Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

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Related document: Convention to establish a multilateral court on investment

Feedback:

Feedback - Establishment of a Multilateral Investment Court for investment dispute resolution
European Commission Inception Impact Assessment (IIA)
The Federation of German Consumer Organisations – Verbraucherzentrale Bundesverband (vzbv) first of all would like to welcome the proposals of the European Commission as being concrete steps towards establishing a multilateral court for the resolution of investment disputes (multilateral ICS). vzbv wishes to give feedback on the proposal and the steps that should also be taken to accompany this proposal. From a consumer perspective, rules of investment protection in principal are not necessary between established democracies that are governed by the rule of law. The recently concluded EU-US Privacy Shield agreement highlights once more that there is a strong imbalance between investors’ and consumers’ rights in international agreements. In this respect, consumers do not have equal rights when it comes to pursuing legal actions in case their fundamental rights have been breached. Although the Privacy Shield disposes of an arbitration body as institution of last resort, however different to the system of investment protection, consumers may not claim any redress or compensation from this process for damages suffered. The same is true for double-taxation agreements where consumers most often do not have the possibility to complain to an international conflict resolution body in case of unfair taxation by one of the parties.
With regard to the system of investment protection, vzbv nevertheless concedes that some countries – when compared to the European Union – lack equally strong systems of rule of law, therefore making an investment court expedient. However, it must be said that such a multilateral institution seeking to resolve investment disputes should only be allowed to take decisions which are perceived as being legitimate from a public welfare perspective if the substantive rules that govern those agreements are phrased in a way that clearly confine investors claims. Therefore, it is crucial to pursue – in parallel to the establishment of a multilateral investment court – a strict
confinement of the substantive rights of investors to the question of non-discrimination and refrain from carrying forward unclear legal terms such as “fair and equitable treatment” in the negotiations of upcoming trade agreements. Furthermore, in order to contribute to legal certainty, it is deemed advisable to ask a legal opinion of the European Court of Justice on the overall compatibility of such a system with EU law.

It is understood that due to the current structure of the investment protection system the European Commission prefers option 5 among the policy options cited in the inception impact assessment. This would entail the negotiation of an agreement among those countries that are willing and able to do so - which bears some similarities to the system of “enhanced cooperation” within the European Union. vzbv equally regards this option as being the most realistic and promising among the options cited.

In light of these general remarks, the European Commission should focus its efforts on negotiating a broad multilateral agreement with as many countries as possible. Given the fact that investment protection is not necessary between established democracies it is, however, even more important to put the system of investment protection on a solid foundation by including at least all those states the European Union currently negotiates trade agreements with. In the long-term, the European Union should only conclude investment agreements containing investment protection rules with those states that join the multilateral investment court system in order to build pressure for the expansion of this system.

To foster a stronger commitment towards the establishment of such a multilateral system it is furthermore advisable to include sunset clauses in future investment protection agreements to establish precise commitments on this multilateral approach in upcoming negotiations.

The inception impact assessment does not provide details on where to institutionally “dock” such a multilateral court. In light of a strengthening of the multilateral trading system it would be particularly advisable to closely link such an institution to the objectives of UNCTAD in order to strengthen trade and development rules multilaterally. Also the UNCITRAL transparency rules should be included as minimum requirements as already mentioned in the IIA.

Beyond the precise policy options for a multilateral investment court it has to be noted that the procedural rules will be governed by the distinct rules that are to be agreed within individual FTAs. Therefore, it is of utmost importance that – on top of the reform and multilateralization of procedural investment rules - the substantive rules that guide these procedures are fit for purpose as well. With the inclusion of ICS in CETA, the European Commission has come a long way in better defining the substantive rules guiding investment protection and seeking to prevent a regulatory chill. However, definitions of investor/investment and the elements upon which a claim can be based have to be phrased more explicitly to de facto focus investment protection on non-discrimination only.

Finally, vzbv would like to remind the European Commission that there is a general imbalance between rights of consumers and rights of companies / investors when it comes to international trade agreements (see above). Although the necessity of a system of investment protection in the narrowly defined case of a discrimination of investors might be legitimate, the European Commission should equally consider the legitimate cases where consumers do not have access to a system of conflict resolution and redress. This is currently not the case although consumers ultimately drive the market due to their consumptive choices.
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Related document: Convention to establish a multilateral court on investment

Feedback:

The attachment provides feedback on the inception impact assessment "Convention to establish a multilateral court on investment" (IIA). The IIA's baseline scenario -- what will happen without policy changes -- is just one sentence long and does not expect a multilateral investment court (MIC) to have social or environmental impacts.

The paper presents more comprehensive baseline and multilateral investment court scenarios. In both cases, more comprehensive scenarios indicate growing social and environmental impacts.

A multilateral investment court would bring institutional improvements. Such improvements, however, do not solve systemic issues with specialised and supranational adjudication which create a high risk of expansive interpretations of investors' rights. Specialised courts tend to interpret expansively; the supranational level lacks effective instruments to correct expansive interpretations. Huge expansion of covered foreign direct investment will cause increased impacts.

A multilateral investment court would strengthen investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

A multilateral investment court makes reforms and (enforcement) measures potentially prohibitively expensive. In the light of the need to protect fundamental rights, and in the light of the risks of climate change, the EU can not ignore, legitimise, or perpetuate growing impacts. The commission has to investigate which options will eliminate social and environmental impacts and reject the multilateral investment court option.

Feedback file:
Multilateral investment court assessment obscures social and environmental impacts

Ante Wessels, FFII

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1 Introduction

This FFII position paper provides feedback on the inception impact assessment “Convention to establish a multilateral court on investment” (IIA). The IIA’s baseline scenario – what will happen without policy changes – is just one sentence long and does not expect a multilateral investment court (MIC) to have social or environmental impacts.

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A multilateral investment court would bring institutional improvements. Such improvements, however, do not solve systemic issues with specialised and supranational adjudication which create a high risk of expansive interpretations of investors’ rights. Specialised courts tend to interpret expansively; the supranational level lacks effective instruments to correct expansive interpretations. Huge expansion of covered foreign direct investment will cause increased impacts.

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2 Issues with the Inception Impact Assessment

2.1 Social and environmental impacts

The main issue with the IIA is that it doesn’t expect social or environmental impacts:

“There are no social impacts expected. The substantive obligations under the investment protection standards already exist in the EU level trade and/or investment agreements or are currently negotiated with third countries for which the EU is acting on the basis of negotiating directives adopted by the Council, as well as in the BITs entered into by EU Member States. These will not be affected by the negotiations on the Multilateral Investment Court.

Those agreements, for example, guarantee the right of EU governments to regulate on social and environmental issues.

The investment dispute settlement mechanism that will be included under the EU’s trade and investment agreements would be removed when the Multilateral Investment Court becomes applicable between the EU and the country concerned.” (emphasis added)

and

“There are no environmental impacts expected for the same reason as there are no social impacts.”

The reasoning does not convince. First, the fact that substantive provisions already exist does not remove their impacts. The commission is well aware of the shortcomings of the existing treaties. It filed amicus briefs in various investor-to-state dispute settlement (ISDS) cases arguing against damages awards and it ordered Romania to not pay ISDS damages.
Secondly, the existing, very open EU member states’ investment treaties do not have a right to regulate clause. Furthermore, the right to regulate clause in proposed future EU agreements may guarantee the right to regulate but does not protect against unlimited backward looking damages including expected profits and interests; see below. This makes reforms more expensive, including action on climate change, and undermines regulatory power.

Finally, the text suggests that removal of existing investor-to-state dispute settlement mechanisms removes any further impacts. This disregards systemic issues with specialised and supranational adjudication (see below) and impacts caused by substantive obligations. For instance, an MIC would not eliminate the environmental impacts mentioned by Van Harten, as they are not caused by institutional issues. ¹

2.2 The one sentence baseline scenario is not comprehensive

A baseline scenario describes what will happen without policy changes. The IIA has a one sentence baseline scenario:

“Baseline scenario – No EU policy change

Option 1: The base line scenario would mean retaining and operating multiple ICSs in EU trade and/or investment agreements.”

The baseline scenario only mentions EU trade and/or investment agreements. It disregards the existing EU member states’ investment treaties that do not have ICS (Investment Court System), the ISDS variant in proposed EU agreements, like EU-Canada CETA. The existing treaties are very open, contain investor-to-state dispute settlement, and cause social and environmental impacts. The baseline scenario overlooks that ISDS not only suffers from a lack of institutional safeguards for independence, but also from systemic issues with specialised and supranational adjudication, which create a high risk of expansive interpretations.

The baseline scenario furthermore overlooks that ICS suffers from these systemic issues as well. The baseline scenario overlooks that proposed EU agreements will greatly expand coverage of foreign direct investment and will expand scope. It overlooks that EU agreements lock in the EU and EU member states. It overlooks that proposed EU agreements will have social and environmental impacts as they provide a similar level of legal protection as the EU member states’ investment treaties.

According to the guidelines on impact assessments, a baseline scenario has to be comprehensive and it’s qualitative analysis has to be rigorous and thorough. The IIA does not meet this standard.

3 A more comprehensive baseline scenario shows growing impacts

3.1 Substantive provisions, existing impacts

The existing investment treaties are mostly very open. Investor-to-state dispute settlement tribunals have expansively interpreted “nearly every provision found in investment treaties”. ISDS tribunals even went be-

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2 Guidelines on Impact Assessment
3 Statement of Concern signed by over 110 scholars; Since this statement, the material provisions did not change substantively; Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) (see section General assessment)
yond levels of protection offered by domestic courts.\textsuperscript{4,5}

The future EU agreements will provide a similar level of protection. The EU-Canada CETA mandate stipulates “the highest possible level of legal protection and certainty”.\textsuperscript{6} The mandate for the EU-US TTIP aims at the “highest standards of protection that both Parties have negotiated to date”.\textsuperscript{7}

The proposals for EU trade and investment agreements codify expansive interpretations.\textsuperscript{8,9} For instance, regarding the fair and equitable treatment standard, arbitrator Todd Weiler said:

“\ldots I love it, the new Canadian-EU treaty\ldots we used to have to argue about all of those [foreign investor rights]\ldots And now we have this great list. I just love it when they try to explain

\textsuperscript{4}Two examples. First, the Dutch Raad van State’s Administrative Jurisdiction Division (Netherlands’ highest general administrative court) is very restrictive regarding legitimate expectations; see for instance decision 201113437/1/R2, 20 juni 2012. In contrast, ISDS tribunals have interpreted legitimate expectations in a broad way. Lise Johnson and Lisa Sachs, The TPP’s Investment Chapter: Entrenching, rather than reforming, a flawed system; page 5, on the Bilcon award: “\ldots Under that approach, a tribunal identifies what it considers to be reasonable or legitimate expectations – which may have been generated by a wide range of even non-binding government conduct and need not rise to the level of actual ‘rights’ – and then strictly scrutinizes government actions or inactions to determine whether the investors’ expectations were wrongly frustrated”. Secondly, ISDS tribunals have seen the exercise of discretionary power as discrimination. See section on data protection. See also Gus Van Harten, Matthew C. Porterfield, Kevin P. Gallagher, Investment Provisions in Trade and Investment Treaties, The Need for Reform.

\textsuperscript{5}As an example of the relationship between changes to the regulatory environment and investment protection under existing treaties, see Roger Alford, Brexit and Foreign Investors’ Legitimate Expectations.

\textsuperscript{6}CETA mandate paragraph 26a

\textsuperscript{7}TTIP mandate paragraph 22

\textsuperscript{8}Van Harten, Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA, page 5: “[T]he Commission’s clarification on fair and equitable treatment codifies a major expansion of this term compared to its widely-accepted customary meaning before the investor-state arbitrators arrived on the scene about 15 years ago.”

\textsuperscript{9}Also note the most favoured nation clause; Van Harten: “Another example of ambiguity in the CETA arises in Article 8.7(4), which gives foreign investors a right to ‘most-favoured-nation’ (MFN) treatment. As framed in the CETA, this ‘me too’ clause may potentially be used to import into the CETA, from other investment treaties of an EU member state or Canada, foreign investor rights that are even broader than those in the CETA.”
things.”

Over 110 scholars commented in a joint submission to a consultation that this approach may have very little effect on expansive interpretations. Over 100 law professors criticised the “vague substantive standards” in the EU-Canada CETA trade agreement text and stated:

“Investment protection constitutes a subtle shift of power towards individual and already influential commercial actors as it weakens the consideration of public interests and restricts democratic change.”

