

Commissioner Malmström
Commissioner for Trade
European Commission
Rue de la Loi 200
1049 Brussels

15 March 2017

Re: Public consultation on a multilateral reform of investment dispute resolution

Dear Commissioner Malmström,

As an organisation committed to a green and peaceful future for people and planet, Greenpeace believes that democracy, the rule of law, protection of fundamental rights, and fair and equal access to justice are essential values in our societies. EU member states have international legally binding obligations to uphold these principles in all policies, including international trade and investment protection.

In this regard, we noted your initiative to create a Multilateral Investment Court (MIC) as a permanent forum for the resolution of disputes between investors and states, with the intention of replacing Investor to State Dispute Settlement (ISDS) mechanisms currently used in investment treaties, as well as the Investment Court System (ICS) recently introduced in CETA.

While we welcome your effort to engage with civil society, we regret that this consultation fails to address the fundamental shortcomings of investment protection rules and mechanisms as they currently stand.¹

Investment agreements are currently designed to offer investors protection and means of redress against possible abuses by public authorities. However, they do nothing to hold investors accountable to states, communities and individuals that may be damaged by their conduct. This asymmetric investment protection results in unjustified privilege for foreign investors and discrimination against domestic authorities, companies and individuals. This asymmetry is all the more troubling when we compare the strong enforcement mechanisms the Commission is pursuing in favour of corporations versus the weak enforcement of international environmental or human rights law.

Creating an international court without addressing this structural imbalance in the system will only serve to crystallise an unfair and selective approach to access to justice. Deeper and fundamental reform is necessary, as the EU institutions have recognised.

¹ Please find our full position on ICS here: <http://www.greenpeace.org/eu-unit/en/Publications/2016/From-ISDS-to-ICS-a-leopard-cant-change-its-spots/>

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.

Greenpeace calls on you and the Commission to address investor rights in a manner that ensures they are in line with the rule of law. Investors should not have special rights granted outside our established legal system, and enforcement and interpretation of investor rights must have regard to the public interest. These rights should also be linked with obligations for investors.

Fundamental rights, notably those related to health, labour and environment and access to public services, must take precedence over investors' interests. Investing is a choice, and the rules protecting this choice must be compatible with the rules that guide our society. Rather than "overloading" discussions on investment protection mechanisms, addressing substantive issues ensures that the rules we implement reflect the kind of society in which we want to live.

You have often invoked EU values in your discourse on CETA, ICS and MIC. Not only are the rule of law and equality before the law EU values, but indeed, they are the legal basis of the EU. We look forward to contributing to the upcoming discussions on structural issues related to investment protection. But if these discussions are held in parallel with this technical work, without any impact on the actual rules of investment protection, these discussions will be meaningless. We thus call on you to ensure that discussions and consultation on this MIC initiative address substantive issues.

We look forward to your response and continued engagement with you on this issue.

Your sincerely,

A handwritten signature in black ink, appearing to read 'Jorgo Riss', with a stylized, cursive script.

Jorgo Riss
Director, Greenpeace European Unit

Annex

In 2014, then President-elect Juncker stated in his political guidelines that the jurisdiction of EU member states' courts should not be limited by special regimes for investor disputes. You clearly supported this statement.²

In 2015, the European Parliament called for the Commission to “address investors' obligations and responsibilities by referring, *inter alia*, to the OECD principles for multinational enterprises and to the UN principles on business and human rights as benchmarks” in the context of its investment policy.³ Similarly, it asked the Commission “to ensure that foreign investors are treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors.”

Greenpeace believes that the Commission should engage in a process of deep structural reform of investment protection law, which would fulfill society's demands for justice, equality, respect of democracy and protection of the public interest.⁴

Investment dispute resolution should use real courts with professional judges who abide by a code of conduct and have no conflict of interest

One of our concerns with ICS is that it is not a real court and does not have real judges. We therefore welcome the work you are doing to include the possibility for rules protecting investment to be interpreted and applied by professional judges who, in light of their exclusive mandate, would not be exposed to a conflict of interest. We also welcome the fact that states would be responsible for appointing these judges, thus removing incentives for creating case-law favourable to investors in order to attract cases. But the description of “permanent adjudicators” in the paper presented by the EU Commission and the Canadian Government at the Geneva workshop⁵ does not clarify if these permanent adjudicators are employed full-time and free of conflicts of interest. We point out, in this respect, that the only way to ensure the independence of judges is the adoption of standards such as those foreseen by Article 4 of the Statute of the EU Court of Justice, including the obligation of taking an oath.⁶

It is a positive sign that proceedings and rulings would be made public, increasing transparency and allowing public scrutiny of case law. This would guard against erratic interpretation of investment protection rules and erosion of the right to regulate. The possibility for interested parties to participate in the proceedings is crucial in this regard. But again, a statement that a “future mechanism would... need to ensure a certain level of transparency”⁷ is too vague to be convincing. Progress in this key area is necessary, but insufficient, to address the structural issues with investment protection rules.

