

FairEconomyAlliance

What SMEs want from trade agreements

Additional information to the European Commission's questionnaire on options for a multilateral reform of investment dispute resolution

The Fair Economy Alliance is a European network of initiatives by small and medium size enterprises (SMEs) concerned about fairness and sustainability in international trade. We welcome that the European Commission is consulting on the existing mechanism for international investment dispute resolution. At the same time, we regret that this questionnaire has omitted a crucial discussion of the fundamentals of the system created and supported by Investor-State Dispute Settlement (ISDS) mechanisms.

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.

We are mindful of the challenge and the Commission's efforts, to review and fix an irregular, deteriorated and even ethically compromised web of global arbitration mechanisms. We consider that to understand the potential role of investment dispute resolution in 21st century trade policy, it is imperative to review how relevant the system is in relation to its objectives and its expectations as a policy tool. A necessary step to formulate such a responsible and informed policy decision would require clarity from the Commission on the following three points:

- The Commission's keenness to reform ISDS despite a consistent lack of evidence to its utility: even after half a century of no evidence connecting the level of foreign investment in a country with the existence of ISDS mechanisms - beyond anecdotal references by advocates of the system -, the Commission has time and again refused to acknowledge the cessation of the mechanism as a valid policy option. The Commission has relied on dubious statements about unfair judicial systems around the world to support its reform proposal. Shockingly, this has been done without providing systematic, documented – or even anecdotal – evidence of these wrongdoings and the subsequent need for extra-judicial investor rights and protections. The burden of proof is not anymore on civil society to bring to light the pitfalls of ISDS mechanisms. The burden of proof lies with the Commission and is capacity to: (A) justify the creation – and financing - of a new global institutional behemoth, and (B) provide comprehensive evidence that extra judicial rights for a privileged minority is in the best economic, social and environmental interest of the EU.

- Apply the 'Think Small First' principle to the MIC impact assessment and the current proposal: the 'think small first' principle reduces the bureaucratic burden on SMEs by looking at proposed policies through their effect on smaller businesses. In this case, it is alarming to note that the Commission considers their MIC proposal to have no effect on SMEs – as it is stated in their call for the MIC impact assessment. The undeniable fact - and despite the best possible intentions - is that the MIC would institutionalise a preferential treatment for a category of investors who – based on the current proposal – could circumvent national legal systems, which have wider and longer established check and balances. Proposing a new institution to solve a – weakly – documented problem is not solving this problem but transferring it to the new institution. This is precisely the type of simplistic bureaucratic expansion and inefficient policy decisions that the 'think small first' principle was created to tackle. The SME question should not be trivialized by thinking that widening access to the mechanism – by subsidizing entry through a tier system – solves its shortcomings.
- Wrong incentives for dubious investment: litigation finance (linked to ISDS claims) expanded after the 2008 financial crisis – from what little transparency surrounding conventional ISDS cases allows to see. Expanding the access to a procedurally different but substantively equal system to ISDS by subsidizing its use could prove to be a strong incentive for litigation finance and increase speculative investments based on possible compensation claims. The Commission should consider the wider implications of its proposal for this controversial activity.

The Fair Economy Alliance remains committed to the improvement of the EU's trade agenda. We commend the efforts towards increased transparency and enabling a wider group of stakeholders to inform the Commission's decision making. Despite clearly good intentions, the current questionnaire and accompanying proposal fails to deliver answers on crucial points that would have allowed comprehensive feedback from our partners. We find it necessary that before moving forward, the Commission addresses and seriously considers the wider implications, incentives and realistic output of its proposal.