FACTSHEET

International investment arbitration

What is international investment arbitration?

Mechanisms to arbitrate between foreign investors and states are usually included in the EU's investment treaties and its past trade agreements. These mechanisms empower investors to initiate proceedings against a state to obtain compensation for alleged violations of their investment rights granted by the treaty.

- An example is ISDS, which stands for Investor-State Dispute Settlement. ISDS schemes originated in the 1950s to allow investors to pursue arbitration when they believed a host nation, usually a developing country, had violated their investment rights and its national courts lacked satisfactory judicial remedies.
- The number of ISDS cases is growing exponentially and has been labelled a "surge": fewer than 50 cases were litigated between the 1950s and 2000, while 942 are known to have occurred as of 2018. (Source: UNCTAD)

This matters to consumers because...

- After civil society and decision-makers pointed to worrying flaws in the system, the European Commission reformed ISDS into a more accountable system: the Investment Court System (ICS). Yet its core remains the same: Foreign investors can claim compensation if they feel that their investment might be affected. This could deter the EU or a country from adopting a consumer protection measure, in order to avoid the risk of long and costly proceedings – and pay-outs. This is known as 'regulatory chill'.
- In October 2016, the Belgian government asked the European Court of Justice for a legal opinion on whether ICS (in the context of a trade deal with Canada) is compatible with European legislation. This followed work by the BEUC network, especially its Belgian member consumer group Test Aankoop/Test Achats, and other actors to highlight the system's shortcomings.
- In April 2019, the Court ruled that ICS is in line with EU law. On consumer protection specifically, the Court found that the agreement's article on the 'right to regulate' is a sufficient safeguard.

Build a watertight safeguard: investor claims related to public interest laws must not be admissible by ICS tribunals

The Court considers that the 'right to regulate' article in the Canada-EU trade deal CETA legally shields our laws from investor attacks. But it could not touch upon the political aspect of ICS – that is, whether Member States might nevertheless settle investors' claims early by lowering their ambition on measures to protect people.

The onus is now on making sure ICS cannot be used as a political (blackmailing) tool to deter the EU, or its Member States, from taking action in the public interest. This should be done by making public interest legislation inadmissible as the basis of an ICS claim (also known as a 'carve out').

BEUC The European Consumer Organisation

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What are the potential risks of ICS for consumers?

- EU taxpayers could see their governments use public money to cover costly legal fees and other expenses related to arbitration trials, burdensome settlement agreements or compensation. To give you an idea, the average legal and arbitration costs per ISDS case – whether won or lost – are estimated at around US$8million, independent from compensation to be paid (Source: OECD). Even though new ICS rules significantly lower these costs, they will still be heavy for countries with restricted budgets.
- ICS might be used as a political tool to deter governments from passing legislation to protect consumers, public health and the environment out of fear by policy makers of being challenged by large companies.

Is there even a need for ICS?

There is no evidence proving the need for a parallel judicial system between developed legal systems. Existing levels of protection in places such as Canada, the EU and US are enough to guarantee legal security for investors. This opinion is shared by the European Parliament's Legal Affairs committee[1] and legal experts[2]. The arguments put forward by proponents have been proven inconsistent by researchers.[3][4]

The Multilateral Investment Court

To move further away from ad hoc arbitration, the EU wishes to set up a permanent body with other countries to resolve investment disputes. It intends to improve logistical flaws of ISDS by setting up an appeal mechanism, resolving judges' potential conflicts of interest and making proceedings more transparent.

It is important to note, however, that this proposed court does not create any rules itself. That is to say: it does not focus on content but on process. It rather uses the investment protection system of the particular trade deal it is asked to rule on. This is why it is important that these trade and investment deals make investor claims on public interest measures inadmissible.

OUR RECOMMENDATION

In order to mitigate any risk posed by ICS, public interest legislation must not be admissible as basis for an investor claim.

[1] This is also the conclusion of 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.

[2] For example, the German Magistrates Association. The European Association of Judges expresses its "serious reservations" about the ICS system.

[3] Jan Kleinheisterkamp, 'Is there a Need for Investor-State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?' - LSE paper, 14 February 2014 – available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410188.

[4] Lauge N. Skovgaard, Jonathan Bonnitcha, Jason Wenn Jackee, 'Costs and benefits of an EU-USA investment protection treaty' – LSE Enterprise for the UK Department for Business, Innovation and Skills, April 2013 – available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf