

Reforming investment dispute settlement

Speech by Cecilia Malmström

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Stakeholder event

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Good afternoon ladies and gentlemen,

I thank you all for coming today. It is a very important part of our thinking about this multilateral investment court: to engage and listen to your views, to listen also to other countries, to see this slowly taking place.

I'd like to just introduce this session, and set out its political relevance as part of a trade policy that we aim in general to be effective...

... transparent...

... and based on our values.

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As you know, the EU is both the world's biggest recipient of investment; but also the most important donor of it abroad.

That investment creates growth and jobs, at home and abroad.

To make it, investors need to know they are treated fairly ...

...that they do not face discrimination ...

... that they can be compensated for any expropriation...

... are able to transfer funds freely....

... and are able to enforce their rights.

This has been done, since the 1960s, through investor-state dispute settlement, ISDS: a model of "ad hoc" dispute settlement found in virtually all the more than 3000 investment agreements in force today.

This system has operated for more than forty years: and the main beneficiaries are EU investors, who bring over half of the world's ISDS cases.

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But ISDS is old fashioned and it is far from perfect.

Even if for decades it remained somewhat outside the political spectrum, it has become a very controversial issue within trade policy.

We have seen ISDS used in high-profile cases that engage the public interest, with questions about fairness and impartiality.

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The system is in clear need of an overhaul. So we are overhauling it.

We have already made a start. The new investment court system is included in the bilateral deal with Canada, to which the European Parliament gave its consent ten days ago; and it is also included in the deal with Vietnam.

We intend to include it in all our ongoing and planned negotiations: with China, Myanmar, Tunisia, Chile, the Philippines, Indonesia, Australia, New Zealand, and so on.

That is an important step forward; but there is more to do.

Among the record number of responses we received to our consultation a few years ago regarding investment protection in TTIP, many suggested a multilateral response.

That is an idea we have begun to present in the international community. At technical level at the WTO in Geneva with ambassadors from many countries; and also, in January, at political level, where together with the Canadian minister we presented to 30 Trade Ministers from across the world, to discuss the issue and get their support. There was a lot of support and many questions of course, and we are working with them.

Many countries have been looking at this. ISDS is not only controversial in Europe, but is being discussed across the world. Some countries are already making changes to make it more modern, transparent, and accountable.

Rather than each of us working separately to adjust and reform ISDS, it would be more sensible to develop a joint, international multilateral solution. The response has been largely positive.

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We do not have preconceptions what the new reformed system should look like...

... but we do have principles.

It has to be a permanent, multilateral system for dispute resolution; it has to build on principles of other effective international dispute settlement systems...

... and of domestic courts ...

... and it needs to bring legitimacy to the system.

But for me, it is important that the principles we apply to trade policy in general apply here: transparent, effective, value-based.

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First, any system should be effective.

Having multiple, potentially inconsistent, courts or panels is costly and complex...

... and it undermines, potentially, the credibility and predictability investors and governments rely on.

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It has to be transparent.

In a regular court, you would expect public proceedings and rights of appeal. You expect judges to be qualified, free of any perception of conflict of interest; free of any interest in the outcome of the case. This does not happen with ISDS.

Our investment court system addresses many of these problems, offering greater transparency than you find some domestic courts, with all documents online and all hearings open to the public. And this is something to build on in the multilateral solution.

After all: it is not enough for justice to be done; it must also be seen to be done.

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The third requirement is of course that it's based on values: upholding the protections and standards we have here in Europe.

Based on a model of commercial, contractual disputes among private parties, ISDS is increasingly now used for treaty-based disputes, where public money and public policy is at stake.

So, people worry that any system could undermine the right to regulate in the public interest...

... or that democratically decided standards and policies in areas like health and safety or the environment could be undermined.

Public authorities need to be able to protect the public interest.

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A multilateral investment court system should be...

... effective, transparent and based on these values...

... used not just in Europe, but by parties and partners across the world...

... not just for new agreements, but also for the thousands — 3400 — which already exist. Ideally they would need to be gathered under the joint multilateral umbrella.

But any new system would need to be designed and scoped properly.

And this is why we are consulting you today, and the consultation runs for another two weeks, and we will continue to engage with you in the months to come.

You are a cross-section of parties concerned.

You can help us reform the system by advising us on the implications and impacts of any new scheme:

... for small business...

... for developing countries...

...for public policy....

... and many others.

We look forward very much to your input.

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In an era when many are sceptical about the benefits of globalisation, this is a chance to ensure trade is not at the expense of values; rather supporting them.

A chance to show that we can reform so trade and investment continue...

... to boost our economy...

... but also to work for everyone, and for the public interest, and do so in a way perceived as legitimate and trustworthy.

We look forward to your input here, and to hearing your contributions today and in the weeks and months to come.

Thank you.