

Why the European Union is Leading the Charge to Reform International Investment Arbitration

Zahar Hryniv | Supervised by Professor William Phelan | Department of Political Science

Background

My project seeks to understand the politics of international investment law. In the centre of this area of research lies the Investor-State Dispute Settlement (ISDS) mechanism present in almost all trade deals between countries. This is a controversial legal mechanism because it allows large corporations to take states before an international tribunal, known as the International Centre for Settlement of Investment Disputes (ICSID), to complain about expropriations or other arbitrary state policies that reduce firms' profits. While working to protect investors in foreign countries, these "shadow courts" (Edwards 2016) grant special preference in their rulings to businesses through a loose definition of "expropriation" that adversely affects governments who make ordinary policy changes like raising taxes, tackling environmental challenges, and managing economic recessions. Governments are often forced to accept unfair rulings so as not to damage their reputation on the world stage and continue to attract foreign investment into their country.

Context

The context of my research is one where the landscape for ISDS in international law is undergoing a slow but significant change. An important international trade agreement the Obama administration tried to implement with Pacific Rim countries was the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) with the EU. Both however, faced vehement opposition from civil society within the United States, Europe, and the Pacific Rim countries. One major complaint was the clause giving large corporations the right to sue governments in international tribunals where decisions are made by three private lawyers with no relation to the jurisdiction of either country. The EU's fundamental view on foreign investor protection is how these rules are interpreted by international tribunals, under what circumstances, and by whom.

Purpose

Why is the EU undertaking efforts to change a court system that has apparently worked for them and repeatedly favored Western corporations in their overseas investments? This is the key question I will attempt to answer in my research. I hope that by investigating the important issues surrounding EU decision making and why, I can constructively contribute to a topic that has significant contemporary relevance and where developments in institutions is currently an ongoing process.



Bilateral (ISDS) vs Multilateral (MIC)

In 2015, the European Parliament announced that it is replacing ISDS with the Investment Court System (ICS), which features a more public law approach, meaning the creation of a court-like structure, semi-permanent judges, more transparency as well as an appeals process. Furthermore, on the 20th March 2018 the EU Commission announced its plan for the formation of a Multilateral Investment Court (MIC) which is a further evolution from ICS as it sets up a permanent court structure. MIC would replace ICS in both the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement.

Investor State Dispute Settlement (ISDS)

- Ad-hoc Arbitration
- No Transparency
- No Appeals Mechanism
- Inconsistent
- Conflict of Interest from Arbitrators
- No SME Access

Multilateral Investment Courts (MIC)

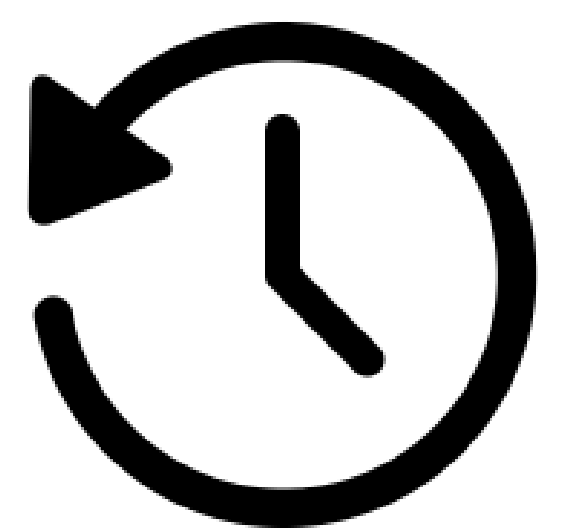
- Permanent Body
- Transparent
- Appeals Mechanism
- Consistent and Fair
- Tenured and Qualified Judges
- Access of SMEs

Research Methodology & Findings

In my research, I used a qualitative approach by analysing numerous pieces of research in the field and concluding that the reason why the EU supports institutional reform of ISDS, while others powerful actors do not, is due to historic, economic, and legal factors.

