



EU PROPOSAL FOR A MULTILATERAL REFORM OF INVESTMENT DISPUTE RESOLUTION

POSITION PAPER BY THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

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INTRODUCTION

In December 2016, the European Commission (the Commission) launched a public consultation on a multilateral reform of investment dispute resolution, including the possible establishment of a Multilateral Investment Court (MIC).¹ The public consultation “builds on the Inception Impact Assessment” and the Commission’s questionnaire “should be read in light” of the assessment.² The following comments provide feedback on the Inception Impact Assessment and the questions posed by the public consultation.

The Commission’s proposal would create an MIC that would be funded, at least in part, by the parties and staffed by full time members. The members would be required to meet certain qualifications and abide by a code of ethics. The MIC would be available for disputes arising under existing and future agreements and be adaptable to a growing membership.³ The EU does not express a preference for whether the MIC would be established as a new institution or docked into an already existing framework. The proposal builds on the Investment Court System (ICS) included in recent agreements such as The EU-Canada Comprehensive Economic and Trade Agreement (CETA).

The questions presented in the public consultation questionnaire and the options identified in the Inception Impact Assessment focus on a narrow range of issues related solely to the institutional

¹ European Commission (December 2016) Public consultation on a multilateral reform of investment dispute resolution <https://ec.europa.eu/eusurvey/runner/multilateralinvestmentcourt#>.

² *Id.*

³ See “Non paper. Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism,” http://www.vieuws.eu/eutradeinsights/wp-content/uploads/2016/11/Non-paper_Considerations-on-the-way-towards-a-multilateral-investment-di...pdf;

“Discussion paper: Establishment of a multilateral investment dispute settlement system”, <http://www.politico.eu/wp-content/uploads/2016/12/Joint-paper-2.pdf>. [hereinafter Discussion Paper].

aspects of the dispute settlement process, which will do little to address the problems with investment arbitration. The Commission fails to consider ways in which a new institution could be designed to improve the balance between the rights and obligations of investors.

The creation of an MIC as proposed by the EU is likely to strengthen an unnecessary and unjustified mechanism that undermines the ability of governments to regulate in the public interest. The advantages gained by the minor improvements in the dispute settlement process would therefore be outweighed by the effect that the proposed MIC would have in further entrenching the investor-state arbitration system.

The Commission ignores the serious opposition and concerns raised by Europeans with the ICS - concerns that persist and threaten to frustrate the Member States' ratification of CETA and the EU's negotiation of future trade and investment deals.

The EU now stands in the middle of two very strong and conflicting forces: one that is led by the ever rising power of corporations pushing for further deregulation, including through trade and investment agreements, and another that uses the negative impacts of the corporate trade agenda to create a climate of defiance against all institutions and against a international worldview. The EU must develop solutions that overcome both forces.

The renewed and growing public mobilizations around trade in recent years requires the development of a more positive, human-centered vision against which investment policy and dispute resolution can be measured. In its narrow focus, the Commission's proposal is a significant missed opportunity to develop and build upon alternative approaches to investment that protect people and the environment. For these reasons, CIEL is opposed to the EU's proposal. The following comments begin by highlighting the major flaws in the EU proposal. The comments then discuss why the minor improvements that would be gained by the proposed MIC are outweighed by the effect that the MIC would have in further entrenching the investor-state dispute system. The comments conclude with recommendations that the EU should consider in developing a multilateral approach to address investment dispute resolution.

1. THE PROPOSAL REJECTS REFORM OF SUBSTANTIVE TREATY PROVISIONS

The proposal for an MIC fails to address the essential problems with the investor-state dispute resolution system. The Commission's stated intent in proposing the MIC is to address the "perceived limitations" of investment arbitration in terms of legitimacy, legal correctness, and other concerns.⁴ The Commission assumes that these "perceived" problems would be corrected "if investment disputes were to be decided by adjudicators that, in addition to having high qualifications and credentials, are devoted full-time to the resolution of disputes through a permanent multilateral system."⁵ Based on this assumption, the consultation and the Inception Impact Assessment address a very narrow range of issues related to some of the institutional aspects of dispute resolution. The Inception Impact Assessment explains that the substantive obligations under existing investment

⁴ *Id.* at 1.

