to be assessed. The term should not be so wide as to completely negate investment protection as this would be illogical. The provision as currently drafted

largely undermines the protection against indirect expropriation. The Commission could explore the use of other terms such as "proportionality" which might offer a useful alternative to "manifestly excessive".

Article 7: Observance of written commitments

19. The Law Society notes that the "umbrella clause" has been refined and therefore takes a different line to some previous umbrella clauses. Article 7 precludes the application of ISDS to claims for breach of contract where the state is acting outside the scope of governmental authority, meaning it is acting as an ordinary commercial party. In other words, ordinary breaches of contract cannot be the subject of ISDS claims. In contrast, claims in which the state takes legislative action such that it is practically released from its contractual obligation, or where the state is asserting its governmental authority as justification for the breach of contract can be the subject of ISDS claims, as they should be. This appears to capture the state-as-sovereign v state-as-merchant limitation on umbrella clauses.

Article 9: Denial of benefits

20. This does not go as far as the Energy Charter Treaty (ECT) although we understand that this part of the text has not been revised in the context of TTIP. It is an important point that without any limitation here (for example, the need for a substantive presence, or business activities or similar), a non-Member State company could established in a Member State and then invest in the US.

Section 3 - Resolution of Investment Disputes and Investment Court System

Introduction of an Investment Court: General Observations

21. A thorough and impartial impact assessment should be carried out to assess the likely costs and effects of the proposed new investment court system. It is difficult to assess the proposal to the extent that it is intended to be a blueprint for the Commission's idea of a multilateral investment court. As such, the following comments are directed primarily towards how the Court might function in the context of TTIP but bearing in mind the wider context behind the proposal.

22. The Law Society does not support or oppose the introduction of an investment court. However, we note that the cost implications of any new system are likely to be significant. Any new system should therefore effectively address the problems which have been identified in the current system - notably its lack of transparency and its potential to impose regulatory chill as a consequence of high damages awards - to ensure that it is an improvement.

23. The Law Society also notes that the Commission's proposal seems to draw on the WTO dispute resolution system. However, a number of problems have been identified with that system and it is important to ensure that any EU system does not merely replicate these.

24. The Society further notes that the proposed system replicates access to a forum outwith the existing domestic court structure in each member state, as is the case in "traditional" arbitration. It also recognises the Commission's efforts to retain some of the advantages of the existing system, particularly the self-enforceability which stems from the ICSID system. However, further consideration may need to be given to these issues to ensure the interaction with these other systems is absolutely clear.

25. It is also vital to ensure that any dispute resolution system facilitates access to justice, contributes to appropriate development of the law through high quality judgments, is fully transparent in respect of its determinations and is practically workable. The Law Society has identified a number of issues which merit further consideration or clarification if the Court is to fulfil these objectives.

26. One general observation is that the new system seems unnecessarily complicated. This could have a negative impact on the Commission's aim to achieve a more transparent system. It is unclear whether the Tribunal of First Instance is intended to be an arbitration panel or a Court. While submission of claims must be under a set of arbitral rules, the other aspects of the process deviate from traditional arbitration - not least in removing the right of the parties to appoint an arbitrator and also the appeal mechanism which has been introduced "on top".

27. It is unclear whether attempts at amicable resolution (through negotiation or mediation) are a condition precedent to dispute resolution (Article 2(1) and Article 4(1) of Section 3).

28. The Law Society notes that the provisions on costs allocation, third party funding and security for costs mark a change in approach from previous investment treaties and free trade agreements. The Law Society supports measures to deter spurious claims, however such measures should not impinge upon access to justice, particularly where this may make it more difficult for SMEs or individuals with limited resources to exercise their rights.

29. The issue of enforceability has not been addressed fully in the proposal. Article 30 specifies that awards will be fully enforceable within each party's territory and the interaction with international agreements that would make this possible should be fully detailed.

Article 3: Mediation

30. The Law Society welcomes the possibility of resolving disputes through alternative methods where appropriate. The timing suggested within the process seems sensible.