Investment protection must respect the rule of law of the domestic system and the equality principle. This requires exhaustion of domestic remedy, and possibility for judicial scrutiny from domestic courts.

While we welcome improvements to how investment protection rules are interpreted and applied, this would only be relevant if investors have exhausted domestic remedies. This is essential to ensure respect for the rule

² “As Commission President, I will also be very clear that I will not sacrifice Europe's safety, health, social and data protection standards or our cultural diversity on the altar of free trade. Notably, the safety of the food we eat and the protection of Europeans' personal data will be non-negotiable for me as Commission President. *Nor I will accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context.*” (emphasis added). Your written answers to the European Parliament contain the following statement: “I fully support this approach of the President-elect and will work in this sense in the negotiations, which are ongoing and where this issue is on the table.”

http://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/malmstrom-reply_en.pdf

³<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN>, Para XIII.

⁴ An overwhelming majority responded to the 2014 ISDS consultation saying that the mechanism was “perceived as a threat to democracy and public finance or to public policies”, we would expect some form of recognition of these concerns. Regrettably, this consultation on MIC does not. Instead, it limits the shortcomings of the existing system to issues of “greater legal certainty, consistency in the settlement of investment disputes, legal correctness through the possibility of an appeal, full impartiality in the decisions, legal predictability for users of the system and improved accessibility for Small and Medium Sized Enterprises (SMEs).” Addressing these issues without further discussion on the systemic problems with ISDS and ICS and potential MIC mean that the public's concerns as expressed in the last open consultation have not been meaningfully addressed. See, European Commission, Staff Working Document, Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), Page 14. http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf

⁵ See para 3.5-3.7 in the discussion paper “Establishment of a multilateral investment dispute settlement system” by European Commission & Government of Canada, presented at the expert meeting 13, 14 December 2016 in Geneva; see http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf

⁶ Statute of the Court of Justice of the European Union, Article 4, paragraphs 1 and 2: “The Judges may not hold any political or administrative office. They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.”

⁷ See para 3.10 on Transparency (“Any future mechanism would, consistent with recent developments in investment treaty making, need to ensure a certain level of transparency.”) in the discussion paper “Establishment of a multilateral investment dispute settlement system” by European Commission & Government of Canada, presented at the expert meeting 13, 14 December 2016 in Geneva; see http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf

of law in the EU and member states.⁸ Decisions on investor claims must be subject to the scrutiny of EU supreme and constitutional courts, including the EU Court of Justice: in particular, investment tribunals must not be allowed to interpret domestic law, particularly when the legality of an investment is called into question by national authorities, without the prior involvement of the above-mentioned courts. The Commission's insistence in ignoring the risks of conflict of jurisdiction between investors tribunals and the EU Court of Justice is incomprehensible, and remains an issue of severe concern.

No preferential treatment of foreign investors compared to everyone else (domestic investors, governments, civil society, affected communities, etc.)

The MIC consultation does not address whether special investment protection rules should exist at all, particularly when no clear mechanism is established to hold investors accountable. Before addressing any technical detail, we must address this fundamental issue.

In principle, foreign investors must not have greater rights than those afforded to individuals, communities or domestic investors. Accordingly, investment protection must come with rules and means of redress to equally protect those that may suffer from investors' conduct. The UN Guiding Principles on Business and Human Rights could be taken into account for this purpose.

Without the possibility of suing investors, any kind of investment court is simply an instrument for the defense of a privilege, rather than a tool to affirm the rule of law. Any discussion about the scope of investment protection, such as protection of legitimate expectations, or direct and indirect expropriation should take place only when investors' obligations and responsibilities are also clearly identified.

Regrettably, the MIC consultation does not address the issue of investor liability: the Commission must be aware that the entrenched inequality of the system has profound consequences for our society and for vulnerable communities around the world, and should take the opportunity to rethink its approach comprehensively.

Guarantee full and unequivocal protection of EU and member states' right to regulate in the public interest

The right to regulate is inherent to democratic systems and must never be qualified by being "consistent" with a trade or investment agreement. Special courts or tribunals are not qualified to decide whether a measure is adopted to protect the public interest. None of the three joint EU-Canada discussions papers on MIC makes a reference to the right to regulate.⁹ Its current formulation in CETA is inadequate to protect EU and national authorities from investors' attacks. A clear, unequivocal carve-out for decisions in public interests sectors (e.g. environment, health and labour protection, as well as the provision of public services) should be introduced in all present and future investment agreements.

⁸ Indeed, if there are concerns about the rule of law in certain member states, this should be addressed for the benefit of everyone, not just foreign investors.

⁹ See 1) non-paper "Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism", OECD-hosted Investment Treaty Dialogue 17 October 2016, Paris, France, at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf 2) discussion paper "Establishment of a multilateral investment dispute settlement system"; expert meeting 13, 14 December 2016 in Geneva, Switzerland, at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf and 3) "The case for creating a multilateral investment dispute settlement mechanism" paper presented at an informal ministerial meeting at World Economic Forum, 20 January 2017, Davos, Switzerland at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf