

The Consumer Voice in Europe

MULTILATERAL INVESTMENT COURT

BEUC position on the Commission draft mandate



Contact: Monique Goyens – trade@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
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Why it matters to consumers

Investment protection is not a traditional focus of consumer organisations. Nevertheless, the growing trend of foreign investors suing States in private arbitration in the past decades is preoccupying. 13 claims for compensation were submitted against States in 2000. In 2015, the number of claims went up to 72. This is concerning for consumers because claims for compensation can relate to public interest measures taken by a State such as a consumer protection law. One of our main concerns is that a foreign investor's claim, or even the threat of a claim, could deter a Member State or the EU from adopting a consumer protection measure.

Context

ISDS mechanisms were developed in the 1970s as a means by which developing countries could signal an openness to foreign investment during (FDI) economically and politically turbulent times. At a time when FDI was in relatively short supply, an ISDS mechanism allowed investors to be sure that they could solve problems quickly.

A number of factors drove this movement. Firstly, many court systems for commercial matters in developing countries were underdeveloped and often very slow. Secondly, governments were much more willing to undertake nationalisations without compensation and other direct state action that could undercut foreign investment without compensation, or compensation that could be easily accessed. ISDS mechanisms were thus a way of ensuring access to justice for non-state actors where such justice was unlikely to exist.

Given this, it is difficult to understand why such a mechanism is necessary in agreements between developed economies. In all developed economies there are well developed local judicial systems, qualified lawyers and legal traditions that respect property rights within the framework of mature legal norms. All commercial entities have rights of one sort or another before such courts. The overwhelming work of such courts relates to domestic disputes between firms and between firms and individuals and builds on decades, if not centuries, of developed case law. Establishing a system outside of this well developed and functioning national or regional system would appear to undermine the principle of equality under the law. If a foreign investor is to have access to a dispute mechanism that an equally large or important domestic investor cannot then that investor will have a higher level of protection than a domestic firm. As a matter of both principle and policy we are opposed to this preferential access to justice based on domicile.

An alternative disputes process also creates access difficulties for third parties. The process of development that European legal systems have undergone over centuries has involved regular struggles for the right of access of individuals and third parties to a transparent and open justice system. Rights and practices that have become enshrined in national processes are well understood by ordinary citizens. Any attempt to bypass these rights in an extra-national forum must be opposed.

It is against this overall context that our contribution needs to be understood.

Summary

BEUC is, in principle, in favour of free trade and a multilateral trading system. Nevertheless, we consistently denounced the flawed ISDS mechanism (investor to state dispute settlement). Therefore, BEUC welcomes that the European 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. It does so by proposing to establish a Multilateral Investment Court System (MICS).¹

Fundamentally however, BEUC still questions the need for the establishment of a parallel dispute resolution system for trade agreements with partners that have a well-functioning judicial system and respect the rule of law.

In any case, BEUC asks the EU not to include any ISDS/ICS provision in any upcoming trade negotiations, before a MICS agreement is in place.



BEUC welcomes that the negotiations to the establishment of a MICS must be conducted in a transparent manner, including via web-streams. Civil society representatives must be able to participate as accredited observers. This is a longstanding demand of public interest organisations and we look forward to providing constructive input into the negotiations.



The draft mandate published by the Commission on 14 September 2017 takes several of BEUC's demands which are related to the prevention of conflicts of interest into account: the draft mandate provides in particular for:

- An appeal mechanism.
- Judges to have strong qualifications and guarantees of independence and impartiality, strong ethics, permanent remuneration, a long mandate which is non-renewable and security of tenure.
- The appointment of judges to be done through an objective and transparent process.



The draft mandate also specifies, although without giving any detail, that proceedings must take place in a transparent manner.



The draft mandate is not clear on whether private parties (i.e. investors, public interest organisations, etc.) can bring a case to court. Reference is made to the Union and Member States, while mention is also made to third party intervention, with a clear reference to natural persons and SME's.



The draft mandate is not clear on whether the judges would be appointed on a full-time basis.

¹ As published by the Commission on 13 September 2017: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017PC0493&from=EN>

✘ We regret that the Commission has not requested, before launching the process of MICS, the opinion of the European Court of Justice regarding the legal compatibility of MIC and ICS provisions with EU law. This is of utmost importance to ensure legal certainty and EU's credibility in the multilateral arena.

