

# **Opinion on recommendation of a Council decision authorising the opening of negotiations for a convention establishing a multilateral court for the settlement of investment disputes (COM (2017) 493 final)**

No. 21/17

November 2017

## **A. Purport of the opinion**

The German Association of Judges is asking the Bundestag and Bundesrat to deny the European Commission the required mandate to negotiate the establishment of a Multinational Investment Court (MIC).

International investor protection requires clear substantive legal requirements that have thus far been lacking. The path envisaged by the European Commission to creating a multinational court that can create its own applicable law is the wrong one.

## **B. Assessment in detail**

### **A. The mandate for a Multilateral Investment Court (MIC)**

#### **I. The proposal of the Commission**

With the proposal for a mandate from the Council to instruct it to negotiate the establishment of a Multinational Investment Court (MIC) (COM (2017) 493 of 13 September 2017), the European Commission aims to institutionalize supranational investor protection. The objective is for the negotiations to lead to an agreement establishing a multinational dispute resolution court (Article 1 of the proposal). States around the world are to be invited to accede to this agreement.

The negotiations are to be led by UNCITRAL and the EU represented by the Commission. Member states can participate in the context of serious cooperation (Mandate Annex 1, Nos. 1-4). Representatives of civil society should be involved in the discussions.

Both the Union and the member states would become members of the Convention.

The jurisdiction of the court, whose contours are only approximately described in the mandate, depends on an agreement in the respective (commercial)

Agreement (Annex 1, No. 5 et seq.). The court would have two instances, whereby the second instance (appeal instance) can assess the decisions of the first instance for errors of law or manifest errors in the appreciation of facts, Annex 1, No. 8). The selection of judges must meet strict requirements. They would be appointed for an extended, non-renewable period and be independent. The procedure would be public ('in a transparent manner', No. 11) and supported by an efficient international enforcement system. It should be ensured that developing countries can use the system.

## II. A Court without substantive law

International investment protection law is characterized by a lack of substantive law principles. There is great uncertainty even about the interpretation of fundamental principles; at the interpretation of what are probably the 'most important protection standards', fair and equitable treatment standards (FETS), the 'party applying the law must interpret a completely unknown clause expressed in very vague terms' (Andrea Schernbeck), *Der FETS in internationalen Investitionschutzabkommen*, pp. 19, 41). No parliamentary law exists; the scope and application of customary international law to the broadly expressed clauses in commercial contracts is uncertain. This was the intention at the establishment of the ICDS. Aron Broches, the then General Counsel of the World Bank, aware of the impossibility of making substantive agreements concerning investor protection, proposed in the 1960s that a procedure for dispute settlement be established first (Stephan Schill *Reforming International Investment Law: Institutional Change v. System-Internal Adaptation*, 30 October, 201 (sic) [www.ejiltalk.org](http://www.ejiltalk.org)). A system should be established which creates its own substantive law ('He [Broches, the author.] meant to create a framework for resolving investor-state disputes that could work out substantive rules on the go', Schill, loc.cit.) and which was described by Broches as 'procedure before substance'. Although the international political situation has changed in the last 50 years, it has thus far not been possible to definitively codify the rights of foreign investors on an international level or indeed confirm these through the Parliaments of states and thus create a dependable, democratically legitimized legal foundation. However, this difficulty in reaching international agreement as to which special rights should accrue to investors worldwide cannot lead to dispensing with the definition of investor protection through the establishment of arbitration bodies. This is the task of the Parliaments and must be demanded of them.

The lack of substantive legality of the 'procedure before substance' in investment protection would be reinforced by the establishment of an MIC. The mandate sought by the Commission envisages the establishment of a court which, in its turn, would also lack democratically established law as a basis for making decisions. The Commission acknowledges this by observing that questions of applicable law, standards of interpretation and compatibility with other international obligations such as the UN Conventions, should not be established in the mandate but rather in individual contracts (Mandate, Explanatory Memorandum, No. 1). A look at the pertinent provisions of CETA shows that the years of negotiation between the Commission and Canada have yielded little concrete result, and have only led to the usual requirements in investment protection agreements. FETS ('fair and equitable treatment standards') was given form through the regulations on 'denial of justice', 'fundamental breach of due process' and others (Art. 8.10 Clause 2 a-f.), which require interpretation; nor was 'manifest arbitrariness' left off the list. More detailed substantive law requirements do not exist.

