

# Multilateral investment court strengthens investments vis-à-vis democracy and fundamental rights

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# 1 Introduction

This position paper is the attachment to the [FFII submission](#) to the [public consultation](#) on a multilateral reform of investment dispute resolution. ([blog](#), [pdf](#))

A multilateral investment court (MIC) would strengthen investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

Investor-to-state dispute settlement (ISDS) gives private parties access to the supranational level. This discriminates against companies operating locally and comes with systemic issues which create a high risk of expansive interpretations of investors’ rights. Specialised courts and tribunals tend to interpret expansively; the supranational level lacks effective instruments to correct expansive interpretations.

Compared with ISDS a multilateral investment court would bring institutional improvements. Such improvements, however, do not solve the discrimination and systemic issues. Moreover, a huge expansion of covered foreign direct investment will increase social and environmental impacts.

The multilateral investment court proposal is based on the [inception impact assessment](#) “Convention to establish a multilateral court on invest-

ment” (IIA). The IIA’s baseline scenario – what will happen without policy changes – is just one sentence long and does not expect a multilateral investment court to have social or environmental impacts. This paper presents more comprehensive baseline and multilateral investment court scenarios. In both cases, comprehensive scenarios indicate growing social and environmental impacts.

A multilateral investment court, in contrast with domestic law systems and the European human rights system, would give investors too generous possibilities to claim compensation. This would make reforms and (enforcement) measures potentially prohibitively expensive and cause regulatory chill. This would impede crucial measures on climate change and impede reform of intellectual property rights. Furthermore, the MIC’s adjudicators would not have to read provisions in the light of the EU Charter of fundamental rights, as the EU Court of Justice would do. A multilateral investment court risks undermining the protection of personal data.

In the light of the need to protect fundamental rights, and in the light of the risks of climate change, the EU can not ignore, legitimise, or perpetuate growing impacts. The commission has to investigate which options will eliminate social and environmental impacts and reject the multilateral investment court option.

## **2 Comprehensive baseline scenario shows growing impacts**

### **2.1 Substantive provisions, existing impacts**

The existing investment treaties are mostly very open. Investor-to-state dispute settlement tribunals have expansively interpreted “nearly every provision found in investment treaties”.<sup>1</sup> ISDS tribunals even went be-

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<sup>1</sup>Statement of Concern signed by over 110 scholars; Since this statement, the material provisions did not change substantively; Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) (see section [General assessment](#))

yond levels of protection offered by domestic courts.<sup>2 3</sup>

The future EU agreements will provide a similar level of protection. The EU-Canada CETA mandate stipulates “the highest possible level of legal protection and certainty”.<sup>4</sup> The mandate for the EU-US TTIP aims at the “highest standards of protection that both Parties have negotiated to date”.<sup>5</sup>

The proposals for EU trade and investment agreements codify expansive interpretations.<sup>6 7</sup> For instance, regarding the fair and equitable treatment standard, arbitrator Todd Weiler said:

“I love it, the new Canadian-EU treaty... we used to have to argue about all of those [foreign investor rights]... And now we have this great list. I just love it when they try to explain

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<sup>2</sup>Two examples. First, the Dutch Raad van State’s Administrative Jurisdiction Division (Netherlands’ highest general administrative court) is very restrictive regarding legitimate expectations; see for instance [decision 201113437/1/R2, 20 juni 2012](#). In contrast, ISDS tribunals have interpreted legitimate expectations in a broad way. [Lise Johnson and Lisa Sachs](#), *The TPP’s Investment Chapter: Entrenching, rather than reforming, a flawed system*; page 5, on the Bilcon award: “Under that approach, a tribunal identifies what it considers to be reasonable or legitimate expectations – which may have been generated by a wide range of even non-binding government conduct and need not rise to the level of actual ‘rights’ – and then strictly scrutinizes government actions or inactions to determine whether the investors’ expectations were wrongly frustrated”. Secondly, ISDS tribunals have seen the exercise of discretionary power as discrimination. See section on data protection. See also [Gus Van Harten, Matthew C. Porterfield, Kevin P. Gallagher](#), *Investment Provisions in Trade and Investment Treaties, The Need for Reform*.

<sup>3</sup>As an example of the relationship between changes to the regulatory environment and investment protection under existing treaties, see [Roger Alford](#), *Brexit and Foreign Investors’ Legitimate Expectations*.

