ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

# Public consultation on modalities for investment protection and ISDS in TTIP

SCC ANSWERS [4 July 2014]

## Question 6: Transparency in ISDS

At the outset, the SCC would like to draw the Commission's attention to relevant developments in investor-state arbitration. Much more information is available to the public than in a commercial arbitration context. There are examples of open hearings, third party submissions and many publications of awards, briefs and procedural decisions by tribunals. This is the backdrop against which the current state of ISDS should be evaluated.

The UNCITRAL Rules on Transparency in Treaty-based Arbitration ("Rules on Transparency") provides a powerful tool for transparent ISDS proceeding. For this reason, it makes much sense to simply incorporate the Rules on Transparency into TTIP by means of a clear referral. It deserves pointing out that an ISDS proceeding under the UNICTRAL Rules on Transparency will be more transparent than many, even most, national court proceedings in Europe.

The Rules on Transparency are also available for use in arbitral proceedings under many different sets of rules, including the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, and *ad hoc* arbitration.

Given the thorough drafting process of the Rules on Transparency, any revision relating to the Rules on Transparency in TTIP itself should be exercised with caution, if at all. It should be kept in mind that the Rules were agreed upon after several years of balancing of interests, in a state-to-state context. The adoption of the Rules on Transparency without any further amendments would also support a global best practice on transparency in ISDS cases.


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## Question 7: Multiple claims and relationship to domestic courts

The SCC is surprised by the statement that as a "matter of principle, EU's approach favours domestic courts." Such assumption appears to overlook the importance played by international arbitration for global economic development at large, also in an intra-EU context.

International arbitration is a globally recognized, neutral, efficient and well-functioning system for dispute resolution. It has provided international business with predictable rules of law, and a levelled playing field for international parties, since the beginning of the last century, with a notable development in 1958 with the enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Whether or not the courts of a specific country are well functioning need not be decisive for choosing international arbitration. Many factors are at play when parties decide upon a specific dispute resolution mechanism. For example, parties from countries with highly sophisticated legal systems, including Europe and the United States, often opt for arbitration in their international agreements. There are many reasons for this.

- Neutrality. Arbitration is the preferred method of dispute resolution not only in investment disputes but in international contracts at large. Disputing parties want to avoid having to adapt to the language, culture and specific procedural rules of its opposing party. These considerations are perhaps even more relevant in the investment treaty context, due to the potentially politicized nature of the disputes. Indeed, the entire rationale behind the birth of ISDS was to move diplomatically and politically sensitive disputes to a neutral venue.
- Procedural efficiency. Investment disputes may involve complex legal questions as well as extensive evidence taking. Arbitration provides the parties and the tribunal with the opportunity to tailor their procedure according to their own calendars and preferences. At the same time, international arbitration produces a final resolution of the dispute faster than most public court systems.
- Effective enforcement. Whereas a court judgment has a restricted enforceability (US judgments are not easily recognized and enforced in the EU, and the other way

around), arbitral awards are relatively easy to enforce on a global scale, either pursuant to the New York Convention or the ICSID Convention, depending on the procedural rules chosen. The efficiency of an arbitral award is unparalleled in comparison with court judgments.

These features notwithstanding, there is generally nothing preventing an investor to pursue its claims in domestic courts if it so wishes. The asymmetrical structure of the consent to arbitration in an investment treaty means that there is no arbitration agreement until the investor requests arbitration. Consequently, the investor may choose domestic litigation when that is appropriate.

An amicable solution of disputes is many times desirable, and language to that effect may well be included in the TTIP. In this respect mediation could be one option, for example with a referral to the IBA Rules of Investor State Mediation.

## Question 8: Arbitrator ethics, conduct and qualifications

Contrary to the Commission's explanation of Question 8, the experience of the SCC does not support a general conclusion to the effect that potential bias or conflicts of interest is an overarching concern in ISDS cases.

Furthermore, the issue of the conduct or behavior of arbitrators is governed by arbitral rules and/or national legislation on arbitration (the latter would be relevant for example in UNCITRAL or SCC cases).

The requirement of impartiality and independence goes to the core of the necessary qualifications of an arbitrator. This is the lens through which any challenge of an arbitrator should be, and is, assessed, by courts and arbitral institutions. Hence, current arbitral rules – be they ICSID, UNCITRAL, SCC Rules or other internationally established sets of rules – together with existing norms in international arbitration, address many of the issues raised under Question 8.

