

The Consumer Voice in Europe

MULTILATERAL INVESTMENT COURT

The Consumer view



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Why it matters to consumers

Investment protection is not a traditional focus of consumer organisations. Nevertheless, the growing trend of foreign investors suing States in private arbitration in the past decades is preoccupying. 13 claims for compensation were submitted against States in 2000. In 2015, the number of claims went up to 72. This is concerning for consumers because claims for compensation can relate to public interest measures taken by a State such as a consumer protection law. One of our main concerns is that a foreign investor's claim, or even the threat of a claim, could deter a Member State or the EU from adopting a consumer protection measure.

Summary

BEUC is in principle in favour of free trade and of a multilateral trading system. Nevertheless, we consistently denounced the flawed ISDS mechanism (investor to state dispute settlement). Therefore, BEUC welcomes that the Commission is now proposing to step away from private arbitration. In a context of widespread public mistrust over secretly negotiated trade deals, it is positive that the Commission intends to address citizens' legitimate concerns. It does so by proposing to establish a Multilateral Investment Court System (MIC) – and allowing civil society and citizens to give feedback by opening a public consultation.

However, as we previously stated¹, the new Investment Court System (ICS) proposed by the EU – which forms the basis of this proposal – fails to address the core flaws of ISDS. We recognise the improvements made, notably in terms of transparency and conflicts of interest. But this is not yet enough to legally secure the right of the EU and its Member States to regulate in the consumer interest. The problem with the idea of the MIC is that it does not aim at further improving the substantial rules of investment protection such as the right to regulate. These rules will continue to be defined in the respective EU trade agreements in case they contain an investment protection part. The EU proposal would only establish a structure and create rules for its proper functioning.

Furthermore, by establishing a MIC, the EU and its partners would further institutionalise and justify the need to have a parallel judicial system for foreign investors. But in the case of TTIP and CETA, the negotiating parties consistently failed to provide evidence for the need for a parallel judicial system in trade deals between highly developed legal systems. Existing levels of protection in the EU and third countries – such as for instance in the case of the US and Canada – should offer enough legal guarantees for investors².

Therefore, the creation of a MIC is not acceptable for consumer organisations in the current context, because the right to regulate is not sufficiently secured.

¹ BEUC key concerns about the investment court proposal, October 2015. http://www.beuc.eu/publications/beuc-x-2015-103_beucs_key_concerns_about_the_investment_court_system_proposal.pdf

² This is notably the opinion on the 2015 TTIP resolution of the Legal Affairs committee of the European Parliament, the committee responsible for the interpretation of EU and international law.

For BEUC to be able to support such a project, a drastic change of approach would be required:

1. **The Commission must request the opinion of the European Court of Justice regarding the legal compatibility of MIC and ICS provisions with EU law.** It is of outmost importance when it comes to legal certainty and EU's credibility in the multilateral arena.
2. The EU must refrain from including an investor to state dispute mechanism like ICS in its trade agreements, even in case of a positive ruling of the European Court of Justice. Indeed, national courts can ensure proper protection for foreign investors. In the eventuality of an empirically demonstrated necessity to have such a system, the EU must reinforce the article on the right to regulate in the ICS chapters of the relevant trade agreements. **Claims relating to public interest measures such as consumer protection must not be admissible by the MIC.** This is a necessary safeguard for consumer organisations. Precedents of carve-outs exist, notably for tobacco control measures in the Trans Pacific Partnership. Such a public interest carve-out should be systematically included in all EU agreements containing an ICS part.
3. The **issue of conflicts of interest has to be effectively addressed** and go beyond the ICS proposed in bilateral trade deals such as CETA. Indeed, ICS in CETA does not address the conflicts of interest to the extent necessary. If a MIC was to be created, judges must be employed full-time, respect strict ethics criteria and comply with a detailed code of conduct.

Finally, BEUC would like to stress that contrary to investors, consumers do not have access to specific means of international dispute settlement. This is notably the case when it comes for example to the violation of their privacy or problems in commercial transactions. The Commission should also reflect upon means to better enforce consumer interests in a cross border context.

1. Checking ICS & MIC compatibility with EU law: need for an ECJ opinion

Several questions³ have been recently raised regarding the compatibility of the ICS system with EU law, notably in the context of CETA. The Walloon Parliament set as a condition to the ratification of CETA a request for an opinion of the European Court of Justice from Belgium. In addition, a significant number of members of the European Parliament proposed to formulate such a request on behalf of the European Parliament⁴.

