

Arbitragem de Investimento

Artigo publicado pelo Dr. Manuel P. Barrocas na Revista “Alternatives” do CPA – International Institute for Conflict Prevention & Resolution, Nova Iorque, sobre os malefícios da substituição da Arbitragem por um Tribunal Permanente no CETA e na malograda proposta do TTIP.

International ADR

TTIP/TAFTA Dispute Resolution System: Why a Move to Judges From Arbitrators Raises Concerns about the Treaty

BY MANUEL P. BARROCAS

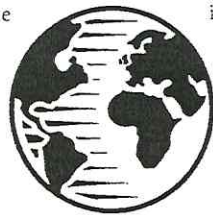
The subject of this article is the current position of arbitration in the context of international dispute resolution mechanisms. The focus is on the emergence of projects to replace arbitration with international courts, in particular the European Commission's proposal to the United States of the Transatlantic Trade and Investment Partnership, or TTIP, and which is known in the United States as TAFTA—the Transatlantic Free Trade Agreement.

Is this a justifiable proposal? And, more specifically, is it likely to succeed in its purpose?

A guide to the text drafts and background can be found on the European Commission's website at <http://bit.ly/1DwU7No>.

The principal criticisms of arbitration, which are rooted in an alleged lack of transparency, lack of independence and impartiality on the part of arbitrators, relate mostly to investment arbitration, and not so much to commercial arbitration.

As a matter of fact, transparency in commercial arbitration is not necessarily a requirement in order to be effective given the confidential, or at least private nature, of commercial disputes. On the other hand, investment disputes concern public and private entities, and it has been said that in such cases the public needs to know the contents of the proceedings or the most important parts of the proceedings.



But other points of criticism have been made about the dispute resolution system of investment arbitration—that is, investor-state dispute settlement, referred to below as ISDS.

This was demonstrated, for instance, in the public consultation the European Commission launched which examined whether ISDS (1) causes erosion of national sovereignty by restricting the states' right to regulate, (2) compromises the principle of fair and equitable treatment, and (3) reduces the right to appeal.

It is rather strange that these issues, including the alleged lack of transparency, appeared not as a reason or justification for ISDS to be replaced, but as a need to improve the ISDS system.

For example, a lack of transparency in investment arbitration led to the publication of the UNCITRAL Transparency Rules, effective on April 1, 2014, and the United Nations Mauritius Convention on Transparency for investment treaties concluded before April 1, 2014. (For details, see Beth Trent, "The U.N.'s Latest Moves on Cross-Border Mediation and Arbitration Practices," 34 *Alternatives* 115 (September 2016) (available at <http://bit.ly/2iZp1My>.)

These rules were ready to be applied to investment arbitration, but the European Union TTIP proposal also required them to be applied to judges in the newly proposed Investment Court System created by that proposal.

It should be pointed out, however, that the EU proposal for TTIP's new dispute resolution system does not come on its own. It is part of other investment protection measures, which include a radical change of the state's right to regulate.

In this author's opinion, this is the reason behind the proposal's option to replace arbitrators with judges. All other criticisms, such as lack of transparency in arbitration or lack of independence or impartiality of arbitrators, are merely arguments, not the bottom-line.

As a matter of fact and in accordance with the EU proposal, the right to regulate public policies should be understood in the sense that the states have the right to change the legal basis under which the investment contracts were entered into, including any matter that may negatively affect the investor's expectations of profits.

Consequently, the EU Commission is now of the opinion that judges may understand this much better than arbitrators and not disregard the states' interests.

But the right to regulate also appears in the EU proposal in connection with cases where the concept of indirect expropriation has grounded a number of charges, adjudicated by arbitrators, of many states, for violating treaties.

This has led countries, such as Canada and the United States, to review their bilateral investment treaty (or BIT) models in order to define, as clearly as possible, to what extent states are free to regulate reasonably—that is, in a non-discriminatory way without infringing the treaties. Such is the case on matters of health, environment, consumer protection, safety, and promotion and protection of cultural diversity.

A similar regime was appropriated by the EU's TTIP proposal.

At this moment, a good question to ask is whether there is, in fact, any justification for the system of international dispute resolution to be drastically changed for any other reason than some people are biased against private mechanisms for settling investment disputes.

DISPUTING GROUNDS

Under the EU proposal, grounds for disputing a state's decision on any foreign investment according to the TTIP proposal may only be based on the following: (1) expropriation without compensation; (2) the possibility to transfer or repatriate funds relating to an

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investment; (3) a guarantee of fair and equitable treatment of the investment and physical security; (4) a commitment that governments will respect their own written (and legally binding) contractual obligations toward an investor, and (5) a commitment to compensate for losses in certain circumstances linked to war or armed conflict.