The SCC has appointed many arbitrators in investor-state disputes, as well as decided on challenges and worked closely with tribunals in procedural matters in cases handled by the SCC. It is our experience that arbitrators in investment disputes generally are independent-minded professionals with a high degree of personal and professional ethics.

A provision inserted in TTIP to the effect that an arbitrator can be retroactively challenged and the award potentially reversed is unnecessary, as a corresponding option is already available today by which an award may be challenged due to an alleged lack of arbitrator's impartiality, also on circumstances that become known *ex post facto*. Again, the treaty should abstain from regulating situations and issues already addressed by established legal principles in national law and recognized rules of arbitration.

The proposal for detailed requirements for arbitrators may lead to a number of practical problems. Questions which need to be asked include (i) who is to decide what level of knowledge is required to qualify as "expertise"? (ii) how much experience and expertise is needed; (iii) in what areas of law? Just to mention a few. In the experience of the SCC, detailed provisions on arbitrator qualifications risk giving rise to a dispute within the dispute. We advise against it. Further, and in addition to creating potential procedural difficulties, such restrictions also circumvent the fundamental freedom of the parties to appoint its arbitrator.

Again, the fundamental requirements of impartiality and independence, and international best practice developed around these norms, as reflected for example in instruments such as the IBA Guidelines on Conflict of Interest in International Arbitration, provide a powerful tool to safeguard the integrity of the proceeding.

The assumption that retired domestic judges, as a matter of principle, should be better suited to decide complex questions of international law, in comparison to other professional backgrounds in the legal field, appears unfounded. There is nothing in the SCC experience from administrating investor-state disputes that supports such a generalizing statement. The highly qualified arbitrators in SCC cases represent a heterogeneous group in terms of professional background, legal training, language, career and personal qualifications, of which "retired judge" is but one of several different profiles represented.

### Question 9: Reducing the risk of frivolous and unfounded cases

On the issue of who bears the costs, it may be noted that this matter is regulated by a number of arbitration rules, including the SCC Rules.

Costs are many times allocated by the tribunal based on the circumstances in each case. It should be kept in mind that detailed provisions on allocations of costs in the treaty may risk removing an important tool for the tribunal to allocate the costs in a manner the properly reflects the conduct of the proceedings.

### Question 10: Allowing claims to proceed (filter)

No comment.

### Question 11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement

No comment.

### Question 12: Appellate Mechanism and consistency of rulings

On the issue of an appellate body, the discussion must be focused on its structure and mandate. The impression from the Commission's text is that all awards should always be available for appeal. This would slow down the procedure considerably, and contradict the ambition to reduce costs for ISDS procedures. Furthermore, the constitution of the appellate body needs to be accomplished with a sufficient level of flexibility and non-politicized procedure. An additional issue which needs to be addressed is the cost of such structure, and its' financing.

Concerns about the defragmented nature of current investment arbitration jurisprudence are exaggerated in the TTIP context. Tribunals constituted under different BITs, with different wording and no supplementary material available, are more likely to reach different conclusions, in contrast to tribunals deciding disputes on one treaty only, such as the TTIP.

TTIP tribunals may also have access to material in terms of *travaux preparatoires*. This means that ISDS cases under TTIP will by design be in a better position to maintain a consistent case law, than is the case with the disparate body of the more than 3,000 BITs. The very same provisions will be tested repeatedly and while there is no doctrine of precedent, it is reasonable to assume that tribunals will look carefully at previous rulings on the same provisions.

## C. General assessment

International arbitration is not a novel concept. It has been an integral part of international trade and investment for decades. The EU should strive to benefit from those aspects that have already been tested and found to work well.

Further, the fact that an issue – such as arbitrator conduct, cost allocation or challenge mechanisms – is left outside of TTIP does not mean that the issue is unregulated. Dispute resolution pursuant to an investment treaty is always supplemented by procedural rules and/or domestic legislation at the place of arbitration.

Finally, the SCC would like to raise a voice of caution not to let single out-liar ISDS cases dictate the terms of a future treaty. Any deviation from the current system should be carefully crafted, taking into account the *joint* experience of the close to 600 known ISDS cases. There is plenty of research material available, and the SCC encourages the Commission to reach out specifically to those bodies and institutions which specialize in ISDS metrics, facts and research. There are plenty.