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### **Report on Panel Discussion:**

#### **The EU's Multilateral Investment Court and its alternatives**

Organised by Friends of the Earth Europe

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### **Programme**

#### **1. Panel: The Multilateral Investment Court: Merits and perils**

- [REDACTED], [REDACTED] German Association of Judges [REDACTED]
- [REDACTED], [REDACTED] Osgoode Hall Law School, York University [REDACTED]
- **Nele Eichhorn**, Member of Cabinet of Trade Commissioner Cecilia Malmström, European Commission [NE]
- [REDACTED], [REDACTED], Corporate Europe Observatory [REDACTED]

#### **2. Panel: Alternative approaches to regulating investment**

- [REDACTED] South African Permanent Mission in Geneva [REDACTED]
- [REDACTED] Economic Law & Policy programme of the International Institute on Sustainable Development [REDACTED]
- **Guillaume Long**, Ambassador, Ecuador Permanent Mission in Geneva [GL]

Moderated by: [REDACTED] Euractiv [REDACTED]

## **1. Panel: The Multilateral Investment Court: Merits and perils**

Panellists: [REDACTED] Nele Eichhorn [NE], [REDACTED]  
[REDACTED]

Moderator [REDACTED] introduced MIC proposal and pointed out that on UNCITRAL meeting on 10 July 2017 countries took different positions on it, in particular mentioning US and Japan. The opening question to the panellists was:

**If they could decide today if the MIC proposal is taken forward or not, how would they decide and why?**

[REDACTED] ISDS system is deeply flawed; it does not provide for (1) judicial independence, (2) procedural fairness, (3) respect for domestic institutions and (4) balance. MIC is an opportunity for a change; however it is very uncertain, as the proposal is still vague. [REDACTED] is supportive to idea, however also sceptical as he is concerned that the four criteria so far do not seem to be accepted by the main proponents of the MIC. There is a role for international adjudication to resolve sensitive disputes that cannot be resolved in domestic courts, and when international adjudication is used for this purpose it has to satisfy basic standards.

[REDACTED] would not pursue the project further as she is of opinion it would lock-in a system that is against the public interest in Europe and internationally. The court would only consider far-reaching rights that investors get in today's BITs and FTAs, which are used by the investors to attack decisions that are in the public interest and to get public money. The name of the proposed reform is misleading as people believe in courts, which they associate with courts that apply same rules for everyone; MIC however would apply same rules as ISDS which favour foreign investors and is only accessible to capital owners.

[REDACTED] (stresses he only gives his own opinion and not the position of German Association of Judges), would also not take it forward, as it proposes establishment of the procedural framework, without having a substantive law which the court would apply, i.e. how would the appeal instance review the decision if there is no law. The proposal is better from the current ISDS in respect of defined procedure, publicity and independent judges; however there is an issue that these judges would be creating non-existent law.

NE provided that the proposed system includes efficiency gains, there are 3200 BITs and EC made a decision to make something about it and proposed a multilateral reform, which is moving towards a more permanent, independent and legitimate multilateral system. MIC would adhere to specific standards and rules, but mainly it is a procedural benefit, that would bring in permanency, appeal, independence of judges and transparency. It would apply the rules from BITs, but would not make treaties fully uniform. The accessibility to the court will be defined in agreement, but the proposal also envisages access for SMEs and natural persons as well as a system that would address disparities between developing and developed countries.

**Does the MIC proposal lack ambition, would it not make more sense to introduce something that would completely reform the system? What will happen to existing treaties?**

■ thinks that the direction is wrong, one of the right things would be that EU member states start terminating BITs, which is however in principle very difficult. This way is pursued by many countries around the world. Additionally, in today globalisation more vulnerable actors need protection and better enforcement mechanisms to effectively protect them i.e. workers, local communities, environment and planet. Additionally, the EU is creating a new system that would lock countries in, by entering the CETA and negotiating investment protection with Japan, even though no EU country so far entered a BIT with Japan, which is creating even worse situation.

■ believes if there is a need for reform then it should start with the substantive rules.

