

Establishment of a multilateral investment court for investment dispute resolution

Transport & Environment feedback on roadmap

September 2016

On 1 August 2016 the Commission published its [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 of 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.

1. Feedback on policy options

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:

- a. 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.
 - b. 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.
 - c. 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.
 - d. 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.

Further information

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