The European Commission argues that its legal service is convinced of the legality of ICS with EU law⁵, the same goes for the legal service of the European Parliament. These opinions are of course important in this debate, however only the European Court of Justice is legally empowered to make such an assessment. It is highly concerning in this time of mistrust in trade policy and investment disputes that this crucial legal check has not been requested by the Commission to the European Court of Justice.

³ a) Professor Dr. Inge Govaere, Director of the European Legal Studies Department of the College of Europe, Bruges, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order", Research Paper in Law 01 / 2016.

b) ECJ advocate general Kokott and Christoph Sobotta, "Investment Arbitration and EU law", Cambridge yearbook of European legal studies, volume 18, December 2016, pp. 3-19.

⁴ Motion for a resolution B8-1220/2016 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposed agreement between Canada and the European Union on a Comprehensive Economic and Trade Agreement (CETA) (2016/2981(RSP), 11 November 2016.

⁵ The document has not been made available to the public.

"The most troubling of all questions is undoubtedly why the CJEU has so far not been requested an Advisory Opinion pursuant to Article 218(11) TFEU on the compatibility of ISDS provisions in EU agreements with the autonomous EU legal order."
Dr. Inge Govaere (footnote 7)

The first step towards the establishment of a multilateral court of this scale must be this legal check. It will clarify once and for all where we stand and create legal certainty.

Once this legal check will be completed, BEUC will define its final position on the MIC according to the respect or not of the other conditions detailed in this paper. BEUC insists on the importance to fulfil these conditions, even if the European Court of Justice would declare ICS compatible with EU law.

2. Refrain from using ICS

2.1. Lack of empirical proof of a need for ICS or MIC

One of the remaining problems in the debate about ISDS and ICS is the absence of empirical evidence of the need of such systems for the protection of investors and of the positive link with foreign direct investment flows.⁶ In certain cases such as TTIP and CETA, it has been demonstrated that the use of domestic courts guarantees enough legal protection for foreign investors⁷. For instance, the German Magistrate Association declared that there is neither a legal basis nor a need for such a parallel judicial system. The association stated that the assumption that foreign investors currently do not enjoy effective judicial protection is not factually correct⁸.

For consumer organisations to support the idea of the MIC, an empirical demonstration of its necessity is urgently required. It would not be acceptable to spend public money on an unjustified system which bears the risk of reducing the current and future levels of consumer protection because of the regulatory chilling effect of claims.

2.2. In cases where ICS would be proven necessary, it should only be the exception, not the rule

Consumer organisations could accept the creation of a multilateral investment court system if it is made clear that the court will be used to address disputes derived from trade deals with countries where there is a demonstrated problem with domestic judicial systems. Such principle should be written in the convention establishing the MIC.

In addition, the Commission must provide a legal opinion and empirical evidence of the need of such parallel system to both the Council and the European Parliament prior to requesting trade negotiating mandates including investment protection rules. ICS provisions should not be included in trade agreements if it cannot be proven that domestic courts cannot ensure sufficient protection for foreign investors.

⁶ See i.a.: Worldbank: Do Investment Treaties attract Foreign Direct Investment? 2003, <http://documents.worldbank.org/curated/en/113541468761706209/Do-bilateral-investment-treaties-attract-foreign-direct-investment-Only-a-bit-and-they-could-bite>

⁷ See the opinion on the 2015 TTIP resolution of the Legal Affairs committee of the European Parliament, the committee responsible for the interpretation of EU and international law.

⁸ See the statement of the German magistrate association from February 2016: http://www.drb.de/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitions_gericht.pdf

Both principles will ensure that the resort to an investor to State dispute settlement mechanism instead of the use of domestic courts is the exception and not the rule.

2.3. If the EU establishes MIC despite our concerns, a public interest carve-out must be added

As we demonstrated in our joint legal analysis⁹, recent provisions intending to strengthen the right to regulate like in CETA, fall short of this aim. The right to regulate has been traditionally understood as defining the balance between the sovereign right of a party to regulate in the public interest and its obligations towards foreign investors. The legislator is entitled to adopt a regulation, but might under certain conditions have to compensate a foreign investor. As it is written in CETA, the right to regulate article merely 'reaffirms' this already existing balance. From a public interest perspective, however, this is not the right balance. It cannot properly be construed as a carve-out for decision making in the public interest.