<sup>4</sup>CETA mandate [paragraph 26a](#)

<sup>5</sup>TTIP mandate [paragraph 22](#)

<sup>6</sup>[Van Harten](#), *Comments on the European Commission’s Approach to Investor-State Arbitration in TTIP and CETA*, page 5: “[T]he Commission’s clarification on fair and equitable treatment codifies a major expansion of this term compared to its widely-accepted customary meaning before the investor-state arbitrators arrived on the scene about 15 years ago.”

<sup>7</sup>Also note the most favoured nation clause; [Van Harten](#): “Another example of ambiguity in the CETA arises in Article 8.7(4), which gives foreign investors a right to ‘most-favoured-nation’ (MFN) treatment. As framed in the CETA, this ‘me too’ clause may potentially be used to import into the CETA, from other investment treaties of an EU member state or Canada, foreign investor rights that are even broader than those in the CETA.”

things.”<sup>8</sup>

Over 110 scholars commented in a joint submission to a consultation that this approach may have very little effect on expansive interpretations.<sup>9</sup> Over 100 law professors criticised the “vague substantive standards” in the EU-Canada CETA trade agreement text and stated:

“Investment protection constitutes a subtle shift of power towards individual and already influential commercial actors as it weakens the consideration of public interests and restricts democratic change.”

On regulatory chill they noted:

“This could in turn lead to a regulatory chill, as governments might refrain from regulatory measures in the public interest due to the threat of investment arbitration and the high damages it entails. Under existing treaties, investors have used this leverage to effectively interfere in democratic policy changes. This problem is not to be underestimated, as poor and wealthy countries alike have proven to be susceptible to this pressure.”

The existing level of legal protection and certainty causes social and environmental impacts. Future EU agreements will provide a similar level of protection.

### 2.1.1 No or a limited right to regulate

The existing, very open treaties do not have a right to regulate clause; the right to regulate clause in proposed future agreements has a limited effect.

In the EU-Canada CETA text the commission made a strong exception for these issues: decisions not to issue, renew or maintain a subsidy.<sup>10</sup> In contrast, the exception for the right to regulate in general is much weaker. Simon Lester notes that the text does not create any new right to regulate

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<sup>8</sup>Quoted by Public Citizen, page 1; video at [CATO institute](#)

<sup>9</sup>Statement of concern, [answer to question 3](#)

<sup>10</sup>[EU-Canada CETA](#), article 8.9 paragraphs 3 and 4. Part of the exception reads: “For greater certainty, a Party’s decision not to ... does not constitute a breach of the provisions of this Section.” The next paragraph contains “For greater certainty, nothing in this Section shall be construed as ... requiring that Party to compensate the investor therefor.”

because it is just “reaffirming” a right that is assumed to already exist.<sup>11</sup> This gives adjudicators a wide discretion. As a result, a government has the right to regulate and to change the legal and regulatory framework, but the clause does not protect against unlimited backward looking damages including expected profits and interests<sup>12</sup>, if one of the standards of protection is breached. This approach avoids neither making reforms more or even too expensive, nor regulatory chill.<sup>13 14</sup>

Supranational obligations resting on states are cumulative. Supranational investment adjudicators can argue that states can regulate, need to protect fundamental rights, and also have to fully compensate investors. This regulate and pay approach leads to high costs for states. States’ budgets are not unlimited; high damages and the threat of such damages have a chilling effect. In contrast, the European Convention on Human Rights leaves states a wide margin of appreciation. This gives states better possibilities to reform and to respond to a crisis.<sup>15</sup>

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<sup>11</sup>Simon Lester on the EU-Canada CETA text, see also FFII. See also [Transport & Environment and ClientEarth](#), Comprehensive Economic and Trade Agreement (CETA) and the environment, page 18.

<sup>12</sup>For the EU-US TTIP proposal, see [Van Harten](#), page 6; FFII, section 2.1 [Ineffective right to regulate](#); S2B, section [The “right to regulate” has not been preserved](#).

<sup>13</sup>The EU-Canada CETA interpretative instrument, which was added before signing, does not change this, and only applies to one agreement. See [Van Harten](#) and [The Council of Canadians](#).

<sup>14</sup>The EU-Canada CETA interpretative instrument is less precise than the [NAFTA interpretative declaration](#), which did not stop expansive interpretations. Compare the NAFTA interpretative declaration with [Lise Johnson and Lisa Sachs](#), page 5, on the Bilcon award.