On regulatory chill they noted:

“This could in turn lead to a regulatory chill, as governments might refrain from regulatory measures in the public interest due to the threat of investment arbitration and the high damages it entails. Under existing treaties, investors have used this leverage to effectively interfere in democratic policy changes. This problem is not to be underestimated, as poor and wealthy countries alike have proven to be susceptible to this pressure.”

Regarding measures on climate change, Van Harten concludes in Foreign Investor Protection and Climate Action: A New Price Tag for Urgent Policies:

“Already, ISDS has been used to undermine legislatures and governments in areas closely linked to climate-friendly policies of prevention, mitigation, and adaptation. Public funds should be used to support the shift to clean energy not to compensate polluters for their lost future revenues when they have not adapted their business model in a timely and responsible way.”

The existing level of legal protection and certainty causes social and environmental impacts. Future EU agreements will provide a similar level of protection.

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10 Quoted by Public Citizen, page 1; video at CATO institute
11 Statement of concern, answer to question 3
12 See the attachment for climate change, intellectual property rights and data protection.
3.1.1 No or a limited right to regulate

The existing, very open treaties do not have a right to regulate clause; the right to regulate clause in proposed future agreements has a limited effect.

In the EU-Canada CETA text the commission made a strong exception for one issue: decisions not to issue, renew or maintain a subsidy. In contrast, the exception for the right to regulate in general is much weaker. Simon Lester notes that the text does not create any new right to regulate because it is just “reaffirming” a right that is assumed to already exist. This gives adjudicators a wide discretion. As a result, a government has the right to regulate and to change the legal and regulatory framework, but the clause does not protect against unlimited backward looking damages including expected profits and interests, if one of the standards of protection is breached. This approach avoids neither making reforms more or even too expensive, nor regulatory chill.

Supranational obligations resting on states are cumulative. Supranational investment adjudicators can argue that states can regulate, need to protect fundamental rights, and also have to fully compensate investors. The right to regulate clause, with its “regulate-and-pay” approach, embodies this line of thought, which leads to high costs for states. States’ budgets are not unlimited; high damages and the threat of such damages have a chilling effect. In contrast, the European Convention on Human Rights leaves states a wide margin of appreciation. This gives states better possibilities

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13 EU-Canada CETA, article 8.9 paragraphs 3 and 4. Part of the exception reads: “For greater certainty, a Party’s decision not to . . . does not constitute a breach of the provisions of this Section.” The next paragraph contains “For greater certainty, nothing in this Section shall be construed as . . . requiring that Party to compensate the investor therefor.”

14 Simon Lester on the EU-Canada CETA text, see also FFII. See also Transport & Environment and ClientEarth, Comprehensive Economic and Trade Agreement (CETA) and the environment, page 18.

15 For the EU-US TTIP proposal, see Van Harten, page 6; FFII, section 2.1 Ineffective right to regulate; S2B, section The “right to regulate” has not been preserved.

16 The EU-Canada CETA interpretative instrument, which was added before signing, does not change this, and only applies to one agreement. See Van Harten and The Council of Canadians.

17 The EU-Canada CETA interpretative instrument is less precise than the NAFTA interpretative declaration, which did not stop expansive interpretations. Compare the NAFTA interpretative declaration with Lise Johnson and Lisa Sachs, page 5, on the Bilcon award.
to respond to a crisis.  

3.2 ISDS

The IIA mentions various shortcomings of the investor-to-state dispute settlement mechanism. See also Over 110 scholars, Joint Statement, and 220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS).

3.3 Systemic issues

3.3.1 Specialised courts tend to interpret expansively

Specialised courts tend to interpret expansively. Justice Heydon noted that specialist courts and tribunals

“tend to become over-enthusiastic about vindicating the purposes for which they were set up”.

The developments regarding patents provide a clear example. Specialised courts and chambers have interpreted patent rules expansively. Brian Kahin wrote regarding developments in the US:

\begin{quote}
Under the European Convention on Human Rights (ECHR) the right to property is enshrined in article 1 of Protocol 1: “Protection of property (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” (emphasis added) The formulation “as it deems necessary” gives the member states a wide margin of appreciation. As a human rights court, the European Court of Human Rights will also be aware of the effects its decisions may have on other human rights. In contrast to the European human rights system, supranational investment adjudication (a) does not require exhaustion of local remedies, (b) does not provide access to the mechanism for all, but only to foreign investors, (c) does not guarantee full respect of fundamental rights (d) provides wide discretion to supranational adjudicators, (e) does not provide a wide margin of appreciation to states, and (f) provides unlimited backward looking damages including expected profits and interests. For the “right to regulate”, see the main text.
\end{quote}

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“The Federal Circuit quickly became a champion of its specialty, making patents more powerful, easier to get, harder to attack, and available for a nearly unlimited range of subject matter.”

The European Patent Office’s boards and boards of appeal caused a similar development in Europe. Investor-to-state dispute settlement provides an other example of expansive interpretations: “widespread expansive interpretations of nearly every provision found in investment treaties”.  

Furthermore, WTO dispute settlement tribunals have encroached on the public interest. Note that mandates stipulating the highest possible level of legal protection and certainty legitimise expansive interpretations and so risk strengthening the expansive tendency of a specialised court.

### 3.3.2 Development of supranational investment protection outside of democratic scrutiny

The supranational level lacks effective instruments to correct expansive interpretations. In contrast, states do have these instruments. The US is dealing with the expansive interpretations of the Federal Circuit court (noted in the subsection above) in two ways. US Congress took legislative steps and the Supreme Court stepped in to reverse the patentability of software. Both instruments to correct expansive interpretations – legislative process and general supreme court – are not available at the supranational level. Supranational courts and tribunals’ interpretations fall outside of democratic scrutiny. As a result the development of supranational investment protection falls outside of democratic scrutiny.

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19 David Kappos, after the US Supreme Court stepped in to reverse the development: “You can get software patents allowed in both China and Europe that aren’t allowable in the US anymore.” Software patents despite the exclusion of programs for computers as such from patentability under the European Patent Convention, article 52.

20 Public Citizen, Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception; see also K. Irion, S. Yakovleva and M. Bartl, Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements.
3.3.3 No supreme court scrutiny

Development of supranational investment protection also falls outside of supreme court scrutiny. Supreme courts resolve tensions between rights originating in various law systems, for instance intellectual property, competition, and fundamental rights. In contrast, supranational obligations resting on states are cumulative. Supranational investment adjudicators can argue that states can regulate, need to protect fundamental rights, but also have to fully compensate investors. This regulate and pay approach leads to much higher costs for states. Furthermore, the rights of others are not guaranteed, including their fundamental rights. Referring to guaranteeing the full legal rights of others, the German Magistrates Association noted regarding the ISDS / Investment Court System proposal for TTIP (used in EU-Canada CETA):

“The creation of special courts for certain groups of litigants is the wrong way forward.”

Josef Drexl’s remarks on a Unified Patent Court (UPC) are relevant for supranational investment protection as well. He mentions that the US Supreme Court stepped in to reverse the Federal Circuit court’s “expansionist interpretation” and notes that specialised patent law courts may be weak in taking into account “the broader societal implications of patent protection and therefore be more likely to develop a pro-patent bias”. He warns against placing the Unified Patent Court outside of the EU legal order:

“This is of particular concern in the case of the Unified Patent Court, which will have to convince patent applicants and patent owners to opt into the new system especially during the first years of its existence. In the light of such risks, and especially in the light of the need to guarantee full respect of the fundamental rights, to prevent the CJEU from interpreting the rules of the UPC Agreement could easily amount to a mistake of historic dimensions.”

Both issues – have to convince litigants to use the system and the need to guarantee full respect of the fundamental rights of others – are relevant for supranational investment adjudication as well. Supranational
adjudication has to compete with domestic courts in attracting foreign investor-litigants. Furthermore, the scope of investment protection is much broader: all government decisions.

### 3.3.4 Values and ability to respond to crises

The supranational level only has limited instruments to reverse expansive interpretations. The parties to an agreement can change the agreement or issue an interpretative declaration. These approaches, however, take the consent of all parties. Moreover, NAFTA’s interpretative declaration did not stop expansive interpretations. 17

As we saw, the development of supranational investment protection falls outside of democratic scrutiny; a supranational approach does not guarantee full respect of fundamental rights. Supranational investment protection strengthens investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

### 3.4 Unfairness, greatly expanded exposure, and lock in

#### 3.4.1 Unjustifiable unfairness

Supranational investment protection is unfair. Foreign investors – and only foreign investors – have the right to bypass domestic legal systems and have, depending on interpretation, greater substantive rights 4, without correspondingly actionable responsibilities. 22

The positive discrimination of foreign investors is unjustifiable. Emma Aisbett and Lauge Poulsen:

“‘Our results suggest that foreign firms tend to be treated at least as well by host state governments as comparable domestic firms in the vast majority of cases. There is a political advantage, as opposed to liability, of being a foreign firm.”

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22 See, for instance, Van Harten, ISDS in the Revised CETA: Positive Steps, But is it the ‘Gold Standard’?; Over 100 law professors, Legal Statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA; and Over 220 Law and Economics Professors, letter to US Congress.

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The right approach is to improve weak aspects of domestic legal systems. Domestic legal systems can combine equal access to the law with supreme court and democratic scrutiny of the development of law.  

3.4.2 Greater scope

In cases based on EU (trade and) investment agreements, judgments would also include EU decisions (greater scope). Investors would be able to claim damages based on EU-wide expected profits. These can be prohibitively high; this would undermine the independence of EU authorities. The inclusion of EU decisions is also important for intellectual property rights and data protection.

3.4.3 Greater coverage of foreign direct investment

New (trade and) investment agreements would expand exposure as they would greatly expand coverage of foreign direct investment (FDI). As an example, current agreements between the US and EU member states cover only one percent of the total US FDI stock in the EU.  

Even without EU-US TTIP, 81% of US investors in the EU would be able to use the EU-Canada CETA agreement, after restructuring their investments.

Investors are not obliged to invest in countries with weak legal systems. This may create an incentive for states to improve their legal system. Further alternatives are contracts, state-state arbitration and insurance. The Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group, offers insurance for political risks. If problems arise, they are very effective in settling them. This approach does not have the problems supranational investment adjudication has. Companies can also take out commercial political risk insurance. Also note the related “The consultation document comes up with one additional argument: that the rights each party grants to its own citizens and companies ‘are not always guaranteed to foreigners and foreign investors.’ The claim is unsubstantiated. Even if it is accepted, there is no obvious reason why the incorporation in TTIP of a simple norm of non discriminatory legal protection and equal access to domestic courts could not address the problem perfectly adequately.” (Statement of Concern, General assessment)

UNCTAD; see also Van Harten, page 5.

Public Citizen, Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP
3.4.4 Lock in

EU member states ratified stand-alone investment treaties. States can withdraw from them, or renegotiate them. The possibility of doing the former gives leverage to do the latter. Governments, harmed by their investment treaties, can act. An interesting option is to first rewrite a treaty with mutual consent to remove the treaty’s afterlife (sunset clause), and then withdraw from it.

In contrast, EU member states can’t withdraw from agreements concluded by the EU. In addition, we cannot expect the EU to withdraw from these agreements. EU agreements will lock EU and member states into the highest possible level of legal protection and certainty.

3.5 Baseline scenario shows growing impacts

In the baseline scenario, the combination of a very high level of protection, no or a limited right to regulate clause, ISDS / ICS, systemic issues with specialised and supranational adjudication, greater scope, greatly expanding coverage of foreign direct investment, and lock in will cause growing social and environmental impacts.

In the light of the need to protect fundamental rights, and in the light of the risks of climate change, a baseline scenario indicating increased social and environmental impacts should set off alarm bells. The commission has to investigate options that will eliminate impacts and reject options with continued or increased impacts.

4 Multilateral investment court scenario shows growing impacts

4.1 Continued growing impacts

As in the baseline scenario, the drivers of increased impacts are greatly expanding coverage and scope.
The multilateral investment court would operate on existing bilateral investment treaties and future agreements like the EU trade and investment agreements with Canada, Singapore, and Vietnam. The MIC mechanism would continue the existing level of legal protection and certainty, with no (existing agreements) or a very limited right to regulate clause.

