Multilateral Investment Court
Overview of the reform proposals and prospects

SUMMARY
The Council of the European Union has authorised the European Commission to represent the EU and its Member States at the intergovernmental talks at the United Nations Commission on International Trade Law (UNCITRAL), with a view to reforming the existing investor-state dispute settlement (ISDS) system. The latter provides a procedural framework for disputes between international investors and hosting states, and relies on arbitration procedures. However, there have been growing concerns among states and stakeholders about the system's reliance on arbitrators, given its lack of transparency, issues over the predictability and consistency of their decisions, and the excessive costs involved. UNCITRAL talks aim to address these concerns by reforming the system. The EU and its Member States support the establishment of a multilateral investment court (MIC), composed of a first instance and an appellate tribunal staffed by full-time adjudicators.

UNCITRAL talks on ISDS reform started in 2017. In April 2019, the working group finalised the list of concerns regarding the current ISDS system and agreed that it was desirable to work on reforms. The states then tabled reform proposals that provided the framework for the discussions that started in October 2019. The proposals range from introducing binding rules for arbitrators to setting up formal investment courts comprised of first instance and appellate tribunals. All in all, the proposals reflect two distinct approaches. Some states back the creation of tools – such as a code of conduct and/or an advisory body for smaller economies and small and medium-sized enterprises – to complement the current system. Others favour fundamental changes through the creation of a two-court system with appointed members.

The latest round of talks took place in January 2020, and another is scheduled for March/April 2020. Although states are eager to reform the ISDS system, the complexity of the issue is likely to require additional sessions before agreement can be reached.

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Background

Following protests against the inclusion of investor-state dispute settlement (ISDS) provisions in the CETA and TTIP agreements, the European Commission engaged in state-level multilateral talks to reform the existing ISDS environment. The three ISDS systems most commonly used today are predominantly based on arbitrators' decisions; furthermore, they provide for no appeal and rely on conventional or ad-hoc rules. The current ISDS environment is widely viewed as complex, opaque and costly; critics, especially investment-hosting states, question its reliability altogether. That said, a reliable and trusted ISDS system is essential to rendering international investment agreements (IIA) effective.

The Commission advocates creating a fully fledged multilateral investment court (MIC). The EU has already replaced the ISDS mechanism with bilateral investment court systems (ICS) in its newly signed IIAs. In addition, the latter include provisions to account for the transition from the ICS to the MIC.

The intergovernmental talks are being conducted under the auspices of Working Group III (WGIII) of the UN Commission on International Trade Law (UNCITRAL), an intergovernmental forum viewed as providing the widest audience for states. WGIII participants have agreed to first list their concerns, then consider the desirability of reforms, and finally submit reform proposals for discussion. Once agreement has been reached on a final reform proposal, it is submitted to UNCITRAL and then to the UN General Assembly.

Between November 2017 and October 2018, WGIII drew up a list of concerns regarding the current ISDS system, which it classified into three categories: a) consistency, coherence, predictability and correctness of arbitral decisions; b) integrity of arbitrators and decision-makers; and c) cost and duration of ISDS disputes. The WGIII added an 'additional concerns' category. On wrapping up the discussion about the concerns, WGIII concluded that it was desirable to work on reforms. Some 24 proposals were submitted, among them that of the European Union and its Member States.

Overview of the proposals

This section provides an overview of the proposals, which is representative rather than exhaustive. The proposed reforms are not necessarily mutually exclusive and thus may be implemented either as stand-alone solutions or in combination with other reforms. In addition, the proposals may address multiple concerns and are therefore not classified by the category of concerns. It is worth noting that some of the proposals described below are already reflected in the EU's more recent IIAs.

