

TTIP – A Revolution in Resolution of Investment Disputes

by  **Lenka Abelovská**,
Associate,
Squire Patton Boggs
s.r.o.

 **Eva Cibulková**,
Associate,
Squire Patton Boggs
s.r.o.

SQUIRE 
PATTON BOGGS

Recent developments in the Resolution of Investment Disputes (RID) indicate that significant changes altering its nature are just around the corner. While the European Union has already outlined its thoughts on RID in its free trade agreements with Singapore and Canada, its currently negotiated free trade agreement with the United States, the Transatlantic Trade and Investment Partnership (TTIP), is even more progressive. What can we expect from the proposed changes?

In June 2013, the member states of the European Union mandated the European Commission to initiate the negotiation of a free trade agreement with the United States. This started the process which resulted in TTIP. The main aim of the partnership is to bring the world's largest economies closer together, facilitating trade between both sides of the Atlantic.

Considering that foreign investments are always accompanied with significant risks, TTIP includes progressive provisions that shall ensure effective RID. Consequently, the RID provisions contained in the bilateral investment treaties between the Member States of the European Union and the United States will be superseded.

Despite the European Union's development of RID methods in its Singapore and Canada free trade agreements, an effort to continue reforming TTIP aroused public concerns. In order to reach wider consensus, the European Commission called for a public consultation and, based on the views of over 150,000 European entities and citizens, it presented a new investment chapter proposal to the United States in November 2015.

Proposed changes of RID under TTIP

The proposal of the European Commission is innovative in many ways, with the focus being on making RID more effective

and transparent, while at the same time being beneficial to both the states and the investors. Some of the main changes cover the following areas:

- 1. Investment Court System**
The most significant change introduced by TTIP is the establishment of a domestic-like court system – the Investment Court System – which should consist of the Tribunal of First Instance and the Appeal Tribunal and resolve any disputes arising around breaches of provisions on investment protection.
- 2. Appeal Mechanism**
Another function which takes inspiration from the domestic courts is the introduction of an appeal mechanism, a novelty never before included in any RID provisions. It allows the filing of an appeal to the Appeal Tribunal against the existing award issued by the Tribunal of First Instance on grounds such as procedural mistakes, incorrect interpretation or application of law, or manifestly incorrect appreciation of facts by the Tribunal.
- 3. Appointment of Judges**
TTIP limits the parties' freedom with respect to the appointment of arbitrators. Under the current methods of RID, the disputing parties may choose their arbitrators freely; TTIP will introduce a fixed list of publicly appointed judges. This means that all levels of judicial system will have judges who

are appointed specifically for the settlement of disputes. For example, the Tribunal of First Instance should have fifteen judges (five with EU, five with US and five with non-EU/US nationality) appointed for a period of six years, out of which three will be chosen to constitute a division that will solve the dispute. Every division will have one EU judge, one US and one non-EU/US judge who will chair the division. The divisional judges should be appointed by the President of the Tribunal of First Instance on a rotational basis. The President is also the guarantor of a random and unpredictable composition of divisions and equal opportunity of the judges to serve.

The same applies to the Appeal Tribunal that shall consist of six judges.

- 4. Requirements Imposed on Judges**
Along with the new method of judge appointment, TTIP also introduces requirements on their qualification. Nowadays, almost anyone can be appointed as an arbitrator. However, under TTIP, judges shall be required to possess the qualifications necessary for appointment to judicial office in their respective countries, or be jurists of recognized competence with extensive expertise in international law.

Additionally, in comparison to the current methods of RID, TTIP improves guarantees of judge neutrality by explicitly prohibiting the unpopular "two hats system" that allowed arbitrators to act as counsels, party-appointed experts or witnesses in multiple investment protection disputes.

- 5. Transparency of Proceedings**
Last, but not least, TTIP reaffirms the new trend in RID – transparent proceedings conducted pursuant to the UNCITRAL transparency rules.

Further steps with respect to TTIP and RID

The above-mentioned changes to the RID were proposed only unilaterally by the European Union. Recently, negotiations with the United States have been initiated. Their results may not only influence the final wording of TTIP but also the overall direction of the European Union's efforts to modernize the methods of RID. Since the ultimate goal of the European Union, together with other like-minded countries, is to establish an International Investment Court to replace old RID methods included in agreements between the European Union, Member States of the European Union and third countries, or even in agreements between two third countries, the results of TTIP negotiations may indicate whether this goal is achievable and has public support.