The formulation of the right to regulate article in the CETA ICS chapter is declarative and not legally enforceable. It is merely a guideline for arbitrators. Contrary to public statements by the parties, these provisions therefore fail to effectively limit claims that challenge public policy measures. To protect the right to regulate, the parties should have introduced a carve-out or a binding principle to guide interpretation. **Our proposal for a public interest measures carve-out** is the following¹⁰:

"Any measure or action undertaken by a Party that aims or has the effect of contributing to a public interest, including measures or actions protecting consumers, workers, public health or combating climate change does not constitute a breach of the provisions of this Chapter."

Any claim brought by a foreign investor against such a measure or action has to be declared inadmissible by the Court. This must be systematically included in all EU trade agreements containing an investment court system chapter.

3. Further preventing conflicts of interest

One of the main critics of the old ISDS model was the risk of conflicts of interest. The ICS model tries to reduce this risk but does not go far enough to entirely discard it. We welcome the willingness to further improve the situation through the constitution of a MIC.

Here are our recommendations for a MIC with a first instance tribunal and an appeal mechanism:

⁹ Joint analysis of CETA's ICS by T&E, Client Earth, BEUC, EPHE and EEB. June 2016. http://www.beuc.eu/publications/joint_analysis_ceta_ics_and_annex_final.pdf

¹⁰ This model carve-out has been jointly drafted by the organisations mentioned above.

- There should be a permanent roster of judges who would be appointed by the parties. The judges should be randomly selected from the roster. The selection process and the criteria for the selection must be transparent. For the European Union, the selection process should follow that for judges to the European Court of Justice.
- The judges should be employed full-time. They should be independent, including financially. In addition, they must not be authorised to work as ISDS arbitrators in other cases.
- The judges should be experts in international investment law but also able to assess domestic laws and have expertise in public law. They should be required to meet the requirements for judicial office.

4. Include the consumer interest in the reform process

In this context of reflexion towards reforming dispute resolution mechanism, it is important to keep in mind the consumer interest. Indeed, consumers lack access to specific means of international dispute settlement contrary to investors. It would be interesting to find appropriate ways for consumers to tackle issues such as privacy violation or problems in commercial transactions. The Commission should reflect upon means to better enforce consumer interests in a cross border context.

Indeed, until now, the international system of dispute resolution remains not only flawed in terms of the material standards but also with respect to the target groups of international enforcement of standards.

Conclusion

BEUC is in principle against the possibility of a parallel judicial system for investment dispute settlement. However, we recognise the added value of the creation of a MIC, notably to put an end to the ISDS system and guarantee a more public and transparent system. Moreover, we would prefer to avoid the duplication of bilateral investment dispute resolution courts.

Our final position on the MIC will be determined by the fulfilment or not of the conditions detailed in this paper.

Annex: BEUC contribution to the public consultation on a multilateral reform of investment dispute resolution

Public consultation on a multilateral reform of investment dispute resolution

Fields marked with * are mandatory.

Purpose

This public consultation aims to gather views relating to the European Union's policy on possible options for multilateral reform of investment dispute resolution, including the possible establishment of a permanent Multilateral Investment Court. It builds on the Inception Impact Assessment (IIA) published by the European Commission on 1 August 2016. [\[1\]](#) The present questionnaire should be read in light of the IIA.

The results of this public consultation will feed into the Impact Assessment that the Commission services are currently preparing concerning options to engage in multilateral reform of the international investment dispute resolution system.

Context of the present consultation

The past years have seen a significant debate in the EU and the rest of the world on the limitations of the system of investment dispute resolution (Investor-to-State Dispute Settlement - ISDS) included in many bilateral investment treaties and Free Trade Agreements (FTAs) in terms of legitimacy, neutrality, transparency, consistency and costs. Many countries are currently engaged in reflections on their approach to investment protection and investment dispute settlement in FTAs and investment treaties.

