

FROM ISDS TO ICS: A LEOPARD CAN'T CHANGE ITS SPOTS**POSITION PAPER ON THE COMMISSION PROPOSAL FOR AN INVESTMENT COURT SYSTEM IN TTIP**

This position paper illustrates Greenpeace's position on the Commission proposal (the Proposal) for an Investment Court System (ICS).¹

The Commission presented the Proposal at the end of 2015, after its initial approach to Investor-to-State Dispute Settlement (ISDS) mechanisms received vehement criticism by the public, NGOs, SMEs, media and political parties in the European Parliament.

The public debate on ISDS and the results of a public consultation on the inclusion of the mechanism in the Transatlantic Trade and Investment Partnership (TTIP), in which a majority of the replies opposed ISDS because it was "*perceived as a threat to democracy and public finance or to public policies*",² forced the EU Commission to suspend for two years (from January 2014 to February 2016) the negotiations on the TTIP investment chapter and to rethink its approach to investment protection.

Whilst containing some improvements in comparison with the investment provisions included in the draft text of the Comprehensive Economic Trade Agreement (CETA) negotiated with Canada,³ the new Proposal substantially fails to address and mitigate our concerns on the detrimental impact of ISDS mechanisms on the protection of public interests, such as health and the environment, and on the fair and non-discriminatory access to justice.⁴

Furthermore, the Proposal does not live up to the engagements taken by President Juncker and Commissioner Malmström before the European Parliament and fails to fulfil the mandate for the replacement of ISDS given by the European Parliament to the Commission in its resolution of 8 July 2015.⁵

¹ The Proposal was transmitted to the United States in the context of the TTIP negotiations and made public on 12 November 2015. http://europa.eu/rapid/press-release_IP-15-6059_en.htm

² See, European Commission, Staff Working Document, Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Page 14. http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf

³ We refer to the version published on 26 September 2014: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

⁴ See, Greenpeace Position Paper of 7 April 2014: "*Investor-to-State Dispute Settlement mechanisms in free trade agreements and bilateral investment treaties: a threat to democracy, the rule of law and access to justice.*"

⁵ European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>

Indeed:

1. Under the Proposal, **foreign investors still benefit from greater rights than domestic investors.** These include: (i) the right to fair and equitable treatment (FET), which includes the protection of legitimate expectations, even if generated by declarations by individual officials not reflecting national or EU authorities' decisions; (ii) the protection against direct and indirect expropriation, and, (iii) the possibility of enforcing EU and Member States' contractual obligations before investment tribunals (through the "umbrella clause"). These rights are not defined in precise terms and often, as in the case of the protection of legitimate expectations or against direct and indirect expropriation, their scope is wider than the scope of correspondent rights granted to domestic investors. By contrast, the Proposal does not give the EU or Member States the possibility of enforcing investors' legal obligations or establishes a binding duty for investors to comply with internationally recognised CSR standards and principles. **Thus, the Proposal treats foreign investors more favourably than the domestic ones but does nothing to ensure that they are held accountable for their behaviour.**
2. The ICS is not a real court system. **Contrary to what the European Parliament demanded, ICS tribunals will not be composed of "professional judges":** their members will be legal professionals that will be free to act, at the same time, as arbitrators or counsels in ISDS cases under other international investment agreements. The rules on conflicts of interests in the Proposal do not effectively prevent "*judges*" from sitting in cases where their impartiality is at stake.⁶
3. **ICS will work as a separate avenue for investors claims. It will not be subject to the judicial scrutiny of EU supreme and constitutional courts, including the EU Court of Justice (CJEU). Therefore, the Proposal does not ensure the consistency of the ICS's case law with that of EU courts.** In turns, this will likely result in a more favourable treatment for foreign investors. Not only is this inconsistent with the rule of law and the equality principle: the ICS might also violate the exclusive jurisdiction of the CJEU on the interpretation of EU law. Thus, if asked for an opinion on the legality of ICS,⁷ the CJEU may find the proposed new system incompatible with the EU treaties.⁸ Furthermore, the Proposal does not require investors to exhaust internal remedies

⁶ It is also important to note that, even if the Proposal will be accepted by the US, the creation of ICS cannot be taken for granted, since it will be subject to the subsequent agreement of the TTIP Committee on Services and Investments, and, therefore, may never take place: this means that investors' claims under the TTIP could be decided through ISDS procedures even if the stated objective of the Proposal is to replace them.