From the perspective of ■, a lot of countries are in bad place, as most of the treaties were concluded before there were any foreign investor claims. Risks and liabilities were not assessed. Treaties are not easy to exit; countries are locked into them and countries search for different ways to solve the existing situation, some are able to get out of them by either withdrawing from ICSID convention, or BITs, but for those who cannot do that the MIC would provide a viable alternative, which would bring in necessary principles, which could be a very positive alternative. The ICS in CETA is not enough; it did address the lack of independence in ISDS by providing for a state-appointed roster by prohibiting side work by arbitrators as counsels and by incorporating an appellate body, but there are still flaws, i.e. ICS roster members would still have a financial interest in frequency of claims by foreign direct investors and they are not prohibited from working on a side as ISDS arbitrators, which are mostly non-public. On the other hand, there is judicial lack of fairness of ISDS, as only governments can be sued.

From the EU perspective (NE) the issues are recognised, and in July an important decision was also taken in UNCITRAL to start work and discussions on the reform, which will be transparent and broadly accessible. An aspect of the MIC could be that it would allow the claims to be grouped and heard by one body, which over time would prevent investors from bringing long-shot claims under different treaties.

**'All affected parties have the right to participate' – this principle is not a part of the ISDS system, do we have the ability to do it with the court?**

■ Some treaties allow for amicus curiae, which is a pathetic substitute that gives very limited rights. Interested parties must have the right to participate, if they don't that is a clear lack of fairness.

■ Even if such improvements were added, it would still be swallowing the poison pill just because it has vitamins, this would not resolve the big problem.

■ believes there is no need to establish a system for protecting property of special kind of party; if there are flaws in substantive national laws for protecting FDI, additional provision could be added into the treaty changing material law within this country.

**Questions from the public on the following points:**

- **Court without substantive laws**

**NE:** There are examples of international courts that work without multilateral substantive law. This however does not mean that MIC would forever operate in this way; it only means that this particular reform step is procedural.

- **The relation of MIC with ECT**

■ There is a footnote in the COM proposal for negotiating directives on the MIC that explicitly excludes the disputes that will come under ECT, meaning the new court would have nothing to do with them.

**NE:** The relationship between the MIC and the ECT is yet to be defined. But the footnote in the proposal only refers to the intra-EU cases.

■: Does not see many options with ECT beyond withdrawing from it. ECT is another locked-up treaty, similar as the NAFTA.

- **Including obligations of investors into treaties**

■: Obligations for investors would be welcome, especially if that would be integrated into all trade treaties.

- **UNCITRAL, a main centre of ISDS, as a place to start discussions on the MIC**

**NE:** A decision taken in UNCITRAL shows that countries believe it is the right place to start this discussion, and in the mandate it is clearly stated that it should be a government-led process.

■ does not see UNCITRAL as the most encouraging option. When UNCITRAL reviewed the UNCITRAL arbitration rules, with the purpose of bring in transparency, the ISDS legal industry was well represented in that process and succeeded in having the new transparency rules only applied to new treaties. Usually this would apply also to existing ones as well, but under these rules those can still be made in secret. This is a troubling precedent. In addition, for the position of the Secretary General there are different candidates, but one of them has a history in UNCTAD in the time when UNCTAD was organising sessions with governments, where the ISDS legal industry was well represented to discuss ISDS.

- **Aspect of HR in treaties – especially why EC is not precise on this point, especially as the mandate for UNCITRAL is much broader**

**NE:** This is just the start of the discussion; a possible later involvement of HR instruments is not excluded, at this stage it is too early to speculate.

- **Draft Mandate from the EC reads that there is a broad support for MIC, review of public consultations shows different picture**

■ Society is clearly asking what the public benefit of this proposal is, but there is still no answer. Commission proposal does not incorporate or balance the inquiries from the society.

- **Timing of debate on the ISDS under UNCITRAL and procedure on the UN Treaty**

**NE:** EU is now fully involved in the UN process on a possible binding legal instrument on business and HR; the process is likely to take years, so at this stage it is not possible to predict any outcomes.