Judicial mechanism: ad-hoc and standing tribunals

Multilateral advisory centre

Several states proposed the establishment of an advisory centre for international investment law (ACIIL), similar to the Advisory Centre on World Trade Organization (WTO) Law in Geneva. The idea of setting up such a centre was suggested and supported by a number of developing countries, and is part of the EU's negotiating directives. Its objective would be to tackle developing countries' main concern: the cost and length of investor-state disputes. More importantly, the ACIIL would help states build their own judicial capacities and disseminate available information on cases. One proposal suggests that ACIIL services should primarily benefit developing countries' governments, while also being extended to SMEs and individual investors. The Netherlands has commissioned a scoping study on such an advisory centre or assistance mechanism.
Stand-alone review or appellate mechanism

Several states were in favour of establishing an appellate body that would either be part of a two-court system or become a stand-alone court within the current arbitrage setup. The post-award mechanism would allow for the interpretation, revision and annulment of decisions. It could take the form of a ‘quality control’ procedure similar to the International Court of Arbitration of the International Chamber of Commerce, or be formalised as a stand-alone institution. Some propose the extension of the competence of the international appellate body, should such a body be established for investment agreements, to decisions issued by domestic courts.

Fully fledged two-court system (first instance and appeal), with full-time judges

This proposal (from the EU and its Member States) includes a mechanism with full-time adjudicators – no longer party-appointed arbitrators – and two levels of adjudication. The first instance tribunal would review facts and apply the relevant laws. The appellate tribunal would have the power to reverse legal findings or serious errors in the weighing of facts, but not review facts.

Interpretation of treaties: parties’ involvement and control

After reaching consensus about the existence of unjustifiable inconsistencies in arbitrators’ decisions, the states came up with the solution to create mechanisms for interpreting the treaties.

Control of parties’ instruments

One potential reform is the establishment of a mechanism allowing one or both parties to interpret treaties through a joint framework. A more advanced solution would be to create a multilateral framework and develop legal standards in treaties. States or multilateral committees would provide guidelines for interpreting the treaties in subsequent dispute settlements.

Involvement of state authorities

A similar set of proposals, though with a different perspective, suggest strengthening the involvement of states in case proceedings. Solutions range from state-state preliminary considerations to the establishment of joint review committees. This solution presents potential overlaps with the creation of a multilateral appellate body whose competences would be extended to the review of decisions.

Appointment and ethics of arbitrators and adjudicators

New methods of appointment

The system for appointing adjudicators is essential to ensuring the credibility of the new system. A series of rules were proposed, to be applied regardless of whether there is a court system or not. One important proposal (from the EU and its Member States) was the establishment of a proper selection procedure within the framework of a standing mechanism. To ensure their independence, adjudicators would fill full-time, long-term and non-renewable positions, without outside activities, and with salaries comparable to other court systems. To ensure competence and objectivity, adjudicators would be representative in terms of geography, expertise and gender diversity.5

Independently of the establishment of permanent bodies, some states proposed to formalise the methods of selecting arbitrators, for instance, by creating an independent appointing authority that would apply transparent and consensual rules. This authority would draw up a roster of arbitrators from which disputing parties could then select the ones they wish to engage. The roster would be made with the help of transparent selection rules and be representative of diversity in terms of geography, gender, developing/developed countries and expertise. Also, the roster may be a mix of existing and new arbitrators, to ensure that both experience and fresh perspectives are present.
Code of conduct

Creating a code of conduct would involve developing a legal standard, possibly together with an enforcement mechanism, aimed at supplementing and harmonising the existing legal framework. It would include appropriate sanctions in case of non-compliance. The code of conduct would place emphasis on arbitrators’ independence, integrity, impartiality, diligence and confidentiality, among others. Two background documents provide model codes of conduct and list the potential consequences of failure to create one.6

Cost management and related procedures

Expedited procedures

These involve defining simplified rules of operation for less complex cases as well as rules that would smooth out the procedure involving ISDS disputes and make it quicker and less costly. This concern is also addressed by UNICITRAL Working Group II.7

