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The European Union Commission Proposal for the Creation of an "Investment Court System": The Q and A that the Commission Won't Be Issuing

Céline Lévesque (University of Ottawa Faculty of law) · Wednesday, April 6th, 2016 · Institute for Transnational Arbitration (ITA), Academic Council

It has become customary for governments and other organisations to issue "Qs and As" to dispel myths about trade agreements. They usually contain categorical statements made to correct the record and reassure the concerned.

The following ten "Qs and As" would likely not be issued by the EU Commission, as too many answers to the questions posed are nuanced or uncertain, but these questions are worthy of consideration as more countries adopt this model.

The focus is on the "Investment Court System" (ICS) proposal submitted to the US in the context of TTIP in November 2015 as well as the system adopted in the EU-Vietnam FTA (January 2016 text) and Canada EU-CETA (February 2016 text).

For TTIP, the proposed ICS would establish a Tribunal of First Instance and an Appeal Tribunal. Fifteen judges would be appointed, by the Treaty Parties, to the First Instance Tribunal for terms of six years, renewable once. The case assignments, made by the President of the Tribunal, would be done on a rotation basis. The permanent Appeal Tribunal would be composed of six members, also appointed by the Parties to TTIP for six year, renewable terms. The system accepted by Vietnam and Canada differs slightly, but not in the fundamentals.

Q 1= Is the EU attempting to create new international *judicial* bodies (i.e., abandoning arbitration)?

A = Not really. The proposal to the US in the context of TTIP, but even more so the agreements with Canada and Vietnam, confirm that the process for resolving disputes is still very much arbitration.

Even as a matter of nomenclature, only the proposal to the US uses the word "court", and at that only in two headings. It uses the title "judges" for members of the First Instance Tribunal only (but not for the Appeal Tribunal). In the EU-Vietnam FTA and Canada-EU CETA, the words "court" or "judges" are never used in describing the system for the resolution of investment disputes.

More substantively, an analysis of the TTIP proposal as well as the other two agreements

demonstrates that the system relies on existing arbitration rules (including those of ICSID and UNCITRAL), and is still ad hoc, in the sense that no permanent secretariat is created and the costs are mostly shared by the disputing parties. Also, the specific procedures included do not differ greatly from what is currently provided under ISDS. Furthermore, the system relies in part on the ICSID and New York Conventions for the enforcement of awards (more on this below).

The key difference from current ISDS relates to the nomination and tenure of judges or tribunal members. The nomination of all tribunal members by the Parties to the agreement (rather than by the foreign investor) as well as the fact that they are appointed for a specific term differs significantly from standard arbitration practice. Their tenure is also subjected to a code of conduct and tribunal members are prohibited from acting as counsel in investment cases, which removes the so-called "double-hat" problem in ISDS.

Q 2 = Can a process qualify as arbitration without unilateral nomination of arbitrators?

A = Most likely. It depends on the answer to the following question: is consent of the parties to the process more important to the qualification of "arbitration" than the option for a party (here the investor) to nominate the decision-makers?

Based on the EU TTIP proposal, Nappert argued that the EU was walking away from international arbitration. She relied in part on criteria outlined by the Advisory Committee of Jurists in the context of the establishment of the PCIJ (1920), which included the nomination of the arbitrators as a distinguishing feature of arbitration as opposed to adjudication.

Yet, a few examples point the other way. Article 1(2) of the New York Convention specifically envisages the role of arbitral institutions in the nomination of arbitrators. In 2010-11, some arbitrators suggested that institutions, and no longer parties to a dispute, nominate arbitrators. In this context, it was stated that no right exists to name one's arbitrator. The Iran-US Claims Tribunal appears to provide a precedent as well. Investors did not nominate the decision-makers, called "judges", but the process relied on the UNCITRAL arbitration rules. Inconsistent decisions were rendered early on, namely in the Netherlands and the US, regarding the issue of whether the Tribunal's decisions could be enforced under the New York Convention because of the lack of "an agreement in writing". However, investment treaties have resolved this obstacle by including deemed consent and the EU TTIP proposal as well as agreements with Vietnam and Canada have followed suit.

Q 3 = Would the EU's continued reliance on the New York Convention cause a problem at the time of enforcement in third countries?

A = Not likely. It should first be specified that the TTIP proposal and recent agreements include an obligation for Parties to recognize and enforce awards in their territory, much like the ICSID Convention does.

As to enforcement in third Party countries, the TTIP proposal as well as agreements with Vietnam and Canada specify that awards rendered by the planned tribunals are meant to qualify as arbitral awards for the purpose of the New York and ICSID Conventions. The fact that the EU is not a Party to the New York Convention does not seem relevant. For Contracting Parties to the Convention that made the reciprocity reservation, the requirement for recognition and enforcement will be that the award was made in the territory of another Contracting State.