⁵ *Id.* at 2.

protection standards “will not be affected by the negotiations on the Multilateral Investment Court.”⁶

By failing to address the substantive provisions in international trade and investment agreements, the Commission’s proposal will not achieve its purported objectives. The broad rights granted to investors, such as fair and equitable treatment, and the lack of any enforceable obligations, such as compliance with human rights, labor, and environmental laws, are at the heart of the investment arbitration system’s lack of legitimacy and fairness. For example, of the more than 200 investor-state arbitration cases currently pending, over half relate to energy and natural resources.⁷ Often, the outcome of these actions, or even the threat of such action, can undermine legislation protecting public welfare or chill the creation of future policies.⁸ The proposal for an MIC does nothing to protect the essential regulatory space of national governments.

The Commission states that “qualifications, such as expertise in public international law and previous experience in international investment law would also be desirable to ensure that disputes are decided by highly qualified and experienced individuals with a top notch understanding of the field.”⁹ This statement suggests that the Commission views disputes involving investors as relating to a single “field.” Yet, given their broad scope of application and the wide range of foreign investment operations, international investment agreements implicate policies on trade, labor, taxation, intellectual property, land rights, national security, cultural, health and environmental protection, and

⁶ European Commission (August 2016) Inception Impact Assessment: Establishment of a Multilateral Investment Court for investment dispute resolution http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf at 8 [hereinafter IIA].

⁷ International Centre for Settlement of Disputes, *Cases*, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27> (last visited Nov. 12, 2015). 7 cases relate to water, sanitation and flood protection, 9 cases relate to agriculture, fishing, and forestry, 49 cases relate to electric power and other energy, and 54 cases relate to oil, gas and mining.

⁸ Public Citizen, CASE STUDIES: INVESTOR-STATE ATTACKS ON PUBLIC INTEREST POLICIES, <http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf>. Several other ISDS cases that threaten to undermine environmental protection are currently pending, including *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Request for Arbitration, May 31, 2012; *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2, Initial Procedural Hearing, January 9, 2015; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Request for Arbitration, March 4, 2014; *The Renco Group Inc., v. Republic of Peru*, ICSID Case No. UNCT/13/1, Constitution of UNCITRAL Tribunal, April 8, 2013. *Id.* See also International Centre for Settlement of Disputes, *Cases*, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?cs=CD27> (last visited Nov. 12, 2015). As of November 12, 2015, there were 213 pending ISDS cases registered on the ICSID database. Of these registered cases, 7 cases are related to water, sanitation and flood protection; 9 cases are related to agriculture, fishing & forestry; 49 cases are related to electric power and other energy; and 54 cases are related to oil, gas & mining.

⁹ Discussion Paper, *supra* n. 3 at 5.

many others.¹⁰ By ignoring other qualifications important to the review of government decision-making, the Commission emphasizes its narrow focus on strengthening the existing arbitration system, which elevates investment over public interest. This approach undermines the Commission's own acknowledgement of the criticism that "arbitral tribunals, in interpreting the investment agreements, have only considered the objective of protecting the economic interests of the investors and have not balanced it against the sovereign right of States to legislate in the public interest."¹¹

The Commission's proposal for a MIC would do nothing to address the provisions in investment agreements that prioritize investment over public interest laws and nothing to ensure that investors abide by international and domestic laws that protect people and the environment. Instead, disputes brought to the MIC would continue to be settled based on international investment treaties and international contracts, disregarding a wide range of international and domestic law, including human rights, labor, and environmental laws, that may be directly relevant to those disputes. This is in direct conflict with the Commission's statement less than two years ago, which recognized that it "must pursue a policy that benefits society as a whole and promotes European and universal standards and values alongside core economic interests, putting a greater emphasis on sustainable development, human rights, tax evasion, consumer protection, and responsible and fair trade."¹²

In addition, the proposal for an MIC does not provide the ability for governments, domestic investors, civil society, individual citizens, communities or trade unions to bring a claim or become party to a proceeding in a dispute related to an investment. The proposed MIC would therefore reinforce the structural bias of arbitration in favor of international investors. By refusing the participation of other parties who are affected by a dispute but who have no right to access the record, file evidence, or make factual and legal arguments, the MIC would also reinforce the practice in arbitration of resolving disputes in a fundamentally unfair manner.