Therefore, the planned review of the decisions of the court of the first instance through an appellate chamber of the MIC for legal errors ('errors of law', Mandate Annex No. 8) can

only refer to its own jurisprudence. Substantive law for an assessment of legal errors is lacking.

This is even more critical, since investment arbitration courts are already exercising direct power in the respective states. Because of their position, they can override decisions of national administrations and courts in favour of an investor. This exercise of power, exercised by an arbitral tribunal, has thus far been limited to the enforcement of individual arbitral awards. However, it would be considerably strengthened if the arbitral tribunals were upgraded to an MIC with permanent jurisdiction, which would operate under an international convention. Together with the investment protection agreements, as part of European law, the MIC Convention will be recognised by international law and can thus bind national courts. This will make the MIC a standard-setting organization.

### III. A special court without proven necessity

The protection of individual goods, including those of investors, is the daily work of the judges of all judicial courts and instances. In principle, these rights can also be claimed by foreign investors. The lack of substantive investor protection law prevents a review of whether foreign investors' claims fail (if they fail) because substantive law puts foreign investors in a worse position because the court system in general (due to corruption or poor organisation) does not function correctly or because the courts fall prey to a national bias. It would first need to be determined where national law places investors in a worse position and, insofar as politically desirable, national law changed. This does not require establishment of an international court.

In addition, the best investor protection is a functioning, uncorrupted administration and jurisdiction and a democratic legislative process. It is the task of every investor to determine this; they can avoid investments in countries that do not fulfil these standards. If they, nonetheless, take the risk, no special protection is necessary. Only where unexpected circumstances in a country change such that the investor is unjustifiably without rights, can the international community have an interest in intervening. When such failure exists on the part of a state, who determines this and what individual rights accrue to an investor through this must be analysed carefully to create international substantive law and procedural law on this basis. Of the essence here would be a mechanism for establishing failure on the part of a state, which would unjustifiably rob an investor of their rights.

### B. Conditions for the establishment of an MIC

The German Association of Judges, therefore, rejects the mandate at this time along with the authorisations proposed by the European Commission.

#### I. Substance before procedure

Whether this requires separate investor protection must be decided politically. If this is the case, and this protection is to be procedurally safeguarded by an MIC, an indispensable prerequisite is the development of a substantive law canon of the investor rights to be protected. This step, which the national parliaments must take, cannot be denied by arguing that the development of substantive investor protection must be the domain of individual trade agreements only. The decision-making basis for the judges of the MIC must be

developed and internationally acknowledged before such a court can be established. Specifically, the difficulty of reaching agreement internationally concerning such rights highlights the necessity of not leaving their definition to an appeal chamber of an MIC. 'Substance before procedure' is the only viable path.

Only through 'substance before procedure' can it also be guaranteed that investor protection would not end up as a business model of a complaint industry or dishonest investors.

## II. Development of legal assistance for the host country

From the point of view of the German Association of Judges, the political decision for investor protection must go hand in hand with an expansion of international legal assistance. Investment protection has thus far only addressed the protection of investment in the host state. A convincing regulation of investment protection, however, only has a chance of success if the host state and its citizens also receive equivalent legal protection from the investor. It is easy for the investor, after a failed investment with considerable loss in the host state or even after criminal activity, to terminate the investment and remove all assets from the host state. Complaints against the subsidiary in the host state can no longer be served, titles cannot be enforced, and criminal investigations can no longer be carried out.

From the point of view of the German Association of Judges, it is therefore essential to also include in commercial contracts, in addition to investor protection, chapters on international legal assistance in civil, administrative and criminal matters that are the object of the investment. In order not to lose its investor rights, the investor must also cooperate across national boundaries with the authorities of the host country within the framework of public order of the investor's country.

