

## COMMENTARY

# Reply to the European Commission's *Public consultation on a multilateral reform of investment dispute resolution*

IISD Investment Program  
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### **The European Commission's Consultation**

On December 21, 2016 the European Commission launched a public consultation to gather stakeholders' views on options for a multilateral reform of investment dispute resolution, including the possible establishment of a permanent Multilateral Investment Court (MIC).

In reality, however, the consultation is not about options for reform. Rather, it is about discussing the technicalities of replacing investor–state arbitration (or ISDS) with a procedurally different investor–state mechanism (still ISDS) that fails to address a range of public concerns that have led to pressure for ISDS reform. The consultation fails to provide an opportunity to collect valuable inputs toward multilateral reform of investment dispute resolution in the best interest of Europeans and the international community.

### **Why the Commission is Missing the Point**

While the Commission has not released language for its MIC proposal, it presumably builds on the Investment Court System (ICS) embedded in recent EU agreements with Canada and Vietnam, comprising a First Instance Tribunal and an Appeal Tribunal with full-time judges empowered to decide on cases initiated by foreign investors against their host states. This would offer improvements on the current flawed system, but does not address key concerns.

Departing from the system of party-appointed arbitrators that predominates in ISDS mechanisms, ICS provides for permanent rosters of tribunal members from which three would be appointed on a rotational and random basis to decide a case. ICS also strengthens ethical standards. For example, individuals appointed to permanent rosters would not be allowed to act as counsel or party-appointed experts or witnesses in pending or new treaty-based investment disputes. There are no such prohibitions in typical ISDS, where the double-hat issue is common. Another ethical improvement is that challenges raised against a tribunal member would be decided by an independent authority rather than, as in the case in traditional ISDS, decided by the remaining panel members. Finally, ICS provides for appellate panels with the power to uphold, modify or reverse a first-instance decision should they find errors of law, manifest errors of fact (including in the appreciation of domestic law) or other traditional grounds of annulment.



With these improvements, the Commission acknowledges the procedural flaws of traditional ISDS, including its opaque and unpredictable nature as well as a perceived lack of independence. However, it fails to address most key public concerns that have led to pressure for ISDS reform by governments, citizens, academics and civil society in Europe and around the globe.

As a reform focused exclusively on procedural aspects, the ICS/MIC proposal does not sufficiently address a range of issues, including:

1. *Replacing or circumventing domestic judicial systems*: given that ICS/MIC does not require exhaustion of local remedies or specific consent to international arbitration, the proposal does not address public concerns about the circumventing of domestic judicial systems or about the parallel international system of adjudication. This is especially concerning in the context of states with well-functioning judiciaries capable of adjudicating investment disputes. The need for ISDS is entirely unclear.
2. *The loss of policy space and the limitation of states' right to regulate through litigation or threats thereof*: ICS/MIC continues to allow transnational companies and other investors to challenge or threaten to challenge legitimate government measures to protect public health, the environment and other public interests. If the creation of any MIC is not accompanied by reform of the problematic content of current investment treaties and chapters, the ideal of consistency created by a permanent court would work against the public interest: the MIC would help cement bad law.
3. *Discrimination and lack of inclusiveness*: ICS/MIC continues to privilege one group of economic actors with a unidirectional right of action: the claimant is invariably a foreign investor (never a domestic investor or an affected local community) and the respondent is invariably the host state (never a transnational company that has disobeyed the law or caused harm to a local community).

## What Investment-Related Dispute Resolution Reform Should Look Like

Acknowledging that the efficacy and value of any mechanism is dependent on the substantive law governing the dispute, and recognizing the importance of national courts and the principle of exhaustion of local remedies, we argue that any new international mechanism to settle investment-related disputes must:

- a. Be inclusive, ensuring meaningful (not merely formal) access to justice for all stakeholders, including governments, communities and individuals, and investors.
- b. Address the variety of legal and actual relationships involved in transnational investments, including multi-stakeholder relationships. For example: State–Investor; Investor–Community/Citizen; State–Citizen/Community.
- c. Have a broad base of law, including:
  - i. International law, relating to obligations of governments and corporations in the context of national and international investments, including for example human rights, business and human rights, environmental and investment treaties.
  - ii. Contractual obligations that establish rights in favour of communities and individuals, as well as the type of direct agreements between investors and communities that are becoming increasingly utilized today.
  - iii. Domestic law, relating to the investment and the rights of potentially impacted individuals, including labour law, environmental law and others.
  - iv. Applicable standards established by or for the private sector, such as the IFC Performance Standards, Equator Principles for banks or OECD Guidelines.



- d. Find its jurisdictional bases in the instruments listed above, though the new dispute settlement mechanism could also consider the possibility of some form of compulsory jurisdiction.
- e. Integrate a variety of conflict resolution and avoidance options, including approaches to lowering confrontation, mediation and fact-finding.
- f. Be disciplined, rule-based, transparent, unbiased and free of conflicts of interest, etc.
- g. Be enforceable and linked to existing mechanisms.
- h. Be financially accessible for different stakeholders.

## Conclusion

We reject the Commission's ICS proposal as it fails to address most of the flaws that have led to public concern regarding ISDS. We further reject the MIC proposal, which would cement the flawed ISDS regime and, worse, extrapolate it to the multilateral level. Despite the procedural improvements brought by both proposals vis-à-vis traditional ISDS, they fall short of advancing satisfactory alternatives to the unidirectional, exclusionist and unbalanced nature of the existing ISDS regime. We regret that the Commission's consultation was based on narrow questions that fail to reach the core elements of much-needed reform in investment dispute settlement. The consultation was a missed opportunity for the Commission to obtain valuable inputs toward multilateral reform of investment dispute resolution in the best interest of Europeans and the international community.

## Relevant Publications

Bernasconi-Osterwalder, N. (2014, June). *Reply to the European Commission's public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*. Geneva: IISD. Retrieved from <http://www.iisd.org/library/reply-european-commissions-public-consultation-investment-protection-and-investor-state>

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Bernasconi-Osterwalder, N. (2015, May). Rethinking investment-related dispute settlement. *Investment Treaty News*, 6(2), 6–8. Retrieved from <http://www.iisd.org/itn/2015/05/21/rethinking-investment-related-dispute-settlement/>

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International Institute for Sustainable Development (IISD). (2014). *Investment-related dispute settlement: Reflections on a new beginning*. Geneva: IISD. Retrieved from <http://www.iisd.org/library/investment-related-dispute-settlement-reflections-new-beginning>

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Rosert, D. (2014, July). *The stakes are high: A review of the financial costs of investment treaty arbitration*. Geneva: IISD. Retrieved from <http://www.iisd.org/library/stakes-are-high-review-financial-costs-investment-treaty-arbitration>

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