⁷ Article 218(11) TFEU states that "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

⁸ On 3 February 2015, the Deutscher Richterbund, the largest German association of Judges, issued a statement warning that ICS would interfere with the member states and EU's judicial and legislative systems: <http://www.drb.de/cms/index.php?id=952>. Several scholars and NGO have taken position on the illegality of ICS under EU law. See, among others, ClientEarth's briefing of 22 October 2015: <http://documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf>.

before proposing a claim before ICS tribunals. In other words, **the Proposal limits the jurisdictions of EU and national courts, establishing a special regime to solve foreign investors' claims.**

4. **The Commission has failed to protect the EU and Member States' right to regulate in the public interest.** Investors' claims under the ISDS have been used to directly attack environmental, health and labour protection measures or to discourage their adoption. The Proposal provides for a weak definition of the "right to regulate", which would cover only measures "*consistent*" with, and thus subordinated to, the TTIP provisions and give ICS tribunals the competence to decide whether a measure is "necessary" to protect the public interest.

For these reasons, Greenpeace calls on the European Parliament, the Council and the parliaments of the EU Member States to reject the Commission Proposal for the creation of an ICS in TTIP.

In addition, seen that the ICS will create a new dispute resolution mechanism that might interfere with the jurisdiction of the CJEU, Greenpeace urges the Commission, the European Parliament and the Council to consult the court, as provided for in Article 218 TFEU, on the validity of the ICS under EU law.

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1. Background.

In its “*Political Guidelines for the Next European Commission*”, presented to the European Parliament on 15 July 2014, President-Elect Juncker made the following political statement:

“As Commission President, I will also be very clear that I will not sacrifice Europe’s safety, health, social and data protection standards or our cultural diversity on the altar of free trade. Notably, the safety of the food we eat and the protection of Europeans’ personal data will be non-negotiable for me as Commission President. Nor I will accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context.” (Emphasis added).⁹ Commissioner Malmström supported President Juncker’s position at her hearing before the European Parliament on 29 September 2014.¹⁰

On 8 July 2015, taking into account President Juncker’s Political Guidelines, the European Parliament recommended to the Commission:

“To ensure that foreign investors are treated in a non-discriminatory fashion while benefiting from no greater rights than domestic investors, and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives”.¹¹

In response to the Parliament’s recommendation, on 12 November 2015, the Commission presented a Proposal to replace ISDS mechanisms with an ICS, and to strengthen the EU and Member States’ right to regulate.

This Proposal represents the EU negotiating position and does not bind the United States. Therefore, there is no guarantee that it will be included in the agreed text of the TTIP.¹² As it stands, however, the Proposal fails to fulfil President Juncker’s political engagement to ensure that the jurisdictions of EU

⁹ http://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf

¹⁰ Her written answers to the European Parliament contain the following statement: “*I fully support this approach of the President-elect and will work in this sense in the negotiations, which are ongoing and where this issue is on the table.*”
http://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/malmstrom-reply_en.pdf

¹¹ European Parliament, Resolution of 8 July 2015, Para XV.

¹² Press articles have reported that the EU and US positions on investment dispute resolution mechanisms are distant and it is unlikely that the US will accept the EU’s ICS proposal. See: <http://www.politico.eu/article/eu-faces-tough-sell-on-ttip-compromise-malmstroem-froman/>

courts will not be limited by special regimes for investor disputes and that the Rule of Law and the principle of equality before the law will be upheld. Similarly, as we explain in the following paragraphs, it fails to meet the recommendation addressed to the Commission by the European Parliament.

2. **Under the Proposal, foreign investors will still benefit from greater rights than domestic investors.**

The Proposal does not solve the core issue affecting investment agreements, i.e. the preferential treatment granted to foreign over domestic investors. On the contrary, it maintains a set of rights for foreign investors to invoke before the new ICS against the EU and Member States' authorities.

These rights **are not limited to post-establishment provisions**, as expressly asked by the European Parliament,¹³ but include pre-establishment protection. This means that potential investors could claim compensation for EU or national provisions that, in their view, limit their market access, without having committed resources or having made any contribution to the economy of the host state.