The bias in favor of international investors is reinforced by the lack of a requirement that investors exhaust domestic remedies. The failure to include this requirement undermines domestic courts and provides a special regime to resolve foreign investors' claims. Although the exhaustion of local remedies is a principle of international law, the proposal for an MIC does not address this issue. As the Commission admitted in the public consultation, the Commission does not advocate for this requirement in the negotiation of investment agreements and appears unlikely to do so in the context of negotiating an MIC. The continued resolution of investment disputes in this way will undermine, rather than support, the Commission's stated goals of legal correctness and legitimacy.

¹⁰ United Nations Conference on Trade and Development, World Investment Report 2015: Reforming International Investment Governance 126, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf. [hereinafter WIR2015].

¹¹ European Commission Concept Paper, Investment in TTIP: The Path for Reform at 5 (May 5, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [hereinafter Path for Reform].

¹² European Commission, Trade for all: Towards a more responsible trade and investment policy (2015) at 18. http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf. [hereinafter Trade for all].

2. THREAT OF UNDERMINING REAL REFORM

The minor improvements to the institutional aspects of dispute resolution in the proposed MIC may improve the independence of the current ad-hoc arbitration tribunal system. However, these small adjustments far outweigh the harm that would result from further entrenching the flawed investor-state arbitration regime. The Inception Impact Assessment entirely ignores the effects that would result from a more fortified regime, asserting that no social or environmental impacts are expected from the proposal. The Commission should consider the potential negative effects of its proposed MIC.

The Commission's proposal is based on a high degree of speculation and entails a number of risks, none of which are acknowledged or addressed. First, as the Commission points out, the creation of an MIC might ensure greater consistency in the application of substantive investment protection provisions. Consistency is important but hardly the most important virtue of a legal system. Even more essential is the need to avoid the consistency of bad law. Because specialist courts and tribunals "tend to become over-enthusiastic about vindicating the purposes for which they were set up,"¹³ consistency within the MIC would very likely strengthen the expansive interpretations of investor's rights. Thus, the MIC would further formalize special rights for foreign corporations. As the Commission has recognized, the agreements that this court would be enforcing are "drafted more with the protection of investments in mind than the state's right to regulate."¹⁴ An MIC would also enhance the award's authority.¹⁵

Second, if the MIC fails to require the exhaustion of domestic remedies, it will foster public doubts about the fairness and independence of domestic courts. To address concerns about the competence of domestic courts, the solution is not to further undermine domestic courts by allowing investors to side step them. Yet the MIC would not only allow investors to bypass domestic courts but would also enforce investors' rights in agreements, such as CETA, that explicitly preclude the use of domestic courts.¹⁶

Third, the MIC as envisioned by the Commission would lock-in the investor arbitration regime, undermining efforts at more meaningful reform, discussed in more detail below.

¹³ Macdonald Rudder Lawyers, *citing* Kirk v Industrial Relations Commission [2010] HCA 1 at [122], <http://www.mrlegal.com.au/rule-of-law-of-the-dangers-of-specialist-courts/>

¹⁴ Path for Reform, *supra* n. 11 at 5.

¹⁵ Kaufmann-Kohler, Gabrielle, and Michele Potestà. "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?" (2016) at 17.

¹⁶ CETA art. 30.6.