Article 6: Submission of a claim

31. Under proposed Article 6, a claim may be submitted to the tribunal under any of the following sets of rules on dispute resolution (Article 6.2):

- ICSID (The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965);
- ICSID, in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (i.e. where the main ICSID rules specified do not apply);
- UNCITRAL (the arbitration rules of the United Nations Commission on International Trade Law); or
- Any other rules agreed by the disputing parties at the request of the claimant.

32. Whichever rules are adopted, the proposed wording at Article 6(3) states that the rules shall apply, "as supplemented by any rules adopted by the [...] Committee, by the Tribunal or by the Appeal Tribunal".

33. The Society notes that the proposed wording in 6(3) mirrors current standard US drafting. The acceptance of supplementary rules should not be problematic if it is merely intended to give the Tribunal and Appeal Tribunal the power to refine procedures. For example, in the WTO context, this has been used to address issues missing from the Dispute Settlement Understanding (DSU).

34. Alternatively however, this wording may suggest that the existing arbitral rules are intended to be subordinate to those produced under the proposed Investment Court System, and it is therefore unclear whether this might affect the status of any judgment or award under UNCITRAL/ICSID. The Commission foresees circumstances where various rules might be added, for example practice guidelines. That is not to say that they would never contradict existing rules - for example they might allow for a greater level of transparency - but the intention is that the outcome of the process would be a judgment that could still come out as an award under UNCITRAL/ICSID. Some further thought may still be required on this issue to ensure that the desired outcome is achieved and clearly defined.

Article 8: Third party funding

35. Third party funding is permitted under Article 8. The Society notes that concerns are sometimes expressed that third party funding options may lead to the commercialisation of claims or facilitate opportunist claims.

36. However as the provision passing the cost to the loser should also curb enthusiasm for pursuing claims on an opportunistic basis. For these reasons the Law Society supports the option to use third party funding to the extent that is may facilitate access to justice.

37. The definition of Third Party funding detailed in Section 3, Article 1 (Scope and Definitions) seems to exclude commercial loans but it might be helpful if this were clarified.

Article 9: Tribunal of First Instance and Article 10: Appeal Tribunal

38. *Qualifications of judges*

39. The proposal stipulates that candidates "shall possess the qualifications required in their respective countries for appointment to [judicial office[2]/the highest judicial offices[3]], 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."

40. This appears to set a very high bar and may limit an already very small pool of candidates, especially given the proposed six year term for judges. While this is not necessarily a problem, we recommend the Commission reflect on the implications, particularly if there were any possibility that the proposed Court might be expanded in the future.

41. Under the existing arbitration systems, and indeed under the WTO system, there is no requirement that the panel members be lawyers. The Law Society notes that this requirement has been introduced in Commission's proposal.

42. The requirements could also help to allay public concerns regarding the qualifications and suitability of arbitrators, as they should have expertise which is relevant to customary international law, rather than a greater focus on commercial arbitration. It might also be helpful to include a clarification that in this context international law does not refer to EU law. However, it should be noted that the requirements for judicial office vary significantly between jurisdictions. Even amongst the Member States there will be significant variation. Further consideration may therefore be required to ensure that this provision does not discriminate unfairly against potential candidates from particular Member States.

43. In practice, judges are likely to come from the existing pool of experts who appear frequently on arbitral panels under the current system. The re-appearance of the same arbitrators is one of the features of the current system that has been criticised.

44. Finally, if the system is to follow the WTO model, the terms such as ‘judge’ or ‘court’ could be replaced by ‘panel member’ and ‘appellate body member.’

Six year term and availability

45. While the Society recognises the desire to ensure that judges have security of tenure which in turn can help to ensure independence, practitioners have expressed concerns that the six year term may discourage potential candidates..

46. Moreover, the requirement to be available "at all times and on short notice"" could be regarded as excessive and could also act as a strong disincentive. However, if

[2] In the case of the Tribunal
[3] In the case of the Appeal Tribunal

the requirement is intended to mean that judges will be required to make themselves available at any point subject to reasonable notice (i.e. of some weeks or months as indicated by the timescales set out in Articles 28 and 29) then this would obviously be less onerous.

Appointment method

47. Under the current system each party chooses a member of the arbitration panel with the third coming from a pre-appointed list. It is generally thought that parties to the arbitration value this ability, even if the person in question will not ultimately agree with their arguments. This is confirmed in the recent White and Case Arbitration Survey[4] conducted by Queen Mary University of London which found that "selection of arbitrators" is seen as one of the key advantages of arbitration as a mode of dispute settlement.

