Is the European Commission Issuing a Dismissal Letter to Arbitrators?

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The Public Consultations launched by the European Commission in March 2014, and the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership [TTIP], in July 2015, have revealed a widespread criticism against the traditional investment arbitration system. Mighty scepticism came from NGOs, according to which the current ISDS regime works in favour of investors. The way in which the ISDS is currently shaped is deemed to be no longer acceptable. In particular, the Parliament advanced the idea to:

> *"replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives."*

The Commission has therefore been charged of the responsibility to effectively take into account all stakeholders' concerns, and build them into the future EU dispute settlement structure. In this sense, the Draft Text on Investment in TTIP, issued by the Commission in September 2015, clearly mirrors the intention to reinvent the existing dispute resolution mechanism, coming up with some creative ideas (the text is available here).

The touchstone of the Draft Text is enshrined in Article 9, which provides for the establishment of a Tribunal of First Instance. The Tribunal is made of 15 publically appointed judges, equally chosen from the European Union [EU], the United States [US], and the remaining five from third Countries. They will be appointed for a six-year term, which can be renewed once. Cases will be heard by a three-member panel, whose composition reflects the geographical division of the Tribunal, with one EU judge, one US judge and the chair judge from a third Country. The members of the panel are selected on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all judges to serve.

The dispute settlement procedure designed by the EU offers a possibility of further scrutiny over the decision through the establishment of a permanent appellate tribunal [Appeal Tribunal]. Its scope aims to cover a broader range of issues than those contemplated in the ICSID system. Article 29 of the TTIP draft text adds two additional appeal grounds to those stated in article 52 of the ICSID Convention:
(a) errors in the interpretation or application of the applicable law, and
(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law.
The Appeal Tribunal consists of six members, appointed for a six-year term, renewable once. The appeal tribunal composition is geographically similar to the one of the First Instance Tribunal–with two judges from the EU, two from the US and the remaining two coming from third Countries. The appeal proceeding is supposed to be quick, since the three-member panel decisions should be decided within no more than 270 days.

At a diplomatic level, the EU proposal may have a strategic impact, even if its feasibility and effectiveness are still open to question. One of the main goals the Commission has is to overcome a generally sceptical attitude raised against arbitrators' expertise and impartiality. As the Commission pointed out in the May Concept Paper, since "the current system does not preclude the same individuals

from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases, this situation can give rise to conflicts of interest – real or perceived – and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators."

In spite of the treaty-based origin of the arbitral tribunal's jurisdiction, and the parties' voluntary commitment to arbitration, the underlying assumption the Commission, quite simplistically, made is that publicly appointed judges are supposed to be more independent –and if not also more qualified – than arbitrators when dealing with investment disputes. In order to strengthen its approach, the Commission included in the draft text a Code of Conduct (Annex II), to which the Members of the Tribunal and the Appeal Tribunal are strictly bound. Among the duties, the Code refers to fairness and diligence, independence and impartiality of judges.

Since most investment treaties do not specify the preferred characteristics of arbitrators, and national provisions do not add relevant information in this regard either, the Commission has remarkably sought to fill this gap by setting legal criteria to identify the areas that arbitrators are required to cover. So far, with the exceptions of the IBA non-binding guidelines and the ICCA task Force, only arbitral tribunals attempted to provide objective standards. In this regard, a case point is the ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, where the tribunal seeks to provide definitions of impartiality –as 'the absence of bias or predisposition towards a party'- and independence as 'the absence of external control' [at para.51]. The Tribunal then come up with an objective test to apply the abovementioned principles: the legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party" [at para 53].

In this sense, the TTIP Draft Text on Investment goes a step further. The Commission attempts to offer an exhaustive definition of independence and impartiality, as the duty to avoid any "self-interest, external pressure, political considerations, public clamour, loyalty to a party or disputing party, or fear of criticism." In addition to this, both the judges of the First Instance Tribunal and those of the Appellate Tribunal "shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of their duties." The Code then further lists "financial,

business, professional, family or social relationships or responsibilities" as potential source of influence that might affect judges' conduct.

The main alteration made to the existing system is clearly to deprive disputing parties of their right to choose a panelist, even from an approved roster, as it happens in domestic or international arbitrations. This approach, however, does not grant *per se* either impartiality or expertise, as judges are generally servants of the state. Governments will appoint judges, and the judges on the panel will be of the same nationality as the parties to the dispute, so even if the chair role is reserved to the non-nationals, the envisaged system risks leading towards re-politicisation of disputes.

All this considered, is the EU going too far, underestimating the benefits of the existing system? The beauty of investment arbitration is the variety of competences and expertise of people involved in it. The plurality of views brought by arbitrators chosen by parties with different backgrounds should be perceived as a benefit of the whole system. Some concerns may arise in respect of excessive plurality. A more balanced approach should, therefore, be focused on advancing ideas to redress this surplus, instead of reinventing it.