At EU level, following the 2014 public consultation on the EU's approach to investment protection and investment dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP), [\[2\]](#) the EU agreed on a reformed bilateral approach on investment dispute settlement to be included in all relevant EU agreements, whereby each trade and investment agreement is to include a fully transparent and institutionalised system for adjudicating investment disputes. The main feature of this new system – the Investment Court System (ICS) – is the establishment of a Tribunal of First Instance and an Appeal Tribunal with permanent judges and members to be appointed by the EU and its respective FTA/investment partner. So far the ICS has been included in two FTAs already negotiated by the EU (the Comprehensive Economic and Trade Agreement (CETA) with Canada and the FTA with Viet Nam) and is part of ongoing EU negotiations with third countries.

In parallel, discussions on multilaterally reforming the investment dispute settlement system have also taken place in the EU. The concept was raised by stakeholders in the 2014 public consultation, where it was pointed to as the preferable approach; and has been largely supported by consensus for a fully-fledged, permanent Multilateral Investment Court in order to develop a coherent, unified and effective policy on investment dispute resolution.

The idea of a multilateral reform to address the shortcomings of the current ISDS system has also gained momentum in a number of third countries and been discussed in international organisations specialised in investment policy (UNCTAD, the OECD, UNCITRAL and the World Bank are all active in this field). While it is clear that full substantial consistency is not within reach until a single set of multilateral substantive investment rules (i.e. investment protection standards) comes into existence, this is not considered a realistic option at the moment. However, in view of the "spaghetti bowl" of 3200 investment agreements globally in place, the establishment of a multilaterally agreed system for investment dispute resolution could already confer a significant degree of predictability and coherence.

A number of concrete proposals for such multilateral reform have emerged in recent years. These proposals, which are briefly outlined in the Inception Impact Assessment (IIA), would allow addressing to various degrees and through different angles the shortcomings identified in the current system of investment dispute settlement.

It is to be noted that this initiative covers investment dispute resolution in trade agreements with third countries. Intra-EU investment treaties and disputes arising between EU Member States are outside the scope of this initiative. In this sense, the Commission considers that intra-EU investment treaties are incompatible with EU law and continues its infringement proceedings against Member States who have such treaties in force between them. [6] Therefore, this initiative does not concern intra-EU application of the Energy Charter Treaty (ECT).

EU Member States and the European Parliament. [3] In its Concept Paper of 5 May 2015 [4], the European Commission also indicated that, in parallel to the reform process undertaken in bilateral EU negotiations, work should be started on the establishment of a multilateral system for the resolution of international investment disputes. In the same vein, the Trade for All communication of 2015 [5] sets as an objective to engage with partners to build

For more information or additional questions please contact:

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Please submit your replies by 15 March 2017.

Relevant documents:

[Inception Impact Assessment](#)

[2014 public consultation on the EU's approach to investment protection and investment dispute settlement in the TTIP](#)

[Concept Paper of 5 May 2015](#)

[Trade for all Communication of 14 October 2015](#)

Public consultation on a multilateral reform of investment dispute resolution

PART 1

I. TRANSPARENCY AND CONFIDENTIALITY

Received contributions may be published on the Commission's website, with the identity of the contributor. Please state your preference with regard to the publication of your contribution.

Please note that regardless of the option chosen, your contribution may be subject to a request for access to documents under Regulation (EC) No 1049/2001 on public access to European Parliament, Council and Commission documents. In such cases, the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.

* Please, indicate your preference:

- ☒ My contribution may be published under the name indicated; I declare that none of it is subject to copyright restrictions that prevent publication
- ☐ My contribution may be published but should be kept anonymous; I declare that none of it is subject to copyright restrictions that prevent publication
- ☐ I do not agree that my contribution will be published at all. Please note that, unless respondents provide a substantial justification for their opposition to the publication of their contribution, contributions are published on the dedicated website.

II. About you

* 1. You are welcome to answer the questionnaire in any of the 24 official languages of the EU. Please indicate in which language you are replying.

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Irish
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian

- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

*2. You are replying:

- ☐ as an individual in your personal capacity. Please go to question 3. After question 7, please go directly to question 27.
- ☒ in your professional capacity or on behalf of an organisation. Please go directly to question 8.

*8. Respondent's first name:

*9. Respondent's last name:

*10. Respondent's professional email address:

*11. Name of the organisation:

*12. Postal address of the organisation:

*13. Type of organisation:

Please select the answer option that fits best.

