Decision in case 1081/2018/SRS on a public consultation carried out by the European Commission on reforming investor-state dispute settlement (ISDS) by creating a multilateral system

Decision
Case 1081/2018/SRS - **Opened on** 10/07/2018 - **Decision on** 17/12/2019 - **Institution concerned** European Commission (No maladministration found) |

The case concerned a public consultation organised by the European Commission on reforming investor-state dispute settlement (ISDS) by creating a multilateral system. The complainant considered that the consultation was not in line with the relevant rules, notably that the timing and scope of the consultation meant that respondents could not provide effective input to the decision-making process. The complainant was also concerned that the Commission had misrepresented the results of the consultation.

The Ombudsman found that the consultation was in line with the applicable rules. She considered that, in defining the scope of the consultation, the Commission had balanced the need for clarity on a technical matter with the aim of making consultations accessible to the broadest possible audience, including non-experts. A further important element was that the Commission had invited participants to provide input in other formats, including by submitting position papers.

The Ombudsman also found that the Commission had not misrepresented the results of the consultation in the 'impact assessment report' it produced. However, she stressed that the Commission should ensure that any summaries of the results of public consultations that it makes available should provide an accurate overview for decision makers. She saw room for improvement in this case in terms of how the Commission summarised the outcome.

While the Ombudsman thus closes the inquiry having found no maladministration, she makes two suggestions for improvement to the Commission.

Background to the complaint

1. Investor-state dispute settlement (ISDS) mechanisms are used to resolve disputes between foreign investors and host countries. ISDS has been subject to intense public debate and

scrutiny in the EU in recent years.

2. In 2014, the European Commission launched a ‘public consultation’ on the EU's approach to investment protection and investment dispute settlement in the EU-US Transatlantic Trade and Investment Partnership (TTIP). Following this, the Commission set out [1] a two-step approach for reforming ISDS. The first step was to include a bilateral court system for resolving investment disputes in EU trade and investment agreements (the Investment Court System or ICS). As a second step, the Commission began work on the idea of creating a multilateral investment dispute settlement system.

3. As part of the process of developing the concept of multilateral investment dispute settlement, the Commission carried out an ‘impact assessment’. The impact assessment included an online public consultation, which took place from 21 December 2016 to 15 March 2017. [2] As part of the consultation, any member of the public or organisation could submit responses to a questionnaire of 63 questions, including 14 ‘open questions’. Contributors also had the possibility to submit position papers. Of the 193 contributors, 54 submitted position papers. [3] In April 2017, the Commission published online all the contributions to the consultation.

4. On 13 September 2017, the Commission published a ‘recommendation’ to the Council to open negotiations on setting up a multilateral court for settling investment disputes. This recommendation was accompanied by, among other documents, the impact assessment, which detailed the results of the public consultation. [4]

5. On 20 March 2018, the Council authorised the Commission to start negotiations and published a negotiating mandate. [5]

6. The complainant, an environmental organisation, was among the contributors to the public consultation. It was concerned that the timing and scope of the public consultation, in particular how the questionnaire was designed, meant it could not produce an effective and representative outcome. It also considered that the Commission had misrepresented the results of the consultation . In June 2018, the complainant turned to the Ombudsman, raising these issues.

The inquiry

7. The Ombudsman opened an inquiry into the complainant’s concerns that:

1) The public consultation was not in line with the relevant rules.

2) The Commission misrepresented the results of the public consultation.

8. In the course of the inquiry, the Ombudsman received the Commission’s reply to the complaint and, subsequently, the comments of the complainant in response to the Commission’s reply.

Whether the public consultation was in line with the relevant rules

Arguments presented to the Ombudsman

9. In the complainant's view, **the Commission organised the public consultation after it had already decided to proceed with its plans** to push for the creation of of a multilateral investment court (MIC). [6] Thus, the Commission did not comply with the general principles set out in its *Guidelines on stakeholder consultation* **[7]** , according to which a public consultation should take place at a time when stakeholder views can still make a difference.