An MIC would continue the unjustifiable unfairness of investor-to-state dispute settlement: foreign investors – and only foreign investors – have the right to bypass domestic legal systems and have, depending on interpretation, greater substantive rights, without correspondingly actionable responsibilities.

As in the baseline scenario, special interests will play a role. This may weaken the multilateral investment court’s design and functioning. Offensive interests – the interests of investors – have frustrated meaningful reform of investor-to-state dispute settlement. EU and member states’ proposals, such as the ISDS / Investment Court System proposal for CETA, are insufficient.

ISDS arbitrators, responsible for expansive interpretations, may reappear as MIC judges / “judges”. An instrument the parties to a multilateral investment court agreement will have is vetting the judges they appoint. The EU won’t have influence on the judges other parties nominate / appoint. In other parties climate change denialists may be in power. Furthermore, within the EU, and especially in trade departments, offensive interests play a major role. This would have an effect on vetting judges.

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26 Inception Impact Assessment, option 5, page 6; See also Discussion paper Establishment of a multilateral investment dispute settlement system, section 3.1.

27 See for instance the statement by over 100 law professors; German Magistrates Association, Opinion on the establishment of an investment tribunal in TTIP; and European Association of Judges, Statement from the European Association of Judges (eaj) on the proposal from the European Commission on a new Investment Court System.

28 The Discussion paper mentions “previous experience in international investment law”, paragraph 33.

29 Associations of judges (one, two) noted that the earlier Investment Court System proposal (used in EU-Canada CETA and other FTA proposals) is not compatible with the Council of Europe’s Magna Charta of Judges.

30 On nomination and appointment see options in Discussion paper, section 3.5.
4.2 Potentially marginal improvement

The multilateral investment court scenario replaces existing investor-to-state dispute settlement with an multilateral investment court. This brings institutional improvements. A positive effect, however, may only be marginal, as such improvements do not solve the systemic issues with specialised and supranational adjudication which create a high risk of expansive interpretations of investors’ rights. Moreover, the effect could also be negative.  

4.3 Negative aspects

The establishment of a court strengthens the legitimacy of supranational investor-to-state dispute settlement and perpetuates its existence and growth, including of its social and environmental impacts.

As an EU agreement, the MIC would lock in the EU member states, and we can not expect the EU to withdraw from the agreement. The court would be able to provide expansive interpretations and maximise its power, as long as it doesn’t act so outrageously that the EU withdraws from the agreement.

In sum, the multilateral investment court scenario indicates growing social and environmental impacts.

5 Conclusion

The multilateral investment court scenario indicates growing social and environmental impacts.

A multilateral investment court would strengthen investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

A multilateral investment court makes reforms of our societies more or even too expensive and causes regulatory chill; it impedes reform, including action on climate change. In the light of the need to protect fundamen-

\[31\text{An International Investment Court: panacea or purgatory? by M. Somarajah}\]
tal rights, and in the light of the risks of climate change, the EU can not ignore, legitimise, or perpetuate growing impacts. The commission has to investigate which options will eliminate social and environmental impacts and reject the multilateral investment court option.

6 Attachment: impacts, three examples

6.1 MIC impedes action on climate change

Mankind faces an existential threat: climate change. The data is disconcerting and shows our societies are not on top of the issue. Further reforms are needed. Van Harten:

“To respond to climate change, the world needs to shift rapidly from high-carbon assets, especially fossil fuel resources and related infrastructure, into clean energy. This will require a massive change in investment and the adoption of public policies to support and incentivize the right kinds of investment.”

The reform will harm vested interests. A multilateral investment court, in contrast with domestic law systems and the European human rights system, would give investors too generous possibilities to claim compensation. This would make reforms potentially prohibitively expensive, cause regulatory chill, and thus impede crucial measures on climate change.

6.2 MIC impedes intellectual property rights reform

Copyright does not work well in the digital world; the patent system is inefficient. Our societies could benefit from reform. The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and

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32 Van Harten, Foreign Investor Protection and Climate Action: A New Price Tag for Urgent Policies
33 Statnews, UN panel urges wider access to medicines, but pharma slams the report; Regarding digital issues, the FFII (one, two) has argued that EU copyright and patent law has to be made compatible with the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).
other international agreements limit possibilities for reform. Expansive interpretation of international treaties would further limit our policy space. It matters who can initiate cases and who interprets the TRIPS agreement. The WTO has its own dispute settlement mechanism, only available to members of the WTO, to interpret the TRIPS agreement. A new forum emerges. United States pharmaceutical company Eli Lilly claims 500 million Canadian dollars in ISDS arbitration after Canada made a minor adjustment to its patent law, to ensure better access to medicine. According to Eli Lilly, Canada’s patent reform is not compatible with the TRIPS agreement. Investment adjudicators interpreting and deciding on compliance with the TRIPS agreement would change the dynamic of interpretation, as investors have less restraint than states regarding policy space and there is a difference between seeing intellectual property rights as innovation stimulants and seeing them as assets.

Eli Lilly contends the Canadian measures produced “absurd results” and accused Canada of expropriation and breach of minimum standard of treatment obligations (fair and equitable treatment). Eli Lilly lambasts the Canadian patent policy framework as “discriminatory, arbitrary, unpredictable and remarkably subjective”. Furthermore, Novartis filed an investment treaty notice to challenge a Colombian cancer drug price-cut. Minor reforms have already led to two supranational investment claims.

Existing investment agreements are very open to interpretation. Proposed trade and investment agreements would contain some additional provisions on intellectual property rights. However, Sean Flynn argues that “language in investment chapters that appear designed to carve out IP policy decisions from private attack in investment forums in fact invite and facilitate such attack.” For weaknesses in the EU TTIP proposal, see FFII.

Supranational investment protection can also have an effect on patentability.

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34See for instance Michael Geist on the U.S. State Department submission in the Eli Lilly ISDS case.

35See also Peter K. Yu, who proposes mitigating approaches in “The Investment-Related Aspects of Intellectual Property Rights”. Note that the article overlooks arbitrator bias and unfair procedural advantages for the US (page 50), weaknesses in TPP’s “right to regulate” clause (page 24, compare Van Harten, page 7), and uses old damages numbers in footnote 102 (compare Van Harten, pages 2-6). Taking these issues into account, mitigating approaches could be less effective than hoped for.
ity of software. Pratyush Nath Upreti adds a new element; he argues that investors can use the proposed Unified Patent Court for investment treaty shopping. The MIC proposal does not eliminate this possibility. As a result, two supranational courts could take decisions on patents, a specialised patent court and specialised investment court – a double whammy of the supranational kind. The UPC – ISDS / MIC combination may lead to disproportionately high costs (unrelated to their market) for UPC member states.

A multilateral investment court would impede reform of intellectual property rights.

### 6.3 MIC risks undermining data protection

Foreign investors would be able to use a multilateral investment court to challenge EU data protection enforcement measures, for instance suspension of cross-border data flows or fines supervisory authorities will be empowered to impose on data controllers and data processors under the General Data Protection Regulation.

Enforcement agencies have limited resources. They have discretionary power: they are allowed to act in some cases and skip others. Domestic legal systems do not see this as discrimination. In contrast, ISDS tribunals have seen the exercise of such discretionary power as discrimination. This undermines the effectiveness of enforcement agencies. This detrimental interpretation is possible under the existing investment agreements, which are very open to interpretation, and under proposed EU agreements. The latter agreements contain a “right to regulate” clause, which, however, as we saw above, does not protect against unlimited backward looking damages including EU-wide expected profits and interests. These damages can be prohibitively high and undermine the independence of EU authorities.

The MIC’s adjudicators would not have to read provisions in the light of the EU Charter of fundamental rights, as the EU Court of Justice would do. A multilateral investment court risks undermining the protection of personal data.

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36 See also Josef Drexl’s remarks on the UPC above.
Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

User's data:

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- Name: BEUC
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- Organisation: BEUC
- Headquarter: select
- Register: 9505781573-45
- Size: select
- Publication: can be published with your personal information

Related document: Convention to establish a multilateral court on investment

Feedback:

BEUC has consistently denounced the flaws in ISDS and therefore welcomes the fact that the Commission is now proposing to step away from private arbitration. In a context of widespread public mistrust over secretly negotiated trade deals, it is positive that the Commission intends to address citizens’ legitimate concerns by proposing to negotiate a convention to establish a multilateral Investment Court System (ICS) – and allowing for civil society and public to give feedback on its proposal by publishing the roadmap and opening a public consultation.

BEUC supports the spirit of option 5 which paves the way to address the concerns related to a private investment protection system. Consumer organisations would support the creation of a permanent public multilateral court composed by a first instance tribunal and an appeal tribunal. Regarding the future set-up, it would indeed make sense to dock this multilateral court into the WTO.

The consumer support to the convention establishing a multilateral court for investment dispute resolution would be conditional on necessary changes to remove the remaining ISDS flaws from the ICS system:

1. The right to regulate is not protected strongly enough contrary to what is exposed in the likely social impact of the roadmap. It is important to consider the establishment of a multilateral court in connection with the investment protection provisions in the trade and investment agreements concluded by the EU. For instance, the TTIP ICS proposal includes a specific article on the right to regulate, which is encouraging. But it does not prevent the regulatory chilling effect deriving from investor claims. Under the TTIP proposal and the CETA agreement, foreign investors will still have the opportunity to threaten to sue governments for compensation. While the regulation would be upheld as intended, compensation might need to be paid to the investor. The threat to have to pay high costs could therefore deter governments’ actions to, for instance, introduce new protection for consumers. BEUC urges to modify the article on the right to regulate in each free trade agreement that will be
subject to ICS in such a way that claims against measures designed to meet public policy objectives will not be admissible by the Court. It is crucial to go beyond the current merely interpretative provisions and include legally enforceable tools to protect the right to regulate.

2. Conflicts of interest remain a problem: The TTIP ICS proposal includes improvements but fails to guarantee real independence. In particular, it allows judges to still work as corporate lawyers. To make sure that judges are truly independent and to prevent conflict of interests from arising, the code of conduct and the ethics provisions must be reinforced. It is, for example, not acceptable that a judge can be linked directly or indirectly to one of the parties in a dispute for a certain period of time surrounding a dispute. Here is our preliminary feedback regarding the related sub-options to assess:

- Qualifications of judges/member and tenure: Specialisation in investment law would be desirable indeed but not only. In the case that our recommendation to make claims related to public policy objectives non admissible would not be taken into account, some judges would need to be qualified in areas such as public health, environment and consumer protection. Judges must be employed full time by the court. This would increase public trust and function as an efficient way to avoid conflict of interest.

- Selection of judges: Some trading partners like the United States do not agree with the EU vision for the selection of judges. The random selection must remain a red line as it is a necessary condition to ensure impartiality.

- Remuneration: The package of remuneration of judges should be monthly fixed and not based on a daily rate or linked to the amount of the awards.

- Secretariat: We agree that a secretariat would need to be established within the court. It should be in charge of the selection of the judges but only according to pre-established criteria to ensure impartial and objective attribution of cases.

- The role of free trade and investment agreements’ joint committees: In CETA, the joint committee has the power to appoint the roster of tribunal members and adopt interpretations of provisions in the investment chapter that will be binding on tribunals. This is not acceptable and must be clarified to be in line with the public and democratic vision of option 5.

3. The costs and the impact of establishing a multilateral court must be evaluated: It was alarming that the Commission proposed a brand new bilateral court system in TTIP and CETA without carrying out a proper impact assessment. It is therefore positive to see in that this is envisaged for the establishment of the multilateral court. The same must be done for the bilateral investment courts that will be established in the meantime.

Most importantly the European Commission must request the Opinion of the European Court of Justice to clarify whether or not such system would be compatible with EU law prior to its establishment. It must be the first step of this process to ensure legal certainty and policy coherence.
Joint analysis of CETA’s Investment Court System (ICS)
Prioritising Private Investment over Public Interest

This analysis is based on the revised Investment Protection Chapter of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, published 29th February 2016.

The new CETA Investment Chapter contains some improvements compared to the previous version: the introduction of an article on the right to regulate; clearer ethics rules; more transparency provisions. Nevertheless, it falls short of addressing some core concerns relating to the protection of public health; animal and plant life and health; the environment; consumers’ and labour rights. It may create a ‘fright to regulate’ as the actual ‘right to regulate’ in the public interest is not sufficiently guaranteed and protected.

