
Resolution on the EU's Multilateral Investment Court

Introduction

In 2013, the Transatlantic Consumer Dialogue (TACD) published a position paper opposing the inclusion of investor-state dispute settlement ([ISDS](#)) in the Transatlantic Trade and Investment Partnership (TTIP). In 2016, TACD raised concerns about the EU's "investment court system" ([ICS](#)). In the latter paper, TACD noted that EU's ICS proposal did not remedy the fundamental structural problem of the ISDS system, in which one class of interests – foreign investors – are empowered to attack in extrajudicial tribunals consumer protections that apply to domestic and foreign entities alike. We therefore recommended that the U.S. and EU governments should exclude this system in any form from any trade agreement.

Since TACD made these recommendations, the political backlash against ISDS in Europe, the United States, and around the globe has grown exponentially. Massive opposition to all forms of ISDS – including the ICS – among European civil society, academics, judges, and member state governments delayed the conclusion of the EU-Canada Comprehensive Economic and Trade Agreement (CETA). And it triggered a separation between trade and investment in EU's agreements. In parallel, serious doubts about the compatibility of ICS with EU law have emerged, to the point that the European Court of Justice will soon rule on whether ICS in CETA is in line with the EU treaties.

Meanwhile, in the United States bipartisan opposition to ISDS in the U.S. congress was a major factor in ensuring that the Trans-Pacific Partnership never had majority support in the House of Representatives and was rejected by Republican and Democratic candidates in the 2016 presidential election. Widespread opposition across the political spectrum in Europe and the United States to any form of ISDS – whether the EC's 2015 ICS model or the U.S. 2012 Bilateral Investment Treaty model – contributed to the demise of the TTIP negotiations.

Despite this widespread opposition to the investor-state system, in March 2018, the European Commission obtained a mandate from EU member states to negotiate a "multilateral investment court" (**MIC**). The EU plan is to convince other countries to create a global court that would replace private arbitration tribunals in ruling on ISDS claims by foreign investors against governments. The MIC proposal is based on the procedural reforms included in the EU's ICS procedure. On the one hand, the EU push for the MIC demonstrates its recognition that the status quo regarding ISDS is politically untenable. On the other hand, the MIC project fails to address the fundamental concerns about ISDS that TACD and others have raised, such as exposing critical consumer safeguards to attack. Rather, it only addresses some procedural changes, such as independence of arbitrators. More importantly, the MIC could actually institutionalize problematic standards that expose important consumer safeguards to challenge.

TACD Recommendation

The current EU MIC project would continue to empower foreign corporations and foreign investors to challenge outside domestic court systems policies related to all of the issues of which TACD is most concerned, including food safety and labelling, regulation of emerging technologies, financial protections for consumers, protecting consumers' privacy rights, ensuring affordable access to medicines, the safety of drug and medical devices,

affordable quality services, control of toxic products and substances and tobacco regulation. Making some procedural changes to a system that allows one class of interests – foreign investors – to attack in extrajudicial tribunals consumer protections that apply to domestic and foreign entities alike does not remedy the fundamental structural problems of the ISDS regime. Nor does the MIC proposal limit the substantive rights and protections granted to one class of interests - foreign investors – that include rights and protections that extend beyond relevant domestic law in the EU and the United States. Critical consumer safeguards should simply not be vulnerable to such challenges.

TACD recommends that, rather than pursuing procedural changes through a MIC at the global level, the EU and U.S. should refrain from including investor-state dispute settlement in any form from any agreement and should seek to terminate existing treaties that include the mechanism.

ISDS systems have proven harmful to consumers, as powerful commercial interests from tobacco companies to corporate polluters have used investor-state dispute settlement provisions around the world to challenge and undermine consumer protections. The European Union’s MIC project would address some specific criticisms of the current system’s mode of operation, by increasing the transparency of investor-state proceedings, eliminating “double-hatting” where individuals can rotate between serving as arbitrators and as claimants’ counsel, and establishing an appeals process. However, these proposed changes do not address TACD’s fundamental concerns with ISDS. The EU’s MIC project could massively expand and institutionalize a tribunal system outside our domestic courts – open only to foreign investors, not domestic citizens – that grants new rights and protections to foreign investors and formally prioritizes corporate rights over the right of governments to regulate on behalf of citizens.

Background

TACD, academics, legal experts, civil society, and elected officials have all raised a series of criticisms related to investor-state dispute settlement that are elaborated in TACD’s October 2013 position paper, our submission to the European Commission’s consultation in 2014, and our response to the EC’s ICS proposal in 2016. The EU MIC project does not address TACD’s core concerns with the ISDS regime and only partially addresses some of TACD’s specific concerns with elements of the regime’s current modes of operation.

Criticism: ISDS empowers foreign investors alone to bypass domestic courts and go before extrajudicial tribunals, or to re-litigate issues already decided in domestic courts before extrajudicial tribunals. This undermines the rule of law and creates a discriminatory structure in which foreign investors enjoy greater procedural rights than domestic businesses and citizens.