48. Because under the current arbitration system the chair of the panel is appointed from a pre-agreed list, the "weighting" of the panel may be regarded as being stacked 2:1 in favour of the State. However, in the proposed new scheme, the States would appoint all panel members, resulting in a weighting of 3:0 in favour of State appointees. There may therefore be a suspicion that the appointees are more likely to side with the States in reaching their decisions. This could act as a further deterrent to investors, particularly smaller businesses, who believe they have a genuine claim but are weighing the risks of litigation.

49. However, the Law Society also notes that in terms of protecting its own citizens and businesses, each Party will be interested in ensuring that the panellists are prepared to rule "against" the State defendant. The Law Society therefore emphasises the importance of ensuring that appointees are genuinely independent and are not considered predisposed to take one side or the other.

50. Another point which merits further consideration is the fact that the composition of the tribunal panel means that the person who is perhaps likely to have the "deciding vote" and therefore a significant influence on the development of the law, will not be a national of either the US or the EU. Given the important role the tribunal will play in determining the direction in which ISDS law moves, this is perhaps an odd decision. It also appears that in following the blueprints of existing international courts, the Commission is looking to achieve collegiality over time. It is also true that a panel of judges already exists for State to State dispute settlement. While the collegiality of the WTO AB members is widely recognised, it may be less apparent in the case of the panels because there are so many panellists.

51. This problem is replicated in the appeal panel. Here, the power vested in the judge with the deciding vote is perhaps even greater. While having such a small number of judges may encourage greater consistency in decision-making, it does mean that the non-EU/US judges may wield a huge amount of power.

[4] http://www.arbitration.qmul.ac.uk/research/2015/

52. The Law Society also notes that nothing has been said in relation to dual nationality and suggests that this should be dealt with explicitly in the interests of clarity.

Remuneration

53. Some may view the level of the retainer as too low if judges would be required to cancel professional or personal plans at very short notice. The provisions relating to remuneration as a whole are also unclear which makes it difficult to assess whether they will be attractive enough to attract high quality judges.

54. The Law Society understands that the intention is to have a smaller retainer and higher per diem fee for first chamber cases and a higher retainer, with lower per diem payment for appeal cases, but clarity on this point would be welcome.

Article 11: Ethics and Annex II (Code of Conduct)

55. The Law Society agrees that arbitrators must be independent and impartial. As stated in its response to the Commission's consultation in July 2014, the Law Society supports the view that arbitrators should act ethically, should conduct themselves in a professional manner, and should have the requisite experience to carry out their role. However, it does not consider that there are significant concerns surrounding the current conduct and expertise of arbitrators.

56. Practitioners did not see arbitrator conduct as a particular issue. A number of practitioners subscribed to the view that arbitrators are self-policing because their desire for reappointment necessitates neutrality in their own self-interest. Perceptions of the public or particular groups should not prompt unnecessary legislation unless these are well-founded.

57. However, while the pre-approved roster format in the current proposals appears to address the concern of nationality bias, it does not necessarily address the issue of a lack of diversity among arbitrators. In practice, there is usually a small pool of people who are regularly reappointed. It is unclear how the proposal provides assurance that the roster will reflect a broad sector of societal interests and expertise in various sectors.

58. Nonetheless the proposed Code itself seems sensible and captures many of the concerns that have been raised in relation to ensuring integrity and impartiality among arbitrators.

Article 18: Transparency

59. The practical significance of the additional obligations however may be negligible however, given the breadth of the obligations to disclose already included in the Transparency Rules and the exceptions enshrined therein (most notably the exception for confidential information).

Article 23: Intervention by third parties

60. Article 23 of the proposed TTIP investment chapter provides for intervention by "any natural or legal person which can establish a direct and present interest in the result of the dispute". Such intervention would be "limited to supporting, in whole or in part, the award sought by one of the disputing parties." It is our position that enabling third parties to intervene in proceedings is a positive feature of the proposal, and also largely in keeping with the approaches of some other international dispute resolution bodies, such as the WTO[5] where third parties "participate in about three-fifths of all cases and tend to outnumber the main parties by a sizable margin"[6].

