

Assessment of the public consultation on the proposed Multilateral Investment Court

Summary

The European Commission conducted a consultation on the Multilateral Investment Court (MIC) from 21 December 2016 to 15 March 2017. The Commission published a summary of the results on 13 September 2017, as an annex to the impact assessment accompanying the draft mandate for the MIC.

This assessment is based on a thorough analysis of the public responses to the consultation and concludes that the public consultation on the MIC was deficient in several ways:

- The scope, questions and methodology were highly inadequate and prevented a broad range of stakeholders for expressing their views
- The Commission misrepresented the consultation, alleging much higher support for the MIC than was actually provided by respondents
- The Commission failed to take alternative views into account

It appears that the public consultation was merely a window-dressing exercise and that results were mis-represented by the Commission to wrongfully claim support for the MIC proposal.

Design of the consultation on the establishment of a Multilateral Investment Court (MIC)

As noted by broad range of respondents with diverging views about investment dispute settlement reform and highlighted in Annex I, the consultation was biased¹ because of a very narrow and highly technical scope.

The main criticisms identified in responses to the consultation include:

- The consultation was an exercise in legitimating a project the Commission had already decided to pursue
- The consultation was overly narrow and limited in its scope, not allowing respondents to express their views on the investment arbitration reform process
- Questions were worded in such a way that answers and ratings could be easily misinterpreted, potentially giving the impression that respondents support the Commission's project where this is not the case

¹ This was acknowledged by the Commission in the annex to the impact assessment (“Despite the Commission's efforts to elaborate a balanced consultation in that sense, the questionnaire was criticised by some stakeholders for being too technical, too long and not allowing respondents sufficient margin to express their views.”). However, this information is completely omitted in the summary of the responses, which synthesises the information for decision makers.

BOX 1: Commission ignores results of public consultation on ISDS in 2014

In its defence of the narrow scope of the consultation, the Commission points out that “the 2014 public consultation on investment protection and ISDS in the TTIP already consulted stakeholders on those broader considerations and provided sufficient elements in that regard. The Commission considered that the consultation at hand would thus build on the 2014 public consultations and aim at seeking more specific information about the options for such multilateral reform.”

However, this answer is insufficient for two reasons:

- (1) The 2014 consultation already suffered from an overly narrow scope that did not allow for critical viewpoints to be adequately expressed. Respondents to the 2014 consultation had already pointed to a narrow and inappropriate scope. For example, in its response to the 2014 consultation, Friends of the Earth Europe specified that “What the consultation's format and structure primarily show is the lack of genuine openness to civil society criticism of the system as a whole. Rather the Commission seems to aim at using it to justify a reform that will not address the fundamental flaws.”
- (2) The Commission did not take into account the overwhelming majority of responses to the 2014 consultation: 97% of respondent rejected the ISDS system in its entirety. Yet the Commission, with the support of the EU member states, chose to ignore these voices and to continue including a reformed ISDS mechanism in its trade agreements.

The mis-representation of consultation results

The Commission's interpretation of the results was in some crucial cases misleading, demonstrating an attempt to justify a pre-determined decision.

For example, in its summary for the Council, the Commission writes that “The consultation showed overall broad support for a multilateral reform of investment dispute settlement as described in this initiative.”²

However, our thorough analysis of the public responses demonstrates an opposite conclusion. While it is not possible to fully categorise every response, because the public consultation did not include a direct question to assess whether the respondents considered the proposed MIC desirable,³ the numbers below provide a good overview of the order of magnitude of different responses and paint a very different picture:

² Explanatory memorandum for a Council decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes

³ Because the consultation asked such narrow questions it was difficult to determine the position of many respondents. Our characterization of the respondents' positions on the MIC represent our best effort to interpret the responses provided. The full evaluation can be access here: https://docs.google.com/spreadsheets/d/1eZ-fkg3WXaFLOnPKV3xyoA3bYPbSq_Nmmc4NLdyBSe0/edit?usp=sharing

1. Unconditionally in favour of MIC – 15 respondents, 7,8 %
2. Do not necessarily or clearly favour MIC but appears to favour ISDS generally – 17 respondents, 8,9 %
3. In favour of more ambitious procedural changes, or substantive changes – 32 respondents, 16,7 %
4. Oppose the establishment of a MIC – 89 respondents, 46,5 %
5. No position/not discernible – 39 respondents, 20,5%

As these results show, less than 10% of the respondents fully support the MIC, while almost half of respondents do not support the MIC at all.

The Commission also claims in the summary of the impact assessment that “the non-profit sector broadly supports the principles that underpin the option to establish a permanent multilateral investment court.” Our figures point in the opposite direction. Fifty respondents identified as non-profits. Of those, only 2 (4%) supported the MIC, while 14 (28 %) favoured more ambitious procedural changes or substantive changes, and 29 (58 %) non-profit respondents opposed the MIC.

The summaries provided by the Commission are therefore clearly misleading and could represent a case of maladministration.

The Commission violated its own internal guidelines

The purpose of public consultations is to inform the decisions of the European Commission. In its guidelines for public consultations, the Commission lists criteria that a consultation should fulfil including the need to “adopt an inclusive approach” and to “consult at a time where stakeholder views can still make a difference”.

The guidelines also state that contributions should be analysed by considering the following elements: “Do they [the answers to the consultation] support/oppose/suggest modifications to a certain policy measure? Do they provide new ideas? Do they suggest an alternative approach?”⁴

The Commission does not seem to draw any conclusions from the numerous responses that ask for a more substantial reform of the investment dispute resolution system, failing to take alternative suggestions seriously and thus disregarding its official guidelines for public consultations.⁵ In addition, the steps the European Commission has taken following the consultation, such as initiating discussions on the reform of the global ISDS system on the basis of the Commission’s MIC proposal even before the consultation results were finalised and recommending to member states a mandate to negotiate the MIC, are contrary to much of the input provided in the consultation.