10. The complainant further contended that a meaningful consultation on reforming investor-state arbitration cannot be limited to choosing between existing ISDS mechanisms or an MIC. The limited number of options set out in the questionnaire prevented participants from expressing their views on the more general substantive problems with investor-state arbitration. [8] These problems are not resolved simply by replacing existing ISDS mechanisms with a new multilateral system and, thus, should have been part of the consultation.

11. The complainant further contended that it was hard for non-experts to understand the highly legalistic and technical language of the questions.

12. The Commission explained that the proposal to create an MIC, as a permanent, independent body for resolving investment disputes, is part of a wider process that aims to address criticisms of ISDS, notably those raised in response to its 2014 public consultation. Following the 2014 public consultation, the Commission set out [9] the two-step approach for reforming ISDS outlined above. The aim of the impact assessment process and the public consultation at issue in this complaint was to examine different options for the second step: developing a multilateral approach to investment dispute resolution. The public consultation thus sought feedback, among other things, on the possible creation of a multilateral investment court, and the consequences of this for other policy areas. The Commission also sought feedback on the technical aspects of how such a system could function.

13. The impact assessment process, of which the public consultation was part, did not seek to examine more general questions related to investor-state dispute settlement. The scope of the public consultation was intentionally narrow, and aimed to get feedback on the specific issue of multilateral investment dispute resolution, with a view to informing the subsequent decision- and policy-making process.

14. The Commission considered that the subject matter of the consultation meant that the language used was justified, even if it might have been technical. It argued that, despite the use of legal terms in certain questions, it appeared that stakeholders had been able to participate effectively in the consultation.

15. The Commission added that, in order to overcome the limitations of questionnaires in online public consultations, it also accepted position papers from respondents, either instead of or in addition to replying to the questionnaire. Furthermore, in preparing the subsequent 'impact assessment report', which the Commission had to prepare before drafting its recommendation, it took into account not only the responses to the public consultation, but also positions that were submitted through other channels, such as meetings with stakeholders, conferences and seminars.

16. Against this background, the Commission argued that the public consultation was conducted in line with the principles outlined in its internal rules on stakeholder consultations and, in particular, the principles of transparency, openness, accountability and effectiveness. [10]

The Ombudsman's assessment

17. In May 2015, after its first public consultation on ISDS, the Commission set out a new approach to investment protection and dispute settlement under EU trade policy. Under this approach, existing ISDS mechanisms were to be initially replaced in trade agreements by an institutionalised investment dispute resolution system (the Investment Court System or ICS).

18. The Commission's new approach ultimately foresaw the creation of a multilateral system to resolve investment disputes. According to the Commission, this idea was put forward by a number of stakeholders in the 2014 public consultation. The Commission further elaborated this approach, for example in its *Trade for all* Communication in October 2015. [11]

19. According to the Commission, its proposal for an MIC comes out of a detailed review of existing policy on investment dispute settlement, including input received in the 2014 public consultation and discussions with EU Member States, the European Parliament, civil society groups and other stakeholders during 2014 and 2015. The Commission took the political decision initially to include ICSs in EU bilateral trade and investment agreements and to then work on reforming the system of investment dispute settlement at the multilateral level.

20. It is not for the Ombudsman to call into question the political decision to pursue a multilateral system for investor-state dispute resolution. EU trade and investment agreements are subject to complex decision-making and ratification procedures. It is thus for the bodies involved in those procedures, or for the Court of Justice of the European Union if it is asked to give an opinion [12] , to determine whether or not the mechanisms for resolving investor-state disputes are acceptable or not.

21. At the same time, the Ombudsman acknowledges that the Commission's efforts to consult the public would risk being significantly undermined were respondents to consider that the Commission had already made up its mind on the outcome of the consultation. To determine whether that was, in fact, the case here, the Ombudsman will examine the timing and scope of

the consultation.

