ONDERNEMERS VAN NU

Voor verstandige handel

Ondernemers van Nu Annex EC MIC-Consultation

A recent survey[1] about the expectations of Free Trade Agreements like CETA and TTIP amongst Dutch SMEs concludes that 57% of exporting Dutch SMEs expect that investment-arbitration like ISDS or ICS will infringe the rights of their company. An even higher share of Dutch exporting SMEs, 68%, expect that investment-arbitration as currently designed in trade agreements like CETA and TTIP will be in favour of foreign companies, over domestic ones and will limit the government's capacity to create a level playing field for SMEs.

The exploration by the European Commission of a Multilateral Investment Court (MIC) that could – in the future – replace ISDS or ICS from trade agreements can be considered an acknowledgement by the EC of the ISDS and ICS short-comings, as viewed by SMEs and many others. The challenge obviously is not to repeat similar design-flaws that characterize ISDS and ICS in the MIC. Therefore Ondernemers van Nu are contributing to the EC's public consultation.

SMEs gathering in the Ondernemers van Nu network aim to increase the transition towards the new economy through their business strategies and look beyond the horizon to ensure highest social standards and lowest pressure on the environment while doing business. Todays' Entrepreneurs demand from governments to ensure that trade, production and transportation in the free market economy are better regulated. Revision of ISDS and ICS in Trade Agreements could contribute to safeguarding the rights of all People and the Planet in the long-term, instead of short-term Profit for a few companies.

The issue Ondernemers van Nu have with ISDS and ICS is that these systems undermine a level playing field for SMEs in general and for sustainable SMEs in particular, because :

- The capacity of governments to regulate for the common interest are decreased
- The domestic rule of law is decreased

Please find below a number of mitigating inputs proposed to repair prior design-flaws in the MIC's architecture:

1.) **Mitigating the undermining of the <u>capacity of governments to regulate for the common interest</u>**

Exploring a Multilateral Investment Court by the EC (on behalf of the EU Member States) and its trade partners could, provided that the MIC would be designed in a smart way, indeed entail moving away

[1] http://www.ondernemersvannu.eu/onderzoekmotivaction/

from the current ad hoc arbitration that undermines the capacity of governments to regulate for the common interest and the interest of SMEs, towards a situation in which investment- arbitration no longer decreases regulatory power. The conceptual emphasis would need to shift from enhancing the 'right to regulate' by governments to strengthening the 'capacity to regulate' by governments. A shift on this conceptual level would recognize that regulating for the common interest – including the protection of social standards and the environment – is not only a right governments should have, but it is about capacity. The current ISDS and ICS do not necessarily present a threat to the rights of governments to propose legislation for e.g. environmental protection. ISDS and ICS though do provide investors with too much leverage over the governments. An investor's suggestion to take a European government to an ISDS/ICS- court in case proposed legislation is unfavorable to their investments, provides investors with too much bargaining power. A Ministry in a small European capital will think twice and adjust its regulations to avoid a lengthy and costly court case, at the expense of the common interest. Therefore just including the 'right to regulate' in trade agreements is not adequate. It's the regulatory capacity of governments that is at stake.

Furthermore, for the companies' redress-claims are after a successful ISDS or ICS case ultimately paid from the national level tax-payers revenues (SME's have generally a higher tax-regime than investors), there is a mismatch between international investment arbitration for private, commercial interests and national, public damages repairs that needs urgent mitigation.

A number of conceptual avenues for mitigating the risk for losing governments 'capacity to regulate should therefore be explored in the design-phase of the MIC:

- Reciprocating the right of investors to seek redress via judicial procedure by granting the right to governments, SMEs, NGOs and individuals, to sue companies for damages in terms of cleaning up environmental pollution, ecocide, health care costs and the costs of social services.
- Exempting consumer protection, public health, environmental protection, animal welfare, and social policies from investor-state-arbitration.
- Introduce obligatory sector-, and country-specific impact analyses on the environment, regulatory power of governments and on SMEs before governments ratify/sign trade treaties, to allow for the exclusion of sectors which are expected to lose too much. Conducting a market scan is good business practice which governments could apply to trade treaties. Business owners know that there is only one chance to launch a product (in this case treaties) successfully on the market.

- Introduce a small and local/responsible business act in the MIC Statute: Allow partial governmental preferences for local businesses for public procurement and as a condition for investment authorization or promotion.
- Introduce binding labelling rules on origin and encourage social and environmental traceability of products.
- Introduce fair tax checks, as well as social responsibility checks into the MIC Statute as grounds for states to not grant trade benefits or other advantages to multi-national companies in case they do not meet similar taxes and social responsibilities that SME have to abide by, including regular country-by-country reporting and blacklisting systems, in order to prevent unfair competition and social dumping.
- Make trade treaties compatible with global commitments on climate as stipulated in the Paris Climate Agreement, by introducing a general safeguard clause on climate change and dedicating a chapter on energy. This would allow governments to plan a progressive phase-out from fossil. Goals and time tables should be stated of future joint climate change and environmental regulation by governmental parties, to provide clarity to producers and transporters. Measures could include the introduction of Climate/Carbon Footprint Revolving Funds or other measures to redistribute from polluting to clean production and transportation.

2.) **Mitigating the undermining of the Rule of Law and national judicial systems by the unclear relationship between investment arbitration and domestic courts.**

It is frequently claimed that ISDS gives foreign investors a special and parallel track for settling investment disputes by which they can by-pass the ordinary jurisdiction of domestic courts[2]. Domestic courts are only competent to rule on investment disputes by application of domestic law. By contrast, ISDS tribunals - like other international courts - only decide on the compatibility of state actions (including all state actors) with international investment rules. This distinction is particularly relevant where the rules in the international agreement are not directly incorporated into domestic law, as is the case for most international trade and investment agreements in particular in the US, Canada and the EU. This puts ISDS tribunals on the same footing as other international judicial institutions in the sense that cases before them are not in legal terms appeals from domestic law, but rather application of international rules. This uncertainty undermines the Rule of Law, which is very important to SMEs and many others.

[2] http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

The majority of Member States' BITs are silent on the relationship between domestic courts and ISDS, thus leaving it entirely up to the investor to choose between domestic and international remedies, and in which order. Parallel claims before domestic courts and ISDS tribunals on the same subject matter are therefore possible (whereas in CETA and the EU/Singapore FTA parallel claims are prohibited). CETA and the EU/Singapore FTA also clarify that ISDS tribunals should apply (only) the agreement and other rules and principles of international law applicable between the Parties to the agreement. This means that they cannot apply domestic law (whether of the EU or Member States). CETA and the EU/Singapore FTA, however, do not provide explicit guidance on how domestic law should be handled.

A number of conceptual avenues for mitigating the risk of undermining the Rule of Law should therefore be explored in the design-phase of the MIC:

- The MIC should be a 'court of last resort' only, after all national judicial routes are exhausted. The MIC therewith complements national judicial systems, instead of undermining them. Signatories to the MIC convention not only ratify MIC legislation but also implement it in their national legislative systems, therewith strengthening the national judicial systems (comparable to the ICC for international criminal law).
- Only cases aimed at fighting impunity for severe infringements on international investment standards, the environment and social rights can be brought before the MIC, in order to exclude speculative, commercial-interest based claims.
- Drop the Regulatory Cooperation Forum from trade agreements, and prevent it from being included in the MIC Statute, in order to strengthen the regulatory power of governments as well as the democratic control of parliaments. Existing multinational regulatory fora function adequately and offer entrepreneurs the clarity they need.

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