61. One of the benefits of this system is that "no member need fear that its benefits will be undercut by any subsequent deals its partners make with others on more preferential terms"[7]. It also ensures an opportunity for all member states to have an involvement in the WTO's judicial process, thereby influencing case law[8].

Article 21: Security for costs and Article 29(4) relating to security for costs on appeal

62. Under the proposals a claimant may be required to give security for costs where "there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against it". This seems to be lowering the bar for cases where security may be required. There is a concern here that legitimate claimants might be deterred from bringing a claim on the basis that they are financially disadvantaged as a result of the actions of the state (e.g. as a result of a direct or indirect expropriation) which form the basis of the claim. This could have a serious impact on access to justice, particularly for SMEs and smaller investors. The Society notes that this may be aimed at cases where it is not clear that there is a legitimate business interest; however, further clarification may be helpful to ensure that the provisions do not capture cases where the investor has limited funds as a result of unfair action by one or other Party.

63. It should be kept in mind that the defendants in TTIP ISDS cases will be developed countries with considerable resources to devote to litigation. There is a risk of creating inequality of arms, in particular in cases where SMEs are looking to pursue a legitimate claim.

Articles 28 and 29 and Article 6 in relation to timescales

64. The outlining of the timescales may be helpful in informing expectations of both parties as to how long the process should take. The timescales appear to be

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[5] See its Understanding on Rules and Procedures Governing the Settlement of Disputes : https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf

[6] Three's a crowd: Third Parties and WTO Dispute Settlement By MARC L. BUSCH and ERIC REINHARDT, World Politics 58 (April 2006), 446–77

[7] Kyle Bagwell and Robert W. Staiger, The Economics of the World Trading System (Cambridge: MIT Press, 2002).

[8] Third party interventions are also allowed eg under NAFTA (see : https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=2#A1115) and in the CJEU under Article 40 of Procotol No 3 on the Statue of the Court of Justice of the European Union (see: http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf)

based on those of the WTO and should help prevent costs from escalating unduly.

65. However, at the initial tribunal stage these are not fixed and it is unclear what, if anything, will happen if the timescales slip, particular if the delay is caused by the unjustifiable behaviour of one or other party.

66. While the 270 day appeal limit is binding, again it is not clear if there will be any repercussions if this is not, or for some legitimate reason cannot be, adhered to. The WTO DSU refers to breaches of any procedural rules as "irregularities" which allows discretion in respect of issues such as delays. It might be helpful to include a similarly broad provision in the Investment Court proposal.

67. In particular, jurisdiction can be a contentious issue and indeed in ICSID arbitration this was previously dealt with as a preliminary issue. Clarification as to the time period if there is bifurcation or even a three-way split in relation to jurisdiction, liability or quantum would be helpful in the interests of clarity.

Article 28(4) (and Article 23 and Annex I, Article 8) in relation to costs allocation

68. The allocation of costs according to the "loser pays" principle should serve to discourage spurious claims and the Law Society notes that this has become quite common in ICSID arbitration.

69. The Law Society supports the inclusion of a provision granting discretion in relation to apportioning costs where this is deemed appropriate in the circumstances of the case.

70. The Law Society is concerned to ensure that SMEs are not discouraged from pursuing legitimate claims if the financial risk were to be assessed as too great, particularly if the value of the claim is small relative to the anticipated costs. The Society therefore welcomes the inclusion at Article 28(5) of a proposal to determine a maximum amount of costs of legal representation and assistance in accordance with the individual circumstances of a claimant which is an individual or SME.

71. The Law Society supports the proposal (in Annex I, Article 8) that each disputing party would bear its own costs associated with participation in a mediation.

72. Furthermore Article 23, which deals with third party interventions, does not make reference to costs incurred by third party interveners. Whilst one presumes that they would bear their own costs (on the basis that the parties should not be liable for costs of those not actually party to the dispute), this would benefit from express confirmation.

Article 28: Provisional Award

73. The term "provisional award" may lead to confusion as it suggests that a separate, final , award, will be granted at a later date. As noted above, greater

clarification is still needed on how this will fit with ICSID although it is less likely to cause problems in the context of UNCITRAL or other systems which do not specifically bar appeals.