Timing of the consultation

22. The complaint takes issue with the fact that the Commission had already decided to work towards the creation of an MIC before launching the public consultation. [13]

23. The Better Regulation Guidelines for stakeholder consultation state that consultations must take place at a **sufficiently early stage, when the views expressed by participants could still have an impact on the related policy or legislation** . At the time this consultation was launched, the Commission had already moved ahead with step one of its approach, namely including ICSs in EU bilateral trade and investment agreements. However, **it had not yet presented definitive proposals on a new multilateral system.**

24. Beyond the option of an MIC, the Commission set out five other options in its public consultation questionnaire. Following the consultation, the Commission included two additional options in the impact assessment report in addition to the six options initially foreseen in the inception impact assessment. [14]

25. While many of the questions in the public consultation questionnaire focused on whether it would be preferable to opt for an MIC or a multilateral appeal tribunal, this is not sufficient to conclude that the Commission was adamant about how to proceed and not open to being influenced depending on the merit of other proposals.

26. As such, the Ombudsman cannot conclude that the consultation took place too late, and that the responses to the consultation could not have had an impact on the future proposals on a multilateral system.

Scope of the consultation

The Commission's 'Better Regulation Guidelines' deal with how to determine the **scope of public consultations** . The scope and objectives of consultations should be determined based on the scope and content of the policy or legislative matter to which they relate. If certain topics are not included in the consultation, it should be clear whether this is due to legal limits or a political decision on the scope of the initiative. [15]

28. The scope and objectives of this public consultation concerned the second step of the Commission's approach to reforming ISDS, namely the creation of a multilateral system for investor-state dispute resolution. The Commission made this clear when it published the consultation strategy.

29. The Commission explained that the scope of the consultation was determined by its objective, and that the subject matter was of a technical nature. The Commission considered that focusing the scope on specific issues related to the overall objective would enable it to assess the feedback received more effectively and ensure the responses could have a greater

impact on the subsequent decision- and policy-making process.

30. The Ombudsman considers that it was reasonable for the Commission to opt for the scope it chose, with a view to receiving feedback on the specific issues arising from its proposal to push for the creation of a multilateral system for investor-state dispute resolution. Moreover, the Ombudsman is of the view that, by allowing respondents to submit broader position papers, the Commission adequately balanced the narrow focus of the questions. Over a quarter of respondents chose to submit position papers.

Language used in the questionnaire

31. The Commission should aim to make public consultations accessible to the widest possible audience, including individuals who are not experts. While the questionnaire included specific terminology concerning the subject matter, the replies to the consultation suggest that participants did not have difficulty understanding the issues raised or the questions asked. The Commission also accepted input in other formats, as mentioned above.

32. The Ombudsman finds that, given the scope of the consultation, the Commission balanced the need to make the consultation accessible with the need to receive clear and precise replies on the technical details of its proposals.

33. At the same time, the Ombudsman agrees with the complainant that some of the questions were structured in a complex manner and that greater efforts could have been made to simplify them. [16] The Ombudsman will make a corresponding suggestion for improvement to the Commission.

34. On the basis of the above, the Ombudsman finds that there was no maladministration by the Commission concerning this aspect of the complaint.

Whether the Commission misrepresented the results of the public consultation

Arguments presented to the Ombudsman

35. The complainant considered that some of the questions in the consultation were leading, which meant that the answers provided could be misinterpreted as indicating overall support for setting up an MIC. The premise of the consultation - seeking guidance on specific aspects of the Commission's proposal to create a multilateral system of investor-state dispute settlement - should not have been taken to mean that the majority of those responding necessarily support the creation of an MIC. According to the complainant, many of those who responded are actually opposed to any form of investor-state dispute settlement system, including possible multilateral systems. These respondents had avoided answering some questions so that their responses could not be interpreted as supporting investor-state dispute settlement in general.

36. The complainant thus argued that the Commission had acted unfairly and was not impartial in its approach to the issue, when it claimed that " *the consultation showed overall broad support for a multilateral reform of investment dispute settlement"* [17] . The complainant's interpretation of the consultation results was that fewer than 8% of the respondents clearly supported the creation of the court. By way of contrast, it claimed that nearly half opposed the creation of an MIC. Replies to the 2014 consultation also showed that most participants rejected ISDS outright, and were not of the view that existing systems for investor-state dispute settlement merely needed to be reformed or made multilateral.