- ☐ Investor (private enterprise or individual)
- ☐ Arbitrator
- ☐ Professional consultancy or self-employed consultant
- ☐ Legal practitioner
- ☐ Trade, business or employers' professional association
- ☒ Trade union, non-governmental organisation, platform or network
- ☐ Research and academia
- ☐ Churches and religious communities
- ☐ Regional or local authority (public or mixed)
- ☐ International or national public authority
- ☐ Other

- * 15. Please indicate your organisation's main area/sector of activities/interest:

[Max 100 characters]

BEUC acts as the umbrella group in Brussels for its members and our main task is to represent them at European level and defend the interests of all Europe's consumers.

18. Have you or has your organisation ever been directly involved in an international investment dispute?

- ☐ Yes
☒ No. Please go directly to question 21.

- * 21. If you answered "no" to question 18, but you have an interest in the matter, please indicate in what capacity you are following this issue:

- ☐ Investor (private enterprise or individual)
☐ Business or trade association representative
☐ Trade union representative
☐ Academic
☐ Journalist
☐ Government institution
☐ International organisation
☒ Non-governmental organisation
☐ Private citizen
☐ Other

- * 23. Is your organisation included in the Transparency Register?

If your organisation is not registered, we invite you to register [here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

- ☒ Yes
☐ No
☐ Not applicable

- * 24. If so, please indicate your Register ID number:

- * 25. Country of organisation's headquarters

- ☐ Austria
☒ Belgium
☐ Bulgaria
☐ Croatia
☐ Cyprus
☐ Czech
☐ Republic

- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Other

PART II

Desirability of a multilateral reform of the investment dispute settlement system

A number of systemic shortcomings have been identified in the area of ISDS in recent years that would need to be addressed in order to ensure that the investment dispute resolution system works in a transparent, accountable, effective and impartial manner at global level.

These horizontal issues include 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).

The current EU policy is to include in each EU trade and investment agreement an institutionalised procedural framework for resolving investment related disputes (the Investment Court System - ICS). It addresses to a significant degree important shortcomings identified with the ISDS system, notably as regards ensuring accountability, impartiality and legal correctness of the dispute settlement process that will apply in the EU's agreements with third countries.

Nevertheless, there are certain limits to what can be achieved through reforms at bilateral level as regards consistency, efficiency and costs. This was also highlighted by stakeholders in the 2014 public consultation who argued that the many concerns expressed in the EU and other parts of the world on the accountability, legitimacy and independence of the investment dispute settlement system would be more effectively addressed through multilateral reforms than through bilateral reforms (as initiated through the ICS approach).

27. The inclusion of an ICS in all relevant EU agreements has raised questions relating to the long-term efficiency of managing multiple bilateral dispute settlement instances in EU trade and investment agreements. There is also a cost aspect for the EU due to the fixed annual costs generated by each ICS (for each ICS approximately EUR 0.5 million/year on account of the remuneration of the permanent tribunal members and members of the appeal tribunal).

To what extent do you consider that seeking to include an ICS in each EU agreement may be less optimal for the EU from the point of view of complexity and cost?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not problematic) to 5 (very problematic)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

28. The EU's reformed approach for investment dispute settlement can naturally only apply to future EU agreements. It leaves open the issue of what to do with the many existing investment treaties in force worldwide (3320 in force, as of November 2016 according to UNCTAD figures^[1]), a very high number of which contain traditional ISDS provisions and could give rise to disputes using those dispute settlement provisions. Treaties between EU Member States and third countries alone account for around half of these existing treaties (1400 bilateral investment treaties (BITs) with third countries). The EU itself is party to the Energy Charter Treaty (ECT). It is not conceivable that such a high number of investment treaties could be renegotiated to allow to make changes to the ISDS provisions.

At EU level, this raises a particular issue, as there would be two sets of investment dispute resolution rules applicable in the EU and Member States' investment relations with third countries depending on which treaty is at issue: (i) ISDS provisions would apply if a dispute is brought by an investor under one of the existing Member State BITs or the ECT; (ii) ICS would apply if a dispute is brought by an investor under an EU level trade and investment agreement with a third country.

