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Public Consultation on a Multilateral Reform of Investment Dispute Settlement

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Recommended Citation

Columbia Center on Sustainable Investment, *Public Consultation on a Multilateral Reform of Investment Dispute Settlement*, (2017).
Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/100

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Position Paper in support of opinions expressed in response to the European Commission's "Public consultation on a multilateral reform of investment dispute resolution"

The Columbia Center on Sustainable Investment (CCSI) is grateful for the opportunity to provide input to the European Commission's (EC) "Public consultation on a multilateral reform of investment dispute resolution". CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment, including related dispute resolution mechanisms, and its impacts on sustainable development.

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 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.

As noted in the EC's public consultation questionnaire, many countries and other stakeholders are currently engaged in substantial debate surrounding the investor-state dispute settlement (ISDS) system that has been created by and included in over 3000 existing international investment agreements (IIAs). ISDS has increasingly raised concerns among governments and other stakeholders with respect to the legitimacy, neutrality, transparency, consistency and cost of these disputes, particularly as a growing number of disputes involve challenges to a wide range of government measures that are taken in good faith and in the public interest.

While the EC should be commended for its initiative to reform what is widely perceived as a broken ISDS system, the proposed MIC/MAT fall dramatically short in addressing the most problematic aspects of the ISDS regime and in fact would serve to further expand and entrench the controversial ISDS mechanism.

CCSI's work is based on the premise that when done correctly, increasing certain kinds of investment flows between nations can be positive, and even necessary, to achieve sustainable development objectives. Relatedly, CCSI believes in the necessity of using international law mechanisms to shape government actions and to hold governments accountable when international laws and norms have been violated. We

regret, therefore, that the EC, in formulating the MIC/MAT proposal and in its related public consultation, is not asking more fundamental questions surrounding what goals the multilateral investment system should be seeking to achieve and how best to structure a system to achieve those goals.

Investment treaties are, by their terms, instruments that aim to promote investment flows, and typically require states to provide certain standards of protection to foreign investors at the international as opposed to domestic law level. They frequently enable investors to easily enforce these treaty-based state obligations through the inclusion of an ISDS mechanism. While the MIC/MAT proposal aims to address some of the problematic aspects of ISDS including errors in the application or interpretation of law, manifest errors in the appreciation of the facts, lack of arbitrator neutrality and lack of transparency in dispute settlement proceedings, it does not propose to, and even boasts that it will not, seek to impact or change substantive legal protections provided to foreign investors. We thus view the MIC/MAT as an alternative to the ad hoc nature of the current ISDS practices in the most limited sense, but it remains a fundamentally flawed system that will apply the same damaging substantive laws and continue to sit as a supranational body that problematically permits only foreign (and not domestic) investors to completely bypass the relevant domestic legal systems and have their disputes heard by a supranational body.

Looking back to why the ISDS regime was developed in the first place, proponents frequently cite four broad objectives for the inclusion of this kind of dispute resolution system in IIAs, claiming that it: (1) is necessary to the overall IIA objective of increasing investment flows; (2) depoliticizes investment disputes; (3) improves governance and the rule of law in host countries; and (4) provides investors remedies for harms. These objectives are of varying degrees of importance to multinational enterprises, home states, host states, and other stakeholders, but none of them stands up to scrutiny.[1] **Because the proposed MIC/MAT does nothing to change the substantive laws contained in IIAs and continues to provide a parallel and privileged system for foreign investors, we do not view the MIC/MAT as sufficiently addressing any of the following issues.**

Taking each of these purported objectives in turn, evidence that IIAs (let alone IIAs that rely on the ISDS mechanism) actually increase investment flows is inconclusive.[2] While some researchers have found a tentative correlation between IIAs signed and investment received, persistent challenges have undermined

[1] *See* Lise Johnson & Lisa Sachs, "The Outsized Costs of Investor-State Dispute Settlement," AIB Insights 16(1) (2016), *available at* http://ccsi.columbia.edu/files/2016/02/AIB-Insights-Vol.-16-Issue-1-The-outsized-costs-of-ISDS-Johnson-Sachs-Feb-2016.pdf; *see also* Jonathan Bonnitcha, Lauge Poulson & Jason Yackee, "Costs and Benefits of an EU-USA Investment Protection Treaty," Report to the UK Department of Business Innovation and Skills (2013).

[2] Christian Bellak, "Economic Impact of Investment Agreements," Department of Economics Working Paper 200, Vienna University of Economics and Business, August 2015; M. Hallward-Driemeier, "Do bilateral investment treaties attract FDI? Only a bit and they could bite," World Bank Policy Research Paper WPS 3121, 2003; J. Tobin & S. Rose-Ackerman, "Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties," Yale Law School Center for Law, Economics and Public Policy Research paper No. 293; Lorenzo Cotula, et al. "China-Africa investment treaties: do they work?," International Institute for Environment and Development, December 2016, *available at* http://pubs.iied.org/17588IIED/; Hejing Chen, et al. "The Impact of BITs and DTTs on FDI Inflow and Outflow Evidence From China," CIGI Papers No. 75, August 2015; E. Neumeyer and L. Spess, "Do bilateral investment treaties increase foreign direct investment to developing countries?," World Development 33(10) (2005); J. Salacuse and N. Sullivan, "Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain," Harvard Int'l L. J. 46(1) (2005).

the ability of researchers to identify any causal connections, much less analyze and understand the incentives behind the investment and the value of ISDS to the overall goal of increasing investment.[3]

Second, depoliticization of investment disputes, often discussed in sweeping and generic terms, can and should be viewed from many different and discrete perspectives (that of the home state, host state, investor, or of the dispute resolution system, per se). The specific contribution of the substantive legal protections found IIAs and/or the ability of only foreign investors to bypass the domestic legal system through an ISDS mechanism to the objective of depoliticizing investment disputes is questionable.[4] In any event, legalized resolution of disputes can occur in many different fora, including through the domestic courts of the host or home states as well as through state-state dispute settlement mechanisms. Further, it is questionable whether investor-state disputes can ever be truly depoliticized.[5] It is clear, however, that the ability of foreign investors to have privileged mechanisms through which to challenge host-state actions is neither necessary nor sufficient to depoliticize disputes.