37. The Commission explained that the consultation did not seek to determine whether the public supported ISDS in general but, rather, sought feedback on different policy options for reforming the current bilateral investment protection structures towards a multilateral structure. The questionnaire was designed to ensure it generated precise input on very specific matters, which it could interpret in a straightforward way. The Commission considered that it had already, in 2014, consulted stakeholders on the broader issues with ISDS. Those broader considerations had also been discussed in the context of conferences and stakeholder meetings. Nevertheless, the Commission addressed many of those concerns again in the impact assessment report.

38. According to the Commission, it summarised the results of the consultation in the impact assessment report in an impartial, fair and objective manner. Based on the replies to the questionnaire, the Commission was of the opinion that there was overall support among the respondents for a multilateral reform of investment dispute settlement *"as per certain specific principles outlined in the questionnaire"* . While the Commission claimed that there was overall broad support among respondents for a multilateral reform of ISDS, it did not claim that there was unanimous support. The report states that certain respondents used open questions in the questionnaire to express outright rejection of ISDS rather than addressing the actual questions on the proposed initiative. The Commission considered that these responses referred to existing ISDS mechanisms, and not specifically to the proposed multilateral initiative. [18] The Commission also explained that it sought to clarify those issues at a stakeholder meeting held in February 2017.

39. The Commission also acknowledged in the impact assessment report that there were issues that still needed to be addressed, thereby showing that concerns remained that still had to be taken into account.

40. Finally, the Commission examined additional options suggested by stakeholders to ensure that the impact assessment process reflected their views as accurately as possible, even though they were not initially included in the inception impact assessment.

The Ombudsman's assessment

41. The Ombudsman finds it reasonable that if the Commission is seeking endorsement of a particular course of action — in this case, that the Council agree to its 'recommendation' to open

negotiations on setting up an MIC, the Commission can seek to make the best possible case for its position. At the same time, the Commission must be careful in reflecting the views of others particularly if it wants to encourage active participation in its public consultations in the future.

42. The Ombudsman acknowledges that many individuals and organisations hold strongly critical views of ISDS. With this in mind, the Commission had a particular responsibility to communicate the results of this public consultation in the most accurate way possible.

43. The Ombudsman has verified that, in explaining its assessment of the responses to the public consultation, the Commission referred to the fact that a number of respondents were expressly opposed to ISDS in general. The general presentation of the results of the public consultation in the annex accompanying the impact assessment report refers to the continuing criticisms and concerns that remain on the matter. Therefore, the Ombudsman considers that how the Commission presented the results in the Impact Assessment Report itself was a fair and accurate reflection.

44. The complainant takes issue, however, with the Executive Summary to the Impact Assessment Report. The first sentence under "Who supports which option" reads as follows:

"The non-profit sector broadly supports the principles that underpin the option to establish a permanent multilateral investment court, notably permanency, independence and detachment of adjudicators from the disputing parties." [19]

45. While this is undoubtedly accurate, it suggests that the main conclusion from the public consultation as far as the non-profit sector is concerned is its support for these principles. The Commission was clearly entitled to emphasise this particular viewpoint and did not commit maladministration in doing so. However, this statement clearly risked antagonising engaged members of the public that the Commission relies on to ensure its public consultations enjoy legitimacy.

46. Similarly, the complainant takes issue with the first part of the sentence summarising the results in the *Explanatory Memorandum* accompanying the proposal to start negotiations, where the Commission stated that " *the consultation showed overall broad support for a multilateral reform of investment dispute settlement as described in this initiative although questions remain, especially on its technical aspects* ".

47. While the Ombudsman acknowledges that a summary is, by definition, selective, any summary should seek to provide an accurate overview for decision makers.

48. Thus, the Ombudsman considers that while there was no maladministration concerning this aspect of the complaint, the Commission could have been more attentive to the concerns of respondents in summarising the results. She will make a second suggestion for improvement in this regard.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [20] :

There was no maladministration by the European Commission in how it carried out and presented the results of the public consultation on reforming investor-state dispute settlement by creating a multilateral system.

The complainant and the Commission will be informed of this decision **.**

Suggestions for improvement

The Commission should intensify its efforts to simplify the structure and wording of questions in public consultations.

