



The Multilateral Investment Court project

**BusinessEurope seminar
Brussels, 13 March 2018**

Outline

- Session 1: **General presentation of the multilateral investment court project**
- Session 2: **Institutional aspects of the Multilateral Investment Court**
- Session 3: **Functioning of the Multilateral Investment Court**
- Session 4: **The appeal mechanism**

Session 1

General presentation of the multilateral investment court project

Introduction and background

2010 Communication "*Towards a comprehensive European international investment policy*" identifies challenges to be addressed in the EU's international investment policy:

- **Transparency**
- **Consistency and predictability**
- **Possibility to appeal**

Introduction and background

2015 Concept Paper "*Investment in TTIP and beyond – the path for reform*" sets the basis for new EU policy on investment protection:

- Replacement of ISDS by an institutionalised **Investment Court System** (ICS) with a first instance and an appeal level in EU **bilateral** agreements.
- Inclusion of clearer and more precise provisions on investment protection, including on the right to regulate.

Introduction and background

2015 *Trade for all* Communication includes the objective of:

"engaging with partners to build consensus for a fully-fledged, permanent International Investment Court"

... in order to develop a coherent, unified, and effective policy on investment dispute resolution in FTAs.

- **CETA** and the **EU FTAs with Viet Nam and Singapore** include specific provisions to allow transition from the ICS to the multilateral court.

Introduction and background

ISDS is included in around 3,000 BITs (almost half concluded by EU Member States)

Rationale of the multilateral investment court initiative:

- Need to **reform and improve** the current system
- Political momentum and reasons of efficiency call for reform at **multilateral level**

State of play

EU internal developments

- Impact Assessment and public consultation
- Commission proposal
- Council discussions
- Role of the European Parliament
- Involvement of stakeholders: Meeting of 13 April 2018

State of play

EU-external developments

Mandate of UNCITRAL Working Group III:

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

Session 2

Institutional aspects of the multilateral investment court project

Institutional structure

- The Multilateral Investment Court could be set up as a **stand-alone institution or be docked into an existing framework.**
- Existing examples.
- Several elements for consideration including costs and feasibility.
- Issue for negotiations.

Membership

- The Multilateral Investment Court should be **open to all interested countries.**
- Need for an effective and efficient mechanism to join, possibly based on the **opt-in** approach in the Mauritius Convention.
- Any system must cater for the necessary **flexibilities** to ensure adaptability to an evolving membership and the particular circumstances of the case.

Financing

- **Membership fees** paid by Contracting Parties as a basic source of financing.
- Amount, distribution and other underpinning principles of financing will depend on the design of the Court and hence have to be **negotiated**.
- Flexibilities catering for relevant countries' differences may be desirable, e.g. level of development.

Session 3

Functioning of the multilateral investment court

Design and functioning

- First instance and appeal **permanent tribunal** with a **secretariat** to support their daily work.
- **Full time** salaried adjudicators with **high qualifications** and subject to **strict ethical requirements**.
 - Questions relating to the selection and appointment of adjudicators.
 - Rationale for the qualification and ethical requirements.
 - Remuneration.

Design and functioning

- **Jurisdiction** of the Court.
- **Effective** international **enforcement** regime.
 - Functioning and link to domestic remedies.
- Procedural safeguards.
- Possibility of **user fees**.
- Possible provisions to secure access by **SMEs**.

Session 4

The Appeal Mechanism

Rationale

- Need for an appeal instance to ensure **consistency and coherence** and foster **predictability** of case law.
- Positive experiences.
- Limitations of the current mechanisms of annulment and refusal of awards.

Functioning of the appeal instance

- Design of the Appeal Tribunal:
 - Full time adjudicators with long, non-renewable appointments enjoying security of tenure.
 - High qualifications and strict ethical requirements.
 - Remuneration of members.
 - Secretariat.
- The Appel Tribunal would hear appeals of decisions issued at first instance.
 - **Grounds of appeal.**
 - **Possibility of remand.**