Third, the relationship between IIAs, ISDS and domestic rule of law remains insufficiently explored. Empirical studies suggest that signing an IIA may have minor negative effects on the host-state rule of law, and that successful ISDS claims may also contribute to these negative impacts (though in statistically insignificant ways).[6] In-depth explorations of causal links between IIAs, ISDS and rule of law remain challenging from a methodological perspective, but it is in any event impossible to conclude that a positive relationship exists, and it remains possible that a negative correlation results.

Finally, with respect to the objective of providing remedies to harmed investors, neither IIAs nor ISDS awards provide a uniform or well-developed theory explaining their approaches to investor remedies. It is unclear whether ISDS tribunals award monetary damages to sanction or avoid enriching a wrongdoing host-state, to provide corrective justice for the investor, and/or to achieve the more utilitarian purpose of encouraging future investment. Nevertheless, cases reflect a basic aim of ensuring investors receive compensation for harms. At the same time, investors have other venues, including host-state courts or state-state dispute resolution options, in which to receive compensation, and the substantive ISDS/MIC/MAT protections for which investors receive compensation have significant costs.

Costs of ISDS that are not addressed by the MIC/MAT proposal include negative impacts on domestic law, policy and institutions as well as the costs of international liability and encroachment on domestic

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[3] *See* Todd Allee and Clint Peinhardt, Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment, 65 International Organization 401 (2011).

[4] Martins Paparinskis, "The Limits of Depoliticisation in Contemporary Investor-State Arbitration," Select Proceedings of the European Society of International Law, Vol. 3, October 2010; *see* Yannick Rani, "Labor Provisions and Dispute Settlement in International Investment Agreements: An Inquiry into the Politicization of the Settlement of 'Labor Disputes'," YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2014-2015, Andrea K. Bjorklund, ed. at 97 (describing the multi-faceted conflicts faced by regulating governments, between the public and private interest, on the one hand, and between differing public interest on the other)

[5] Theodor M. Posner and Marguerite C. Walter, *The Abiding Role of State-State Engagement In the Resolution of Investor-State Disputes*, 11 TRANSNATIONAL DISPUTE MANAGEMENT 1, January 2014..

[6] Lise Johnson, *Aligning Swiss Investment Treaties with Sustainable Development: An Assessment of Current Policy Coherence and Options for Future Action*, October 2015, *available at* http://ccsi.columbia.edu/files/2016/08/Aligning-Swiss-IIAs-with-SD-CCSI-June-2016-.pdf; Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, at 136 (2014).

regulatory space.[7] ISDS and the MIC/MAT proposal create a parallel and preferential legal system for foreign investors that undermines domestic legal institutions and courts in their role of developing, interpreting and applying laws imposed by host states by allowing foreign investors to bypass applicable substantive and procedural rights that have developed over time in the domestic context and bring claims related to domestic administrative, contract, tort or constitutional law directly to an international tribunal. Awards in these cases can effectively create property rights otherwise not recognized in the domestic context and may upset domestic separations of powers. Further, the ISDS/MIC/MAT systems marginalize the non-parties whose interests and rights may be directly impacted by a claim or award but whose only access to the dispute is through an amicus curiae submission at the discretion of the tribunal. Finally, while the costs to regulatory space are frequently anecdotal, some studies have suggested that privileged protection of investor interests, the violation of which can carry a heavy financial penalty, can discourage economically efficient government regulation in the public interest.[8] It is, in any event, impossible to definitively assert that there is no impact on domestic regulatory space.

Further, and more critically, even if the purported benefits of ISDS could be realized, there are increasing doubts regarding whether these stated objectives are adequate or appropriate for international economic governance in an era in which the world is facing pressing economic, environmental, social and governance challenges. The presumption that all increased investment flows will necessarily lead to positive development outcomes in any host-state is fundamentally incorrect, as actual benefits will depend on the specific attributes of each investment (such as sector, technologies transferred, jobs created, among other factors).

Further, there is a need to ensure that international investment law is developed in an inclusive manner, for the service of the most vulnerable and those whose lives and livelihoods benefit from or are harmed by international investment, and not just the most powerful. Mechanisms to ensure the accountability of governments as well as private sector actors must be developed, and all parties – beyond only the investor and the state - who are directly impacted by international investments must have access to remedies. This is particularly the case as governments are outsourcing more and more of traditionally public sector activities to private actors (for example, provision of essential public services and infrastructure) and private actors are in turn bringing claims against governments in relation to those activities.

Toward this end, CCSI and others are engaged in discussions of what real reform should look like, not just tweaks around the margin – but a fundamental reassessment of the role of international law in advancing sustainable growth and development, and combatting challenges such as increasing inequality, poverty, climate change, and loss of biodiversity. We regret that the EC, in proposing the MIC/MAT and by limiting its public consultation to the narrow questions posed, has not engaged with these more fundamental and critical questions at a time when the international investment system is ripe for reform.

[7] *See* Johnson & Sachs, *supra* note 1.
[8] Bonnitcha, *supra* note 6.