The following analysis highlights key concerns that have not been addressed in the revised CETA investment chapter, meaning that CETA falls short of safeguarding democracy and the rule of law both in Europe and Canada. See Annex 1 for a technical and detailed legal assessment.

ICS in CETA: The Good, the Bad, the Ugly

The Good:
- Recognition of the flaws of Investor to State Dispute Settlement (ISDS)
- Increased transparency in the proceedings

The Bad:
- One-sided system which allows investor claims only, based on broadly defined investor rights
- The right to regulate is not sufficiently protected
- No requirement to exhaust domestic legal remedies
- Negative effects of awards and “loser pays” on small Member States

The Ugly:
- Lack of independence of Tribunal members not fully addressed
- Insufficient public scrutiny and accountability of the CETA Joint Committee
- Lack of justification for such a contentious mechanism between Parties with developed legal systems based on the rule of law
- No legal certainty over compatibility of Investment Court System (ICS) with the EU Treaties

A joint briefing by:
Key concerns

1. **Definition of Investment (Art. 8.1)**

   The definition is very broad, covering “every kind of asset” under direct and indirect control of an investor. Moreover, it is retroactive and would cover investments made before the entry into force of CETA. The chapter attempts to limit treaty shopping and abuses by mailbox investors, but defining the key concept of “substantial business activity” is left open to interpretation by tribunals. An exhaustive list of covered investments, an enterprise-based definition and thresholds could have ensured that only selected types of investment were protected under the agreement.

2. **Establishment of Investment (Arts. 8.4 - 5)**

   CETA grants extensive market access, which may prohibit a wide range of measures that regulate the entry or treatment of foreign investors. The full extent of liberalisation depends on the market access carve-outs (measures or future measures reserved in Annexes I and II). However, it still risks binding the EU or Member States to longstanding commitments in areas they did not intend to cover. This is due to the negative list approach, which the EU used for the first time in CETA and which still looks very patchy. A further risk is that some of these commitments are subject to investment arbitration. The prohibition of performance requirements in Art. 8.5 is another weakness because it goes beyond obligations at WTO level. Local content or technology transfer requirements can be legitimate policy tools.

3. **Non-discriminatory Treatment (Arts. 8.6 - 8)**

   The articles create obligations to grant national treatment and most-favoured nation (MFN) treatment to each other’s investors. The outcome of this is that the EU and Member States have, de facto, undertaken commitments to prospective investors even before the investment is made.

4. **Right to Regulate (Preamble and Art. 8.9)**

   These newly included provisions intend to strengthen the right to regulate. The right to regulate can be understood as defining the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. However, Art. 8.9 (1) merely ‘reaffirms’ this already existing balance. The following paragraph offers some improvement, but it cannot properly be construed as a carve-out for decision-making in the public interest. The formulation of this article is declarative and not legally enforceable. It is merely a guideline for arbitrators. Contrary to public statements by the parties, these provisions therefore fail to effectively limit claims that challenge public policy measures. To protect the right to regulate, the parties should have introduced a carve-out or a binding principle to guide interpretation, see Annex.
5. **Investment Protection and Fair and Equitable Treatment (Art. 8.10)**

This article accords Fair and Equitable Treatment (FET) to investors and investments, which has become the centrepiece of most modern investor claims. Known as “catch-all” provision, it has allowed investors to challenge public policy measures through arbitration. Art. 8.10 seeks to address this problem by listing the types of conduct that constitute a breach of the FET standard. However, it falls short of a real improvement for three reasons:

- The list is a mere codification of already existing practice under investment law, and does not significantly limit the standard.
- The article codifies the ‘frustration’ of ‘legitimate expectations’ of an investor as a breach of the standard. As one of the most far reaching interpretations of FET, codifying legitimate expectations is not a limitation of the standard, but an expansion of it.
- The list of breaches is not exhaustive, and can be amended by the CETA Joint Committee, which would expand the scope of the standard (please see point 13 and Annex).


While the definition of indirect expropriation (in Annex 8-A) offers a shield against general investor challenges concerning regulatory measures, the carve-out only applies to non-discriminatory measures that protect legitimate public welfare objectives and to measures that do not ‘appear manifestly excessive’. An acceptable solution would have been to exempt all measures that aim at or contribute to public interest, but as it stands, the text fails to ensure full protection of public health, the environment and consumer rights. Furthermore, the calculation of compensation should take into account whether the investment produced negative economic and societal costs from the date of requisitioning or destruction until the date of actual payment.

7. **Relationship with Domestic Courts (Arts. 8.22 - 24, Arts. 8.32 - 33)**

The revised chapter does not require the exhaustion of domestic remedies, but permits investors to choose between going to national (or international) courts or the investment arbitration mechanism under CETA. The exhaustion of local/domestic remedies is an important rule of international law. It can officially be demanded as a requirement for consent under the ICSID Convention (Art. 26). CETA therefore goes against a standing practice in international law and perpetuates the privileged status of foreign investors under international investment law. Furthermore, both Canada and the EU have advanced legal systems, based on the rule of law, which guarantee adequate judicial protection for foreign investors and there is no evidence of systematic discrimination of foreign investors in either jurisdiction.

8. **Independence and Selection of Tribunal Members (Arts. 8.27, 8.28 & 8.30)**
The revised chapter seeks to address one of the core criticisms of ISDS - the lack of independence and bias towards investors of ISDS arbitrators - by modifying the selection process of CETA tribunal members. Tribunal members will be randomly selected from a roster of 15 individuals, appointed by the CETA Joint Committee. While the selection process is a step in the right direction, CETA still does not guarantee sufficient independence because (please see Annex for an elaboration of the points below):

- Tribunal members are (still) not financially independent and remain incentivized.
- The selection process of the roster of Tribunal Members is opaque and lacks concrete rules on appointments or scrutiny thereof.
- This system opens the interpretation of complex, sovereign public policy decisions up to tribunal members who will evaluate them from a narrow trade/investment perspective with insufficient knowledge of domestic law or expertise in public policy fields.

9. **Appellate Mechanism (Art. 8.28)**

While the introduction of an appellate mechanism is to be welcomed, the ad-hoc tribunal merits some criticism. Neither its overall functioning and procedures, appointment of members or their remuneration are defined in the final CETA text. The mechanism is heralded for increasing the legitimacy of the system, yet these fundamental elements are to be defined by the CETA Joint Committee (see also point 13). One of the core features of ICS is thus still pending, enabling it to escape any democratic scrutiny and risking to produce a technocratic court, driven by policy justice rather than public justice.

10. **Transparency (Art. 8.36) and Intervention by Third Parties**

The chapter contains considerable improvements on transparency. It is based on, and goes further than the UN Commission on International Trade Law (UNCITRAL) transparency rules. Hearings, exhibits and submissions would be made available to the public, which is a novelty, and civil society stakeholders can make amicus curiae submissions. However, there are no deadlines for the publication of awards, and redactions of confidential information will have to be monitored by civil society to make sure they are not going too far. Unlike the TTIP ICS proposal, CETA does not offer possibilities for third-party intervention. This is a regrettable choice. Rights and mechanisms for third-party intervention are vital, for example for local population, who are directly affected in cases relating to environmental permits for mining or infrastructure projects.

11. **Final Award (Art. 8.39)**

The article attempts, but fails to effectively prevent a potential regulatory chill effect, resulting from fear of having to pay high compensation to foreign investors. On the one hand, it excludes the award of punitive damages and limits damages to monetary damages and restitution of property at market value. On the other hand, it fails to clarify that ‘the loss suffered by the investor’, which will have to be compensated, does not include expected profits. This is relevant in light of claims brought in relation to investor’s legitimate expectations (see above). As it stands, investors would be able to sue governments for great sums covering years of expected profits.
Moreover, while the “loser pays” principle may in principle deter (frivolous) claims, it might also impose a heavy burden on smaller Member States, considering that proceedings can last 24 months or longer. If, as the chapter claims, frivolous and unlawful claims are already being filtered by the respective articles, this principle is an inadequate choice.

12. **Sunset Clauses in CETA (Arts. 30.8 (4) and 30.9 (2) CETA)**

Sunset clauses are a controversial mechanism to prolong the applicability of investment agreements so that investors can still bring a claim, even after countries have terminated the agreement. The sunset clause in CETA Art. 30.9 (2) is set for 20 years, which is long in international comparison and longer than the 15 years used in most Member State BITs with Canada. This undermines democratic processes as, particularly in Europe, decisions to terminate international agreements are usually based on internal democratic decision-making. Moreover, CETA contains a sunset clause for provisional application, which is entirely unprecedented (Art. 30.8 (4)). If provisional application was terminated and the agreement does not enter into force, investors could benefit from the chapter for another three years. This means that foreign investors could potentially sue governments under CETA, even if national parliaments reject the deal.

13. **The CETA Joint Committee (Art. 26.1)**

The CETA Joint Committee has several important powers, but there are no rules which determine how the Committee can be publicly held accountable for its decisions, nor are there any clear rules on its composition, decision-making, and transparency. Art. 26.1 establishes the Committee which “shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees”, but further elements of its composition are unclear. It not only appoints the roster of Tribunal members, but it can also adopt definitions of the ‘fair and equitable treatment’ standard and adopt interpretations of provisions in the investment chapter that will be binding on tribunals, even while a case is ongoing. These factors contribute to making ICS unpredictable and potential prey to influences seeking to undermine public interest decision-making processes. The powers of the CETA Joint Committee are problematic because it can change features of the agreement without democratic oversight or accountability and undermine the power of courts to interpret EU law.

14. **Compatibility with EU Law (Art. 8.31 and others)**

Art. 8.31 seeks to accommodate one of the key constitutional flaws of ISDS under EU law: its incompatibility with the Treaties. The article seeks to preserve the powers of the European Court of Justice (ECJ) and the autonomy of the EU legal system by limiting the powers of the Tribunals in relation to domestic law. However, these precautions are not sufficient to take into account the fundamental concerns regarding the compatibility of the agreement with the EU Treaties. To respect the powers of the courts of the Member States and the ECJ under the Treaties, the system would require (i) exhaustion of domestic remedies and (ii) prior involvement of the ECJ over questions of EU law.
Annex 1: Legal analysis of CETA’s Investment Court System (ICS)

Currently Canada has 7 Bilateral Investment Treaties (BITs) with EU Member States: Croatia; Czech Republic; Hungary; Latvia; Poland; Romania; Slovakia. To date four cases have been brought forward each in different countries - Romania, Slovakia, Czech Republic and Croatia. In two cases, Czech Republic and Croatia, the courts found in favour of the state in issues related to breaches of shareholder agreement and alleged mistreatment of investment in a joint venture. Both the Slovakian and Romanian case are pending decision and are linked to permit approval for mining rights.

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<thead>
<tr>
<th>Topic</th>
<th>Summary of provisions</th>
<th>Analysis</th>
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<tr>
<td>Chapter EIGHT - Investment</td>
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<tr>
<td>Section A - Definition and scope</td>
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<tr>
<td>Article 8.1 - Definitions</td>
<td>No revisions made in the Article</td>
<td>● Limits suits by ‘shell-companies’, it does not prohibit corporate restructuring for the benefit of bringing an investment claim.</td>
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<td></td>
<td>● Section sets out the legal binding definition of key words and concepts used in the chapter.</td>
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<tr>
<td>Article 8.4 - Market Access</td>
<td>No revisions made in the Article</td>
<td>● Extensive market access commitments.</td>
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<td>Point a) of this article contains prohibitions regarding imposing several limitations, eg on (i) establishment of an investor of the other</td>
<td>● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual</td>
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party, such as limiting the number of enterprises that may carry out a specific economic activity and (ii) a numerical quota or economic needs test.

Point b) prohibits requirements on incorporation such as a specific type of legal entity or joint venture.

Next, this article lists exceptions to the abovementioned prohibitions. Exceptions include:

- a) zoning and land use regulations, and
- d) the imposition of a moratorium or ban to ensure the conservation of natural resources and the environment.