Prevention and mitigation of disputes

A set of proposals recommend stand-alone reforms, while others recommend reforms that would be carried out in conjunction with other reforms. The main options relate to pre-emptive actions before the procedure starts: mediation for early settlement disputes and implementation of waiting (cooling-off) periods, before the launch of disputes. To prevent excessive dispute procedures (frivolous claims), it is proposed to implement a mechanism for an early dismissal of claims and to allow the tribunal to require the claimant to pay all costs for the procedure. Such clauses have already been inserted in ISDS provisions of investment protection treaties, including those of the EU. Also, to resolve issues when proceedings take place through different channels, a mechanism of ‘consolidation’ could be implemented through an exchange of information.

Other areas

Third-party funding

Claimant investors may contract with non-involved third parties in such a way that the latter provide financing and legal advice and receive a share of the award (‘third-party funding’, TPF). TPF may be a source of conflict of interests with arbitrators. A number of IIAs offer hardly any possibilities to exercise control over third-party provisions and disclosure of third-party funding, thus posing a threat to respondent states. Inclusion of third-party transparency provisions in IIAs is more frequent nowadays, and EU IIAs do regulate TPF. The proposals submitted to UNCITRAL WGIII require that TPF be disclosed to all parties, including the sums at stake, and compensation for third parties be limited. Some states propose banning TPF altogether, or at least imposing sanctions in case of violation of disclosure obligations.

Opt-in convention

An important feature that has emerged in the talks is the implementation of various reform options simultaneously, gathered in an opt-in convention. Technically, such a convention involves creating a general framework serving as an ‘umbrella’ for all treaties, so that countries could consider whether or not to opt into such a framework. Two treaty parties may decide to recognise the umbrella for existing treaties. There are ongoing discussions as to whether it would apply ‘automatically’ to all of the treaties that countries join, or whether they would have the freedom to opt in for specific treaties. There is also the question of whether countries could apply only a part of the system, for instance, the appellate body, but not the first instance tribunal.

The opt-in convention is a mechanism that is already being employed in the UN Convention on transparency in treaty-based investor-state dispute arbitration (the 2014 Mauritius Convention), and the Multilateral Convention to implement tax treaty-related measures to prevent base erosion and...
**General view and prospects**

Overall, the proposals apply one of two distinct approaches, with some applying a mix of both. The first approach involves fixing some of the issues in the current ISDS setup while maintaining the principles of an arbitration-based ruling system. This approach includes reforms such as the creation of an advisory centre and a code of conduct for arbitrators.

In contrast, the second approach favours making major modifications to the ISDS. Under this approach, states would ensure transparency and independence before any disputes occur. A two-court system – a first instance court and an appellate body – would be created, accompanied by an appointment system for adjudicators. The effectiveness and transparency of the rules governing this system are likely to determine its capacity to persuade states to join.

The opt-in mechanism clearly comes into play as a way to permit the activation of a 'trial mechanism' of sorts, allowing parties to observe and/or test various features before using the framework as a whole. This should pave the way for both approaches to proceed, giving states the chance to commit further at a later stage and engage smoothly in the process.

**Rationale for the MIC, with numbers**

![Figure 1 – Number of bilateral investment treaties in force, to which EU Member States are a party](source: UNCTAD (accessed November 2019), author’s calculations.)

**Figure 1**

Investment is generally considered as benefiting host countries by encouraging growth, employment and productivity. This explains the nearly 3,000 bilateral investment treaties (BITs) that have been signed worldwide since the 1970s. UNCTAD reports that 2,337 BITs are currently in force, of which 1,461 involve at least one EU Member State and 1,176 involve EU Member States and non-EU Member States (see Figure 1).

![Figure 2 – Number of initiated ISDS cases, EU-28 respondents and/or EU-28 claimants](source: UNCTAD (1994-July 2019), author’s calculations.)