<sup>15</sup>Under the European Convention on Human Rights (ECHR) the right to property is enshrined in article 1 of Protocol 1: “Protection of property (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws **as it deems necessary** to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” (emphasis added) The formulation “as it deems necessary” gives the member states a wide margin of appreciation. As a human rights court, the European Court of Human Rights will also be aware of the effects its decisions may have on other human rights. In contrast to the European human rights system, supranational investment adjudication (a) does not require exhaustion of local remedies, (b) does not provide access to the mechanism for all, but only to foreign investors, (c) does not guarantee full respect of fundamental rights (d) provides wide discretion to supranational adjudicators, (e) does not provide a wide margin of appreciation to states, and (f) provides unlimited backward looking damages including expected

## 2.2 ISDS and ISDS/ICS

Investor-to-state dispute settlement gives private parties access to the supranational level. This discriminates against companies operating locally and comes with systemic issues which create a high risk of expansive interpretations of investors' rights (see next section).

The inception impact assessment mentions various shortcomings of ISDS. See also [over 110 scholars](#), Joint Statement, and [220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement \(ISDS\)](#). For the ISDS / Investment Court System (ICS) proposal for TTIP and CETA see scholars and judges. <sup>16</sup>.

## 2.3 Systemic issues

### 2.3.1 Specialised courts tend to interpret expansively

Specialised courts and tribunals tend to interpret expansively. Justice Heydon [noted](#) that specialist courts

“tend to become over-enthusiastic about vindicating the purposes for which they were set up”.

The developments regarding patents provide a clear example. Specialised courts and chambers have interpreted patent rules expansively. Brian Kahin [wrote](#) regarding developments in the US:

“The Federal Circuit quickly became a champion of its specialty, making patents more powerful, easier to get, harder to attack, and available for a nearly unlimited range of subject matter.”

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profits and interests. For the “right to regulate”, see the main text.

<sup>16</sup>See for instance the statement by [over 100 law professors](#); [German Magistrates Association](#), Opinion on the establishment of an investment tribunal in TTIP; and [European Association of Judges](#), Statement from the European Association of Judges (eaj) on the proposal from the European Commission on a new Investment Court System.

The European Patent Office's boards and boards of appeal caused a similar development in Europe. <sup>17</sup> Investor-to-state dispute settlement provides an other example of expansive interpretations: "widespread expansive interpretations of nearly every provision found in investment treaties". <sup>1</sup>

Furthermore, WTO dispute settlement tribunals have encroached on the public interest. <sup>18</sup> Note that mandates stipulating the highest possible level of legal protection and certainty legitimise expansive interpretations and so risk strengthening the expansive tendency of a specialised court.

### **2.3.2 Development of supranational investment protection outside of democratic scrutiny**

The supranational level lacks effective instruments to correct expansive interpretations. In contrast, states do have these instruments. The US is dealing with the expansive interpretations of the Federal Circuit court (noted in the subsection above) in two ways. US Congress took legislative steps and the Supreme Court stepped in to reverse the patentability of software. Both instruments to correct expansive interpretations – legislative process and general supreme court – are not available at the supranational level. Supranational courts and tribunals' interpretations fall outside of democratic scrutiny. As a result the development of supranational investment protection falls outside of democratic scrutiny.

### **2.3.3 No supreme court scrutiny**

Development of supranational investment protection also falls outside of supreme court scrutiny. Supreme courts resolve tensions between rights originating in various law systems, for instance intellectual property, competition, and fundamental rights. In contrast, supranational obligations

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<sup>17</sup>[David Kappos](#), after the US Supreme Court stepped in to reverse the development: "You can get software patents allowed in both China and Europe that aren't allowable in the US anymore." Software patents despite the exclusion of programs for computers as such from patentability under the European Patent Convention, [article 52](#).

<sup>18</sup>[Public Citizen](#), Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception; see also [K. Irion, S. Yakovleva and M. Bartl](#), Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements.



resting on states are cumulative. Supranational investment adjudicators can argue that states can regulate, need to protect fundamental rights, but also have to fully compensate investors. This regulate and pay approach leads to much higher costs for states. Furthermore, the rights of others are not guaranteed, including their fundamental rights. Referring to guaranteeing the full legal rights of others, the German Magistrates Association [noted](#) regarding the ISDS / Investment Court System proposal for TTIP (used in EU-Canada CETA):

“The creation of special courts for certain groups of litigants is the wrong way forward.”