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<th>Article 8.5 - Performance requirements</th>
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<td>No revisions made in the Article</td>
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<tr>
<td>● Prohibits the imposition of performance requirement on investors, such as to export a given percentage of their production or to transfer technologies. Prohibition relates to establishment (para.1) or receipt of subsidies or other advantage (para.2). The following paras. list exceptions.</td>
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<tr>
<td>● Performance requirements are already prohibited by the WTO’s TRIMS agreement. Art. 8.5(1)(a)-(e) are following the TRIMS. However, (f) and (g) are going beyond TRIMS, which is more restrictive than necessary.</td>
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<td>● Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States’ reservations.</td>
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<th>Section C - Non-discrimination treatment</th>
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<tr>
<td>Article 8.6 - National Treatment</td>
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<tr>
<td>● Obligations to provide National</td>
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<td>● Needs to be read in conjunction with Annexes I</td>
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<td>Article</td>
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| 8.7     | Most-favoured-nation treatment | - Obligations to provide Most-favoured-nation treatment (MFN)  
- Prohibition to market access and relative establishment rights incorporation  
- Host have obligation to prospective investors before investment is made - limits ability to regulate at pre-entry stage.  
- Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States’ reservations. |
| 8.8     | Senior management and boards of directors | - Prohibition to impose nationality requirements on senior management and boards of directors.  
- Needs to be read in conjunction with Annexes I and II of the CETA Agreement to check individual Member States’ reservations. |
| 8.9     | Investment and regulatory measures | - Reaffirmation of the right to regulate to achieve legitimate public policy objectives (such as public health, safety, the environment, public morals, social or consumer protection or cultural diversity).  
- Clarification that regulations in the public interest are an essential part of a democratic society.  
- The article is a novum in international investment law and its inclusion is to be welcomed. It should be borne in mind that the parties, by their definition as sovereign entities, possess the right to regulate. The inclusion of such an article is therefore to clarify the balance between sovereignty and the protective role of the state. |
interest that negatively affect an investment or expectations of profits are not a breach. Further paragraphs clarify the relation of subsidies with this chapter.

duty to compensate for some infringements and to lessen the scope for these infringements. In contrast to Art. 2.1 in the TTIP proposal, this article contains no necessity test (a need for a regulation to be necessary to protect . . . ), which is commendable.

- However, it must be noted that this clause does not secure the right to regulate as wordings designed to exclude public interest measures from the scope of investment protection do not necessarily prevent investors from suing and arbitrators are not likely to discard a case due to such an exception clause.
- A carve-out to protect public policy measures could be formulated as follows: “Any *measure or action undertaken by a Party that aims or has the effect of contributing to a public interest, such as environmental protection including measures or actions combating climate change, social protection, consumer protection, and public health protection, does not constitute a breach of the provisions of this Chapter.*”

<table>
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<th>Article 8.10 - Treatment of investors and covered investment</th>
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<td>Limited revisions made in the Article</td>
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<tr>
<td>● Defines the standard of and accords fair and equitable treatment (FET) to investors and investments.</td>
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<td>● Contains a list of what would constitute a breach of FET ((2)(a)-(f)) and a review mechanism (3).</td>
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<tr>
<td>● Hybrid approach to establish breach of FET - there is a list of behaviours constituting a breach of FET which is complemented with a flexibility mechanism allowing parties to discuss FET obligations.</td>
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| ● Known as the ‘catch-all’ provision that in the past
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<th>Article 8.10</th>
<th>Adds criterion about frustration of an investor’s legitimate expectation (4) and clarifications concerning breaches of provisions in the CETA agreement (6) or domestic law (7).</th>
<th>has been most used by investors when launching cases and has been interpreted in an inconsistent and far-reaching manner.</th>
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<td>Article 8.10 seeks to address this problem by listing the type of conduct that constitutes a breach of ‘fair and equitable treatment’.</td>
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<td>Article 8.10, however, falls short of a real improvement for three reasons:</td>
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<td>Firstly, the text does not make explicit that the list is exhaustive, for instance by adding the word ‘only’ (thus stating ‘A Party only breaches the obligation’). The CETA Joint Committee on a proposal by the Committee on Services and Investment, may, moreover, decide to expand the scope of the standard (see for a criticism on the powers of the CETA Joint Committee point 12 and 8).</td>
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<td>Secondly, the list of measures constituting a breach of fair and equitable treatment merely codify already existing practice under investment law, and do not constitute a significant limitation of the standard.</td>
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<td>Thirdly, article 8.10 actually codifies frustration of legitimate expectations of an investor as a breach of the standard. As one of the most far reaching interpretations of fair and equitable treatment, codifying legitimate expectations is not a limitation of the standard, but an expansion of it.</td>
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<td><strong>Article 8.12 - Expropriation</strong></td>
<td>Prohibits a party from directly or indirectly nationalising and covered investment and lists the circumstances and conditions</td>
<td>The article is a copy of the TTIP ICS Article 5 text and can also be found in other existing Bilateral Investment Agreements (BITs).</td>
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<td>Limited revisions made in the</td>
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| Article | under which it may do so ((1)(a)-(d)). Limits the compensation to be paid to the fair market value (2) plus interest (3).  
- Accords a right to review to an investor (4) and clarifies issues related to intellectual property.  
- Annex 8-A provides definitions of direct or indirect expropriation and further clarifications. |
| --- | --- |
| | ● The article and annex are modest improvement and provide increased legal certainty. In its determination of an indirect expropriation, a tribunal is required to carry out a case-by-case and fact-based inquiry (Annex 8-A (2)).  
- While the definition of indirect expropriation offers a shield against some investor challenges of regulatory measures, the carve-out only applies to non-discriminatory measures that protect ‘legitimate’ public welfare objectives and to measures that do not ‘appear manifestly excessive’. Clearly more preferable language would be to exempt all measures that aim or contribute to the public interest, such as environmental, social, health, or consumer protection. As such both the CETA and TTIP ICS fail to sufficiently ensure coherence between trade and the values of EU trade policy including public health, environmental and consumer rights.  
- The calculation of compensation should also take into account if the investment is considered to have potentially negative economic and societal costs from the date of requisitioning or destruction until the date of actual payment. |

| Section E - Reservation and exceptions |
| --- | --- |
| Article 8.15 - Reservations and exceptions | ● Selected substantive commitments do not apply to those existing non-conforming measures that are |
| No revisions made in the Article | listed in the schedules.  
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>● State are not allowed to maintain pre-existing laws, regulations and other measures that are not in conformity with the commitments in the investment chapter unless stated in the schedule.</td>
<td></td>
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</tbody>
</table>

**Section F - Resolution of investment disputes between investors and states**

| Article 8.22 - Procedural and other requirements for the submission of a claim to the Tribunal |
| Limited revisions made in the Article |  
| • Lists the conditions which an investor needs to fulfill to file a claim ((1)-(3)) and that could constitute reasons for the tribunal to refuse jurisdiction (4). Most notably withdrawal of other proceedings and waiver to initiate proceedings over the same matter in other fora (“no u-turn”). |
|  | • Covers what happens if requirements or other procedural or jurisdictional elements are not fulfilled. |
|  | • After renegotiation under the disguise of ‘legal scrubbing’: investor no longer required to prove that an award/judgment/decision was rendered by another forum (court or tribunal under domestic law or BIT). |
|  | • What remains is a requirement to withdraw existing procedures in a domestic court or under a BIT (1(f)) and to waive the right to initiate a claim in these fora with respect to the same measure (1(g)). The main improvement in relation to the previous CETA text is that this fork-in-the-road clause is not limited to claims for damages, but applies to all actions in courts concerning the same measure. |
|  | • However, the waiver in (1)(g) expires if the tribunal does not accept the claim based on list of conditions or any other procedural or jurisdictional grounds (5(a)) or if it dismisses the claim as manifestly without legal merit (Art. 8.32) or unfounded as a matter of law (Art. 8.33). The investor could thus go back to national courts or |
use a BIT.

- Moreover, the respondent (Canada or the EU) has to request that the tribunal declines jurisdiction (4). The burden of proof that the investor has withdrawn or waived its right to initiate is thus on the respondent. In our opinion, the Tribunal itself should examine these requirements on its own motion, and not upon the request of the respondent.

**Article 8.24 - Proceedings under another international agreement**

Technical revisions made in the Article

- Covers overlaps with claims brought under other international agreements.

**Article 8.26 - Third Party funding**

*NEW Article*

- Requires full disclosure of third party funding to the Tribunal, at the time of the submission claim

- The article does not prohibit third party funding, thus allowing for companies to ‘invest’ in ICS cases and as a result claim part of the potential award as a return on their investment.

- Relation to Art. 8.22.

- Helps to catch cases where a claim is brought pursuant to this section and another international agreement (BIT), but for another measure (if it was concerning the same measure, it would have to be withdrawn or waived, see Art. 8.22(f)-(g): overlapping compensation or other impacts would be taken into account by staying proceedings or in the decision, order or award.

- However, following Art. 8.39(2)(d), the award shall not affect the right a person - other than the person which has provided a waiver pursuant to Article 8.22 - may have in monetary damages or property awarded under a Party’s law.
<table>
<thead>
<tr>
<th>Article 8.27- Constitution of the Tribunal</th>
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<tbody>
<tr>
<td><strong>NEW Article</strong></td>
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<tr>
<td>- Tribunals shall be constituted on the basis of a permanent roster of fifteen arbitrators. These fifteen individuals shall be appointed by the CETA Joint Committee. The roster will be made up of five EU nationals, five Canadian nationals, and five from third party nationals. Random case allocation.</td>
</tr>
<tr>
<td>- Members of tribunal shall have qualification of respective country to be appointed as judicial office, or jurist.</td>
</tr>
<tr>
<td>- Members of the tribunal shall be paid monthly retainer fee, decided by the Joint Committee.</td>
</tr>
<tr>
<td>- The ICSID Secretariat will act as Secretariat for the Tribunal as in the ICS proposal. It will manage the account where the fees of the parties will be sent.</td>
</tr>
<tr>
<td>- The establishment of a permanent roster appointed by the Parties is a step in the right direction in securing independence of the arbitrators. However, some concerns over independence remain:</td>
</tr>
<tr>
<td>- Tribunal Members are not fully financially independent. They receive a retainer fee, but are still paid for the amount of work they carry out, creating a financial incentive to hear cases in a one-sided system (only investors may bring cases). Moreover, Tribunal Members may still work as ISDS arbitrators in other cases brought under the old system;</td>
</tr>
<tr>
<td>- There are insufficient guarantees that the arbitrators will be able to properly assess domestic law as the system favours the selection of arbitrators that are 'experts' in international investment law.</td>
</tr>
<tr>
<td>- CETA does not require arbitrators to meet the requirements for judicial office. CETA also does not require arbitrators to have expertise in the field of domestic social, environmental or other public law. Considering the controversy over the system and the failure to recognise the value of such law in the past, it is appropriate that this is made an explicit requirement in EU trade agreements even if domestic law is not formally part of the applicable law (as arbitrators will still assess domestic law);</td>
</tr>
<tr>
<td>Article 8.28 - Appellate Tribunal</td>
</tr>
<tr>
<td>Article 8.29 - Establishment of a multilateral investment tribunal and appellate</td>
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</table>

**NEW Article**

- The functioning of the tribunal, the appointment and the remuneration of members are not determined in the final CETA text but will be defined at a later stage by the CETA Joint Committee
- Appellate Tribunal may confirm, modify or reverse any decision based on error of application or interpretation / error of facts / presentation of new facts.
- The Appellate Tribunal will be made up of three appointed members.
- There will be a possibility for the committee on investment and services to review the functioning of this appellate body and make recommendations to the joint committee

- Article 8.29 provides that CETA Joint Committee can decide that a potential future multilateral investment mechanism
<table>
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<tr>
<th>mechanism</th>
<th>replaces the ICS system under CETA.</th>
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**NEW Article**

**Article 8.30 - Ethics**

**NEW Article**

- Requires member of Tribunal to be independent, and not government affiliated (though may receive remuneration from government).
- May not participate in dispute that would create direct or indirect conflict of interest.
- Must comply with International Bar Association Guidelines on Conflicts of Interest in International Arbitration.
- Any conflicts of interest must be raised to the President of the International Court of Justice.

