On Monday the Deputy Director General of DG Trade, Mauro Petriccione, presented the Commission's new draft text on ISDS to the INTA Committee.

Petriccione highlighted this move as an unprecedented step from the Commission, as he is not presenting a formal text but a Commission draft instead. There will also be discussions in the Council before it becomes the text to be used in negotiations with the United States.

This is a very special case and an issue of extraordinary importance which has prompted an extraordinary debate. As a result, the Commission has also taken the unprecedented step of making this draft public because it was felt to be inappropriate for it to wait any longer.

Petriccione noted that there had already been a lot of discussion on this subject, and this text will attempt to deliver on Commissioner Malmström’s commitment to use TTIP as an opportunity for the in-depth reform of ISDS.
What has become clear in this process is that there is widespread distrust of commercial arbitration from citizens. The European Parliament clearly interpreted this as a move towards a more jurisdictional approach.

Petriccione explained that a concept paper was also discussed in the INTA Committee in May, and this text follows the structure and objectives of that paper. It contains two fundamental elements:

1. Investment Protection: it continues the work of the Commission to ensure that investment protection standards are clear, well-defined, operational, and can be decided upon in a court of law. Most importantly, they will not prevent a government from regulating in the public interest.
2. Public Justice: it represents a move from a system of private justice to one of public justice, in which decisions are taken by public judges in order to restore confidence in their impartiality, judgement and competence to do the job properly.

These are the exact requirements of the European Parliament’s TTIP resolution. It defines protection in a precise legal manner, explicitly mentions the right to regulate and proposes a new system of resolution which is public, transparent, and has the possibility of appeal to correct any mistakes of law.

The main element, which is new to the proposal, is the article on the right to regulate ensuring that the right to regulate for public policies is fully preserved. The provision also clarifies that investment protection provisions do not prevent governments from changing the legal framework – known as the non-stabilisation clause – even if this has a negative impact on investment expectations. Rather than simply tinkering with standards, the Commission has taken a step further by putting the standards of protection up front and within the main articles.

The second element concerns investor protection and resolution. Under the proposal there will be an investment court system, with the tribunal of first instance having 15 judges for a period of six years.

These would be the only people entitled to hear about investment disputes under TTIP. Five of the judges would be EU nationals appointed by the EU, five would be US nationals appointed by the US, and the remaining five would be from other third countries for which a selection procedure would need to be agreed upon.

This would not be as complicated as it first seems, he noted, because such system appear in various jurisdictions as well as under the WTO’s Appellate Body.

These judges would have to have high technical and legal understanding equivalent to permanent international judges. In the event of a case, three judges would be selected at random, with one from each category.

The President of the Tribunal – who would be neither an EU nor a US national – would manage the
system whereby the random selection could also take into account the workload and availability of the judges.

This would be radically different to when the parties chose the arbitrators; the parties would have no influence on who is to hear a particular case under this system. To safeguard the independence of these judges, they would no longer be paid by the parties involved in the dispute, but the parties to the agreement, i.e. the European Union and the United States.

This would include a monthly retainer to ensure that the judges are available for a given dispute, which would be a public payment from the public authorities of the two parties. There would, therefore, be no incentive for a judge to multiply the disputes.

The appeal tribunal would have a very similar system to this, except with only six members, two each for the EU, US and third countries. They would also be randomised to sit on the appeal of a particular case, with the same system of payment from public purses.

Concerning the ethics and impartiality of the judgements, they have already negotiated a code of conduct in CETA which was largely inspired by the approach taken by the International Bar Association. This code of conduct would now be made binding on the judges of the appeal tribunal and the enforcement of the code would no longer be left to the judges themselves – it entails using a third party to ensure the correct and impartial implementation of this code of conduct.

There are also provisions on the funding of disputes. One aspect which has been raised in discussions is the issue of third parties raising a dispute in exchange for compensation. This cannot be prevented, yet it can be made transparent so that this could be taken into account in the decision-making process.

The new system does, however, add complexity and costs. According to initial calculations based on past disputes and the WTO’s Appellate Body system, the cost for the EU of this TTIP tribunal would be around €1.5m.

This is a fairly reasonable sum when compared to the additional credibility gained in disputes, which can involve very large amounts of money. The duplication of this mechanism could become an issue and part of the debate on this topic has indicated a growing consensus of multilateral institutions for handling investment disputes.

However, such a multilateral consensus can only be built over time. The Commission will start looking into this, and for this reason the proposal has transitional provisions which would allow the transfer of competences from the bilateral to a multilateral system.

From an investor’s viewpoint, there is increased complexity, cost and duration in this mechanism. One element of this is simply the addition of the appeal, but this cannot be compensated for.

The new solidity of the system is worth any additional costs. There are also other aspects, such as strict deadlines for the completion of procedures, which compare rather well to current ISDS cases.

Furthermore, the adjudication system would no longer be paid for by the parties, they would have to pay their own legal costs and those of the other party if they lose – this should also help in reducing frivolous disputes.

In response to the idea that they need to compensate investors for any of the additional inconvenience, Petriccione said that they have to remember that this is about restoring the credibility of dispute resolution mechanisms.
Other third countries continue to benefit from basic guarantees, Petriccione felt that the quality of the resolution disputes are improving in a very considerable manner.

He considered that this would be a good signal for attracting investment into Europe; in Europe, foreign investors would be treated according to the law and no worse than any others.

(...)

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