- **Constitutionality of the ISDS and MIC**

■ This is a constitutional issue for member states, and the MIC would overrule the decisions of the national courts, which would raise questions on national constitutional laws and European law

ISDS system provides a powerful tool for the foreign investors also from the perspective of enforceability. Since the decisions are not final under the national courts, but have the access to ISDS and ICS, that causes countries to lose control on budgeting of the courts and gives the access to the public money only to a limited group.

## 2. Panel: Alternative approaches to regulating investment

Panellists: ,  
**Guillaume Long [GL]**

### What other role have other countries taken to solve the problems of the ISDS?

■: Ecuador and South Africa both took similar steps by terminating certain treaties that were no longer in conformity with their constitution or development aims, additionally some also exited ICSID, institutional home of ISDS, and replaced it with the national approach to dispute resolution.

On substance there are four areas that need to be addressed, 1) reforming investment protection, 2) introduction of liberalisation and how to address risks, 3) bring in more facilitation and cooperation, 4) new approaches to the right to regulate and introducing investment obligations.

1) MFN and fair and equitable treatment: Spectrum of different approaches, India has no MFN, and has narrow approach to fair and equitable treatment, EU on the other hand has a list of descriptions on what constitutes as violation of fair and equitable treatment, which is still very broad. So there are different degrees of reform on investment protection.

2) Traditional BITs have no liberalisation clauses; however, after 2009 EU introduced a combined approach of putting together investment protection and liberalisation - to some extent this is a problematic reform.

3) One of the most important approaches is the one from Brazil, who had no BITs in force, they focused on investment facilitation. Since they do not have ISDS system, all problems would have to be resolved on the state-to-state level, and all individual issues with investors through an ombudsman.

4) In terms of the right to regulate, there is a very important development in South Africa, where investor obligations are spelled out in treaties, and this also impacted Indian model of treaties.

**Brazil started from a scratch, what would be an approach when you have thousands to BITs in place – would it be one-by-one BIT approach or collectively?**

■: It is about politics and depends on the country. First, most obvious option is to discontinue BITs, another to renegotiate them with partners, however if renegotiation not a real option, there are different ways how to approach the problem. Presumably, EU began with the MIC due to a broad international dissatisfaction with the existing ISDS system; on the other hand there is no support for the reform of the substantive rules.

**South Africa and Ecuador dealt with the issue in a unique individual way.**

■: SA story began with the independence and discontinuation, when new government brought new rules. They wanted to reassure foreign investors that their rights are protected, the approach to do it was to sign BITs, however due to racial discrimination history, there are many constitutional obligations of protecting interests of those that were disregarded in place. Foreign investors did not expect for these rules to apply to them and found unfair that they would also have to contribute to the redistribution of wealth in the country. As a result, fundamentally that resulted in an obligation to regulate in public interest, and BITs were impeding this obligation. Their experience shows that they attracted investment from countries with which they had no investment agreements, and very little from countries with which they did. Correlation between BITs and investment flows was not proven. They went through public consultations, which showed that BITs impacted their right to regulate and needed to be overlooked, which resulted in a decision to terminate them. They were substituted with national system of protection, and supplemented by additional procedural and substantive protection, including national treatment, dispute prevention (ombudsman), investment facilitation, and sustainable development. Approach, which shows investors what are their rights and obligations was also transplanted regionally (African continent).

**GL:** Ecuador terminated 27 BITs, over the period of several years. Reasons were similar as those pointed out by ■, in particular no correlation between the BITs and investment flows. They realized that investment was attracted when the country is stable, which Ecuador was not before 2007, independent judiciary, clear regulations and diversification of economy. In this context they changed the constitution, which now provides that extra regional arbitration

is not constitutional; and established the commission to review FDI (correlation review, problems with arbitrators, costs and benefit analysis, etc.). ISDS bypasses national law, which de facto results in weakening of the national institutions, which raises issues of sovereignty; but also weakens multilateralism.

