Asia-Europe Meeting
Workshop on possible approaches to a multilateral reform of the investor-state dispute settlement (ISDS) system
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PERSPECTIVES FROM THE EU:
The Idea of Creating a Multilateral Investment Court

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PERSPECTIVES FROM THE EU:

• Background

• Multilateral investment court
  - objective and main features

• Next steps
BACKGROUND
Background

• 2010 Communication: "Towards a comprehensive European international investment policy"
  > transparency, consistency, predictability, possibility to appeal

• 2015 Concept Paper: "Investment in TTIP and beyond – the path for reform"
  > replacement of ISDS with the ICS

• Trade for all Communication (2015)
  > ICS: CETA, EU-Vietnam FTA
Background

• **2016:** Public consultation on multilateral reform of the dispute settlement resolution
  > broad range of stakeholders involved

• **Impact Assessment on the MIC**
  > different options and possible features of the MIC

• **10 July 2017:** UNCITRAL
  > Mandate to Working Group III: Possible reform of the ISDS system
Why?

- Public law issues – vertical relationship between government and investor

- Repeat issues. Specific fact patterns being tested against fixed, broad standards

- Paradigm very different from commercial disputes using commercial arbitration.
  
  > NB – ICSID drafted with contractual disputes in mind, not treaty disputes
Why?

- Public law, repeat issues – normally heard by a permanent institution, typically with appeal.

- Examples – administrative courts, constitutional courts, regional human rights courts

- Why – because effective and fair administration of justice is seen as a public good. “Justice must not only be done, but seen to be done.”

- Why should investment disputes be treated differently?
Objective

- set up a framework for investment dispute resolution that is:

1. Permanent, independent and enjoys the recognition of authority and legitimacy of citizens.

2. Predictable, delivering consistent case-law in its functioning, ensuring that the interpretation of substantive standards is consistent, where possible.
Objective

- set up a framework for investment dispute resolution that is:

3. Allowing for an appeal of decisions in order to correct legal and factual errors.

4. Transparent, in line with the fundamental expectations from citizens that justice is a public good.

5. Efficient, in that it satisfies the needs of involved stakeholders through an effective use of financial and human resources.
Possible Main Features

- First instance tribunal and appeal tribunal
- Full time salaried adjudicators
- Qualifications and ethics
- Open to all interested countries
- Developing countries and SMEs
First instance tribunal and appeal tribunal

- Permanent nature
  - Predictability
  - Transparency
  - Consistency of case-law
  - Secretariat

- Number of adjudicators
  - Workload of the tribunal
  - Efficiency

- Appeal
  - Legal and factual errors
  - Legitimacy, independence, consistency and predictability
Full time salaried adjudicators

- Adjudicators
  - Full time
  - Nature of their mandate (renewability)
  - Appointment
  - Impartiality and independence

- Salary
  - Independence
  - Impartiality

- Case allocation
Qualifications and ethics

- High qualification criteria
  - Similar to other international fora
  - Consistency
  - Predictability
  - Legitimacy
  - Independence

- Ethics
  - Impartiality
  - Compatibility with other professional activities
Open to all interested countries

- Opt-in system
  - More efficient than re-negotiating each treaty (Mauritius Convention approach)
  - Cost-efficient

- Financing
  - Contributions of contracting parties
  - User fees?
Developing countries & SMEs

- Developing Countries
  - Advisory Centre
  - Financial aspect: contributions based on the level of development of the country

- SMEs
  - Small claims/simplified procedures
NEXT STEPS
Next Steps

• UNCITRAL

• Role of other international organizations
  > ICSID, OECD, UNCTAD, WTO etc.
Thank you for your attention!