The MIC does not address this concern. As currently proposed, this global investment court project would still be an extrajudicial tribunal and would remain available only to foreign investors. Consumers organizations, trade unions, domestic businesses, nor the governments themselves would have the right to launch claims against corporations. Further, although the EU CETA rules require foreign investors to choose between bringing their claim to a domestic court or an investment arbitration mechanism, they do not require foreign investors to exhaust domestic remedies before appealing to the MIC.

Criticism: The right to regulate is not protected, non-discriminatory public interest policies may be subject to successful ISDS challenge.

The MIC project does not address this concern in a meaningful way. The legal basis for the MIC to assess claims from foreign investors would be on the basis of the substantive investor rights and privileges provided by the ISDS provisions in the trade or investment agreements to which the attacked States are party. The EU included an article on the “right to regulate” in CETA which, it claims, ensures that its ICS system would not affect the right of countries to regulate. However, this article is not a carveout for decision making in the public interest, as its formulation 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. Thus, nothing will prevent the MIC to accept a claim against even a concededly “legitimate” consumer protection measure.

Criticism: The definition of investment is extremely broad, enabling challenges to a wide array of public interest policies and allowing for firms that have made no real “investment” to launch a case.

The MIC does not address this concern. As noted above, the substantive rights and legal definitions determining the scope of actions subject to challenge (ie. the definition of investment) would come from governments’ underlying trade or investment agreements. These agreements continue to define investment very broadly.

Criticism: Foreign investors are granted vague, broadly-interpreted substantive rights such as “Minimum Standard of Treatment (MST), including “fair and equitable treatment” (FET) and a prohibition of “indirect expropriation.” These standards have proven dangerously elastic and favorable to foreign investors in a series of ISDS decisions in which governments have been ordered to pay compensation for non-discriminatory public interest policies.

The MIC does not address this concern because it does not address these broad substantive standards in existing treaties. If the MIC did in fact lead to more consistency in rulings, as its proponents suggest, such consistency could prove to be even more problematic than the status quo for regulation in the public interest. Indeed, for example, the fair and equitable treatment (FET) standard has been the most successful provision in investment agreements that foreign investors have used to attack public policy measures. The FET definition in CETA, for instance, is very broad, allowing for challenges of a wide array of non-discriminatory public interest policies. The substantive investor rights and protections in CETA codify the “frustration” of “legitimate expectations” of an investor as a breach of the standard. While the CETA text states that such broad foreign investor rights “shall not be interpreted” as committing a government to freeze policies in place, the text does not say that the government should not have to pay compensation to investors for changing its policies. Furthermore, the track record of ISDS litigation provides extensive evidence that tribunalists ignore such textual caveats.

The CETA’s expropriation definition, in combination with the broad definition of investment, would allow for findings of expropriation violations that would not pass muster in many domestic courts. As in the standard U.S. FTA text, in its annex on expropriation, the EU allows for non-discriminatory public interest policies to constitute expropriation violations in “the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.” This “rare circumstance” language gives the tribunal undue discretion in this area.

Criticism: ISDS tribunals are rife with conflicts of interest, as tribunalists commonly serve as attorneys for investors in other ISDS cases, and/or have ties to the investors in the cases they are deciding.

The MIC would partially address this concern. The MIC would prohibit tribunalists from participating in cases presenting conflicts of interest or serving as counsel in investment disputes. However it is unclear whether arbitrators would be employed on a full time basis as would be the case in our domestic court systems, which would be a complementary safeguard against conflict of interest.

Criticism: ISDS tribunals enjoy wide discretion – they are not bound by a system of legal precedent or any substantive appeal.

The MIC would partially address this concern. The MIC would include an appeal system with wider grounds for appeal than are currently allowed to initiate “annulment” proceedings under existing ISDS pacts. However, it is unclear whether there would be a requirement for tribunalists to adhere to a system of MIC legal precedent, either in the initial claims process or in the appeals process. And, given the arbitrary, expansive precedents set by past ISDS tribunals, there is no clarity about whether such past awards would be considered precedents for the MIC system. If they were, it would lock in a body of law antithetical to public interest regulation.

Criticism: ISDS incentivizes a pro-investor bias among tribunalists and drawn-out proceedings that mean higher costs to taxpayers. ISDS tribunals are rife with conflicts of interest, as tribunalists. Only foreign investors are able to initiate cases and thus create business opportunities for tribunalists. Tribunalists are paid on an hourly basis, meaning that lengthy cases generate more income than those dismissed at an early stage. These structural problems are exacerbated by the fact that the initiating investor is empowered to select one of three tribunalists and must consent to the chair.

The MIC partially addresses this concern but does not address the structural problem. Under the MIC, tribunalists would be assigned randomly from a roster of appointed judges by states, and the investor would not be empowered to select one of the tribunalists. Tribunalists would have a fixed salary and would no longer be paid by the hour or day. However, it is unclear whether tribunalists would be employed full time, which is necessary to foreclose the possibility of conflict of interest. Moreover, foreign investors would remain exclusively empowered to launch cases, which could continue the structural pro-investor bias.