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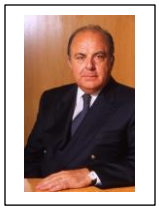
CETA (EU-Canada Comprehensive Economic and Trade Agreement): Is There any Justified Reason to Move from Arbitrators to Judges in the Resolution of Disputes System?

ABOUT THE AUTHOR



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Arbitration has been the most favored dispute resolution system of settling investment disputes until recently.

Quite unexpectedly, the EU and Canada agreed to shift the core of the investment dispute resolution system from arbitrators to judges with relation to the enforcement of the CETA Agreement.

In the meantime, the benefits, experience and efficiency of thousands of BITs (bilateral investment treaties) are ignored and also multilateral agreements such as the ICSID (International Centre for Settlement of Investment Disputes), which was created under the auspices of the United Nations through the IBRD (International Bank for Reconstruction and Development) and has administered since 1965 a significant part of the most important investment disputes.

This move was basically a result of the position of the EU Commission, which Canada accepted, although the Commission was initially favorably inclined to arbitration. However, under pressure from leftwing political parties in the European Parliament, the Commission changed its views and has terminated what was more than a tradition. It was a truly advantageous system based on arbitration that proved to be less bureaucratic, more expeditious and, in our view, offering better conditions to make arbitration tribunals more operative than the expected activity of ICS (Investment Court System) now created by CETA.

A major criticism of arbitration on settlement investment disputes has been the fact that, according to their critics, arbitrators usually have little knowledge and preparation to understand and preserve public interest in an investment dispute. For this reason, a radical change of the state's right to regulate was introduced in investment legislation in some countries and some international treaties. Strengthening the government's right to regulate was the most recent of the main goals to achieve in international investments treaties. Its main purpose is 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, and not the most important factors.

As a matter of fact and in accordance with Article 8.9 of CETA, the right to regulate should be understood in the sense that 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. Interdiction or limitation of the right to regulate has been traditionally a real matter of concern to investors and, for this reason, thousand of bilateral and multilateral treaties have been entered into mainly in order to protect investors rights against anti-democratic and nationalist governments.

Such is not at all the case in CETA and still lengthy negotiation between the EU and

USA in other multilateral agreements of the kind, such as TTIP/TAFTA Agreement, can only be expected.

Consequently, the EU and Canada have now taken the position that judges may understand this much better than arbitrators and not disregard the states' interests.

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

This resulted in a large number of situations and has led countries, such as Canada and the United States, to review their bilateral investment treaty (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. This has happened on matters of health, environment, consumer protection, safety, promotion and protection of cultural diversity which are, anyway, also sectors included in Article 8.9 of CETA, although enlarged to other sectors. At this moment in time, 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 reason other than some people are politically biased against the usual private mechanisms for settling investment disputes.

On the grounds for disputing a state's decision on any foreign investment, CETA may only allow a breach based on *unfair and inequitable treatment* (Article 8.10) in any of the following cases:

a) denial of justice in criminal, civil or administrative proceedings;
b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings;
c) manifest arbitrariness;
d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
e) abusive treatment of investors, such as coercion, duress and harassment; or
f) a breach of any further elements of the fair and equitable treatment obligation adopted by the parties in accordance with paragraph 3 of Article 8.10.

Consequently, the traditional grounds provided for in BITs and ICSID Convention such as expropriation without compensation, denial of the right to transfer or repatriate the investment, etc. disappeared and may not necessarily be covered by the vague concept of *fair and equitable treatment*, now subject to a new element: the government's right to regulate. In brief, CETA created a different system that set aside the traditional arbitration system and intends to replace it with an international court composed of 15 *ad hoc* judges – five to be proposed by the European

Union, five by Canada and another five by both parties but whom must be non-nationals of any EU member state or Canada. An appellate court has also been provided for and is to be composed of members appointed by a decision of the CETA Joint Committee (Article 8.28 (3)).

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

The UNCITRAL Rules on Transparency and the UN Mauritius Transparency Convention took the route to make arbitration more transparent. They were conceived in order 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. Those transparency rules and convention created a repository of documents dealing with arbitration subject to UNCITRAL Rules and is aimed at setting up a publication service.

But, improving arbitration is definitely not the path followed by CETA.

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

We do not know of any reliable statistics that reveal the number of arbitrations in which arbitrator's 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 United Nations Conference on Trade and Development (UNCTAD) (see World Investment Report 2014, 124 available at http://bit.ly/1nC3ouQ) show that between 1987 and 2013 the total number of investment arbitration was 568. European countries were involved in 53% of these arbitral cases. Of that total number, 43% were decided in favor of public entities; 31% in favor of investors and 26% ended in settlements.

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

After all, the judges who will compose ICSS will be civil servants nominated and paid by the states involved. They may be retired judges, academic or politicians who were chosen to be judges, and were probably trained in the public sector with the

consequent tendency to favor or understand public interests in a certain manner.

Of course, arbitrators may also face some of these or similar pressures and biases, as well as their own issues emanating from the source of their placement on tribunals. However, 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 lack of independence may be scrutinized and awards declared null and void by courts of law - that is to say, by independent and professional judges in ordinary courts of law.

Considering that the Appellate Court provided for in CETA 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 adjudicate awards and not be influenced by some lack of independence or impartiality that will favor public entities?

In what way would such a court be better than properly selected, installed and supported arbitrators?

There are other criticisms that can be made about CETA 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?

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?

CETA 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 1 February 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 enforcing of judgments adjudicated by the International Court, because Canada is not a member of that convention and only four countries are. Furthermore, the 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 to be provided with funds, and from which resources?

Another pertinent question is if 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 consequently a reduction of investments? International arbitration has boosted international trade and investment particularly since 1958.

All of a sudden, it was deemed possible to create - by a mere wave of a magician's wand - an international court composed of judges in the guise of real arbitrators to solve investment disputes. And this occurred just because political criticisms were leveled at arbitration and arbitrators; criticisms that have not been validated.

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

Finally, do we know what the relationship between the International Court and the EU Court of Justice will be like? 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.

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