Article 29: Appeal Procedure

74. Currently appeals are limited to appeals on procedural grounds under the ICSID rules, which, if successful, result in annulment of the original arbitration decision. The grounds are very limited and typically narrowly construed. Introducing a true appeal process would therefore represent a significant change. That said, the ICSID annulment procedure has been controversial and the introduction of an alternative approach could prove helpful.

75. There is also a concern that the appeal system could be used as a matter of course which would increase and potentially even double, costs and time frames.

Grounds for appeal

76. It seems sensible to allow appeals on procedural grounds as is already the case under ICSID, but this is very different to appeals on the substance of a case. It is unclear why the second ground for appeal - "that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law" - has been included.

77. Articles 28, 29 and 30 and the relationship with ICSID and other existing dispute resolution custom

78. Questions have also been raised as to how the proposed system within the wider framework of international dispute resolution law. The relationship with ICSID may prove particularly problematic as it is not clear whether disputes submitted according to the ICSID rules will be categorised as ICSID disputes or something else. We have identified the following key areas where there is tension between ICSID disputes and the format proposed by the Commission.

79. The reference to Article 30(3) in referring to awards and judgments could cause confusion. The language in paragraph 3 is taken directly from ICSID but there is a question as to whether this is appropriate, given the express provision that other systems may be used to govern the dispute resolution. There is perhaps a further point of uncertainty caused by the fact that there is no equivalent provision to Article 55 of the ICSID Convention. It may be helpful for the text to confirm that national law in the state of execution covers immunity issues. There is also a problem if the proposed approach does not work outside the ICSID scheme. Some potential points of conflict are as follows:

80. Tribunal composition: Articles 37-40 of the ICSID rules provide that an ICSID tribunal will consist of either a sole arbitrator or "any uneven number of arbitrators appointed as the parties shall agree". Within these constraints, parties are free to agree the number and nationality of arbitrators and the rules generally only come into play if there is no agreement. However, under the proposed system, the parties will no longer have the power to appoint an arbitrator.

81. Appeals/Annulments: ICSID provides a procedure for the annulment of a decision at arbitration, and the grounds (given at Article 52 of the Convention) upon which this may be brought are that:

- the Tribunal was not properly constituted;
- the Tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the Tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

82. The TTIP proposal represents a significant departure from this approach. In particular, the fact that a dispute submitted according to the ICSID rules could be considered an "ICSID" dispute, gives rise to questions as to whether a decision of the Tribunal Panel, or even the Appeal Panel, could later be annulled under Article 52 of the Convention. Article 30(1) states that no annulment is possible. Moreover, presumably an ICSID annulment will be impossible when the Appeal Court has itself conducted and ICSID-style annulment adjudication pursuant to Article 29(1)c.

83. A further issue is that the annulment committees have a special appointment procedure involving the president of the World Bank: this would not fit with the TTIP Appellate Court.[9]

84. Finally, it is not clear how the jurisdiction of the proposed Court would interact with that of the CJEU and the development of EU law.

Conclusion

85. The scope of investor protection now appears closer to that in existing treaties. The Commission has clearly worked on ensuring that there is less scope for argument around the limitations of definitions. This is a positive step in the interests of legal certainty. However, some terms could benefit from further clarification, as outlined above. Furthermore, the effect of all provisions will, in practice, depend on the approach to interpretation taken by the arbitration panels hearing cases.

86. Concerning the creation of an investment court, the Society notes that the Commission has drawn from existing international dispute resolution forums in deciding the form that the proposed court might take. Some parts of the proposal are uncontroversial and could prove helpful in resolving disputes. For example, the Law Society supports the formal inclusion of mediation, but raises concerns that not enough consideration has been given to certain other issues. In

[9] The role of the Chairman of ICSID and the exercise of discretion in appointing members to annulment committees is discussed further in D Collins, "ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?" 30:4 Journal of International Arbitration 333-344 (2013) (download available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246756)

particular, more detail is needed as to the way in which the procedures outlined would interact with existing systems such as ICSID and UNCITRAL. It is imperative that the judgements and awards remain enforceable under international law, and proposals must not result in any other unintended consequences.