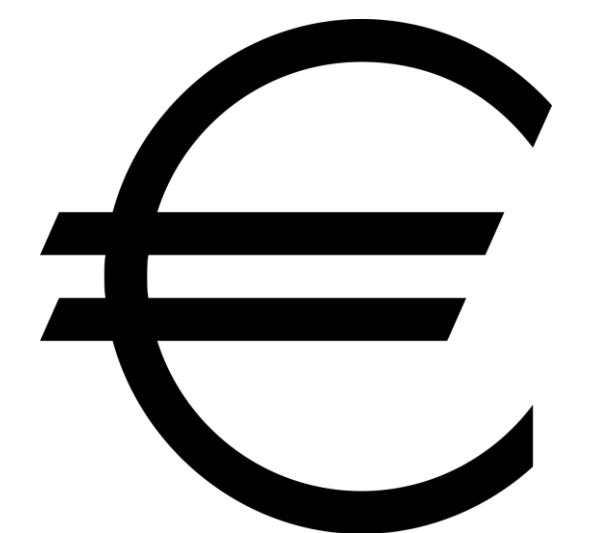
Historic

Since its inception in post-WW2 Europe, the European project has greatly increased cooperation between states politically, economically, and culturally. At its core however, the EU is an ambitious trade treaty which has evolved over time to become an effective institution based on inter-state cooperation. Because of this, the EU will also support other similar institutions and will therefore have an incentive to support ISDS reform towards a more multilateral process.



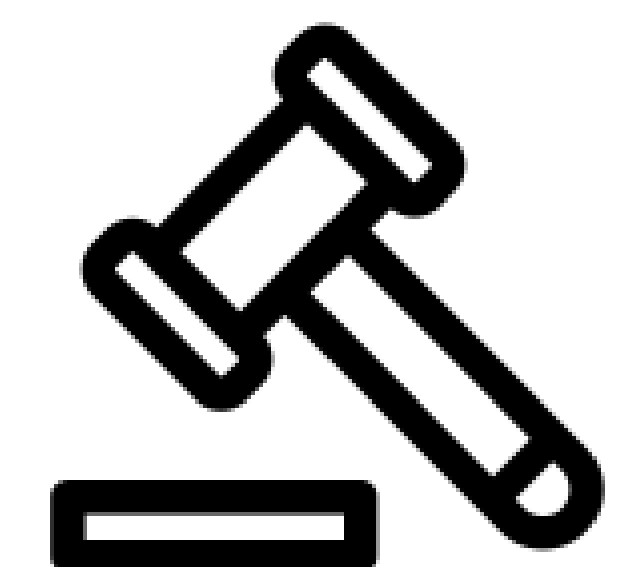
Economic

The EU is a market power in global affairs meaning it has considerable influence on regulations in trade and corporate behaviour. This is just one example of the EU's competencies. Consequently, like the USA uses its competency in military strength globally, so in this case the EU, in what is known as the Brussels Effect (Bradford 2013), uses its competency in market power globally to try and shape the rules of investment arbitration and write the rules of globalization.



Legal

Outside of economic competencies of trade regulation, the EU also champions human and environmental rights, diplomacy, and the rule of law. The presence and strong influence of the European Court of Justice has ensured a strong, internal legal system within the bloc centered on the doctrines of direct effect and supremacy. This internal legal system explains why the EU uses law and international institutions as a useful tool in world politics.



Author's Note

I would like to sincerely thank Professor William Phelan for his supervision on this project and the Laidlaw Undergraduate Research and Leadership Programme for their support and funding. I would also like to give a big thank you to the organisers of the Programme in Trinity College Dublin and in particular, for all their hard work organising leadership trips and sessions.

References

Image reference: <https://apibc.org.au/blog/what-is-isds-investor-state-dispute-settlement/>
Academic references to past published works by scholars can be found on a separate hand out for your referral.