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A Career System As A Way To Strengthen Diversity In Multilateral Investment Courts?

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A study published in 2012 revealed that only 15 arbitrators decided 55% of the 450 investor-State dispute settlement (ISDS) cases reported at that time, most of them practitioners from Europe, USA or Canada. This was the case despite the fact that parties from all over the world were involved in those proceedings. To date, according to UNCTAD, the number of cases has doubled, but still 22 out of the 25 most influential arbitrators are either from North America or Europe (see further here). Not surprisingly, in the last decade, the lack of geographical, racial, and ethnic diversity has created doubts about the impartiality of arbitrators. Some allege that such arbitrators might have a pro-investor bias due to their particular worldview. To overcome this and other concerns, the European Union (EU) currently proposed to establish a permanent multilateral investment court (MIC). This blog post argues that such an initiative may be an interesting approach to some concerns over the legitimacy and viability of ISDS, but that it may not solve the issue of lack of diversity amongst decisionmakers. This post further proposes that one solution to this particular facet of the diversity challenge in ISDS may be to strengthen it with a career system (i.e., a scheme where adjudicators' staff is trained to produce future potential decisionmakers) to increase the number of diverse, impartial, and highly qualified arbitrators.

An orchestra of concerns

Concerns on the ISDS system are being discussed at least since 2010. They are several, complex and often overlapping. Generally, they fall into categories related to (1) lack of consistency, coherence, predictability and correctness of arbitral decisions; (2) lack of diverse arbitrators; and (3) costs and duration of cases. Various proposals have been suggested to address these issues. One of them is strongly supported by the EU and calls for the establishment of a MIC.

The EU Proposal for a MIC and Underlying Policy Issues

The MIC is a proposal to reconceptualize arbitral tribunals. Currently, every time an ISDS case is commenced the parties constitute a new arbitral tribunal through the designation of arbitrators. Those tribunals disappear once the proceedings have concluded, either through termination of the proceedings or the issuance of a final award. The MIC aims to change that scheme by creating a

permanent dispute body with tenured adjudicators.

One of the concerns that the MIC seeks to address is the perception that arbitrator's impartiality is at stake. In that regard, some suggest that arbitrator's impartiality is called into question due to the fact that the current freedom of designation maintained by the parties might have created a reservoir of adjudicators with a Western mindset, who may not understand the policy efforts that are enacted by host States and challenged by investors.

There are analyses that suggest that the above-mentioned concern is nothing more but an ungrounded feeling. However, adapting the phrase attributed to Galileo Galilei, "yet it concerns". In fact, you, dear reader, would agree with the following assertion: If we had the opportunity to choose a system, with or without features that give rise to doubts about arbitrators' impartiality, we would opt for a system without them, even if they are just doubts.

To correct the current system, the EU proposes to implement in the MIC a different appointing mechanism. Such scheme consists of replacing party-appointed arbitrators with standing panels of arbitrators carefully selected by States. This, according to the EU, would ensure that the MIC would be nurtured with a pool of adjudicators with diverse backgrounds and able to understand both investors and States.

However, this revised appointing mechanism is also being strongly criticized. Some argue that it would upset the balance by favoring States, for the appointer would be tempted to nominate pro-State individuals. Therefore, the perception of biased tribunals would remain.

Yet, even if States were completely determined to appoint impartial arbitrators, they might still find difficulties in appointing diverse persons. This is not because they do not exist, but because the appointers would be forced to choose practitioners from among the narrow list that is already criticized.

To tell the truth, it may be impossible to produce a proposal that would generate overnight experienced and trained arbitrators with diverse backgrounds for the first adjudicators to be appointed for the MIC. However, what is possible and is not being addressed is the need to ensure that such profiles will exist in the future. This last flaw may be resolved with the implementation of a career system.

The Proposal for a Career System Solution

A career system approach would help to produce portfolios of diverse adjudicators. In general, a career system consists of staffing adjudicators with legal assistants of different hierarchical ranks.[1)] These assistants are promoted according to seniority and knowledge criteria. The rationale is to train the judges of tomorrow. Most importantly, one of its main benefits is that it encourages diversity through public selection examinations.[2)] Indeed, this system is successfully used in most civil law jurisdictions to improve independence and diversity (see Rasmusen & Ramseyer, and Violaine). In fact, in June 2021, the United Nations Development Program reported that jurisdictions with a career system are able to achieve diversity among judges much faster than jurisdictions where judges are appointed from a limited pool of seasoned lawyers. Thus, experience supports that applying the career systems approach in ISDS may foster diversity.

This post proposes a MIC career system as follows: the MIC would require a certain number of adjudicators. Each would be staffed by a certain number of legal assistants of different hierarchical rank. In order to determine who would assume each of those roles, an international call for applications would have to be made to select the persons who, on the one hand, meet the minimum requirements to apply and, on the other hand, obtain the best score in the public selection tests. The minimum requirements could be to hold a law degree with good or exceptional grades, and to be qualified to practice law. In turn, the exams could assess aspects such as knowledge of arbitration, international investment law, public international law, and drafting and research skills. Once in their positions, all legal assistants would be subject to constant substantive, adjective, and drafting training. Therefore, training and work experience would result in the development of attractive profiles for consideration by the appointing States.