In your view how important is it that the same procedural rules for investment dispute settlement apply in EU Member States' existing BITs with third countries and in EU level trade and investment agreements with third countries?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

29. If you consider it important to have the same procedural rules apply, please indicate why	0	1	2	3	4	5	I don't know / I don't have an opinion
Increases legal certainty for investors and states in the EU and in third countries	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides uniformity to the applicable dispute settlement rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Improves investment climate in the EU and in third countries	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
It is important for the EU's credibility that reform of ISDS also applies at the level of EU Member States' BITs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Other reasons why it is important to have the same procedural rules apply. Please specify.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

Possible features of a new multilateral system for investment dispute resolution

30. The specific features below are some of the most important elements at the basis of the EU's bilateral ICSs to be included in the EU's trade and investment agreements with third countries. If a multilateral reform were to be started to what extent do you consider that these elements should also be reflected?

From 0 (should not be included) to 5 (should certainly be included)

	0	1	2	3	4	5	I don't know / I don't have an opinion
Permanent dispute resolution structure (i.e. not disbanded after issuing a ruling)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Appeal instance to correct errors of law and manifest errors of fact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Full-time adjudicators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Fixed remuneration for adjudicators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
High qualification criteria for selecting adjudicators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Random allocation of cases	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Transparency / full documentation disclosure requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

High ethics standards	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Safeguards for independence (e.g. random allocation, tenure, etc)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

31. Can you identify other possible features that you believe should be included in a new multilateral system?

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

The system should provide a permanent roster appointed by the parties and ensure a random selection. The selection process and criteria must be transparent. Judges must be employed full time and be financially independent. They should not be authorised to work as ISDS arbitrators in other cases. Judges must be able to assess domestic laws and have expertise in public law. They should be required to meet the requirements for judicial office. Cases documents and proceedings should be transparent.

32. An important criticism commonly made of the current investment dispute settlement system is that developing or transition economies do not always have the resources and legal expertise to defend themselves effectively and adequately against claims made by investors.

Do you think that discussions on a new multilateral system for investment dispute resolution should include special assistance to developing countries?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (should not be addressed) to 5 (should certainly be addressed)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

33. If the issue of special assistance for developing countries should be addressed, do you consider that centres that provide assistance to developing countries (such as the Advisory Centre on WTO Law - ACWL) which provide legal service and support in WTO dispute settlement proceedings, provide a useful model in this regard?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not a useful model) to 5 (certainly a very useful model)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

34. Please provide any additional comments that you may wish to add on how to take account of the special needs of developing countries within a multilateral reform of investment dispute settlement.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

35. Similarly, critics of the system have consistently argued that it is difficult for SMEs to access the investment dispute settlement system considering the associated costs (although these are largely made up of legal costs) and perceived complexity.

In the context of a multilateral reform, do you believe that there should be special provisions for SMEs?

- ☐ Yes
- ☐ No
- ☒ I don't know / I don't have an opinion

37. Please provide any additional comments that you may wish to add on how to take account of the special needs of SMEs within a multilateral reform of investment dispute settlement.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

38. In your view, should a multilateral dispute settlement mechanism be limited to investment treaties only?

- ☐ Yes
- ☒ No
- ☐ I don't know / I don't have an opinion

If not, please identify what other issues relating to investment could be covered by a permanent multilateral dispute settlement mechanism.

Text of 1 to 500 characters will be accepted

In our view, it is important to refrain from duplicating parallel dispute settlement systems. However, if MIC is created then it is important to think about a similar access to dispute resolution for consumers and consumer organisations. For instance, they should be able to bring claims in case of enforcement problems in trade agreements.

40. In most international judicial systems, the enforcement of the ruling or award is a crucial element for the effectiveness of the system in question. The same applies to investment dispute resolution. Under the current system of ad hoc ISDS arbitration there are a number of ways to enforce arbitral awards. For instance, the rules that apply to dispute settlement under the International Centre for Settlement of Investment Disputes (ICSID) Convention ensure that the enforcement of pecuniary awards is obligatory in the domestic courts of every state party to the ICSID Convention. Consequently, domestic courts cannot refuse the enforcement of an ICSID award and their power is limited to verifying that the award is authentic. 159 countries signatory to the ICSID [Convention](#) have subscribed to this system, which ensures an effective enforcement system. Other awards can be enforced via the [United Nations New York Convention on the Enforcement of Arbitral Awards](#).