Josef Drexl’s remarks on a Unified Patent Court (UPC) are relevant for supranational investment protection as well. He mentions that the US Supreme Court stepped in to reverse the Federal Circuit court’s “expansionist interpretation” and notes that specialised patent law courts may be weak in taking into account “the broader societal implications of patent protection and therefore be more likely to develop a pro-patent bias”. He warns against placing the Unified Patent Court outside of the EU legal order:

“This is of particular concern in the case of the Unified Patent Court, which will have to convince patent applicants and patent owners to opt into the new system especially during the first years of its existence. In the light of such risks, and especially in the light of the need to guarantee full respect of the fundamental rights, to prevent the CJEU from interpreting the rules of the UPC Agreement could easily amount to a mistake of historic dimensions.” <sup>19</sup>

Both issues – have to convince litigants to use the system and the need to guarantee full respect of the fundamental rights of others – are relevant for supranational investment adjudication as well. Supranational adjudication has to compete with domestic courts in attracting foreign investor-litigants. Moreover, the scope of investment protection is much broader: all government decisions.

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<sup>19</sup>quoted at [FFII](#)

### 2.3.4 Values and ability to respond to crises

The supranational level only has limited instruments to reverse expansive interpretations. The parties to an agreement can change the agreement or issue an interpretative declaration. These approaches, however, take the consent of all parties. Moreover, NAFTA's interpretative declaration did not stop expansive interpretations.<sup>14</sup>

As we saw, the development of supranational investment protection falls outside of democratic scrutiny and a supranational approach does not guarantee full respect of fundamental rights. Supranational investment protection strengthens investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

## 2.4 Unfairness, greatly expanded exposure, and lock in

### 2.4.1 Unjustifiable unfairness

Supranational investment protection is unfair. Foreign investors – and only foreign investors – have the right to bypass domestic legal systems and have, depending on interpretation, greater substantive rights<sup>2</sup>, without correspondingly actionable responsibilities.<sup>20</sup>

The positive discrimination of foreign investors is unjustifiable. [Emma Aisbett and Lauge Poulsen](#):

“Our results suggest that foreign firms tend to be treated at least as well by host state governments as comparable domestic firms in the vast majority of cases. There is a political advantage, as opposed to liability, of being a foreign firm.”

The right approach is to improve weak aspects of domestic legal systems. Domestic legal systems can combine equal access to the law with supreme court and democratic scrutiny of the development of law.<sup>21</sup>

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<sup>20</sup>See, for instance, [Van Harten](#), ISDS in the Revised CETA: Positive Steps, But is it the ‘Gold Standard’?; [Over 100 law professors](#), Legal Statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA; and [Over 220 Law and Economics Professors](#), letter to US Congress.

<sup>21</sup>Investors are not obliged to invest in countries with weak legal systems. This may

## 2.4.2 Greater scope

In cases based on EU (trade and) investment agreements, judgments would also include EU decisions (greater scope). Investors would be able to claim damages based on EU-wide expected profits. These can be prohibitively high; this would undermine the independence of EU authorities.

## 2.4.3 Greater coverage of foreign direct investment

New (trade and) investment agreements would expand exposure as they would greatly expand coverage of foreign direct investment (FDI). As an example, current agreements between the US and EU member states cover only one percent of the total US FDI stock in the EU.<sup>22</sup> Even without EU-US TTIP, 81% of US investors in the EU would be able to use the EU-Canada CETA agreement, after restructuring their investments.<sup>23</sup>

## 2.4.4 Lock in

EU member states ratified stand-alone investment treaties. States can withdraw from them, or renegotiate them. The possibility of doing the former gives leverage to do the latter. Governments, harmed by their investment treaties, can act. An interesting option is to first rewrite a treaty

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create an incentive for states to improve their legal system. Further alternatives are contracts, state-state arbitration and insurance. The [Multilateral Investment Guarantee Agency](#) (MIGA), a member of the World Bank Group, offers insurance for political risks. If problems arise, they are very effective in settling them. This approach does not have the problems supranational investment adjudication has. Companies can also take out commercial political risk insurance. Also note the related “The consultation document comes up with one additional argument: that the rights each party grants to its own citizens and companies ‘are not always guaranteed to foreigners and foreign investors.’ The claim is unsubstantiated. Even if it is accepted, there is no obvious reason why the incorporation in TTIP of a simple norm of non discriminatory legal protection and equal access to domestic courts could not address the problem perfectly adequately.” ([Statement of Concern, General assessment](#))

<sup>22</sup>UNCTAD; see also [Van Harten](#), page 5.