Defense grounds enumerated in the ICSID Convention, however, are more accurately defined (more information is available on the International Centre for Settlement of Investment Disputes' web page at <http://bit.ly/2jST0UZ>).

In addition, thousands of BITs entered solely into by the EC on behalf of the European Union and third countries that have been a party with different EU members before they were replaced may, in turn, disappear.

In brief, the EU's TTIP proposal to the United States created a different system that set aside the traditional arbitration system and intends to replace it with an international court composed of 15 judges—five to be proposed by the European Union, five by the United States, and another five by both parties but whom must be non-nationals of any EU member state or the United States. An appellate court has also been proposed, which is to consist of six judges—two judges from the EU member states, two from the United States, and two non-nationals from either the EU or the United States.

In October 2016, a new round of negotiations was held during which the U.S. delegation was expected to reply to this EU proposal, as well as other important matters still under discussion. But no agreement on major points was reached.

The election and inauguration of a new U.S. president will affect the future of the U.S. view of TTIP/TAFTA. On his third day in office, President Trump signed an executive order withdrawing the U.S. from the Trans Pacific Partnership, better known as TPP, throwing the future of a new U.S.-Europe trade negotiation and treaty into question. In addition, the longstanding North American Free Trade Agreement, best known as NAFTA, also has been disputed by the President Trump.

PROPOSAL SHIFTS TO COURTS

It should be emphasized that the original TTIP proposal made by the EU didn't contemplate an international court, but the traditional ISDS. The Commission had a change of mind because of pressure from the European Parliament—more specifically from several anti-globalization, anti-liberal and anti-capitalist political forces represented there and

Trading Treatment

The treaty on the brink: The Transatlantic Trade and Investment Partnership.

Status? At press time, the agreement is being negotiated with major issues still under consideration. And it is under examination by a new U.S. administration that scrapped a similar major trade treaty on the Pacific side just hours after the January inauguration.

The ADR component: Why does the current TTIP proposal rely on judges, rather than arbitrators, for investor-state matters?

supported in Europe by the left-wing press and media, which have followed the position of NGOs.

These forces support a system where states would take the lead in the dispute resolution system by means of judges and not arbitrators. In other words, they seek people selected and appointed by the public sectors themselves.

But with regard to the attack on the traditional dispute resolution system based on arbitration and by supporters of an international court, the question is whether the alleged lack of transparency of proceedings is a defect of arbitration tribunals, or is a procedural defect which can be solved by changing the arbitration rules.

Investment arbitration has been mainly organized and administered either by ICSID or in accordance with UNCITRAL rules through

ad hoc arbitration with the cooperation of the Permanent Court of Arbitration in The Hague.

The EU's TTIP proposal includes some procedural documents, in addition to the award, which must be made available to the public. So why not follow the same regime of existing arbitration rules? Is this such a sensitive matter for arbitrators?

Improving arbitration is definitely not the path followed by the TTIP proposal. As already mentioned, the UNCITRAL Rules on Transparency and the UN Mauritius Transparency Convention took this route. They were conceived to be applied to investment arbitration, not only to create a set of rules specifying which documents should be made public in addition to the award. The transparency rules and convention created a repository of documents dealing with arbitration subject to UNCITRAL Rules that is aimed at setting up a publication service.

MAJOR CRITICISM

Another major criticism made about investment arbitration is the alleged lack of independence and impartiality of arbitrators resulting in a tendency to benefit the investors rather than public entities.

It is true that some large law firms compete in order to get good mandates as counsels for important corporations, and we should not forget the immense power of these large corporations. But we do not know of any reliable statistics that reveal the number of arbitrations in which arbitrators' awards, or a majority of arbitrators with a decisive influence in the award, have been set aside for showing partiality or lack of independence.

On the contrary, statistics published by the United Nations Conference on Trade and Development show (see World Investment Report 2014, 124 (available at <http://bit.ly/1nC3ouQ>)) that between 1987 and 2013, the total number of investment arbitrations was 568. European countries were involved in 53% of these arbitral cases. Of that total, 43% were decided in favor of public entities; 31% in favor of investors, and 26% ended in settlements.

It is imperative to ask ourselves if, on shifting the power of decision to judges from arbitrators, we can be absolutely certain that judges will demonstrate greater impartiality than arbitrators.

After all, judges are civil servants nominated and paid by the states involved. Or they may be academics or retired politicians who were chosen to be judges, and were probably trained in the public sector with the consequent tendency to favor or understand public interest in a certain manner.