Do you consider that in the context of discussions on a multilateral reform (which would include an appeal mechanism) a mechanism comparable to ICSID for the enforcement of decisions (i.e. that enforcement is not subject to domestic review) should be sought?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (no, this is not needed) to 5 (yes, this is certainly needed)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

41. Please provide any additional comments that you may wish to add on the enforcement of awards.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)



Options for a reform at multilateral level

A permanent Multilateral Investment Court

The idea of establishing a permanent Multilateral Investment Court comprised of both a First Instance and an Appeal Tribunal (henceforth "single Multilateral Investment Court") has emerged. This single Multilateral Investment Court would be permanent and open to all countries interested to join. The adjudicators of both the First Instance and the Appeal Instance would be appointed for fixed terms and would be required to have comparable qualifications to members of other international tribunals. They would also be subject to the highest ethical standards.

42. 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?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

43. A number of potential positive effects have been identified which could result from centralising international investment dispute settlement in a single Multilateral Investment Court.

Please indicate to what extent you agree that centralisation could contribute to the following:

From 0 (not likely) to 5 (very likely)

	0	1	2	3	4	5	I don't know / I don't have an opinion
More predictability in investment dispute resolution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Higher degree of legitimacy for this type of dispute settlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Increased consistency of case law and legal correctness through the permanent appeal tribunal	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Higher level of efficiency in the adjudication procedure (more efficient adjudication)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Lower costs for users (assuming some or all procedural costs would be borne by the states Party to the agreement)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other contributions which could be achieved by centralisation. Please specify

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

A permanent Multilateral Appeal Tribunal

44. Another option that has emerged is the establishment of a permanent Multilateral Appeal Tribunal, i.e. without changing the existing first instance tribunals. Thus a Multilateral Appeal Tribunal would be limited to deal with ISDS awards appealed on the grounds of errors of law and manifest errors of fact, which the current ISDS system does not allow for. This would address the issue of ensuring legal correctness and assist with consistency of case law.

The Multilateral Appeal Tribunal would rule on ISDS awards rendered under the ad hoc ISDS tribunals established under existing investment treaties (e.g. EU Member States' BITs) and under investment treaties in force between third countries. Such a Multilateral Appeal Tribunal would also replace the Appeal Tribunals included in the EU's ICSs in EU trade and investment agreements with third countries.

Do you agree that the creation of a permanent Multilateral Appeal Tribunal would already be an important tool to improve legal correctness in investment dispute resolution as argued above?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

45. Do you consider that establishing a Multilateral Appeal Tribunal (i.e. without a multilateral tribunal at the level of the first instance) would be sufficient to satisfactorily reform the current investment dispute settlement system?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Design, composition and features of a single Multilateral Investment Court or a Multilateral Appeal Tribunal

Common to the proposal for a single Multilateral Investment Court and for a Multilateral Appeal Tribunal are questions on overall design and size. It would for instance be necessary to provide for mechanisms allowing the body established to adjust to a growing membership.

46. Do you consider that it is important to ensure that each country party to the agreement establishing the single Multilateral Investment Court or Multilateral Appeal Tribunal should have the possibility to appoint one or more adjudicators?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

47. Do you consider it important that the number of adjudicators should be tailored to the likely number of cases and not linked to the number of countries signatory to the agreement?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

48. Do you have any further comments on the manner in which adjudicators should be selected?

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

The criteria for selecting adjudicators should be integrity, impartiality, independence, including financial independence and expertise. The selection process should follow the selection of judges to the European Court of Justice.

49. Also common to both proposals whether to establish a single Multilateral Investment Court or a Multilateral Appeal Tribunal, are considerations on the qualifications required to be a permanent adjudicator.

In the EU's Investment Court System (ICS), there are a number of criteria that adjudicators must meet for being eligible, including being qualified to hold judicial office in their country or being recognised jurists, as required by the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR). Under the ICS, judges must also have expertise in public international law and previous experience in international investment law. It is assumed that adjudicators would be able to call on experts for technical or scientific information.

Do you consider that these qualifications would also be appropriate for a permanent multilateral mechanism, whether a single Multilateral Investment Court or a Multilateral Appeal Tribunal?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

50. Do you have any further comments on the qualifications of adjudicators under such a mechanism?

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

▲

▼

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▶

Adjudicators should have expertise in international investment law, expertise in public law and be able to assess domestic laws.