The **"fair and equitable treatment" (FET)** clause contained in CETA, whose terms are prone to extensive interpretation by investment tribunals, is fully reproduced in the Proposal's text.¹⁴

US investors could claim compensation for **breach of legitimate expectations**, by referring to specific representations made by officials, even if these are not incorporated in written documents.¹⁵

On **expropriation**, the Proposal puts foreign investor in a more favourable position than EU citizens and companies by requiring *"prompt, adequate and effective compensation"* as a condition for the expropriation's legality,¹⁶ whereas standards in force in Europe, based on the case-law of the European Court of Human Rights, require compensation to be *"appropriate, just and equitable"*, giving appropriate consideration to the public interest served by the expropriation.¹⁷

On **indirect expropriation**, and despite a specific recommendation from the European Parliament,¹⁸ the Proposal maintains a vague language that could result in investors being compensated for the adoption of public interest measures. In particular, the Proposal does not currently provide any guidance on how protection against **indirect expropriation** should be applied. Therefore ICS tribunals will have a wide margin of appreciation on whether national measures are *"so severe in light of their purpose"* that they appear *"manifestly excessive"*, obliging public authorities to compensate investors.¹⁹ Had the Commission

¹³ European Parliament, Resolution of 8 July 2015, Para XIV.

¹⁴ This clearly results from a comparison of CETA, Chapter 10, Article 9 and TTIP, Chapter II, Section II, Article 3 (Treatment of Investor and of Covered Investment).

¹⁵ TTIP, Chapter II, Section II, Article 3(4).

¹⁶ TTIP, Chapter II, Section II, Article 5(1) (d).

¹⁷ See : UNCTAD, Expropriation - Series on Issues in International Investment Agreements II. Geneva 2012, and the case law at page.41: ECHR, Judgement of 5 November 2001, *Pincova and Pinc v. Czech Republic*.

¹⁸ European Parliament, Resolution of 8 July 2015, Para. XIV.

¹⁹ Proposal, Annex I.

been serious about protecting the EU's and public authorities' right to regulate, it could have limited investment tribunals' discretion for instance by following UNCTAD recommendations and by listing specific types of measures that do not constitute expropriation.²⁰

The Proposal includes the “**umbrella clause**” (not present in the draft CETA text), which extends international investment protection to contractual obligations between the EU and the Member States, on the one hand, and investors, on the other hand. The umbrella clause provides a clear advantage to foreign undertakings over domestic ones, allowing them to bypass national court systems to solve contractual disputes.²¹

Against this background, the Proposal does not contain any provision to allow EU or Member States' authorities to enforce investors' legal obligations or to oblige investors to comply with internationally recognised standards and principles of corporate social responsibility (CSR).

3. **The ICS is not subject to democratic principles and scrutiny. The judicial function in the ICS is not exercised by independent professional judges.**

The Commission proposed the creation of a court system to replace the ISDS model currently used in CETA. Despite the name, however, the ICS has very little in common with a real judicial system.

Investment courts under the ICS would be completely detached from the EU or the US judicial systems and operate in accordance with a separate set of rules. EU or US Supreme Courts would not have any means of ensuring consistency of ICS “rulings” with the respective case law or constitutional rules.

The European Parliament clearly rejected the ISDS model and the possibility that investment disputes be decided by arbitrators (i.e. by individuals not permanently and exclusively serving in a judicial institution). The Parliament's recommendation is clearly aimed at avoiding that investment disputes be solved by lawyers, or other professionals, that could be structurally subject to conflicts of interest.

The Proposal fails to address this crucial aspect: indeed, it does not foresee that ICS “judges” shall serve on a full-time basis (a Committee on Services and Investments may take this decision),²² thus being prevented from engaging in any occupation that may affect their independence. The Proposal only requires these “judges” to “*stay abreast of dispute settlement activities*”²³ under the TTIP. ICS “judges” have an ethical obligation to abstain from participating “*in the consideration of any disputes that would create a direct or indirect conflict of interest*”.²⁴ However, the existence of a conflict of interest under the

²⁰ UNCTAD, World Investment Report 2015, “Reforming International Investment Governance”, page 139. Available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

²¹ See TTIP, Section II, Article 7, Observance of written commitment.

²² Proposal, Article 9(15).

²³ Proposal, Article 10(11).

²⁴ Idem, Article 11(1).

Proposal does not invalidate a ruling that the panel of “judges” may adopt. Indeed, ICS rulings may be annulled, on the basis of Article 52 of the ICSID Convention, when “*corruption on the part of a member of the tribunal*” is demonstrated. This is a different breach of rules of conduct than the existence of a conflict of interest.

Furthermore, an issue of conflict of interest may only be raised by one of the litigating parties (and not be declared by the tribunal on its own motion). For these reasons, the system is not structurally fit to prevent and detect situations in which a “judge” would not be entirely and fully independent from the interests at stake in a case.²⁵

Finally, the Proposal does not guarantee that the ICS will ever be functioning. The Committee on Services and Investments will have the task of establishing the ICS. However, in absence of a Committee’s decision, nothing will prevent investors from filing a claim before an ISDS arbitration panel.²⁶

4. The ICS will not ensure consistency of judicial decisions and will limit the jurisdiction of courts of the EU and of the Member States.