✘ By establishing a MIC, the EU and its partners further institutionalise a parallel judicial system for foreign investors. But in the case of the TTIP and CETA negotiations, negotiating parties consistently failed to provide evidence for the need for a parallel judicial system in trade deals between highly developed legal systems. Existing levels of protection in the EU and third countries – such as for instance in the case of the US and Canada – should offer enough legal guarantees for investors².

✘ The draft mandate does not say that claims relating to public interest measures such as consumer protection would not be admissible by the MIC. This would be a necessary safeguard from a consumer point of view. Precedents of carve-outs exist, notably for tobacco control measures in the Trans Pacific Partnership. Although the substantive rules will be defined in the respective EU trade and/or investment agreements we would like to recall our position that a public interest carve-out should be systematically included in all those EU trade/investment treaties.

✘ The mandate is silent about enabling other international disputes to be solved in an effective way: contrary to investors, consumers do not have access to specific means of international dispute settlement³. This is notably the case when it comes for example to the violation of their privacy and data protection rights or problems in commercial transactions.

Please find below an updated analysis of the different issues mentioned in our [initial position paper](#).

² This is notably the opinion on the 2015 TTIP resolution of the Legal Affairs committee of the European Parliament, the committee responsible for the interpretation of EU and international law.

³ For more details on the lack of an adequate international framework for consumer dispute resolution, please check the survey contracted by BEUC and vzbv on the challenge of protecting EU consumers in global online markets: http://www.beuc.eu/publications/beuc-x-2017-122_the_challenge_of_protecting_eu_consumers_in_global_online_markets.pdf

More detailed analysis

Welcome provisions on transparency of negotiations.

The draft mandate provides for welcome provisions for transparent negotiations, including via audio- or web-streaming. It also mentions that civil society representatives should have the possibility to participate in the process as accredited observers. We also welcome the approach to anchor such a multilateral institution inside the UN system, notably UNCITRAL, as this strengthens established multilateral institutions.

Welcome provisions for preventing conflicts of interest

One of the main critics of the old ISDS model was the risk of conflicts of interest. The ICS model contained first attempts to mitigate these risks. We welcome the willingness to further improve the situation through the constitution of a MIC.

The draft mandate published by the Commission takes several of BEUC's demands related to the prevention of conflicts of interest into account: the draft mandate in particular provides in particular for:

- An appeal mechanism.
- Judges to have strong qualifications and guarantees of independence and impartiality, strong ethics, permanent remuneration, a long mandate which is non-renewable and security of tenure.
- The appointment of judges to be done through an objective and transparent process.

The draft mandate also specifies, although without any detail, that proceedings must take place in a transparent manner. The appointment process should follow the same as that of the judges of the European Court of Justice. The judges would be subject to strong requirements on qualifications.

However, the draft mandate does not clarify whether the appointee judges would be working full-time for the court. While guarantees of independence and impartiality are included in the list of conditions, it is not formally mentioned that judges must not be authorised to work as ISDS arbitrators in other cases.

Still missing: checking ICS & MIC compatibility with EU law: need for an ECJ opinion

Many legal scholars and practitioners have raised concerns⁴ regarding the compatibility of the ICS system with EU law, notably in the context of CETA. The Belgian government has introduced a request for an opinion of the European Court of Justice on this topic.⁵

The European Commission argues that its legal service is convinced of the legality of ICS with EU law⁶, the same goes for the legal service of the European Parliament. These

⁴ a) Professor Dr. Inge Govaere, Director of the European Legal Studies Department of the College of Europe, Bruges, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order", Research Paper in Law 01 / 2016;

b) ECJ advocate general Kokott and Christoph Sobotta, "Investment Arbitration and EU law", Cambridge yearbook of European legal studies, volume 18, December 2016, pp. 3-19;

⁵ https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf

⁶ The document has not been made available to the public

opinions are of course important in this debate, however only the European Court of Justice is legally empowered to make such an assessment. It is highly concerning in this time of mistrust in trade policy and investment disputes that this crucial legal check has not been requested by the Commission to the European Court of Justice.