- This article is a copy of Article 11 in TTIP ICS

**Article 8.31 - Applicable law and interpretation**

**NEW Article**

- This article is based on article 13 in section 3, subsection 5, of the Commission ICS proposal in TTIP;
- The text seeks to make the Investment Court System compatible with the EU Treaties, by taking into account the powers of the EU courts granted in the Treaties. In particular, the text seeks to obscure the powers of the arbitration tribunals to consider questions of EU law, a core competence of EU courts, and to obscure the effects this would have on the

- Article 8.31 seeks to accommodate one of the key constitutional flaws of ISDS under EU law: its incompatibility with the Treaties. Article 8.31 seeks to preserve the powers of the European Court of Justice and the autonomy of the EU legal system by limiting the powers of the Tribunals in relation to domestic law. However, these precautions are not sufficient to take into account the fundamental concerns regarding the compatibility of the agreement with the EU Treaties.
- To respect the powers of the courts of the Member States and the ECJ under the Treaties, the system
| Article 8.32 - Claims manifestly without legal merit | Establishes rights for respondent to file an objection to a claim that is **manifestly** without legal merit.  
- The respondent must specify the grounds for the objection.  
- The tribunal will hear the parties and issue a decision stating the grounds for its reasoning. | Establishes a “fast-track” procedure, after the establishment of a tribunal, to quickly check a claim on its legal merits and dismiss it if the tribunal so decides.  
- Important to filter “**frivolous claims**” - however entirely dependent on the interpretation of the tribunal and the quality of the objection, because “the Tribunal shall assume the alleged facts to be true” (5).  
- Cannot be used if an objection was filed under Art. 8.33.  
- Relation to Art. 8.22(5)(c): the investor would still be able to go to a domestic court or tribunal via a BIT. |

| Article 8.33 - Claims unfounded as a matter of law | Establishes a right for the respondent to file an objection claiming that the claim has no legal merit and “is not a claim for which an award in favour of the claimant may be made under this section, even if the facts alleged were assumed to be true.”  
- Similar procedure as in Art. 8.32. | Used as another filter to dismiss **unlawful** cases.  
- Based on a similar provision in TTIP ICS Art. 17.  
- Relation to Art. 8.22(5)(c): the investor would still be able to go to a domestic court or tribunal via a BIT. |

| Article 8.36 - Transparency of proceedings | States that hearings should be open to the public. | Includes the provision of art 18 of the TTIP ICS proposal |
| Technical revisions made in the Article | ● Provides protection against disclosure of confidential information or protected information, if deemed necessary.  
● Confidentiality is defined according to each party’s law. | Article 8.39 - Final award  
Limited revisions made in the Article | ● This is based on the TTIP ICS article 28 (‘Provisional Award’)  
● The main difference between the TTIP and the CETA award system that the TTIP ICS is about provisional' award and there are rules - including an appeal mechanism - regulating it which have the potential of early compensation for the claimant. In the current CETA ICS, such an opportunity does not exist.  
● Costs include monetary damage and interests, limited to the damage suffered by the investor and depending on the Tribunal's decision, other reasonable costs, including legal representation and assistance.  
● If only parts of the claim have been successful, the costs shall be adjusted proportionately.  
● This maintains the financial chilling impact of ICS as the unsuccessful disputing party shall bear the costs (which might be the state), legal costs are included and adjustment is foreseen in case of partial win. |
<table>
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<tr>
<th>Article 8.44 - Committee on Services and Investment</th>
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<tbody>
<tr>
<td>Substantial revisions made in the Article</td>
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</tbody>
</table>

- Defines the code of conduct for the members of the tribunal
- The committee can recommend to the joint committee the adoption of interpretations of this agreement
- The committee can recommend the adoption of any further elements of the FET obligation

- The composition of this committee, which will have a major influence on the system, is not defined in the text.
Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

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Related document: Convention to establish a multilateral court on investment

Feedback:

The European Heart Network (EHN) welcomes the European Commission’s decision to assess the potential of establishing a multilateral court for investment dispute resolution. This decision acknowledges that:

a) the prevailing Investor-to-State Dispute (ISDS) mechanism is not fit for purpose; and
b) managing numerous Investment Court Systems (ICS – the new EU concept of ISDS) in parallel is “sub-optimal in terms of policy effectiveness and increases the risk of creating inconsistencies in the application of substantive investment protection provisions.”

The inception impact assessment document further recognises that “maintaining and managing 10-15 or more ICSs in EU trade and/or investment decreases the cost efficiency of these systems.

Below we offer our comments, some of which go beyond the scope of the inception impact assessment. Nevertheless, we believe that they are pertinent to current EU negotiations of bilateral trade and investment agreements.

Multilateral court for investment dispute resolution

A multilateral court for investment dispute resolution has benefits compared to bilateral ICS and ISDS. This for the many reasons set out in the inception impact assessment document, e.g. consistency in the interpretation of substantive rules. We welcome the consideration of establishing a secretariat. We also welcome the proposal that the court must ensure effective transparency of its work and easy access for users to documents; in that context we recommend that criteria for what
constitutes ‘confidential and protected information’ be defined. It is important to avoid abuse of the right to designate documents as confidential.

We reiterate (some of the) comments we have made in the past, to the consultation on ISDS and the proposal for the ICS in the context of TTIP, as we believe they are also valid in the context of a multilateral court for investment dispute resolution.

Right to legislate
The Treaty establishing the multilateral court for investment dispute resolution must declare that all parties to the court preserve their right to regulate in a legally binding manner. The judges/panel members of the court must respect the parties’ margin of appreciation when deciding on regulatory measures to protect, improve and promote public health. This entails the recognition that measures which are potentially effective protect public health must be considered legitimate provided that they are not patently discriminatory.

Exhaust national remedies
Investors must be required to seek domestic remedies before proceeding to the multilateral court for investment dispute resolution. The exhaustion of domestic remedies is not required if such remedies are not available or manifestly ineffective, or domestic courts are unable or unwilling to provide legal protection.

Qualification of judges/panel members
It is reasonable to require that the judges/panel members should have some specialisation in investment law. We submit that it is also reasonable and desirable to require that they have expertise or experience in societal and public policy matters.

We agree that a permanent court with professional full-time judges and public tenure would be the best option as this should guarantee their integrity and independence. It is essential that the judges/panel members are in a position to render awards that are fair and impartial.

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The inception impact assessment document suggests that the current EU policy of including in each EU agreement a bilateral ICS constitutes a significant step forward to provide an alternative form of dispute resolution as compared to the traditional ad-hoc ISDS system.

The document admits that this policy has certain limitations. In particular, it does not provide an effective solution to the continued existence of numerous EU Member State BITs with ISDS. Moreover, whilst the conclusion of new EU trade and/or investment agreements with ICS should lead to the replacement of the corresponding Member State BITs with ISDS, this process is “likely to take many decades and there is no guarantee that it will eventually cover all Member State agreements”.

Consequently, EHN recommends that the EU no longer includes ICS in its bilateral trade and investment agreements but puts its efforts into establishing a multilateral court for investment dispute resolution. Or that, at a minimum, currently negotiated
bilateral trade and investment agreements should stipulate that ICS will cease to exist automatically for example three years after its entry into force in the expectation that such a clause will accelerate negotiations to establish a multilateral court for investment dispute resolution.

Feedback file:
ResponsetotheEuropeanCommissioninceptionimpactassessmentontheestablishmentofaMultilateralCourtforinvestmentdisputeresolution_fin.pdf
Response to the European Commission inception impact assessment on the establishment of a Multilateral Court for investment dispute resolution

7 October 2016

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Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

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Related document: Convention to establish a multilateral court on investment

Feedback:

Please see attached file.

Feedback file: TEfeedbackroadmapfinal1.pdf
Establishment of a Multilateral Investment Court for investment dispute resolution

Transport & Environment feedback on roadmap

September 2016

On 1 August 2016 the Commission published a roadmap for a Council Decision proposal authorising the Commission to negotiate a Convention to establish a multilateral court on investment. T&E welcomes a public debate on this controversial issue, and the initiative to provide feedback on the initial roadmap and through a public consultation. Additionally, we welcome the Commission’s intentions to abandon the controversial private arbitration, the establishment a permanent multilateral Investment Court System (ICS) could be a solution however the details of the legal and democratic construction of such a court remains to be seen.

T&E supports option 5 as it aims to rectify the flaws of the ISDS. We support the creation of a permanent investment court that is composed of a first instance and an appeal tribunal.

However, there are still some concerns about the ICS. T&E could only support the convention establishing a multilateral court for investment dispute if the remaining flaws are removed.

1) **Compatibility of ICS with EU treaties**: One of the main flaws of the current ISDS system is its incompatibility with the Treaties. The autonomy of the EU legal order and the power of the Court of Justice of the EU (CJEU) are not protected. The CETA text seeks to accommodate these flaws by limiting the powers of the Tribunal in relation to domestic law. However, these precautions are not enough to address the fundamental concerns about the compatibility of ICS with the Treaties. Therefore, the European Commission must request the opinion of the CJEU before the establishment of such a system to ensure legal certainty.

2) **The right to regulate is not sufficiently protected** contrary to what is stated in the roadmap concerning likely environmental impacts. The investment protection provisions need to be looked at when establishing a multilateral court. While the TTIP ICS proposal includes a
provision on the right to regulate, it is not phrased strong enough to prevent any regulatory chill deriving from investor claims. The mere fact that governments might need to pay high amounts to investors could lead to a reluctance to introduce new environmental protection standards. Therefore, T&E asks for a specific carve-out to protect public policy measures in all FTAs that include ICS. Any measure aiming to contribute to the public interest such as environmental protection is not a breach of the investment provisions.

3) **Conflict of interest remains a problem:** While the TTIP ICS proposal regarding the selection of tribunal members is a step into the right direction, sufficient independence is, however, still not guaranteed. The code of conduct and ethic provisions must be reinforced in order to ensure that judges are truly independent. A judge should never be allowed to work as a corporate lawyer or have any sort of relation with the disputing parties surrounding the dispute. We have some comments on the following aspects:

- Qualifications of judges/member and tenure: In order to increase trust and avoid conflict of interest, judges must be employed full time. If claims related to public policy objectives are not excluded from the scope of the investment provisions, judges should – beside investment law – also be qualified in areas such environment, public health and consumer protection.

- The role of joint committees: In CETA, the roster of tribunal members is drawn up by the joint committee. This lacks transparency on appointments and scrutiny thereof. Furthermore, the joint committee can also adopt interpretations of provisions in the investment chapter. This is not acceptable as there is no democratic oversight. With a view to the public and democratic vision of option 5, this point needs to be clarified.

- Remuneration: The package of remuneration of judges should be monthly fixed and not based on a daily rate or linked to the amount of the awards.

- Secretariat: The need to establish a secretariat is evident. Appointments thereto should be transparent.

4) **The costs and the impact of establishing a multilateral court must be evaluated:** It was alarming that the Commission proposed a new bilateral court system in TTIP and CETA without carrying out a proper impact assessment. We welcome that this is now foreseen for the establishment of the multilateral court. However, the same must also be done for the bilateral investment courts that will be established in the meantime.
Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

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Related document: Convention to establish a multilateral court on investment

Feedback:

I am attaching a paper reflecting on the future of Investor State Dispute Settlement (ISDS), in the light of the latest EU developments on the issue.

Feedback file:
UESSRNid2893215.pdf
1. INTRODUCCIÓN

Pocos temas jurídicos son tan actuales, dinámicos y controvertidos como la política comercial y de inversiones de la Unión Europea (UE). Afirmar que las novedades en esta materia se han seguido generado hasta el mismo día de la publicación de este texto no es en este caso un mero recurso literario – unas horas antes de entregar este trabajo se firmó el Acuerdo Económico y Comercial Global negociado entre la UE y Canadá (CETA 2016)-. Muestras adicionales de la celeridad con que están discurriendo los acontecimientos son la Sentencia del Tribunal Constitucional Federal alemán de 13 de octubre de 20161, así como la espiral de reacciones al veto que ese mismo 13 de octubre emitió el Parlamento valón sobre CETA2; veto que ha sido neutralizado in extremis el 27 de octubre3.