3. ALTERNATIVES THAT THE COMMISSION SHOULD CONSIDER

The Commission should consider alternatives that would support trade and investment that is based on sustainable development. Rather than further entrench and legitimize a fundamentally flawed system, a multilateral process should be focused on consensus building for concrete reform. As explained by UNCTAD, “Multilateral agreed criteria and guidelines could provide benchmarks against which certain parameters for IIA reform could be assessed.”¹⁷ It is unclear whether International Investment Agreements lead to increased investment, yet the increased risks that these agreements pose to environmental and human rights governance is well established. A multilateral process should consider more broadly how investment agreements could be used to foster sustainable development and how a multilateral dispute resolution system could play a role in these efforts.¹⁸

Without first developing a multilateral consensus about the priorities for reform, the Commission’s limited resources are likely to be spent in a manner that is counter-productive. As an enforcement mechanism for substantive provisions of International Investment Agreements, an MIC should not be discussed in isolation of those substantive provisions. In addition, even within the context of dispute resolution, a range of reform options exist that should be prioritized through a multilateral process.¹⁹ For example, it is unclear why the Commission has decided to focus only on a narrow set of issues related to the institutional aspects of dispute settlement. As UNCTAD points out, dispute settlement reform needs to address a broad spectrum of concerns, including the unforeseen legal and financial risks that host states face, such as in circumstances beyond clear-cut infringements on private property, the special rights granted to international investors, the risk of regulatory chill, and guarantees of due process.²⁰ None of the options presented by the Commission would address these concerns.

Thus, specifically with respect to dispute settlement, a multilateral process should consider how public interest considerations could be better addressed, for example, by: refusing jurisdiction over investors who have violated domestic or international laws relevant to the investment; accepting claims based only on uncompensated direct expropriation of real property to enable governments to have the policy space to develop new regulations that protect people and the environment; and precluding claims against measures intended to contribute to public interest objectives.²¹ In addition,

¹⁷ WIR2015, *supra* n. 10 at 169.

¹⁸ *Id.* at 126 (noting that international investment agreements are “underused potential as an instrument for sustainable development objectives.”)

¹⁹ See, e.g., IISD Investment and Sustainable Development Program, INVESTMENT-RELATED DISPUTE SETTLEMENT, Towards an inclusive multilateral approach: Results from an IISD expert meeting held in Montreux, Switzerland, May 23–24, 2016 and INVESTMENT-RELATED DISPUTE SETTLEMENT, Reflections on a New Beginning: Results from an IISD expert meeting held in Montreux, Switzerland, May 23–24, 2016.

²⁰ WIR2015, *supra* n. 10 at 128.

²¹ See *id.*, at 148 (recommending limitations on investors’ access).

investors should be required to exhaust domestic remedies before bringing claims against states.²² This will enable national courts to judge investment disputes in a broader context of applicable law and policy, and provide an equal playing field between international and domestic investors as well as between investors and everyone else. International investment dispute resolution should also provide standing and procedural rights to other stakeholders. These alternatives could be also achieved through a multilateral process that results in the adoption of provisions that supersede certain provisions in existing BITs and FTAs.²³

Yet, the question remains whether investment arbitration is necessary in the first place. Criminals use the system to avoid prosecution.²⁴ Investors use the system to avoid legitimate environmental and social regulations. And there is no evidence that the system actually increases investment,²⁵ let alone investment that it supports sustainable development. Thus, more generally, the Commission should consider alternatives to the arbitration system itself. At the public consultation, the Commission dismissed out of hand the possibility of withdrawing from existing BITs and FTAs with investors' rights. Yet other countries have made it clear that this approach is possible.²⁶

Some governments have taken other measures to mitigate the impact of investor attacks, such as limiting the substantive investment protection standards or eliminating access to an enforcement mechanism.²⁷ For example, Brazil has developed a Cooperation and Investment Facilitation

²² *Id.* at 149 (recommending local litigation requirement).

²³ See, e.g., United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, art. 2.

²⁴ Chris Hamby, The Court that Rules the World (28 Aug., 2016) (noting that In over 10% of the claims filed during a five-year period, the “company or executive seeking protection in ISDS was accused of criminal activity, including money laundering, embezzlement, stock manipulation, bribery, war profiteering, and fraud.”). https://www.buzzfeed.com/chrishamby/super-court?utm_term=.rbKvEn3eN#.hv2bxNMm

²⁵ The Commission asserts that “international investment is key to economic growth of developed and developing nations alike,” but fails to support its assumption that investment arbitration is essential for international investment. Discussion Paper, *supra* n. 3 at 2.