**Figure 2**

BITs’ substantive laws typically protect investors against expropriation and discrimination. The procedural framework relies on international arbitration conventions and ad-hoc rules. Historically, developing countries have been the main target of foreign investors. Since the early 2000s, ISDS claims have targeted industrialised countries, including EU Member States. Figure 2 reports the total
number of ISDS cases initiated against EU Member States (orange line; EU membership at case initiation). The number of ISDS cases initiated by non-EU investors against EU Member States (light blue line) has boomed from nearly no cases in the early 2000s to an average of four cases yearly since 2010, with a peak of nine cases initiated in 2015. In the UNCTAD ISDS case database (July 2019), there are 332 pending cases against EU Member States, of which 47 were initiated by non-EU investors. Finally, out of the 421 ISDS cases for which an arbitration decision has been delivered, 230 decisions (54%) are in favour of the Member States.

EU laws and positions of parties concerned

Interpretation of EU laws

The Court of Justice of the European Union (CJEU) has issued two opinions clarifying the interpretation of EU laws in relation to the MIC. On 16 May 2017, the CJEU declared that 'direct investment' indeed falls within the competence of the EU, but that portfolio investment, investor protection and ISDS frameworks do not (Opinion 2/15). The ruling came in response to a request for an opinion regarding the EU-Singapore Free Trade Agreement. On 30 April 2019, the CJEU confirmed that the investment court system (ICS) is compatible with the treaties of the European Union (Opinion 1/17). The opinion came in response to a request regarding the EU-Canada CETA.

Stakeholders

Before the launch of UNCTAD talks, the ISDS provisions were heavily criticised by both stakeholders and states for promoting the protection of investors’ rights at the expense of those of civil society, in particular the right of states to regulate and protect the environment. The criticism is based on the observation that the ISDS system allows corporations to initiate arbitration proceedings against states and to claim substantial damages when new legislation adversely affects their investments; this may deter states from taking further action. Some associations and NGOs, while acknowledging substantial progress in the MIC, view it as insufficient.

In response to criticism against the MIC in relation to the right of states to regulate, the Commission has recalled on various occasions that the MIC aims to bring legitimacy, transparency and neutrality to decisions. The rights of parties and the precise role of the court in procedures should be determined by the investment agreements. Moreover, the Commission has underlined that the UNCTAD investment policy framework for sustainable development and road map for IIA reform envisage steps for safeguarding the right to regulate and for ensuring responsible investment. Indeed, new generation IIAs – including those signed by the EU – affirm the right to regulate and address issues concerning environmentally and socially responsible investment.

Advisory committees

In December 2018, the European Economic and Social Committee (EESC) adopted an opinion that welcomes the Commission’s efforts to establish the MIC under the auspices of UNCTAD. Protection of investors is widely welcomed as a factor promoting international investment, and the MIC is viewed as a major step towards predictability and transparency of decisions. In particular, the EESC states that enhanced transparency would allow NGOs to monitor the discussions and even participate in them. In addition, the opinion emphasises that the appointments of judges on a permanent basis is key to building predictability, and that the MIC should give access to SMEs at a reasonable cost. Finally, the opinion argues that decisions must be enforceable and made public.

In its opinion of March 2018, the European Committee of the Regions (CoR) acknowledges the progress in terms of rendering decisions predictable, but calls for the MIC to protect not only the rights of investors but also the rights of states to legislate and the rights of third parties. It also stresses that the MIC should not bypass domestic legal systems or local government decisions defending the rights of private investors. Similar concerns are voiced in the EESC opinion: 'the right of States to regulate in the public interest must not be undermined'.
Parliament

The European Parliament has adopted a number of resolutions encouraging the MIC initiative. This position is reflected in its consent to the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, the EU-Canada CETA, and the EU-Singapore Investment Protection Agreement (ESIPA). All three agreements contain provisions for the establishment of an investment court system (ICS) similar to what the EU has proposed to UNCITRAL; these agreements also provide for the adoption of the MIC once it has been established.