Of course, arbitrators also may face some of these same or similar pressures and biases, as well as their own issues emanating from the source of their placement on tribunals. Like judges, arbitrators have ethical and professional code responsibilities to uphold, depending on the jurisdiction and their professional status.

But it should be highlighted that there is a regime for setting aside arbitration awards, in which a lack of independence may be scrutinized and awards declared null and void by courts of law—that is to state, by independent and professional judges in ordinary courts of law.

Considering that the Appellate Court provided for in the EU proposal is made up of judges of similar background to those of the first-instance court, is there any guarantee that it will have the independence of mind to examine awards influenced by any lack of independence or lack of impartiality that favors public entities?

Why would such a court be better than properly selected, installed and supported arbitrators?

MORE COURT CONCERNS

There are other criticisms that can be made about the EU proposal in favor of international courts instead of traditional arbitration.

For example, how to enforce a judgment that has been adjudicated by a new International Court against the European Union, bearing in mind Article 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, best known as the New York Convention, which only refers to states and not international organizations? (The convention text is available at <http://bit.ly/1Aikzs3>.) Of course, not only the EU but all EU member states are expected to sign TTIP, but this may not be sufficient to prevent conflicts.

As a matter of fact, a few remarks should be made on this matter. Under Regulation No. 912/2014, the EU bears financial responsibility for consequences that result from how the EU and its agencies deal with investment protection

agreements (such as bilateral and multilateral investment treaties) entered upon by the EU or by one or part of its member states, or alternatively, the treatment received by any member state alone but in compliance with EU laws.

It should also be borne in mind that the EU enjoys immunity vis-à-vis any court of law.

So how can the central problem created by this structure about the enforcement of judgments be solved?

The EU proposal fails to do enough to provide for the application of the New York Convention to the decisions adjudicated by the International Court, and is indeed open to criticism because the EU is not a state nor a member of that convention.

Moreover, the International Court is not now nor will it become an arbitral tribunal. On the other hand, the application of the Convention of Feb. 1, 1971, on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (available at <http://bit.ly/2jeRpbi>) will not be of any real significance for the enforcement of judgments adjudicated by the International Court, because the United States is not a member of that convention, and only five countries are. Furthermore, a draft text of a new Hague Convention on the recognition and enforcement of foreign judgments is still at an early stage.

Another issue is how to decide who bears the costs of any EU charge. Which of the member states? All of them? Only some of them? Should there be a compensation fund? If so, how will it be provided with funds, and from which resources?

In addition, article 8.21 of the proposal provides that the EU shall designate, on a case-by-case basis, who the respondent party should be. Is that the EU? Some member state? Both?

And what kind of appeal exists if a member state does not accept its designation? The proposal makes no mention of this possibility.

In addition, what is the position of the investor in the matter of designation of the respondent? There is nothing about this, either, in the TTIP proposal.

Another pertinent question is whether we are going to have an increased judicial bureaucracy with legalistic-minded judges rather than arbitrators, selected case-by-case by the parties. Will that produce more delays and further backlogs?

Are we going to have a system involving more protection for host countries and con-

sequently a reduction of investments? International arbitration has boosted international trade and investment, particularly since 1958.

Then, it was suddenly thought possible to create—by the mere wave of a magician's wand—an international court composed of judges in the guise of arbitrators to solve investment disputes. And this has happened merely because of criticisms leveled at arbitration and arbitrators, criticisms that have not been validated.

In short, is this really, simply, an exercise of a narrow-minded protectionist movement against modernity and progress?

LOOKING AT JUDGING

Nomination of judges in the most democratic countries falls within the competence of a body of judges. They are not nominated by the state seeing that states may be, directly or indirectly, interested parties with regard to court disputes. So why should the EU Commission not opt for ICSID or UNCITRAL Rules?

A number of challenges for judges may arise with the "Code of Conduct for Judges" provided for in the proposed TTIP's article 5. This code requires an appointed judge to show real "purification status"—free of pressure of any kind at present and in the past, has no political considerations, no influence through political clamor, no loyalty to a disputing party, and no fear of criticism.

It is a rule in arbitration that if an arbitrator commits any serious fault or mistake in their functions, they should be removed from further arbitration cases. What sanctions for judges in similar circumstances are provided for in TTIP's proposal?

Finally, do we know what the relationship will be like between the International Court and the EU Court of Justice? It should be noted that the EU Court of Justice is the only entity with the competence to construe and create jurisprudence on community laws in the EU.

The U.S. Chamber of Commerce, the nation's largest business lobbying group, already has criticized the EU proposal, and advocated that the U.S. government should not use it as a model. Finally, it should also be pointed out that the U.S. adopted the traditional ISDS arbitration system in the Trans-Pacific Partnership Agreement. ■