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Human rights compatibility of investor–State arbitration in international investment protection agreements

Committee Opinion¹

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Mr Geraint DAVIES, United Kingdom, Socialist Group

A. Conclusions of the committee

The Committee on Social Affairs, Health and Sustainable Development has examined the report prepared by the Committee on Legal Affairs and Human Rights. It has a number of reservations with regard to the merits of the proposed Investment Court System (ICS), which is meant to gradually replace the Investor–State dispute settlement (ISDS) clauses in the “new generation” of trade agreements involving European countries and eventually also in the “older” trade and investment treaties. In the view of the Social Affairs Committee, the proposed ICS does not remove many of the central problems inherent in the ISDS system.

The committee considers that the main danger of the Investor–State arbitration systems in both ISDS and ICS is that investor rights “to make a profit” tend to prevail over public policies protecting human rights, in particular social rights such as workers’ rights, and protection of public health and the environment. Unlike the proposed investment protection provisions in the “new generation” trade agreements which have the enforcement mechanism through the proposed ICS, States’ policies to protect the public interest have no equivalent mechanism and could be trumped by the proposed ICS, the successor of ISDS.

The committee considers both ISDS clauses and a permanent, multilateral ICS as unnecessary in developed countries such as the United States, Canada and member States of the European Union as foreign investors are already protected by existing public and contract law. It therefore puts forward a series of amendments intended to reflect its conclusions in the draft resolution presented by the Committee on Legal Affairs and Human Rights.

B. Proposed amendments

Amendment A (to the draft resolution)

At the end of paragraph 3, add the following sentence:

“However, foreign investors in the European Union are already protected in three ways – by the European Court of Human Rights, European law and domestic law.”

1. Reference to committee: [Doc. 13691](#), Reference 4115 of 20 April 2015. Reporting committee: Committee on Legal Affairs and Human Rights. See [Doc. 14225](#). Opinion approved by the committee on 24 January 2017.



Amendment B (to the draft resolution)

At the end of paragraph 4, add the following sentence:

“However, the European Court of Human Rights and European law also protect foreign investors in Europe and no cases have occurred where these, alongside domestic contract and public law, have allowed discriminatory practices against inward investors.”

Amendment C (to the draft resolution)

At the end of paragraph 5.1, add the following sentence:

“, but the primary investor in the vast majority of these cases has been the European Union in smaller third countries that do not have the triple-lock investor protection of the European Court of Human Rights, European law and domestic contract and public law;”

Amendment D (to the draft resolution)

At the end of paragraph 5.2, add the following sentence:

“the parties do not normally have the right of appeal, the tribunals can be inconsistent in their verdicts and may not respect the doctrine of precedent;”

Amendment E (to the draft resolution)

At the end of paragraph 5.3, add the following sentence:

“. There is a number of competing arbitration systems that have not had the benefit of transparent iterative evolution like the delivery of justice in public law in mature democracies;”

Amendment F (to the draft resolution)

At the end of paragraph 5.4, add the following sentence:

“. However, international trade between the European Union, Canada and the United States is well established with existing protections;”

Amendment G (to the draft resolution)

After the first sentence in paragraph 6.1, insert the following sentence:

“However, foreign investors in Europe are already protected – by the triple-lock system of the European Court of Human Rights, European law and domestic law. The proposed ICS”

Amendment H (to the draft resolution)

At the end of paragraph 6.1, add the following sentence:

“Once implemented, such arrangements would persist for twenty years without being open to change or improvement by the European Parliament or member States, irrespective of whether judgments and financial penalties were in conflict with the imperatives of public health, environmental sustainability and rights at work;”

Amendment I (to the draft resolution)

At the end of paragraph 7, add the following sentence:

“However, the Assembly considers that, in developed countries such as the United States, Canada and member States of the European Union, ISDS clauses and a permanent, multilateral ICS are unnecessary to protect foreign investors.”

Amendment J (to the draft resolution)

In paragraph 8, at the end of the third sentence, add the words:

“which should be limited to a reasonable time frame”.