As a consequence, it is posed, this system would diversify and democratize professional access to investment arbitration. In other words, under it, knowledge is privileged as a criterion over the geographical area, skin color, race, gender or religion of a person. This is a way to overcome (to some degree) the inequality caused by the concentration of opportunities in North America and Europe. Currently, an entry level role in investment arbitration (intern/trainee/junior associate) requires an LL.M. degree (normally from a prestigious/expensive university from the global north) (which implies the economic capacity to study/live abroad [or being born in such countries]), a work permit (valid for Switzerland, USA, France, or the UK, normally) and participation in recruitment processes that could be flawed of impartiality for reasons of gender, religion, geographic origins, etc. On the contrary, a career system tries to establish a mechanism in which the only requirement is what really matters: “knowledge”. This system assumes that access to (most of the) investment arbitration knowledge is available to all. This assumption, granted, is not absolute; awards are mainly but not entirely public, and access to academic databases is usually expensive. However, a proof that access to investment arbitration knowledge is (quasi-) universal can be seen in the multicultural participation in moots such as the Foreign Direct Investment one.

Besides, this framework does not intend to make the “*career staff*” the only appointable profile. No, the appointers would retain freedom to appoint whomever they wish. Certainly, in comparison to today, they would have a broader pool of appealing profiles. Accordingly, the career staff will also have the possibility to leave their role at the MIC to work as counsels, scholars, or at an arbitral institution. This ‘talent drain’ is natural and would not impact negatively the proposal; on the contrary, it strengthens the ultimate goal of promoting diversity, competence, and inclusion in arbitration.

Furthermore, with the implementation of a career system, future appointers would enjoy a pool of trained people with diverse mindsets who can fill the role of an arbitrator. That is because it is a fact that nonetheless the design of the role of a MIC adjudicator, there will be the need from time to time to replace them. Today we have a narrow pool of candidates consisting mainly of current arbitrators and scholars that could potentially be appointed. However, with a MIC we would add to such group professionals with a strong near experience in the adjudicating process, and that would have been subject to continuous training.

This post does not seek to address all the characteristics that an implementation of this idea would have. I know that certain questions might come to the reader’s mind. For example, how many assistants per adjudicator are adequate, who would design the exams, would assistants have a permanent contract or one with a limited duration, what would be the salary of the assistants, who would pay for their salary, would it be necessary to establish a diversity quota, would assistants be

promoted under which criteria or would they need to also sit the corresponding public examination for the higher position?

Leaving questions on the design of the career system aside, I will address a way in which this proposal may be challenged. One criticism against the career system approach may be that in ISDS there is no need for legal assistants as there is in judicial bodies. Some scholars (here, here and here) maintain that legal assistants in the judiciary have the function of helping judges with their enormous workload. However, such a caseload does not exist in ISDS, which in fact is very different. For instance, in 1999 it was estimated that judges from eleven countries received, on average, 1,400 cases per year. That number is considered to increase yearly; i.e., on 2010 in the UK the average was 3,415 cases per judicial officer. On the other hand, in the last 32 years, there have been only 1,023 ISDS cases. This argument, nevertheless, is insufficient to discard the idea; arbitral tribunals are already being assisted by secretaries who attend hearings, deliberations, and draft important parts of the awards.

Furthermore, the difference in caseload does not in itself imply that there is no need for legal assistants in the MIC. The need for them in a permanent court system lies in relieving adjudicators of drafting and research tasks to let them focus on the most important thing: the decision-making process. This demand for the arbitrator to devote time to analyzing and deciding becomes clear if we consider that an ISDS award can have severe financial repercussions on a State. In fact, the average amount awarded in ISDS is USD 482.5 million and the largest amount awarded was USD 40 billion in the *Hulley v. Russia* case.

Status of the debate at the UNCITRAL Working Group III

On November 2018, at its 36th session, the UNCITRAL Working Group III (WGIII) concluded that development of reforms, *inter alia*, addressing lack of appropriate diversity among decision makers in ISDS was desirable. On that basis, the WGIII has recognized that "training and continuous learning as a condition to become a possible member of an ISDS tribunal would constitute an effective means to ensure both competence and inclusiveness". However, it has only noted that such matter might be addressed on another of the reforms, the one regarding an advisory centre.

The latest document published by the WGIII on the MIC is one prepared for its 42nd session on February 2022. On it, the WGIII noted that the establishment of a MIC would require the preparation of a statute for adoption by States and possibly regional economic integration organizations. In fact, such document includes draft provisions for the MIC. It analyses multiple of its characteristics, but none about arbitrator's staff and the possibility to create a career system for them.

Concluding remarks

In conclusion, the EU has a noble intention to eliminate the perception of pro-investor profiles. However, as discussed above, its proposal, as it has been presented, neither attacks the problem of lack of arbitrator background diversity at its root nor puts in place any mechanism to solve it in the coming years. The arbitration community should take advantage of this moment to complement the

EU's proposal with a career system for its legal assistants with the goal of training them to be potential arbitrators in the future.

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References

?1 *See, e.g.*, Cipriano Gómez Lara, *La Carrera Judicial y las Escuelas Judiciales*, 38 Revista de la Facultad de Derecho de México (1988).

?2 *See, e.g.*, Héctor Fix-Fierro, *La Carrera judicial en el poder judicial de la federación, en El Poder Judicial y la modernización jurídica en el México contemporáneo*, Instituto de Investigaciones Jurídicas, 448 (2020) (Mex.).

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