<sup>23</sup>[Public Citizen](#), Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP

with mutual consent to remove the treaty's afterlife (sunset clause), and then withdraw from it.

In contrast, EU member states can't withdraw from agreements concluded by the EU. In addition, we cannot expect the EU to withdraw from these agreements. EU agreements will lock EU and member states into the highest possible level of legal protection and certainty.

## **2.5 Baseline scenario shows growing impacts**

In the baseline scenario, the combination of a very high level of protection, no or a limited right to regulate clause, ISDS / ICS, systemic issues with specialised and supranational adjudication, greater scope, greatly expanding coverage of foreign direct investment, and lock in will cause growing social and environmental impacts.

In the light of the need to protect fundamental rights, and in the light of the risks of climate change, a baseline scenario indicating increased social and environmental impacts should set off alarm bells. The commission has to investigate options that will eliminate impacts and reject options with continued or increased impacts.

# **3 Multilateral investment court scenario shows growing impacts**

## **3.1 Continued growing impacts**

As in the baseline scenario, the main drivers of increased impacts are greatly expanding coverage and scope.

The multilateral investment court would operate on existing bilateral investment treaties and future agreements like the EU trade and investment agreements with Canada, Singapore, and Vietnam. <sup>24</sup> The MIC mechanism would continue the existing level of legal protection and certainty, with no (existing agreements) or a very limited right to regulate clause.

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<sup>24</sup>[Inception Impact Assessment](#), option 5, page 6; See also [Discussion paper Establishment of a multilateral investment dispute settlement system](#), section 3.1.

An MIC would continue the unjustifiable unfairness of investor-to-state dispute settlement.

As in the baseline scenario, special interests will play a role. This may weaken the multilateral investment court's design and functioning. Offensive interests – the interests of investors – have frustrated meaningful reform of investor-to-state dispute settlement. EU and member states' proposals, such as the ISDS / Investment Court System proposal for CETA, are insufficient.<sup>16</sup>

ISDS arbitrators, responsible for expansive interpretations, may reappear as MIC judges / "judges".<sup>25 26</sup> An instrument the parties to a multilateral investment court agreement will have is vetting the judges they appoint. The EU won't have influence on the judges other parties nominate / appoint.<sup>27</sup> In other parties climate change denialists may be in power. Furthermore, within the EU, and especially in trade departments, offensive interests play a major role. This would have an effect on vetting judges.

### 3.2 Potentially a marginal improvement

The multilateral investment court scenario replaces existing investor-to-state dispute settlement with a multilateral investment court. This brings institutional improvements. A positive effect, however, may only be marginal, as such improvements do not solve the systemic issues with specialised and supranational adjudication which create a high risk of expansive interpretations of investors' rights. Moreover, the establishment of a supranational institution could also have negative effects.<sup>28</sup>

### 3.3 Negative aspects

The establishment of a court strengthens the legitimacy of supranational investor-to-state dispute settlement and perpetuates its existence and

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<sup>25</sup>The [Discussion paper](#) mentions "previous experience in international investment law", paragraph 33.

<sup>26</sup>Associations of judges ([one](#), [two](#)) noted that the earlier Investment Court System proposal (used in EU-Canada CETA and other FTA proposals) is not compatible with the Council of Europe's [Magna Charta of Judges](#).

<sup>27</sup>On nomination and appointment see options in [Discussion paper](#), section 3.5.

<sup>28</sup>An International Investment Court: panacea or purgatory? by [M. Sornarajah](#)

growth, including of its social and environmental impacts.

As an EU agreement, the MIC would lock in the EU member states, and we can not expect the EU to withdraw from the agreement. The court would be able to provide expansive interpretations and maximise its power, as long as it doesn't act so outrageously that the EU withdraws from the agreement.

In sum, the multilateral investment court scenario indicates growing social and environmental impacts.

## 4 Impacts: three examples

### 4.1 MIC impedes intellectual property rights reform

Copyright does not work well in the digital world; the patent system is [inefficient](#). Our societies could benefit from reform. <sup>29</sup> The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and other international agreements [limit possibilities for reform](#). Expansive interpretation of international treaties would further limit our policy space.