Amendment K (to the draft resolution)

Reformulate paragraph 9 to read as follows:

“The Assembly therefore calls on the European Union not to pursue, in their ongoing and future negotiations of international investment agreements with developed countries, including the Transatlantic Trade and Investment Partnership (TTIP), the establishment of an ICS to gradually replace traditional ISDS mechanisms. It regrets the inclusion of the ICS in the recently signed Comprehensive Economic and Trade Agreement (CETA) with Canada. CETA and TTIP must only be agreed if they are in line with human rights and the rule of law, and should in particular:”

Amendment L (to the draft resolution)

At the beginning of paragraph 9.1, insert the following words:

“ensure that legal proceedings around investment continue to”

Amendment M (to the draft resolution)

In paragraph 9.2, replace the words “such human rights as the” with the words:

“human rights, including social rights,”

Amendment N (to the draft resolution)

Reformulate paragraph 10.1 to read as follows:

“in the creation of an ICS, ensure that the above human rights and rule of law considerations are fully taken into account and that the final judgments of the existing system of public and commercial law consistent with European Court of Human Rights and European law are promptly and fully implemented at the national level;”

Amendment O (to the draft resolution)

Reformulate paragraph 10.5. to read as follows:

“review whether any existing ISDS clauses in international investment agreements that they have entered into are eligible for change and if so, assess their appropriateness and bring them into line with the best practices foreseen for the future ICS.”

C. Explanatory memorandum by Mr Geraint Davies, rapporteur for opinion²

1. The report submitted to the Parliamentary Assembly by the Committee on Legal Affairs and Human Rights mainly reviews the various flaws and drawbacks in the ISDS mechanism, making proposals for improvements to the future ICS so as to safeguard human rights and the rule of law. I see many problems with regard to the proposed ICS.

1. ICS: is it necessary?

2. First and foremost, I believe that there is no need for creating the proposed ICS because domestic and European Union law already creates an environment in which investors can do business subject to consistent, just, and predictable laws. For example, property is already protected from uncompensated and/or unreasonable expropriation by the domestic law, European law and the European Convention on Human Rights (ETS No. 5, “the Convention”) (Protocol No. 1 (ETS No. 9). Moreover, all individuals are protected from discrimination by domestic law, European Union law and the Convention. The existing protections can be enforced in national and European Union courts and before the European Court of Human Rights by foreign investors in the same way as they can be by the citizens of the State.

2. As rapporteur for opinion, I present special thanks to expert Mr Sam Fowles, FRSA, School of Law, Queen Mary University of London.

3. Creating a separate level of law, accessible only to foreign investors, is only necessary if the objective is to give foreign investors different rights compared to citizens. The architects of ISDS/ICS have yet to identify what aspects of domestic/EU/Court law are deficient, how the proposed treaty provisions will remedy those deficiencies, and why the deficiencies should be remedied only for foreign investors and not for citizens. The idea of giving a revolver instead of a rifle for transnationals to shoot democracies is hardly a “compromise”. Indeed, the commercial interests and investment of European enterprises abroad are sufficiently well protected by the courts of host countries, notably the developed ones.

2. An obvious lack of consistency

4. Secondly, I am concerned about the lack of consistency, as ICS introduces an appeals level but it does not, however, introduce a doctrine of precedent. The purpose of appeals courts is to clarify points of law so that the law is predictable and subjects can regulate their behaviour accordingly. If the lower tribunals are not bound by the decisions of the appeals tribunal then they cannot perform this function. The appeals tribunal is reduced to the role of giving investors a second “bite of the cherry” if they lose at first instance.

5. Investment protection law will remain less predictable than domestic law (which, even in civil law European States, is subject to the binding jurisdiction of the European Union courts). This lack of predictability causes issues such as regulatory chill in which governments are incentivised against making decisions that might compromise the interests of investors if a suit is brought against them.