51. An important consideration would be the remuneration and conditions of employment of these adjudicators. Judges in the International Court of Justice (ICJ), the World Trade Organisation (WTO) Appellate Body or the Court of Justice of the EU (CJEU) receive a regular monthly salary which is not linked to their workload.

Do you consider that adjudicators in a single Multilateral Investment Court or a Multilateral Appeal Tribunal should be remunerated in a similar manner?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

52. Under the EU's ICS set out in EU level agreements, tribunal members must adhere to high standards of ethical conduct. In particular, they cannot act as counsel in investment disputes (so-called "double hatting"). This is also a safeguard ensuring their impartiality. The legal text in EU agreements establishing the ICS foresees the possibility that tribunal members become full-time and hence would, in principle, not be allowed to have external activities.

Do you agree that adjudicators in a single Multilateral Investment Court or in a Multilateral Appeal Tribunal should be full-time with no external activities?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

53. In most international and domestic courts, including under the EU's ICS, disputes are allocated on a random basis to divisions of adjudicators to ensure impartiality and independence.

Do you agree that a similar approach should be followed for the distribution of cases in a potential multilateral investment mechanism, whether a single Multilateral Investment Court or in a Multilateral Appeal Tribunal?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

54. Another important consideration relates to the financing of a single Multilateral Investment Court or a Multilateral Appeal Tribunal, including salaries for adjudicators, staff and related administration expenses. For instance, under the EU's ICS, the Parties to the Agreement (i.e. the EU and the other country signing the trade and investment agreement) share the fixed operational costs of the ICS.

A repartition key, for instance based on the level of economic development, is often used to determine the contribution of states that are members of international organisations.

In your view, would it be appropriate to employ a repartition key to determine the share of the contracting Parties in the operational costs?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

55. In your view, should it also be considered that some of the operational costs could be funded in part by user fees (i.e. by investors and/or states)?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not appropriate) to 5	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Possible impacts

56. Do you consider that the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal could contribute in a positive way to improving the global investment climate?

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (no contribution at all) to 5 (very strong contribution)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

57. If yes, please indicate the specific reasons:

From 0 (no impact) to 5 (strong impact)

	0	1	2	3	4	5	I don't know / I don't have an opinion
Higher acceptability of investment dispute settlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Higher consistency of case law	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unified dispute settlement system	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

If you consider there would be any other impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

58. The following preliminary economic impacts have been identified as resulting from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal for the settlement of investment disputes.

Please indicate to which extent you share this assessment.

From 0 (disagree) to 5 (fully agree)

	0	1	2	3	4	5	I don't know / I don't have an opinion
Reduced budgetary expenditure for the EU as a result of phasing out multiple Investment Court Systems (ICSs) in EU agreements in favour of a single multilateral mechanism	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Reduced costs for users (investors, states) from having one single multilateral mechanism because of increased predictability	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Reduced costs because arbitrators' fees and fees of arbitral institutions (in current ISDS system) no longer necessary because remuneration of permanent adjudicators and court borne by Parties	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

If you consider there would be any other economic impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)



There is definitely an economic impact for consumers who are also taxpayers because public money will be used to finance a system that has not been proven necessary. The system could lead to lowering of consumer protection in case of a negative ruling for a State. The only real reduction of costs would be to rely on domestic courts instead of creating a multilateral investment court.

59. No environmental impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Do you consider that there could be any environmental impacts?

- ☒ Yes
- ☐ No
- ☐ No opinion

If you consider there would be any environmental impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

There could be negative environmental impacts for example in case of a negative ruling related to an environmental measure.

61. No social impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal since there would be no change to the substantive investment rules.

Do you consider that there could be any social impacts?

- ☒ Yes
- ☐ No
- ☐ I don't know / I don't have an opinion

If yes, please specify the social impacts and explain how they are linked to the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Text of 1 to 500 characters will be accepted (still 1 more characters expected)

There could be negative social impacts for example in case of a negative ruling related to a social measure, including a consumer protection measure. Even before the ruling phase, the mere threat of claim from a foreign investor could induce regulatory chill effect. To avoid any negative impact, the EU must improve the substantial investment protection rules in the relevant trade agreements. This should start with the inclusion of a public interest measures carve out as we propose on page 3 of our position paper attached to our reply.

63. You may also upload a position paper to support the opinions expressed in this questionnaire.

END



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