It matters who can initiate cases and who interprets the TRIPS agreement. The WTO has its own dispute settlement mechanism, only available to members of the WTO, to interpret the TRIPS agreement. A new forum emerges. United States pharmaceutical company Eli Lilly claims 500 million Canadian dollars in ISDS arbitration after Canada made a minor adjustment to its patent law, to ensure better access to medicine. [According to Eli Lilly](#), Canada's patent reform is not compatible with the TRIPS agreement. Investment adjudicators interpreting and deciding on compliance with the TRIPS agreement would change the dynamic of interpretation, as investors have less restraint than states regarding policy space <sup>30</sup> and there is a difference between seeing intellectual property rights as

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<sup>29</sup>[Statnews](#), UN panel urges wider access to medicines, but pharma slams the report; Regarding digital issues, the FFII ([one](#), [two](#)) has argued that EU copyright and patent law has to be made compatible with the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>30</sup>See for instance [Michael Geist on the U.S. State Department submission](#) in the Eli Lilly ISDS case.

innovation stimulants and seeing them as assets. <sup>31</sup>

Eli Lilly contends the Canadian measures produced “absurd results” and accused Canada of expropriation and breach of minimum standard of treatment obligations (fair and equitable treatment). Eli Lilly lambasts the Canadian patent policy framework as “discriminatory, arbitrary, unpredictable and remarkably subjective”. Furthermore, [Novartis filed an investment treaty notice](#) to challenge a Colombian cancer drug price-cut. Minor reforms have already led to two supranational investment claims.

Existing investment agreements are very open to interpretation. Proposed trade and investment agreements would contain some additional provisions on intellectual property rights. However, [Sean Flynn](#) argues that “language in investment chapters that appear designed to carve out IP policy decisions from private attack in investment forums in fact invite and facilitate such attack.” For weaknesses in the EU TTIP proposal, see [FFII](#).

Supranational investment protection can also have an effect [on patentability of software](#). [Pratyush Nath Upreti](#) adds a new element; he argues that investors can use the proposed Unified Patent Court for investment treaty shopping. The MIC proposal does not eliminate this possibility. As a result, two supranational courts could take decisions on patents, a specialised patent court and a specialised investment court – a double whammy of the supranational kind. <sup>32</sup> The UPC – ISDS / MIC combination may lead to [disproportionately high costs](#) (unrelated to their market) for UPC member states.

A multilateral investment court would impede reform of intellectual property rights.

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<sup>31</sup>See also [Peter K. Yu](#), who proposes mitigating approaches in “The Investment-Related Aspects of Intellectual Property Rights”. Note that the article overlooks [arbitrator bias](#) and [unfair procedural advantages for the US](#) (page 50), weaknesses in TPP’s “right to regulate” clause (page 24, compare [Van Harten](#), page 7), and uses old damages numbers in footnote 102 (compare [Van Harten](#), pages 2-6). Taking these issues into account, mitigating approaches could be less effective than hoped for.

<sup>32</sup>See also Josef Drexler’s remarks on the UPC above.

## 4.2 MIC risks undermining data protection

Foreign investors would be able to use a multilateral investment court to challenge EU data protection enforcement measures, for instance suspension of cross-border data flows or fines supervisory authorities will be empowered to impose on data controllers and data processors under the [General Data Protection Regulation](#).

Enforcement agencies have limited resources. They have discretionary power: they are allowed to act in some cases and skip others. Domestic legal systems do not see this as discrimination. In contrast, ISDS tribunals have seen the exercise of such discretionary power as discrimination.<sup>33</sup> This undermines the effectiveness of enforcement agencies. This detrimental interpretation is possible under the existing investment agreements, which are very open to interpretation, and under proposed EU agreements. The latter agreements contain a “right to regulate” clause, which, however, as we saw above, does not protect against unlimited backward looking damages including EU-wide expected profits and interests. These damages can be prohibitively high and undermine the independence of EU authorities.

The MIC’s adjudicators would not have to read provisions in the light of the EU Charter of fundamental rights, as the EU Court of Justice would do. A multilateral investment court risks undermining the protection of personal data.

## 4.3 MIC impedes action on climate change

Mankind faces an existential threat: climate change. The data is [disconcerting](#) and shows our societies are not on top of the issue. Further reforms are needed.

