

DG Trade Concept Paper

Investment in TTIP and Beyond – The Path for Reform

Observations by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

About the SCC

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is the second largest arbitral institution in the world, after ICSID, for the administration and management of ISDS disputes. Together, SCC and ICSID represent the two ISDS institutions where more than 65% of the world's known ISDS cases have been administered.

As of 31 December 2014, the SCC has seen a total of 73 ISDS disputes since the first case in 1993, both under the SCC Rules and the UNCITRAL Arbitration Rules.

Sweden and/or the SCC is a designated venue for investor-State dispute resolution in at least 120 bilateral investment treaties, in addition to the Energy Charter Treaty.

The SCC also administers about 200 commercial arbitration cases per year.

Observations on the Concept Paper

The SCC would like to convey the following brief observations, based on our more than 40 years of experience of managing international arbitration cases, including ISDS, as referred to above. Our observations address only procedural issues.

- **Roster of arbitrators pre-established by the State parties to the agreement**

The proposal of a pre-established roster of arbitrators gives rise to a number of concerns.

- a. If only State parties can make appointment of arbitrators to the roster, it will risk entailing a perception of no equal treatment of the parties. Limiting parties' right to appoint arbitrators to a roster also undermines the underlying principle of arbitration that each party in a dispute selects the arbitrator of its choice. A roster could be a valuable complement, if not made exclusive.
- b. How should appointments to the roster be made, and how will correct expertise be safeguarded? And perhaps more importantly, how can members of the roster be removed and what should be the criteria?
- c. In general, the definition of proper qualifications of arbitrators is very narrowly construed.
- d. It is practically impossible to foresee exactly what future disputes under a treaty will look like, and what specific expertise will be required. A pre-established roster may in practice constitute an obstacle for the dispute to be resolved by the most suitable arbitrator. As a consequence, the aim of achieving the highest possible quality of the award, i.e. the assessment of the substantive issues involved, may be jeopardized.
- e. Listing a person on a roster is in itself no guarantee that this person is independent and impartial; this needs to be assessed in relation to all parties involved in the dispute, including the investor, the identity of which is of course not known when deciding on the roster.

- Appellate mechanism

An appellate mechanism is an interesting idea that is worth exploring (and has been explored before). However, in this context, we find it important to take note of the following.

- a. The ICSID Convention provides a mechanism in which an award can be annulled for procedural grounds, among others if the tribunal manifestly exceeded its power.
- b. If the concern is correcting the “wrong outcome”, the question is (i) whether the whole case should be tried again or (ii) should it be reviewed only on the grounds of procedural flaws and lack of due process.
- c. If the latter is desired, the annulment mechanism of the ICISD Convention, or the provisions of the New York Convention, already serves this purpose.
- d. If the former is desired, it will significantly increase the time and costs associated with an investor-state dispute. For many investors, and potentially also States, this is not a desirable outcome.
- e. The appointment of judges in the appeal process needs to be carefully considered to avoid politicization of the mechanism.

- Additional remarks

In addition to the above, the SCC notes the following.

- a. The Concept Paper foresees the creation of “a permanent multilateral system for investment disputes”. In our view such system is already in place through the Washington Convention and the ICSID system, which has been endorsed by more than 150 states.
- b. The Concept Paper states that “A major part of [the] challenge is to make sure that any system for dispute settlement is fair and independent”. We submit the current system in the vast majority of cases *does* represent the values of impartiality and independence.
- c. It would have been useful if the proposals put forward had been substantiated by empirical evidence, and not only based on perception. This would facilitate better decision-making in an important topic.

Stockholm, 6 May 2015