²⁶ South Africa, Indonesia, India, Bolivia, Ecuador, and Venezuela have terminated several BITs. See, for example: UNCTAD (March 2016) “Taking stock of IIA reform, IIA issue note No.1” http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf; Both ENDS, Maydam and SOMO (March 2016) “Rethinking bilateral investment treaties. Critical issues and policy choices” <http://www.madhyam.org.in/wpcontent/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf>.

²⁷ South Africa, Indonesia, India, Bolivia, Ecuador, and Venezuela have terminated several BITs. South Africa has developed a domestic bill that does away with some of the fundamental and most dangerous clauses in international investment law. So do India’s and Indonesia’s new model investment treaties. And in Europe, Italy has withdrawn from the Energy Charter Treaty – a multilateral treaty created after the Cold War to integrate the energy sector of the former Soviet Union into Western markets. See, for example: UNCTAD (March 2016) “Taking stock of IIA reform, IIA issue note No.1” http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf; Both ENDS,

Agreement or (CIFA) model which excludes ISDS altogether. Unlike most BITs and FTAs, CIFAs do not include articles on expropriation, non-discrimination or the free transfer of capital.²⁸ Rather than allowing claims to be brought by investors, the agreements provides for state-state consultations and negotiations when disputes arise. Other states have proposed dispute prevention and avoidance mechanisms, which could minimize conflicts before reaching the dispute phase.²⁹ The potential for a cooperative approach to promote balanced and sustainable development makes this an appealing alternative to ISDS.³⁰ In addition, countries such as South Africa and Australia have sought to strengthen domestic judicial systems so that international forums are avoided altogether.

Multilateral cooperation towards these more meaningful reforms would enable governments to regain policy space to regulate toxic chemicals, climate change, inequality and other pressing global issues.

In addition to investment reform, however, the Commission and EU governments' focus should be on promoting binding and enforceable public international law to strengthen human rights, and environmental protection, such as through the creation of a UN treaty requiring business enterprises to respect to human rights.³¹ This would more effectively address the grave imbalance between the highly enforceable investor rights and the weak international protection of human rights and the environment.

CONCLUSION

The EU proposal for a multilateral reform of investment dispute resolution threatens to entrench the current imbalance between investors' rights and the right to regulate in the public interest. This will further empower corporations, weaken the quality of life for EU citizens, and contribute to the rise of isolationist policies. Instead of strengthening the regime in which corporations can challenge government actions to protect citizens, EU and global efforts must prioritize the strengthening of regimes that protect of human rights and the environment. As part of those efforts, the EU should be focused on establishing the primacy of human rights and environmental law over trade, investment

Maydam and SOMO (March 2016) "Rethinking bilateral investment treaties. Critical issues and policy choices" <http://www.madhyam.org.in/wpcontent/uploads/2016/03/Rethinking-BIT-Book-PDF-15-March-2016.pdf>.

²⁸ <http://www.iisd.org/commentary/brazils-innovative-approach-international-investment-law>

²⁹ 7th Annual Forum of Developing Country Investment Negotiators (Jakarta, Indonesia) 4-6 Nov. 2013, suggestions by Chantal Ononaiwu, Trade Policy and Legal Specialist, CARICOM Secretariat.

https://www.iisd.org/pdf/2013/7th_annual_forum_report.pdf

³⁰ WIR2015 at 151.

³¹ See "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights",

<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx>. Additional information can also be found on the websites of the Treaty Alliance (www.treatymovement.com/) and the Dismantle Corporate Power Campaign (www.stopcorporateimpunity.org).

and other fields of international law. Within the area of investment protection, however, the EU should focus on how investment can be used to promote sustainable development and must ensure that elected governments have the policy space to pursue the transition of our economies and societies, without facing impossibly costly obligations and liability risks.