We also believe this to be misleading and representing a case of maladministration.

⁴ All quotes from <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-stakeholder-consultation.pdf>

⁵ The Executive Summary of the Commission’s impact assessment, eight options were identified. These include Option 6 (negotiations on substantive reforms), Option 7 (further improvements of ISDS in bilateral EU investment agreements and in the ECT), and Option 8 (phase out of ISDS).

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Authors:

Lucile Falgueyrac, coordinator S2B network, lucile@s2bnetwork.org

Fabian Flues, trade campaigner Friends of the Earth Europe, Fabian.flues@foeeurope.org

Layla Hughes, senior attorney, Center for International Environmental Law, lhughes@ciel.org

Research on the responses conducted by the Center for International Environmental Law, contact Layla Hughes (lhughes@ciel.org) in case of questions.

Annex I

Full quotes of some respondents to the consultation:

The Columbia Center on Sustainable Investment:

«This Position Paper is submitted by CCSI in response to question 63 of the questionnaire. We would like to take this opportunity to address the reasons for which we were unable to answer the majority of the substantive, multiple choice questions on the proposed Multilateral Investment Court (MIC) and/or Multilateral Appeal Tribunal (MAT) that are posed in the questionnaire. Questions 27 through 61 are consistently phrased in such a way that respondents must indicate that either the existing ISDS system or the MIC/MAT best solves the problem in question. In many cases, no feasible response is provided for respondents to indicate that neither ISDS nor the MIC/MAT is sufficient. Further, the “neutral” response is “I don’t know / I don’t have an opinion,” which is clearly an inaccurate response when a respondent does know and/or does have an opinion but feels that none of the available responses adequately address the issue. Write in questions that ask for elaboration on a bubble response similarly frequently do so in the context where the respondent has agreed with the phrasing of the question in the first place and only in a minority of cases permit more open ended comments. In other words, the questionnaire contains questions in form, but many of the response options are extremely limited in fact. In order that our responses are not misconstrued to support the MIC/MAT or the current ISDS system, we have been unable to answer the majority of the form questions, and would like to take this opportunity to explain our reasoning as to why we could not provide responses.»

The International Institute for Sustainable Development:

«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.»

The European Service Forum:

«We would like however to express the view that the current questionnaire is particularly user-unfriendly and many questions are very difficult to reply. ESF deeply regrets the very poor format of the questionnaire, and the very small space for replies (500 characters !?), which prevent stakeholders to provide substantive views. This system of ranking "From 0 (not important) to 5 (very important)" or even “no opinion” is most of the time inappropriate and give ways for as many interpretations as you will collect answers! When we circulated it to our members, we collected so many different replies. But when we asked for explanation of the replies, the substance was often similar. So, the expressions of a position were completely

different for a similar answer. We would like therefore call for the Commission to give an extreme caution in interpreting the responses.»

The FairEconomy Alliance:

«The current questionnaire allows only for a narrow and, ultimately, inconsequential discussion on a set of ideas and loose concepts for a procedural reform of ISDS – the MIC – that depends entirely on the acceptance of a new global institution by a large majority of other countries – some of who have abandon ISDS mechanisms all together. Further to this, the questionnaire fails to show the Commission’s vision on issues of substantive content reform. We consider that, without this full-picture, it is impossible to assess the Commission’s ideas responsibly. We fear that doing so would indirectly legitimise a reform process, which partially addresses some ISDS concerns but fails to deliver solutions to – or could potentially exacerbate – others.»

The organisation of German public water management companies (AöW):

«We criticise that the consultation questions were designed in a way that the answers imply that the establishment of an international arbitration court exclusively for international corporations is accepted. It first needs to be clarified « whether » the establishment of court is expedient, before its establishment is being discussed. The consultation does not allow for the discussion of this important question. [Own translations from : Wir kritisieren, dass die Konsultationsfragen so angelegt sind, dass eine Antwort impliziert, dass die Einrichtung eines internationalen Schiedsgerichtshofes ausschließlich für internationale Investoren akzeptiert wird. Bevor die Einrichtung eines solchen Gerichtshofes diskutiert wird, muss geklärt werden „ob“ dies überhaupt sinnvoll ist. Die Konsultation ermöglicht die Debatte über diese wichtige Frage nicht.] »

Greenpeace:

«Because the consultation asked such narrow questions it was difficult to determine the position of many respondents. Our characterization of the respondents’ positions on the MIC represent our best effort to interpret the responses provided. [...] The current public consultation on the MIC is premature, as it focuses on technical aspects without addressing any of the underlying substantive issues. We note your plans to have parallel discussions on the substantive issues; these should take place before, and not after, a technical consultation. For this reason, we have decided not to answer the questions in this open consultation. We have annexed to this letter the key issues related to investment protection mechanisms that the Commission must address in a meaningful public consultation.»

The European Federation of Public Services Unions:

«EPSU considers that the format of the EC questionnaire is inappropriate for a public consultation on this matter. There is no space for comments regarding alternative policy orientations. Nor does the EC Inception Impact Assessment consider alternatives to investor protection/ISDS. The Assessment makes the assumption that the EC proposal will have no adverse social impacts without providing any evidence for this.»

The European Trade Union Confederation (ETUC):

«We consider the format of the Commission’s questionnaire inadequate for our purposes in responding to the public consultation.»