Habida cuenta de las restricciones formales de este trabajo, ha de precisarse ya desde su inicio que en él no van a hallar cabida cuestiones tales como: el status quo y futuro de los acuerdos bilaterales de inversión intracomunitarios así como los celebrados entre Estados miembros y terceros países4; la controvertida naturaleza5 de la competencia de la UE en materia de política comercial -que engloba la protección de las inversiones extranjeras directas-6; las repercusiones que el ejercicio de dicha competencia, a través de la creación de un tribunal en materia de inversiones, puede tener sobre el principio de autonomía del derecho de la UE y la competencia exclusiva del TJUE en la materia7; la

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5 Doctrinalmente se ha apuntado que la UE posee competencia exclusiva para negociar acuerdos internacionales en materia de inversión extranjera directa, incluso cuando estos incluyen medias post-establecimiento, estándares materiales de protección y mecanismos de solución de controversias. Por el contrario, y pese a la voluntad expansiva de la Comisión en esta materia, se ha impuesto la tesis de que la celebración de acuerdos que engloben todo de transacciones financieras es competencia compartida entre la UE y sus estados miembros y que por lo tanto han de concluirse como acuerdos mixtos. HINOJOSA-MARTÍNEZ, L. M., “The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism”, JWIT, Vol. 17, 2016, pp. 86-115.


responsabilidad financiera relacionada con los tribunales de resolución de litigios entre inversores y Estados establecidos por acuerdos internacionales en los que la UE sea parte; el relevante papel que ha adquirido el Parlamento europeo en dicho ámbito⁸, etc. Ni que decir tiene que todas estas materias ya están siendo objeto de análisis pormenorizados por parte la doctrina española y extranjera. El presente trabajo únicamente va a centrar su atención en cómo articulan el sistema de resolución de controversias relativas a inversiones internacionales los textos que actualmente está negociando la UE con cruciales socios comerciales -incluido el recién firmado CETA-⁹. Con el fin de facilitar su lectura y de maximizar además el espacio disponible ¹⁰, el presente estudio se va a referir a algunos textos y conceptos clave en la materia recurriendo a los acrónimos con los que se les conoce normalmente en el contexto internacional. Con los mismos fines, en este trabajo no se van a incluir referencias numéricas individualizadas de artículos contenidos en los documentos precitados ¹¹.

2. INVERSIONES INTERNACIONALES Y UNIÓN EUROPEA: ¿LÍDER GLOBAL O NEÓFITO?

La andadura de la UE en materia de inversiones extranjeras directas comenzó hace escasos años, a raíz de la entrada en vigor a finales de 2009 del Tratado de Lisboa. Parece difícil que en ese momento la UE fuese capaz de prever todos los quebraderos de cabeza que iban a generarse tres escuetas palabras –“inversiones extranjeras directas”- incorporadas –hay quien asegura que subrepticiamente ¹²- en el artículo 207 del Tratado de Funcionamiento de la UE. Dejando de lado las cuestiones jurídicas de naturaleza comunitaria y constitucional apuntadas en la sección introductoria, merece la pena incidir aquí en la crucial importancia de esta concreta faceta de la política comercial común. La negociación de mega-regionals como la Asociación Transatlántica de Comercio e Inversión (TTIP) o CETA 2016, que incluyen un capítulo específico en materia de inversión, traslúcera las múltiples pulsiones de sus participantes. Entre las que se perciben en la foto oficial de la UE, destaca el afán comunitario por llevar la voz cantante en la construcción de la futura gobernanza global en materia de inversiones. De hecho, no puede reprocharsele a la Comisaría de Comercio Cecilia Malmström que no esté realizando su trabajo con un celo y un optimismo inquebrantable. Los negociadores comunitarios no sólo conocen las ingentes cifras de inversión que conectan a la Unión Europea con Estados Unidos y Canadá ¹³, sino que también son conscientes -y sienten el peso en sus espaldas- de argumentos geopolíticos como los siguientes: un afianzamiento de la cooperación euroatlántica a través de textos como TTIP y CETA permitiría aminorar

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* La elaboración de este artículo se enmarca dentro de un proyecto de investigación financiado por la Humboldt Stiftung (Forschungsstipendium für erfahrene Wissenschaftler). La autora también es miembro de los proyectos de investigación DER2016-80568-R (subprograma Retos) y e-Procofs S 14/3 DGA. katiafachgomez@gmail.com.


⁵ La fecha de consulta de todas las webs citadas en este trabajo es el 30 de octubre de 2016.

⁶ Efilab, “Why the EU’s FDI competence should be re-nationalized”, https://efilablog.org/2016/08/25/why-the-eus-foreign-direct-investment-fdi-competence-should-be-re-nationalized/.

la dependencia energética europea respecto de Rusia, frenaría la expansión de China y otros países emergentes en el gran tablero mundial y, en suma, apuntalaría el modelo económico occidental.

El anhelo de la UE por convertirse en un líder global, tejiendo una nueva malla jurídica para las inversiones internacionales, no ha de calificarse a priori como reprovable. Sin embargo, en este caso, la realidad le está golpeando desde múltiples –y dolorosos– frentes. Las encarnizadísimas críticas de amplios sectores sociales y políticos al capítulo de inversiones de textos como TTIP y CETA son de sobra conocidas. A ello se suma no sólo la revuelta que contra estos textos han iniciado en el plano institucional varios países miembros de la UE –y divisiones territoriales de estos-, sino también los velados reproches que están emitiendo voces acreditadas de socios negociadores como Estados Unidos y Canadá y las más expresas que tácitas recriminaciones de carácter doctrinal.

Frente a todo ello, y en los planos político y jurídico, se estima que la UE está ofreciendo una imagen carente de unidad interna, así como, en ocasiones, de una hoja de ruta estable y coherente en sus relaciones con terceros países. Centrándose en la resolución de controversias entre inversor y Estado (ISDS), una muestra de ello es que el férreo apoyo que la Comisión había otorgado hasta bien entrado el año 2014 a un ISDS 2.0 –reflejado en textos como el Acuerdo de libre comercio con Singapur (EU-Singapur FTA) o el 2014 CETA-, se ha resquebrajado por completo a raíz del abrupto viraje que supuso el contenido del informe de enero de 2015 de “Consulta pública en línea sobre la protección de las inversiones y la solución de diferencias”. Ello obligó a la Comisaria Malmstöm a pasar a defender a partir de mayo de 2015 un novedoso modelo de resolución de controversias diligenciado por un tribunal permanente de inversión de dos instancias y a proclamar pocos meses después, en


19 Este término, que alude a un sistema mejorado de ISDS, es utilizado por autores como Marc Bungenberg y Nicolette Butler.

20 El texto afirma que: “Las respuestas colectivas reflejan una oposición generalizada a la ISDS en la ATCI o con carácter general. También una mayoría de respuestas se opone (sic) a la ATCI en general”. Informe Consulta pública en línea sobre la protección de las inversiones y la solución de diferencias entre inversores y Estados en el Acuerdo de la Asociación Transatlántica de Comercio e Inversión (ATCI), http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153304.pdf. Otra de las contracciones que se le pueden achacar a la UE en materia de inversiones directas es la contraposición, según muchos actores implicados en la materia, entre el oscurantismo que está caracterizando las negociaciones políticas de los textos de TTIP y CETA con las buenas intenciones que la Comisión quito mostrar en esta consulta online. Sobre esta última cuestión, Buer, M., “Campaign-triggered mass collaboration in the EU’s online consultations: the ISDS-in-TTIP case”, European View, Vol. 14, 2015, pp. 121-129.

21 La Comisaria lanzó un globo sonda en esta materia desde su blog el 5 de mayo de 2015, al hilo de la presentación del concept paper comunitario. Es en este último documento donde se habla en extenso por primera vez del ICS. “Investments in TTIP and
septiembre, que “el público tiene una falta de confianza esencial y generalizada en el viejo sistema de ISDS”\textsuperscript{22}. Entre tanto, la severa recomendación del Parlamento Europeo de julio de 2015 de “sustituir el mecanismo de resolución de litigios entre inversores y Estados por un nuevo sistema para resolver las diferencias entre los inversores y los Estados que esté sujeto a los principios y el control democráticos”\textsuperscript{23} también fue utilizada para respaldar el giro de timón de la Comisión. En un tiempo récord, la UE ha emitido su concept paper “Investment in TTIP and beyond- the path for reform”\textsuperscript{24}, como consecuencia de un ejercicio que originariamente calificó como un mero legal scrubbing, ha puesto sobre la mesa un nuevo texto de CETA en el que se recoge la figura de un tribunal permanente de inversiones (ICS)\textsuperscript{25}; y está defendiendo con renovada energía el mismo modelo también frente a su contraparte estadounidense en el TTIP\textsuperscript{26}.

En el plano teórico puede argüirse que un cambio de ruta como la apuntada no hace sino mostrar la sensibilidad de la UE respecto del sentir de su ciudadanía\textsuperscript{27}. En el plano práctico, sin embargo, es incuestionable que estos presuntos brindis al respetable no han evitado que el actual status quo en esta materia sea realmente inmanejable\textsuperscript{28}. La credibilidad de la UE como negociadora de acuerdos de comercio e inversión se encuentra en sus horas más bajas. Visto todo lo acontecido en los últimos meses –y previendo lo mucho que seguirá aconteciendo en los próximos-, diversas voces –y no sólo de euroescépticos– entonan ya el réquiem por la UE como negociadora de textos internacionales de comercio e inversión\textsuperscript{29}. No obstante, aunque en el momento de culminar la redacción de este trabajo se repuete improbable, no puede descartarse por completo que la concreción en el corto o medio plazo de algún desenlace pendiente –un as en la manga de la Comisión, como un Dictamen 2/15 proclamando que la UE posee las competencias necesarias para firmar y celebrar por sí sola el Acuerdo de Libre Comercio con Singapur\textsuperscript{30} consiga dar un vuelco a la situación\textsuperscript{31}, permitiendo que el ave fénix de la UE restablezca su vuelo.


\textsuperscript{23} El texto sigue afirmando: “(un nuevo sistema) en el que los posibles asuntos sean tratados de forma transparente por jueces profesionales, independientes y designados públicamente en audiencias públicas, y que incluya un mecanismo de apelación en el que se garantice la coherencia de las decisiones judiciales, se respete la jurisdicción de los tribunales de la UE y de los Estados miembros, y los intereses privados no puedan menoscabar los objetivos en materia de políticas públicas”. Punto (d) xv de la Resolución del Parlamento Europeo, de 8 de julio de 2015, que contiene las recomendaciones del Parlamento Europeo a la Comisión Europea relativas a las negociaciones de la Asociación Transatlántica de Comercio e Inversión (ATCI) (2014/2228(INI)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-&&EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//ES.

\textsuperscript{24} “Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court”, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.


\textsuperscript{28} En este sentido, el 25 de octubre el Ministro australiano de comercio declaró que va a continuar con sus negociaciones con la UE, pero avanzó que en vez de un FTA se va a negociar un texto más modesto, que pueda ser firmado por la Comisión sin necesitar la ratificación de los parlamentos de los países comunitarios. http://worldtradelaw.typepad.com/ielpblog/2016/10/the-australians-may-be-looking-for-a-simpler-eu-trade-deal.html.

\textsuperscript{29} A modo de muestra, EFILA propone que la reforma de los Tratados comunitarios que va a requerir el Brexit se aprovecha también para retirar las inversiones extranjeras directas de la competencia comunitaria. “Why the EU’s FDI competence should be re-nationalized”, https://efilablog.org/2016/08/25/why-the-eus-foreign-direct-investment-fdi-competence-should-be-re-nationalized/.

\textsuperscript{30} Por ejemplo, la emisión del esperado Dictamen 2/15 por parte del TJUE, respondiendo a la solicitud de la Comisión sobre si la Unión aglutina las competencias necesarias para firmar y celebrar por sí sola el Acuerdo de Libre Comercio con Singapur. http://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:62015C0002&from=EN. El carácter informal de la opinión legal emitida el 1 de junio de 2016 por la asesoría jurídica del Parlamento europeo resta relevancia a la conclusión de que los artículos de CETA sobre resolución de conflictos son compatibles con los Tratados comunitarios.
3. LA RESOLUCIÓN DE CONTROVERSIAS RELATIVAS A INVERSIONES INTERNACIONALES EN TTIP, CETA Y EU-VIETNAM FTA: ALGUNOS HILOS CONDUCTORES ... Y MUCHOS FLECOS PENDIENTES

En la sección precedente ha quedado expuesto cómo la UE navega actualmente en aguas procelosas por lo que respecta a su política de inversiones internacionales. La actual sección reflexiona sobre si la concreta propuesta de la UE de crear un ICS con aspiraciones de multilateralidad no supone además nadar contracorriente. Los preceptos de TTIP, CETA y el Acuerdo de libre comercio con Vietnam (EU-Vietnam FTA) dedicados a esta específica materia están siendo objeto de un acalorado debate a ambos lados del Atlántico. Como bien muestran los distintos posicionamientos de la doctrina española en la materia, se trata de un tema candente en el que se antoja difícil alcanzar una solución globalmente consensuada y ejecutable en el futuro próximo. Sin ir más lejos, parece que las actuales contrapartes negociadoras de la UE cuentan con sus propias preferencias al respecto, que no coinciden con el proyecto comunitario de Tribunal multilateral de inversiones (MIC). La doctrina ha aludido a un dualismo calificado como Realpolitik versus Idealpolitik, el cual trasluce una soterrada pugna por conseguir que el modelo estadounidense o europeo de resolución de controversias derivadas de inversiones se imponga como una especie de nuevo gold standard global. En ese sentido, Estados Unidos se inclina por basar las negociaciones –como ha hecho recientemente con el Acuerdo Transpacífico de Cooperación Económica (TPP) en su Modelo de tratado bilateral de inversiones (US BIT 2012). Éste mantiene el esquema tradicional de tribunales arbitrales ad hoc en cuya elección participan las partes de la controversia. Diversos aspectos del US BIT están a su vez inspirados en el Tratado de Libre Comercio de América del Norte (NAFTA). Dicho texto permite conectar con una tradición canadiense ya asentada en la materia que tampoco recoge la figura del ICS, pese a lo cual el nuevo gobierno de Canadá admitió recientemente el ICS en CETA 2016.