Yet, one may wonder whether a domestic court might refuse recognition and enforcement on the basis that the decisions are not – in fact – arbitral awards? This is not likely as Article V(2) of the New York Convention limits the grounds the court may raise *ex officio* to refuse enforcement to arbitrability and the public policy exception (which has generally been interpreted restrictively). A question remains, however, as to whether the removal of any set-aside possibility in domestic court would endanger the balance achieved between the autonomy of arbitration and the duty of control by States at the time of enforcement.

Q 4 = Is the removal of domestic set aside of awards a strength or a flaw of the proposal?

A = It depends on one's perspective. Clearly, the EU believes this is a strength. The combination of a First Instance Tribunal and an Appeal Tribunal provides, much like ICSID with tribunal and annulment decisions, a "self-contained" or "autonomous" system. This matches the EU discourse of creating a "public justice system – just like those we're familiar with in our own countries, and the international courts which Europe has so actively promoted in the past." (Cecilia Malmström blog, 16 September 2015)

However, having concluded that the process is still very much one of arbitration, the removal of any role for domestic courts in the set-aside of awards appears to be dissonant with claims of increased public accountability made by the EU Commission. It also raises the question in 3 above as to the possible reaction of a third country domestic court at the time of enforcement.

Q 5 = Is the proposal compatible with the ICSID Convention?

A = Probably. It should be recalled that the EU is not a member of the ICSID Convention as only States can be. Assuming TTIP and the other agreements are mixed agreements, the question remains: Can States that are Parties to such agreements "displace" the annulment process provided for under Article 52 of the ICSID Convention?

The exclusivity of remedies provided at Article 53(1) of the Convention would, at first glance, seem to prevent such an outcome. However, the Vienna Convention on the Law of Treaties article 41 (agreements to modify multilateral treaties between certain of the parties only) and article 30 (application of successive treaties relating to the same subject-matter) could potentially allow the appeal to replace the ICSID annulment process for the Treaty Parties. A key question appears to be whether this derogation "is incompatible with the effective execution of the object and purpose" of the ICSID Convention as a whole. At one level, the answer would appear to be negative, since the grounds for appeal provided in the EU proposal include all the ICSID annulment grounds.

Q 6 = Is the multiplication of appellate mechanisms a threat to the attainment of the objectives set for such bodies?

A = Partly. An Appeal Tribunal will *in principle* be able to correct errors of law and ensure consistency of decisions *within* the agreement. However, the existence of an Appeal Tribunal for each agreement has the potential to undermine the attainment of more consistency in International Investment Law as a whole.

It would also seem to present particular problems for the EU, as different Appeal Tribunals could diverge on key interpretation issues. One could imagine that the EU would nominate the same members to different Tribunals in order to promote consistency. However, this would be unfair to other Treaty Parties as it would give the European members undue influence, may affect the

members' independence and other Treaty Parties may be unwilling to consent to the appointment of certain members appointed by the EU to one Tribunal to their own Appeal Tribunal.

Q 7 = Will the CJEU object to this new "Investment Court System"?

A = Unclear. As Schill recently argued, as long as only international investment treaties and not EU Law is being interpreted, the ICS may not conflict with the jurisdiction of the CJEU. However, the interpretation of domestic law (even as a "fact") by the ICS remains contentious.

In 2014, the CJEU was asked to render an advisory opinion on who has the competence to sign and ratify the FTA with Singapore. It remains to be seen whether the CJEU might take this opportunity to give its opinion on the compatibility of traditional ISDS with the jurisdiction of the CJEU. It is also unclear whether the enhanced public dimension of an ICS makes the likeliness of conflict higher or lower.

Q 8 = Will the EU proposal be sufficiently attractive to investors or will they turn away from the State dominated system?

A = Only time will tell, but chances are that once in place, investors will adopt the system. Opponents have argued that States may "stack the deck" (so to speak) by appointing to the ICS only pro-State individuals. However, if the States were to do so, one may question the point of including an investment protection dispute settlement process in such agreements at all. In fact, Canada, the US as well as many European countries have by now realized that the system protects both their "defensive" and "offensive" interests.

Q 9 = Does the proposal set the stage for a (smooth) transition to a truly multilateral system?

A = A transition yes; a smooth one, no. The European Commission TTIP proposal as well as recent agreements with Vietnam and Canada provide for a transition to multilateral dispute settlement mechanisms, either an investment tribunal "and/or" an appellate mechanism. However, it is not clear how or when this would happen. The gradual replacement of the 1400 or so BITs that EU members States are Party to certainly does not offer a clear path. Further, since the US, Canada and Vietnam are also signatories to TPP, which foresees the possibility that an appellate mechanism be instituted under some other arrangements, it is possible that only the appellate tribunal materializes. The best option may be an additional protocol to the ICSID Convention, which would offer an appellate facility to willing Parties that referred to it in their treaties.

Q 10 = Where will all these new tribunals "hold court"?

A = Unclear, as neither the TTIP proposal nor the other two agreements address the issue. The tension between a permanent and an ad hoc system again rears its head. If nothing else stops these initiatives, this political question may slow any progress…

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The issues discussed in this blog will be analyzed further and in more detail in a forthcoming CIGI paper. All comments can be sent to celine.levesque@uottawa.ca

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