

Legality of ISDS and a request for an Opinion

Legal briefing

This briefing sets out a short analysis of the legality under EU law of both investor-state dispute settlement (ISDS) in two draft EU trade agreements (CETA and the EU – Singapore FTA) and the new Commission proposal of 16 September 2015 on an Investment Court System (ICS). It also briefly outlines how a member state government may verify the legality of envisaged EU trade agreements containing ISDS with the European Court of Justice (ECJ).

1 Why there are serious doubts about the legality under EU law of ISDS and ICS

EU law, and settled case-law of the ECJ, suggest that ISDS (including ICS) may be incompatible with the EU legal order because it would (1) undermine the autonomy of the EU legal order and the powers of the EU courts in particular and (2) negatively affect the completion of the internal market, and more specifically the EU's competition rules.

1.1 Undermining the powers of the EU courts

The EU Treaties set out a 'complete system of legal remedies' within the EU legal order. Direct and indirect challenges of EU decisions and rules, as well as the power to give a definitive interpretation of EU law, are matters that fall within the exclusive jurisdiction of the European Court of Justice (ECJ). ISDS affects these exclusive powers of the ECJ because they give individuals a remedy to challenge EU decisions and rules and to make a legal assessment of such rules without any involvement of the ECJ.

It is clear that these extensive powers of the EU courts do not in principle prohibit the EU from concluding international agreements that subject the EU and its institutions to the jurisdiction of another international court for the interpretation of that agreement. However, not only has the ECJ imposed strict conditions on when this is possible not met by ISDS mechanisms, ISDS also deviates in a fundamental way from the international agreements containing court systems that have been found compatible with EU law. ISDS allows claims from individuals, as opposed to claims from states, against the EU. This means that the EU courts would have to share their powers to hear claims by individuals against EU actions, decisions and rules with another court.

Therefore, ISDS poses a direct challenge to the powers of the EU courts. To preserve the powers of the EU courts fundamental precautionary measures need to be introduced within ISDS and this has not been done in the draft CETA and EU – Singapore FTA text, nor has the Commission

14 December 2015

sufficiently addressed this problem in its proposal for an ICS of 16 September which is to be included in the EU-Vietnam FTA.

1.2 Discrimination and effectiveness of EU internal market law

ISDS also poses a challenge to the proper functioning of the EU internal market rules. Not only does ISDS and ICS introduce a discriminatory judicial remedy that is only open to foreign investors and foreign owned EU undertakings contrary to a number of EU Treaty and Charter provisions, it also hampers the effectiveness of EU primary and secondary law, in particular in the context of the EU internal market. ISDS enables foreign investors to nullify fines and other financial obligations imposed on the basis of the EU treaties. This problem is not confined to the obligation to pay back unlawfully granted state aid, as the Commission suggests in its proposal for an ICS. For instance, it equally applies to any fine issued by the Commission for the breach of other EU competition rules.

2 A request for an Opinion

Under article 218 (11) of the Treaty on the Functioning of the European Union, a member state may request an Opinion of the European Court of Justice on the legality of an 'envisaged' EU international agreement.

The reason for the existence of this Treaty procedure is to prevent complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union.

A request for an Opinion can only concern an 'envisaged' EU international agreement. The Court therefore requires that there is sufficient information on the actual content of that agreement and secondly that the agreement is not yet concluded. On the basis of these criteria, a member state government can request an Opinion on the compatibility of ISDS in the EU-Singapore FTA, the EU-Vietnam FTA and CETA.

There is no doubt that ISDS raises many other fundamental questions such as the actual need of such systems, the negative impact they may have on public interests such as environmental protection, and the lack of a sound constitutional and transparent judicial process. This debate should however be without prejudice to the legality of ISDS and ICS, an issue that can easily be addressed by making a request to the ECJ.

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14 December 2015

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ClientEarth is funded by the generous support of philanthropic foundations, engaged individuals and the UK Department for International Development.

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