3. ICS failure to address the substantive problems of investment protection provisions

6. Thirdly, objections to the investment chapters in the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) are not limited to the form of the dispute settlement mechanism. The more significant objections concern the substantive provisions of the agreements, which grant investors greater rights against governments than those that are granted to citizens. The provisions in the European Union’s proposal for the TTIP investment chapter go some way to addressing this issue by specifying and limiting the breadth of the “expropriation” and “fair and equitable treatment” provisions and reaffirming the “right to regulate” in the body of the text.

7. This does not, however, solve the underlying issue. While there is a separate level of law for investors, there will always be an incentive for special treatment. If the “expropriation” and “fair and equitable treatment” provisions are truly subject to the “right to regulate” then they offer no substantive protections beyond those in domestic law, in which case they are unnecessary. If they are necessary, then it must be because they offer something beyond domestic law, in which case they are privileging the interests of investors over those of citizens.

8. European efforts should be concentrated on continuing to use existing legal frameworks of public and contract law to protect both the investor and the public interest as regards public health, the environment and social rights. Indeed, whilst the investment protection provisions in the “new generation” trade agreements have the advantage of the proposed mechanism of enforcement through the ICS, the sustainable development provisions have no equivalent mechanism. The same applies to concerns about safeguards concerning public health and social rights. European countries should continue making good use of the precautionary principle to put public safety first without fear of being subjected to legal action in arbitration courts for compensation.

4. The issue of equal access

9. Fourthly, the current proposals for creating the ICS do nothing to address the cost of investment arbitration. This means that small and medium-sized enterprises will be unlikely to benefit from the ICS because the financial risk of bringing a suit and losing will be too great. Indeed, in many cases even the cost of winning (bearing in mind that claimants must make substantial outlays, usually over a period of several years, before seeing damages or costs) will be too great. ICS, like ISDS, is therefore likely to remain reserved only for the most wealthy investors in practice.

5. Inequality of arms

10. Finally, creating a special level of law, with a powerful and effective enforcement mechanism, elevates the interests of investors beyond other, important, interests. Measures to protect, for example, the environment, health, or labour rights do not benefit from a mechanism equivalent to ICS. Even if the

substantive rights given to investors are only the same as those accorded to others, the existence of a specific enforcement mechanism, reserved for investors, provides a greater incentive for governments to consider the interests of investors than to consider other interests. The very existence of a separate level of law and a separate enforcement mechanism, regardless of their content, privileges the interests of investors over the interests of any other party.

6. Concluding remarks

11. In conclusion, I am convinced that investors already receive ample protection, so the case for ICS is based on a false assumption considering that investors need additional protection from discrimination. In fact, investors are already protected in triplicate in the European Union by the European Court of Human Rights, European law and domestic law. There are no cases in the European Union where investors have been successfully discriminated against and therefore no evidence to support the need for an ICS here. Such cases have only occurred outside the European Union where this “triple-lock” protection is not in place.

12. The European Convention on Human Rights protects both property and people against discrimination; so the introduction of the ICS represents discriminatory protection in favour of the investor not available to either citizens or to the democracies that represent them. Therefore, under the ICS, investors and citizens would not be treated equally under the law and this is in conflict with the principle of the rule of law. Citizens and investors in the European Union, the United States and Canada are protected by established systems of public law and contract law. These would be trumped by proposed arbitration panels, and the proposed appeal system would not follow the doctrine of precedent so that if arbitrary decisions were made by the arbitration panel that were overruled in appeal, they could still be repeated in the future. The introduction of the ICS for these countries would be both unnecessary to protect investors and in conflict with the rule of law, human rights and democracy.

13. In addition, the ICS would also give investors disproportionate powers to use against the interests of human rights, democracy and the rule of law, and there are many cases, to suggest that such powers would be exercised. In such cases, the same investor powers proposed for ICS have been used in its predecessor ISDS to undermine the public good – including undermining laws to protect the environment, public health and rights at work – when laws potentially reduce the profit of investors. Therefore, the ICS would subjugate democracy, human rights and the rule of law on the false pretext of investor protection. ICS represents a fundamental shift away from democracy in favour of transnational corporate power and should not be included in any transatlantic trade agreement, including CETA and TTIP.