Under the proposal, ICS panels are required to treat national law (i.e. the law of the EU and Member States) as a “fact” and therefore to refrain from interpreting it. In case interpretation is needed, ICS panels are required to “*follow the prevailing interpretation of that provision made by the courts or authorities*” of the EU or of a Member State.²⁷

This provision of the Proposal, on the one hand, admits that ICS “judges” may find it necessary to decide on the meaning of EU or national laws, for instance when a decision on the legality of an investment is taken, or when it is necessary to decide whether an EU or national decision violates substantive or procedural standards of due process or good administration. However, the said provision is manifestly insufficient to ensure that the case law of ICS tribunals will be consistent with the interpretation made by the EU Court of Justice or by national Supreme Courts.

The task of ensuring the coherence of ICS jurisprudence is delegated to the ICS Appeal Court.²⁸ However, differently from a national court, this appellate body will not be able to make a reference to the EU Court of Justice and ask for the interpretation of EU law and will not be subject to the judicial supervision of national Supreme and Constitutional courts. This may result in a separate case law, applicable only to foreign investors, which may be inconsistent with the jurisprudence of domestic courts.

²⁵ Idem, Article 11(2).

²⁶ The provisions on the Committee are yet to be drafted. If the Committee fails to proceed with the creation of the ICS, it seems logical that investors will be nevertheless authorised, under Articles 6(2) and 7 of the Proposal, to file a claim under the ICSID rules, the ICSID Additional Facility Rules or the UNCITRAL arbitration rules.

²⁷ Proposal, Article 13

²⁸ Proposal, Article 29(1)(a).

This contradicts the European Parliament’s recommendation. It also conflicts with the case-law of the EU Court of Justice, which has consistently held that the EU cannot conclude international agreements that would undermine the “*autonomy of EU law*”, by conferring interpretative powers to courts outside the EU judicial system.²⁹

In addition, the Proposal does not foresee the exhaustion of national remedies as a condition for an investor to start a claim before the ICS. This means that, contrary to what President Juncker and Commissioner Malmström promised, and to what the European Parliament requested, investors will be allowed to bypass domestic courts.

5. **The Proposal does not protect the right to regulate.**

In TTIP, the Commission has aimed to introduce provisions to protect the right of the EU (and its Member States) to regulate in line with public policy objectives. Nonetheless, an analysis of these provisions shows that this right is subject to severe limitations, and that ICS tribunals (which, as we have seen, do not ensure independence and impartiality and have no democratic accountability) would retain a great margin of discretion in assessing public authorities’ decisions.

Indeed:

1. Public authorities must exercise the right to regulate in a way that is “*consistent with the provisions*” of the TTIP title on investors’ rights.³⁰ Thus, in the system envisaged by the proposal, the right to regulate is recognised but subordinated to investors’ protection. Had the Commission really intended to ensure that “*private interests cannot undermine public policy objectives*”, as requested by the European Parliament, it would have been well advised to adopt the opposite approach, requiring that investment rights must be protected in a way that is consistent with the public interest;
2. **Under the Proposal, Public authorities have the burden of proving that a measure adopted in the public interest is “necessary” for that purpose.**³¹ ICS tribunals might therefore have the power of assessing the necessity of national and EU measures and order investors to be compensated if, in their judgement, public authorities have gone beyond what was necessary to protect, for instance, the environment or public health. The Commission could have avoided the insertion of this strict necessity test in the proposal, by simply requiring that public measures be “related to”, “aimed at”, or “designed to achieve” a public policy objective, as it is recommended by the UNCTAD.³² By referring to the necessity principle, the Commission has enhanced the risk

²⁹ See, in particular, Opinion 1/09 of the Court of Justice, of 8 March 2011, paragraphs 76 and subsequent.

³⁰ TTIP, Chapter I, General Provisions, Article 1, Objective coverage and definitions.

³¹ Proposal, Article 2(1).

³² UNCTAD, World Investment Report 2015, “*Reforming International Investment Governance*”, page 141.

that environmental, health and labour regulation will be attacked by private interests if TTIP enters into force.

List of Abbreviations

CETA	Comprehensive Trade and Economic Agreement between the EU and Canada
CSR	Corporate Social Responsibility
EU	European Union
CJEU	European Court of Justice
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-to-State Dispute Settlement
MS	Member States
NGO	Non-Governmental Organisation
SME	Small and Medium Enterprises
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America

For more information please contact:

Andrea Carta

EU Legal Strategist

Tel: +32 2 274 1920

andrea.cart@greenpeace.org