36 En marzo 2014, el US Trade Representative proclamó que: “Our approach to ISDS has helped establish higher global standards and strengthen arbitration procedures through clearer legal rules, enhanced safeguards, and transparency throughout the ISDS process. As a country that plays by the rules and respects the rule of law, the United States has never lost an ISDS case. In our current negotiations, we are working to expand upon this approach to ISDS, in ways spelled out in the Model BIT that the Obama Administration released in 2012 following an extensive period of public comment and consultation.” The Facts on Investor-State Dispute Settlement, https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors.


Centrándolo la atención en TTIP, CETA y EU-Vietnam FTA, sólo los acérrimos ISDS-haters niegan que estos textos hayan traído consigo avances en aspectos relevantes del sistema de resolución de controversias relativas a inversiones. Entre dichas mejoras pueden contarse las siguientes: clarificación de estándares sustantivos, mayor fiscalización de la conducta de los árbitros –llamados en dichos textos jueces o miembros del tribunal–, ampliación del régimen de transparencia e incorporación de un mecanismo de apelación. Ello no significa, naturalmente, que nos hallemos ante temas ya completamente cristalizados, pero sí que se aprecia que hay determinadas evoluciones que se antojan imparables. La propuesta comunitaria de ICS es, por el contrario, una cuestión actualmente mucho más volátil y controvertida. Un análisis de los, en ocasiones, farragosos artículos de TTIP, CETA y EU-Vietnam FTA invita a subrayar dos de las características trasversales más relevantes del modelo de ICS propuesto recientemente.

En primer lugar, la UE ha configurado el ICS como la última ratio. Diversas disposiciones sobre protección de inversiones, tanto de naturaleza sustantiva como de naturaleza procesal, confluyen en los tres textos analizados y perfilan un panorama general en el que el inversor demandante se le restringe el acceso al ICS. Así, quedan excluidas de este sistema reclamaciones derivadas de una reestructuración negociada de deuda, de inversiones generadas con fraude o corrupción, así como reclamaciones colectivas. Se impone igualmente que el tribunal decline su jurisdicción en casos subsumibles en el precepto anti-circumvention –prohibición de elusión–. El tribunal tiene también limitado el tipo de remedios que puede conceder al inversor y éste no va a obtener una decisión en la que se aplique el derecho nacional para valorar la conducta controvertida. Asimismo, en estos textos se adoptan medidas de corte procesal para rechazar con celeridad las reclamaciones materialmente infundadas. Otra disposición que desincentiva el recurso al ICS es la implantación como regla general en materia de costas del principio “quien pierde paga”. La prohibición de forum shopping, el enfoque no u-turn –renuncia a litigios nacionales ya iniciados para poder plantear la demanda ante el ICS- y el endurecimiento de las normas respecto de la revelación de la existencia de financiación por parte de terceros persiguen el mismo objetivo final. Se aspira asimismo a que un porcentaje creciente de las controversias puedan resolverse sin llegar a acudir al ICS, más bien por medio de mecanismos ADR -solución amigable y la mediación- o través de consultas entre las partes.

En segundo lugar, la UE ha construido el ICS como un sistema de justicia público: Como bien se ha apuntado doctrinalmente, el sistema pre-ICS –esto es, el sistema de ISDS cuyo buque insignia es el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI)–, es un fiel reflejo de la cosmovisión de sus creadores y del momento histórico en que se originó, es decir, la década de los sesenta del siglo pasado. Es por ello que dicho sistema, nacido para despolitizar las controversias derivadas de inversiones, en ocasiones hace auténticos juegos malabares con diversos sectores del derecho.


41 Dichas características se presentan de forma general, sin precisar en todos los casos si son comunes a los tres textos objeto de análisis o sólo a alguno de ellos.


internacional y con el arbitraje comercial\textsuperscript{45}. Se ha expuesto ya cómo la UE es plenamente consciente de
que una contemplación contemporánea de este sistema clásico de ISDS provoca un claro rechazo por parte
de muchos de sus analistas, quienes lo acusan de carecer de legitimidad democrática: con crudeza se
manifiestan recientes \textit{policy papers} titulados “Cuando la injusticia es negocio” o “ISDS-The devil is in the
details”\textsuperscript{46}. Es por ello que la propuesta comunitaria de ICS se vende abiertamente como un sistema de
justicia público\textsuperscript{47}, que se siente honrado de haber conseguido asemejarse en diversos puntos a los sistemas
judiciales nacionales. Aparte de las novedades terminológicas que estos textos introducen –juez, tribunal,
etc.–, dicha consigna se refleja en una serie de elementos definidores del ICS. Así, los jueces o miembros
del tribunal son seleccionados por los Estados y adquieren un status cuasi-functional: se les asignan
aleatoriamente los casos y pueden llegar a recibir un sueldo fijo que garantice su dedicación a este trabajo.
El margen interpretativo de los antaño árbitros se ve claramente reducido, no sólo porque algunas
disposiciones sustantivas sobre protección de inversiones han sido definidas de forma más clara y
detallada –trato justo y equitativo, expropiación indirecta-, sino también porque los textos analizados
permiten que los Estados, a través de su Comité conjunto, adopten decisiones interpretativas vinculantes
respecto de preceptos controvertidos. Se aprecia por tanto la clara voluntad de la UE –y de los países
extracomunitarios que en el futuro pudiesen aceptar el mecanismo de ICS- por mantener su contribución
político-legislativa no sólo en la fase de negociación de los textos, sino también a lo largo de toda la vida
de estos\textsuperscript{48}. En los textos también se aprecia la firme intención de la UE por restringir las prerrogativas
de las partes. La eliminación de autonomía de la voluntad del inversor a la hora de elegir a quienes decidirán
la contratación supone dinamitar una de las bases del ISDS clásico. Por último, la incorporación de un
mecanismo de apelación también se interpreta como muestra de la voluntad comunitaria de asimilar el
ICS a un sistema de tribunales de justicia públicos.

A priori, no puede afirmarse que dichos objetivos trasversales sean criticables por ser o
cazcan de fundamento. Dado que es indiscutible que parte de los agentes implicados en el sistema
contemporáneo de ISDS no aceptan éste, la propuesta de la UE ha de verse como un intento de dar un
paso adelante deshaciéndose de diversas rémoras del pasado. Sin embargo, los hilos conductores de la
propuesta de ICS no han conseguido por ahora tejer un producto final convincente. Da la impresión de que
el paso adelante deshaciéndose de diversas rémoras del pasado. Sin embargo, los hilos conductores de la


\textsuperscript{46} Transnational Institute, https://www.tni.org/files/download/cuando_la_injusticia_es_negocio-web.pdf,
conferencia “BITs that bite into budgets: will the EP let private lawyers decide?”, http://www.s2bnetwork.org/bits-that-bite
-into-budgets-will-the-ep-let-private-lawyers-decide/

\textsuperscript{47} MALMSTRÖM, C., nota 20.

\textsuperscript{48} En torno al político-legislativo input de los Estados, VENZKE, I., “ISDS in TTIP from the Perspective of a Public Law Theory

Ya se ha indicado que la presentación por parte de la UE de su innovador modelo de ICS ha hecho aflorar un amplio espectro de opiniones y una panoplia de posibles mejoras y de opciones alternativas. Prestigiosos autores apuntan que los déficits del ICS poseen una naturaleza auténticamente sistémica. Es por ello que hay voces que reclaman a la UE que dé un paso atrás y sacrificie su proyecto de ICS con el fin de salvar el TTIP o CETA. Asumiendo por tanto esta posibilidad de tener que planificar rutas alternativas, las opciones teóricas son variadas: aparte de la posibilidad de retomar al ISDS 2.0, algunos autores defienden volver a un régimen de solución de controversias inter-estatal, implementando una “OMCización”, mientras que otros proponen confiar en los sistemas de justicia nacionales para resolver dichos conflictos, lo cual es ratificado por quienes consideran además que en el contexto North-North es innecesario implantar un régimen especial de protección de inversiones.

Sin embargo, la UE en la actualidad sigue manifestando su firme intención de llegar a implementar un MIC. Así lo pone de relieve por ejemplo la estrategia de consulta presentada el 30 de septiembre de 2016, vinculada a la evaluación de impacto sobre el establecimiento de un MIC. Si este planteamiento cuajara, no cabe duda que la transición será larga y compleja. No en vano en este sector se cuenta con “fondo de armario” de más de 3,000 acuerdos internacionales de inversión (IIAs) actualmente en vigor que no reconocen las figuras ICS/MIC. A este último respecto, la doctrina ha propuesto acelerar la transición.

Referencias:

50 En este contexto de metamorfosis, cuando la traducción española de estos textos esté disponible, será interesante comprobar si award se traduce como sentencia o como laudo.
54 Otra propuesta sugiere mantener el arbitraje de inversiones y recurrir al ICS si bien partes rechazan el arbitraje o bien si el inversor puede elegir entre ambas opciones. GAFFNEY, J., “The EU proposal for an Investment Court System: what lessons can be learned from the Arab Investment Court”, http://ccsi.columbia.edu/files/2013/10/Perspective-Gaffney-Final-Formatted.pdf.
61 Si en el futuro próximo llegasen a coexistir una pluralidad de tribunales de inversiones, derivados de diversos IIAs, ello generaría las mismas discordancias interpretativas que se la achacan al actual sistema de IISD. SCHILL, S., “The European
implementando un mecanismo similar al establecido por el tándem la Convención de Mauricio sobre la Transparencia y el Reglamento de la CNUDMI sobre la Transparencia. Las voluntades políticas y el paso del tiempo dictarán sentencia respecto de todas estas cuestiones.

Palabras clave: solución de controversias entre inversor y Estado (ISDS), tribunal permanente de inversiones (ICS), Tribunal multilateral de inversiones (MIC), Asociación Transatlántica de Comercio e Inversión (TTIP) y Acuerdo Económico y Comercial Global (CETA).

Keywords: Investor State Dispute Settlement (ISDS), Investment Court System (ICS), Multilateral Investment Court (MIC), Transatlantic Trade and Investment Partnership (TTIP), Comprehensive Economic and Trade Agreement (CETA).

62 La Convención establece un mecanismo de opt-in, el cual permite que las partes incorporen las nuevas reglas de CNUDMI sobre transparencia respecto de Tratados cronológicamente previos a la fecha de la entrada en vigor del Reglamento CNUDMI. Así, el artículo 1 de la Convención de las Naciones Unidas sobre la Transparencia en los Arbitrajes entre Inversionistas y Estados en el Marco de un Tratado establece que dicha Convención se aplicará a los arbitrajes entre un inversionista y un Estado o una organización regional de integración económica sustanciados de conformidad con un tratado de inversiones celebrado antes del 1 de abril de 2014, teniendo en cuenta las circunstancias establecidas en los artículos 2 y 3 del texto. http://www.uncitral.org/pdf/spanish/texts/arbitration/transparency-convention/Transparency-Convention-s.pdf. KAUFMANN-KOHLER, G., POTESTÀ, M., “Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?”, http://www.uncitral.org/pdf/english/commissionsessions/unc-unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.
Your Voice In Europe: ROADMAP feedback for Convention to establish a multilateral court on investment

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Feedback:

Regarding members/judges qualifications, I consider that including non-legal arbitrators in certain investment arbitrations would be beneficial to increase the system’s legitimacy.
In the same sense, members/judges with dual qualifications should be "sympathetically considered"