When summarising the results of a public consultation, the Commission should be particularly attentive to the concerns of respondents so as to provide an accurate overview to decision makers.

Emily O'Reilly

European Ombudsman Strasbourg, 17/12/2019

[1] The Commission published a 'concept paper', *Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court* : https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF [Link].

[2] See: https://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 [Link].

[3] The Commission also received eight additional independent contributions in the form of comments or position papers sent directly to a functional mailbox.

[4] For the recommendation for a Council decision, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN [Link].

For the explanatory memorandum, see: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1505306108510&uri=COM:2017:493:FIN [Link].

For the impact assessment, see:
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN [Link].

For the Executive Summary of the impact assessment, see:
https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-303-F1-EN-MAIN-PART-1.PDF [Link].

For the 'inception impact assessment', see:
http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf [Link].

[5] Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, available at:
http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf [Link].

[6] More information on the Multilateral Investment Court project:
http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 [Link].

[7] The Commission's Better Regulation Guidelines and Toolbox include 'Guidelines for stakeholder consultation', see:
https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better [Link].

[8] For the complainant, this breached the principles of participation, openness and accountability, and effectiveness in the Better Regulation Guidelines.

[9] See the Commission's 'concept paper' referenced in footnote 1 above.

[10] As set out in the Better Regulation Guidelines:
https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf [Link], page 69.

[11] For more information, see: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1381 [Link].

[12] See Article 218(11) of the Treaty on the Functioning of the European Union and Opinion 1/17 of 30 April 2019, ECLI:EU:C:2019:341, paragraphs 126-129 and 245.

[13] The Ombudsman further notes that when the Council adopted the decision authorising the signature of CETA, it stated that *"the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established, and according to the procedure foreseen in CETA"* . Statement 36 of the Statements and Declarations entered on the occasion of the adoption by the Council of the decision authorising the signature of CETA. Brussels, 27 October 2016.

[14] These options were: (1) retaining and operating multiple ICSs in EU trade and/or investment agreements; (2) renegotiating EU Member States' Bilateral Investment Treaties and the Energy Charter Treaty to include an ICS; (3) reforming current international arbitration rules; (4) creating a permanent multilateral appeal instance; (5) establishing a Multilateral Investment Court; and (6) negotiating multilateral substantive investment rules (all included in the inception impact assessment). Additionally, following the public consultation, the impact assessment report also included (7) improving ISDS in bilateral EU investment agreements and the Energy Charter Treaty, and (8) making national courts competent to decide on investment disputes.

[15] Better Regulation 'Toolbox', available at https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox_2.pdf [Link], pages 382-383.

[16] The complainant gives the following example: *"A crucial aspect would be that such a single Multilateral Investment Court could potentially adjudicate disputes arising not just under future investment*

treaties but also under existing international investment treaties. This could for instance be achieved through a system of opt-ins where countries agree in the Treaty/Legal Instrument establishing the single Multilateral Investment Court to subject their investment treaties to the jurisdiction of the Court (a model could be the United Nations Mauritius Convention on Transparency for Investor-State Dispute Settlement). The single Multilateral Investment Court would thus in effect supersede ISDS provisions included in investment treaties of EU Member States with third countries or in investment treaties in force between third countries. It would also replace the ICS that would have been included in EU level agreements with third countries. Do you share the view that such a single Multilateral Investment Court

should also be competent to adjudicate disputes arising under existing investment treaties, including EU Member State BITs with third countries, EU level trade and investment agreements and investment treaties in force between third countries?"

[17] In the *Explanatory Memorandum* , which accompanied the Commission's *Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes* (section 3): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0493 [Link].

[18] See Commission Staff Working Document, *Impact Assessment - Multilateral reform of investment dispute resolution* , available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN [Link], pages 72-73.

[19] The Commission has explained that it came to the interpretation that there was overall broad support for the principles ' *permanency, appeal and transparency, as well as involving state appointed highly qualified full-time adjudicators with a fixed remuneration subject to high ethical standards'* .

[20] Full information on the procedure and rights pertaining to complaints can be found at https://www.ombudsman.europa.eu/en/document/70707 [Link].