[Van Harten](#), in *Foreign Investor Protection and Climate Action: A New Price Tag for Urgent Policies*:

“To respond to climate change, the world needs to shift rapidly from high-carbon assets, especially fossil fuel resources and related infrastructure, into clean energy. This will require a mas-

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<sup>33</sup>[Lise Johnson and Lisa Sachs](#), page 9.



sive change in investment and the adoption of public policies to support and incentivize the right kinds of investment.”

He concludes:

“Already, ISDS has been used to undermine legislatures and governments in areas closely linked to climate-friendly policies of prevention, mitigation, and adaptation. Public funds should be used to support the shift to clean energy not to compensate polluters for their lost future revenues when they have not adapted their business model in a timely and responsible way.”

A multilateral investment court, in contrast with domestic law systems and the European human rights system, would give investors too generous possibilities to claim compensation. This would make reforms potentially prohibitively expensive, cause regulatory chill, and thus impede crucial measures on climate change.

## **5 Conclusion**

The multilateral investment court scenario indicates growing social and environmental impacts.

A multilateral investment court would strengthen investments vis-à-vis democracy and fundamental rights. This undermines our values, ability to reform, and ability to respond to crises, including climate change.

A multilateral investment court makes reforms of our societies more or even too expensive and causes regulatory chill; it impedes reform, including action on climate change. In the light of the need to protect fundamental rights, and in the light of the risks of climate change, the EU can not ignore, legitimise, or perpetuate growing impacts. The commission has to investigate which options will eliminate social and environmental impacts and reject the multilateral investment court option.

## 6 Attachment: issues with the Inception Impact Assessment

The multilateral investment court proposal is based on the [inception impact assessment](#) “Convention to establish a multilateral court on investment” (IIA).

### 6.1 The one sentence baseline scenario is not comprehensive

A baseline scenario describes what will happen without policy changes. The IIA has a one sentence baseline scenario:

“Baseline scenario – No EU policy change

Option 1: The base line scenario would mean retaining and operating multiple ICSs in EU trade and/or investment agreements.”

The baseline scenario only mentions EU trade and/or investment agreements. It ignores existing EU member states’ investment treaties and issues mentioned in this paper.

According to the guidelines on impact assessments, a baseline scenario has to be comprehensive and it’s qualitative analysis has to be rigorous and thorough.<sup>34</sup> The IIA does not meet this standard.

### 6.2 Social and environmental impacts

The [Inception Impact Assessment](#) does not expect social or environmental impacts:

“There are no social impacts expected. The substantive obligations under the investment protection standards **already exist** in the EU level trade and/or investment agreements or are currently negotiated with third countries for which the EU is acting on the basis of negotiating directives adopted by the Coun-

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<sup>34</sup>[Guidelines on Impact Assessment](#)

cil, as well as in the BITs entered into by EU Member States. These will **not be affected** by the negotiations on the Multilateral Investment Court.

Those agreements, for example, **guarantee the right of EU governments to regulate** on social and environmental issues.

The investment dispute settlement mechanism that will be included under the EU's trade and investment agreements would be **removed** when the Multilateral Investment Court becomes applicable between the EU and the country concerned." (emphasis added)

and

"There are no environmental impacts expected for the same reason as there are no social impacts."

The reasoning does not convince. First, the fact that substantive provisions already exist does not remove their impacts. The commission is well aware of the shortcomings of the existing treaties. It filed amicus briefs in various investor-to-state dispute settlement (ISDS) cases [arguing against damages awards](#) and it ordered Romania [to not pay ISDS damages](#).

Secondly, the existing, very open EU member states' investment treaties do not have a right to regulate clause. Furthermore, the right to regulate clause in proposed future EU agreements may guarantee the right to regulate, but does not protect against unlimited backward looking damages including expected profits and interests. This makes reforms more expensive, including action on climate change, and undermines regulatory power.

Finally, the text suggests that removal of existing investor-to-state dispute settlement mechanisms removes any further impacts. This disregards systemic issues with specialised and supranational adjudication and impacts caused by substantive obligations. For instance, an MIC would not eliminate the environmental impacts mentioned by Van Harten, as they are not caused by institutional issues. <sup>35</sup>

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<sup>35</sup>Environmental impacts not caused by institutional issues; see [Van Harten](#), An ISDS Carve-out to Support Action on Climate Change, page 3,