## III. MIC only conceivable for existing contracts

However, the German Association of Judges deems it necessary to find a solution for existing bilateral investment treaties (BITs) with investment protection clauses. The termination of these clauses due to lack of substantive legal content initially leads to the continuation of investment protection agreements - sunset clauses - during which arbitration tribunals can be called upon.

To what extent BITs between member states of the EU require a separate regulation which also secures the validity of European rule of law in this area regarding cross-border investments, will depend upon the decision of the CJEU in the matter of the Slovakian Republic versus Achmea BV (C-284/16).

Regarding this, the German Association of Judges shares the view of the governments in the non-paper of 07 April 2016 on intra-EU investment treaties (Trade Policy Committee 25/16), according to which the termination of arbitration clauses for BITs between member states of the EU could lead, outside the EU, to doubts about their necessity (non-paper Par. 2,6,2). It is incomprehensible to the German Association of Judges why a trade agreement between partners with democratic governments and a functioning judiciary, as is the case with all EU member states, requiring special rules for investor protection that bypass the Parliaments in terms of substantive law, should be set up and enforced by a special court. This also applies to agreements with constitutional states outside the EU, such as Canada. The mistrust of their own judiciary (q.v. no. 11) expressed in the governments' non-paper and the lack of

willingness to invest in a MIC, instead of investing in their own judiciary, is irritating. An MIC for investor protection between EU Member States or EU member states and third countries with a stable judiciary requires justification that is thus far not apparent.

Only where BITs with countries outside the EU already exist and deadlines for the continuation of investor protection clauses are to be bridged during the course of sunset clauses does the Commission's proposed agreement on the establishment of an MIC with independent judges, a public procedure and an appellate body represent progress compared to previous arbitral tribunals.

However, the mandate is not in fact formulated forcefully enough to ensure that the established requirements for an independent court can be met in full.

From the point of view of the German Association of Judges, it must be ensured that an established investment protection court is set up only for existing BITs during the term of the investment protection (sunset clause). The previously mentioned 'substance before procedure' cannot, therefore, be circumvented because existing arbitration tribunals are to be improved.

It must be ensured that the decisions of the established arbitral tribunal do not bind either the European Court of Justice or the courts of the member states. This must be explicitly stated in an agreement.

The judges must come from the jurisdiction of the participating states and bring professional experience with them. Work as an arbitral judge or counsel before courts of arbitration cannot count as required experience.

It must also be possible for proceedings to be carried out without risk for economically weak countries. The possibility must be ruled out that a litigation industry is created, because eligibility for arbitration is established, the mere presence of which will put countries under pressure. The established arbitration court, therefore, needs a narrow fee framework for counsel, which is binding on all parties.

The characteristic of the investor as 'foreign' and the origin of the invested money from clean sources must be confirmed *ex officio*.

#### IV. Compatibility with European and national legal systems

On 6 September 2017, the Government of the Kingdom of Belgium responded to various demands, including that of the German Judges Association, and called upon the European Court of Justice to clarify the compatibility of ICS with European primary law. It is essential to wait for said clarification prior to a granting mandate.

However, scepticism remains about the competence of the EU to establish an international court and that court's compatibility with German constitutional law. Nor has it been clarified to what extent this jurisprudence is compatible with the guarantee of the system of property ownership of the Member States in Article 345 TFEU and the social obligation aspect of property in Article 14 GG (Basic Law) enshrined in the constitution.

In the opinion of the German Association of Judges, the conclusion of investment protection agreements with the United Kingdom after its withdrawal from the union would be incompatible with the concept of the Union.

ENDS

*This translation was provided by EuroMinds Linguistics and has not been verified by the Deutsche Richterbund. Only the German original is an authentic document of the Deutsche Richterbund and can be found here: <http://www.drb.de/stellungnahmen/2017/multilateraler-gerichtshof-fuer-investitionsstreitigkeiten.html>*