**Would MIC therefore be welcome, as it would reassure multilateralism? What is the position of SA and Ecuador on MIC?**

**GL:** Ecuador is yet to take its position, but it seems that it can make the situation either significantly better or worse, which will depend on details. The constitution of Ecuador prohibits extra-regional arbitrations, which is why Ecuador is endorsing the establishment of investor-state mechanism on the UNASUR regional level since 2008.

■: Time to set up new institutions has gone; the existing institutions on international and national level need to be optimized. SA is trying to understand the arguments for the establishment of the MIC, which are transparency, predictability and stability, but disagrees on them. MIC is not a solution as it only creates an alternative track and has no substantive law, which would be applicable. At this point SA cannot support MIC, firstly due to lack of clarity and secondly, also because they are of opinion that such system would not add value to the current set up.

**Questions from the public on the following points:**

- **UNCITRAL mandate is broader, options for reform beyond the idea of the MIC**

**GL:** If there is any multilateral setting, it is of importance for Ecuador that it would ensure that investors and corporations are accountable for HR.

■: SA opposes the idea of MIC, because it does not address the fundamental disconnect in respect of substance of what applies to investment. SA participated in UNCITRAL process, this process is more general, does not necessarily deal with the MIC in its entirety but possibly with some of the issues. Current UNCITRAL process should not be hijacked to only make it about the MIC; SA welcomes any constructive debate on how to make the system work better. Additionally, when it comes to international arbitration (of any kind), the distinction between private and public goods is necessary, as state that acts like a government needs to take different considerations into account.

■: Issue of the MIC is linked to the fear of expansion of the ISDS. The only way MIC could be appealing to critics of ISDS or countries that are exiting this system, is if it is broader.

- **Contributions of BITs to sustainable development**

■: There is a need for more cooperation, to ensure that investment flows are there to support sustainable development and address sustainable goals.

- **Problems, experiences and consequences of terminating BITs**

■: In the termination procedure, investors did not oppose it but only wanted clarity in the process. SA still attracts investors. They replaced BITs with fairer Investor Act, which treats all investors the same. It is certain that a host country run great risk when signing a treaty. A way to address it is to put sustainable development provisions into the treaty and reduce this risk.

GL: There are numerous problems but mainly political; it took Ecuador 9 years to terminate some of them.

■: Termination is today easier than when SA made first steps, however many developing countries are still afraid to do it. In two weeks UNCTAD will discuss what to do with existing BITs and how to find a way to reduce their negative impacts, additional solutions need to be found.

- **Position of developing countries – loss of flexibility to answer to climate change and other negative affects**

GL: Developing countries should not think that termination would make investors leave, because that is proven to be wrong. In ISDS states rarely win, and there are also only few cases where states took investors to arbitration; it is mostly the other way around.

- **Chances that the UNCITRAL procedure would lead to a permanent system of unbiased judges that would also consider obligations of investors**

GL: Ecuador is still in the process of creating a position.

- **Added value of the MIC: approach of replacing the ISDS by something that is more legitimate, fair, transparent. It is unlikely that BITs would be terminated in the next years and if MIC is not done, we are left with the *status quo* of 3000 BITs that are in place.**

■: Good to know that EC is planning to replace the BITs, but when? Also the question is when entering into FTAs, is it already possible to address that they will only apply to future aspects and that existing treaties will be terminated and also to address the globalisation. SA interest is focused on the interest that is global and common to everyone. There are many more questions that need answers.

**UNASUR – regional system: regional and not global (UN system)**

GL: This is the position of the Ecuadorian people, who confirmed this constitutional change. This only allows them to work regionally. There are number of ways in which EU and Ecuadorian position is coming closer.



- **Enforce investors and human rights in the reform – UNCITRAL as area to discuss it**

■: UNCITRAL is an expert body, so it is not typical for these types of bodies to negotiate treaties. It can only be actually done if countries send people from governments to discuss it. This is what EU member states kept saying in July. EU agreements have very little provisions on the right to develop, which implies that there is no much attend in that way. Much more could also be done in the sustainable development chapters of EU FTAs, i.e. to bring in accountability systems.