The first step towards the establishment of a multilateral court must be to ascertain its compatibility with EU law. It will clarify once and for all where we stand and create legal certainty.

Once this legal check will be completed, BEUC will define its final position on the MIC according to the respect or not of the other conditions detailed in this paper. BEUC insists on the importance to fulfil these conditions, even if the European Court of Justice would declare ICS compatible with EU law.

Still not addressed: Lack of empirical proof of a need for ICS or MIC

One of the remaining problems in the debate about ISDS and ICS is the absence of empirical evidence of the need of such systems for the protection of investors and of the positive link with foreign direct investment flows⁷. In as the case of TTIP and CETA it has been demonstrated that the use of domestic courts would guarantee legal protection for foreign investors⁸. For instance, the German Magistrate Association declared that there is neither a legal basis nor a need for such a parallel judicial system. The association stated that the assumption that foreign investors currently do not enjoy effective judicial protection is not factually correct⁹.

An empirical demonstration of the necessity of the MIC is urgently required. It would not be acceptable to spend public money on an unjustified system which bears the risk of reducing the current and future levels of consumer protection because of the regulatory chilling effect of claims.

Still not addressed: addition of public interest carve-out

As we demonstrated in this legal analysis¹⁰, recent provisions intending to strengthen the right to regulate, like in CETA, fall short of this aim. The right to regulate has been traditionally understood as defining the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. While the legislator would still be entitled to adopt domestic laws they might under certain conditions have to compensate a foreign investor. The right to regulate article in CETA merely 'reaffirms' this already existing balance. From a public interest perspective, however, this is not the right balance. It cannot properly be construed as a carve-out for decision making in the public interest.

The formulation of the right to regulate article in the CETA ICS chapter 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

⁷ See i.a.: Worldbank: Do Investment Treaties attract Foreign Direct Investment? 2003, <http://documents.worldbank.org/curated/en/113541468761706209/Do-bilateral-investment-treaties-attract-foreign-direct-investment-Only-a-bit-and-they-could-bite>

⁸ See the opinion on the 2015 TTIP resolution of the Legal Affairs committee of the European Parliament, the committee responsible for the interpretation of EU and international law.

⁹ See the statement of the German magistrate association from February 2016: http://www.drj.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitions_gericht.pdf

¹⁰ Joint analysis of CETA's ICS by T&E, Client Earth, BEUC, EPHA and EEB. June 2016. http://www.beuc.eu/publications/joint_analysis_ceta_ics_and_annex_final.pdf

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. Our proposal for a public interest measures carve-out is the following¹¹: *Any claim brought by a foreign investor against such a measure or action has to be declared inadmissible by the Court.*

This must be systematically included in all EU trade agreements containing an investment court chapter. It should also be integrated into the MICS mandate, as a major guidance for the MIC proceedings.

Still missing: opportunity to include the consumer interest in the reform process

In this context of reflexion towards reforming dispute resolution mechanism it is important to keep in mind the consumer interest. Indeed, consumers lack access to specific means of international dispute settlement contrary to investors¹². It would be interesting to find appropriate ways for consumers to tackle issues such as privacy violation or problems in commercial transactions. The Commission should reflect upon means to better enforce consumer interests (or any other public interests, such as public health, worker protection or environment protection) in a cross-border context.

Indeed, until now, the international system of dispute resolution remains not only flawed in terms of the material standards but also with respect to the target groups of international enforcement of standards.

Conclusion

BEUC is in principle against the possibility of a parallel judicial system for investment dispute settlement. However, we recognise the value of the creation of a MIC to put an end to the ISDS system and guarantee a more public and transparent system. Moreover, we would prefer to avoid the duplication of bilateral investment dispute resolution courts.

In this respect, the draft mandate as published by the Commission on 13 September is a step in the right direction. We ask the Council, in the final mandate, to correct the remaining flaws. We also ask the EU institutions to complement the improvements brought to the investment disputes system by clear provisions on carve-out of public interest measures from investment disputes and on availability and accessibility of international dispute mechanisms for consumers.

In any case, we ask the EU not to include any ISDS/ICS provision in any upcoming trade negotiations, before a MICS agreement is in place.

¹¹ This model carve-out has been jointly drafted by the organisations mentioned above.

¹² See reference in footnote 3.



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