

Prospects for a Multilateral Investment Court

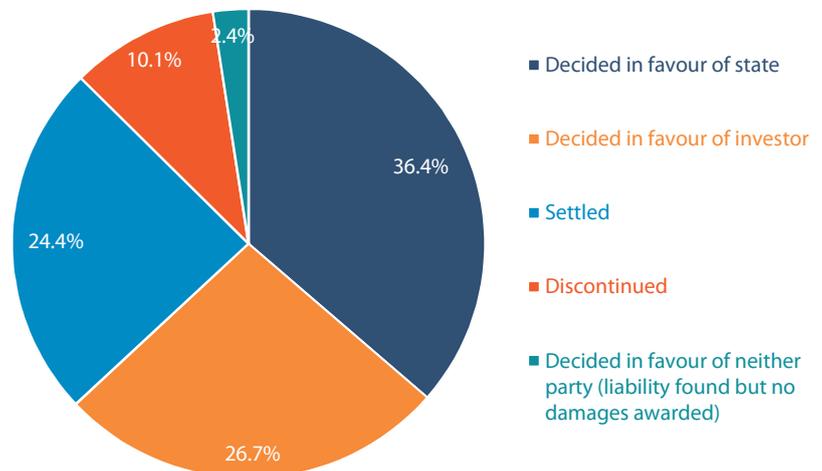
Since 2015, the European Commission has worked on the establishment of a Multilateral Investment Court (MIC). The purpose of this court is to have a permanent international body that can settle investment disputes between investors and states. The MIC would replace the current system of investor-to-state dispute settlement (ISDS) based on ad hoc commercial arbitration, which has become controversial over the past few years.

Rationale for the creation of a Multilateral Investment Court

Investment is generally considered to [benefit](#) recipient countries, as it contributes to total factor productivity and income growth. The EU is the world's largest exporter and importer of foreign direct investment. It is therefore in the EU's interest to have a clear set of international rules that protects both EU investments abroad and foreign investments in the EU against expropriation and discrimination. Currently, an [international patchwork](#) of rules exists, in the form of more than 2 350 Bilateral Investment Treaties (BITs) and over 300 Treaties with Investment Provisions (TIPs) that regulate investment disputes. Of the treaties that involve EU Member States, nearly 1 200 [contain provisions](#) on ISDS mechanisms to settle disputes through ad hoc arbitration panels.

In recent years, however, ISDS provisions have been heavily [criticised](#). First, ISDS mechanisms are perceived as [threatening](#) states' right to regulate their public interests, such as protecting the environment. The reason for this is that ISDS could allow corporations to initiate arbitration proceedings against states and claim substantial damages when new legislation adversely affects their investments, which could influence states' decisions to adopt such legislation. A second criticism of ISDS questions the [impartiality](#) of the arbitrators who decide cases in such proceedings. One concern is that arbitrators are often involved in several cases at the same time, including as counsel to investors or as witnesses, which raises the potential for conflicts of interests. Thirdly, existing ISDS mechanisms do not typically include [appellate mechanisms](#). If any of the parties considers that the arbitration panel has erred in law or fact, therefore, it is in principle unable to have another panel look at its case. [Other criticisms](#) of ISDS relate to its perceived lack of consistency and transparency, high costs and bypassing of domestic courts.

Figure 1 – Outcomes of 495 known ISDS cases



Source: UNCTAD (accessed 8 June 2017).

Structure of the envisioned Multilateral Investment Court

The Commission [aims](#) to address some of the aforementioned concerns through the [establishment](#) of a [permanent MIC](#) with a specific institutional set-up. First, the MIC would consist of [two tribunals](#): a first instance tribunal and an appeal tribunal. This would enable parties to appeal against decisions of the first instance tribunal with which they disagree. Second, instead of arbitrators selected on an ad hoc basis by the parties



themselves, highly qualified judges would be appointed to the MIC, who would deal with cases on a rotational basis. The intention is to remove any concerns about potential conflicts of interest or a lack of impartiality on the part of the judges. The MIC would also work transparently and rule on disputes arising under existing and future investment treaties. Finally, the MIC would seek to complement the EU's existing reforms of substantive investment protection rules (such as provisions on states' right to regulate).

Box 1 – Failed OECD negotiations on a Multilateral Agreement on Investment (1995-1998)

Between 1995 and 1998, negotiations on a [Multilateral Agreement on Investment](#) (MAI) took place within the framework of the Organisation for Economic Cooperation and Development (OECD). These talks involved the OECD's then 25 member countries and the European Commission. The talks were [discontinued](#) in 1998, allegedly due to significant internal differences between the negotiating parties as well as outside pressure from non-governmental organisations. A key difference with the EU's envisioned MIC appears to be that the MAI was centred on setting substantive levels of investment protection, whereas the MIC will focus only on the procedural side of investment protection (although it might also reinforce states' right to regulate).

Potential challenges ahead

The Commission faces a number of challenges in establishing the MIC. A first question will be how many other countries are prepared to join the new court (see box 1). While attempting to modernise investment protection along the lines of the envisioned MIC in bilateral trade negotiations, the Commission has run into [opposition](#) from other countries, notably the USA (in TTIP-negotiations) and Japan. Various other countries have recently also begun to [turn away](#) from international investment treaties with ISDS mechanisms. At the same time, the EU has managed to include provisions on bilateral Investment Court Systems (ICS) in its most recent state-of-the-art trade agreements with Canada ([CETA](#)) and [Vietnam](#). Both agreements even contain express provisions on the pursuit of a MIC that will eventually replace each bilateral ICS (see box 2). The idea for a MIC has also [attracted](#) a considerable amount of interest in other countries.

Box 2 – Provisions on multilateralisation of investment protection in the EU's latest trade agreements

EU-Canada CETA (Article 8.29)

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

EU-Vietnam FTA (Article 8.15)

The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Trade Committee may adopt a decision specifying any necessary transitional arrangements.

A second question raised by the establishment of a MIC concerns its [compatibility](#) with EU law and in particular the autonomy of the EU legal order. This legal principle entails primarily that the EU and its institutions cannot be bound to an external judicial body's interpretation of EU law. At this stage, it remains to be seen how the MIC will interact with EU law. However, the Belgian government is widely expected to ask the Court of Justice of the EU for an opinion on the compatibility of CETA with EU law, which will certainly include an assessment of [CETA's bilateral ICS](#). The Court's subsequent opinion could either facilitate or block the path towards a MIC. Finally, it is not yet clear whether civil society will support the establishment of a MIC. While the Commission views the MIC as a way to solve many of the problems associated with existing ISDS mechanisms, certainly [not everyone](#) is convinced that establishing the MIC will solve them. The MIC could accordingly become subject to intense public scrutiny. In March 2017, the Commission completed a [public consultation](#) on the options for a multilateral reform of investment dispute resolution, the results of which may influence the Commission's request for a mandate to start negotiations on a MIC, which is [expected](#) before the end of 2017.

Position of the European Parliament

In a [resolution](#) of 8 July 2015, the European Parliament supported the establishment of a multilateral solution to investment disputes in the medium term. It [considers](#) CETA's ICS as a stepping-stone towards achieving that goal, which should ultimately reduce the present incoherence in international investment protection rules.