In its resolution on a forward-looking and innovative future strategy for trade and investment (PA_TA(2016)0299), the Parliament recognises the benefits of investor protection agreements: as well as supporting trade and growth, they benefit international investments by protecting investors. Also, the resolution calls on the EU and its Member States to follow the recommendations contained in UNCTAD’s comprehensive investment policy framework for sustainable development, aimed at making investments more responsible, transparent and accountable. Finally, the Parliament voices regret that the ICS proposal does not include an ‘investors’ obligation provision’.

Next steps at UNCITRAL

At its October 2019 session in Vienna, UNCITRAL WGIII launched discussions on reforms, addressing in particular the creation of an advisory centre and a code of conduct, and matters related to third-party funding (see box on the right). Advanced structural reforms were the subject of the latest session, on 20-24 January 2020 in Vienna. The final session on the agenda is scheduled for 30 March - 3 April 2020 in New York. Even though states are eager to reform the current ISDS, the complexity of the issue is likely to require more sessions.

To keep up the pace of negotiations as well as to generate broader interest, the WGIII organises 'inter-sessional regional meetings' in various locations worldwide. Three of them have already taken place; the latest one was in Conakry (Guinea) in September 2019.

MAIN REFERENCES


Possible Reform of investor-State dispute settlement (ISDS) Selection and appointment of ISDS Tribunal members, note by the Secretariat A/CN.9/WG.III/WP.169, UNCITRAL WG III, July 2019.


Stakeholder meeting on the establishment of a multilateral investment court, European Commission, DG Trade, 9 October 2019.
ENDNOTES

1 The main ISDS systems were suggested by the World Bank International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), and the UN Commission on International Trade Law (UNCITRAL).

2 EU IIAs that contain ICS provisions are those with Canada, Mexico, Singapore and Vietnam.

3 UNCITRAL is a UN legal body that promotes the harmonisation and modernisation of international trade law. Its tasks consist in preparing and promoting the use and adoption of legislative and non-legislative instruments in key areas of trade law. Membership of UNCITRAL comprises 60 states that are elected by the UN General Assembly for a term of six years, the term of half of the members expiring every three years. Each UNCITRAL working group addresses specific issues; Working Group III (WGIII) covers the ISDS.

4 Proposals were submitted by Bahrain, Brazil, Chile, China, Colombia, Costa Rica, the Dominican Republic, Ecuador, the EU and its Member States, the Republic of Guinea, Indonesia, Israel, Japan, Kazakhstan, the Republic of Korea, Kuwait, Mali, Mexico, Morocco, Peru, the Russian Federation, South Africa, Thailand and Turkey. Some proposals were submitted jointly.

5 This system is inspired by the WTO Appellate Body, the European Court of Human Rights, and the International Court of Justice. The mechanism is a two-level one: 1) selection of adjudicators; and 2) assignment of cases.

6 Ethics and codes of conduct for the members of tribunals are standard provisions in EU IIAs.

7 The World Bank ICSID is also discussing this issue in their Proposals for amendment of the ICSID rules, August 2019.

8 For extensive details and discussions about the opt-in mechanism, see Kauffman-Kohler and Podestà, 2016.

9 See UNCITRAL A/CN.9/WG.III/WP.169 for detailed proposals about the selection of members of the ISDS tribunal.


11 See also Paul Magnette: ‘[Le PS] continuera de s’opposer à tout mécanisme d’arbitrage, en ce que ce dernier n’est ouvert qu’aux plaintes des entreprises, ce qui affecte les intérêts des pouvoirs publics et des particuliers’ (Le Soir, 30 April 2019).

12 Consistently with these concerns, the EU IIAs assert the right of states to regulate and restrain the protection of investment in relevant activities. See, for instance, the Joint Interpretative Instrument added to the EU-Canada CETA, stating that ‘CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment’; see also the EU-Vietnam IIA (Article 2.1, Scope).

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