



The Energy Community – Dispute Resolution Forum
Vienna, 27 September 2018

**The future of investment
dispute resolution:
Towards an Investment Court**

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Outline

- 1. Background*
- 2. Main features of a Multilateral Investment Court: EU ideas*
- 3. Latest developments*



European
Commission

1. Background

Concerns related to ISDS

- Appointment of ad hoc arbitrators by the disputing parties on a case-by-case basis
 - ↳ - Doubts on independence, impartiality
 - Inconsistent decisions
 - Lack of predictability
- Lack of geographical and gender representativeness
- Insufficient review opportunities
 - ↳ - Inability to correct errors of law or fact

Concerns related to ISDS

- Confidentiality of proceedings, lack of transparency
 - ↳ - Limited access to information
 - Limited third-party participation
- High costs of disputes
 - ↳ - Restricted access to justice

Consequence of those problems:

- Growing criticism on the legitimacy of ISDS
- Questioning of ISDS as such (need, cost-benefit, ...)

The EU's response to ISDS criticism

- Public consultation in the context of TTIP in 2014
- 2015 Concept Paper 'Investment in TTIP and Beyond' and 2015 Communication 'Trade for All'
- Investment Court System (ICS) in all EU bilateral agreements with third countries (CETA, Vietnam, Singapore, Mexico)
- Transition to a Multilateral Investment Court

Investment Court System

- **Hybrid system:** elements of arbitration but closer to a court.
- Aims at restoring **public trust** addressing demands for reform of traditional ISDS.
- **Full transparency:** UNCITRAL Transparency Rules
- **Standing** bilateral First Instance and Appeal Tribunal staffed with judges, appointed by the Contracting Parties and subject to strict ethical requirements; Code of Conduct.
- **Random case allocation**

ISDS

Ad hoc

- Party-appointed arbitrators
- Confidential

Arbitrators

- Ethics: control ultimately by arbitration centre
- Fees are often confidential and paid by disputing parties; selection of arbitrators is long and expensive
- Can act as ISDS lawyers

No appeal

- Inconsistency, errors remain
- Limited grounds for annulment
- Where available, long and expensive annulment proceedings without possibility of remand

Investment Court System

Permanent

- Judges appointed by Contracting Parties and random case allocation
- Full transparency

Judges

- Ethics: strict rules ensure independence and prevent conflicts of interest
- Retainer fees paid by Governments; can be turned into salary;
- Cannot be ISDS counsel

Possibility of appeal

- Consistency and correctness
- Wider grounds for appeal
- Strict time limits for appeal, process paid by the Contracting Parties with possibility of remand

Longer term

- The ICS is the current EU policy for all ongoing and future EU negotiations.
- The optimal solution in the longer term is a **multilateralisation of the bilateral system** since the concerns about ISDS are global → a permanent multilateral court for all existing and future Treaties.
- Main **advantages**: legitimacy; efficiency; consistency
- Transitional provisions from ICS to a multilateral investment court are already included in the EU's bilateral agreements.
- UNCITRAL discussions on a multilateral ISDS reform.

2. Main features of a Multilateral Investment Court: EU ideas

Design features

- First instance and appeal mechanism
 - ✓ **Consistency and predictability**
 - ✓ **Correctness**
- Full-time salaried adjudicators appointed by the treaty parties for fixed non-renewable terms
 - ✓ **Enhanced legitimacy**
- High qualifications and ethical requirements, including representativeness requirements
 - ✓ **Judicial independence and impartiality**

Design features

- Enhanced transparency(*see UNCITRAL Transparency Rules*)
 - ✓ **Contributes to legitimacy and accountability**
- System financed by the Contracting Parties, taking into account the level of development
 - ✓ **Reduction of costs for investors and states**
 - ✓ **Justice as a public good**

Design features

- Special provisions for SMEs
 - ✓ **Accessibility**
 - ✓ **Reduction of costs**
- Effective enforcement procedures
 - ✓ **Effectiveness**
- Open to all interested countries
- Applicable to all 3200 existing international investment treaties ('opt-in mechanism')

3. Latest developments

EU internal developments

- August 2016 – September 2017: **Impact Assessment** and public consultation
- September 2017: **Commission Recommendation** for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes
- March 2018: Council gives Commission the **negotiating authorisation**
- Continuous involvement of **EP and stakeholders**

EU external developments

UNCITRAL Working Group III mandate:

1. Identify and consider concerns regarding ISDS
2. Consider whether reform is desirable in the light of any identified concerns
3. If the Working Group concludes that reform is desirable, develop any relevant solutions to be recommended to the Commission

More information and documents:

http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html

UNCITRAL commitment to transparency and openness

- Participation open to all UN members and any interested party (international/regional organisations, civil society)
- Publication of meeting reports and audio recordings
- Working document from the EU on possible reform of ISDS:
<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/088/32/PDF/V1708832.pdf?OpenElement>

More information and documents:

<http://www.uncitral.org/uncitral/audio/meetings.jsp>

UNCITRAL process

- First 2 rounds of discussions on ISDS concerns:
 - 27 November – 1 December 2017, Vienna
 - 23 – 27 April 2018, New York
- UNCITRAL WG III reporting to UNCITRAL:
 - June 2018
- Next steps:
 - 29 October – 2 November 2018: 3rd round of discussions on whether ISDS reform is necessary
- UNCITRAL trust fund: to ensure developing countries' delegations attendance to Working Group III meetings



Thank you

European Commission, DG TRADE, Multilateral Investment Court project:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>

UNCITRAL Working Group III (Investor-State Dispute Settlement Reform):

http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html

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