

<div data-bbox="215 85 284 161" data-label="Text"> <p>L</p> </div>	<div data-bbox="363 62 563 107" data-label="Section-Header"> <p>BRIEFING</p> </div> <div data-bbox="352 136 564 170" data-label="Text"> <p><i>Origin: DG TRADE</i></p> </div>	<div data-bbox="592 62 1106 179" data-label="List-Group"> <ul style="list-style-type: none"> ○ Subject: State of play of on-going negotiations ○ Meeting: FAC TRADE ○ Date: 9 November 2018 ○ Place: Brussels </div> <div data-bbox="1212 85 1554 112" data-label="Text"> <p> Ref. Ares(2019)3285988 - 20/05/2019</p> </div>
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Pages 2,5-10,13-20 and 22-25 have been deleted as they were redacted entirely as out of scope

OBJECTIVE

OUT OF SCOPE

- Update Ministers on the latest state of play of the Multilateral Investment Court

SCENE SETTER

OUT OF SCOPE

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OUT OF SCOPE

On **MIC** there have been developments following discussions of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) in the week of 29 October to 2 November.

The Working Group concluded that ISDS reform is desirable to address the concerns it had identified and is expected to finalise phase 2 of the mandate regarding any other concerns at the beginning of its next meeting in April 2019. Discussions also touched upon process and delegations will discuss more thoroughly in April how to organise work under phase 3 (design of solutions). It would appear, although it has to be carefully nurtured, that there will be sufficient support to start more detailed work on the multilateral investment court in Autumn 2019 after the Working Group has reported to the UNCITRAL Commission in June-July 2019.

It will be useful to encourage Ministers to step up and raise this issue in their bilateral relations with third countries.

Out of scope

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SPEAKING POINTS/ KEY MESSAGES

OUT OF SCOPE

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OUT OF SCOPE

- I am happy to inform you that the **Multilateral Investment Court** project is moving steadily forward. The Working Group at the United Nations Commission on International Trade Law (UNCITRAL) examining this issue met last week for the third time.
- In one year, countries have already discussed the numerous concerns affecting ISDS (Investor-State Dispute Settlement). They have now decided that multilateral reform is necessary.
- The UNCITRAL Working Group will take up these issues in April next year. This is when we need to step up our actions. It is time for us to persuade third countries that they should at least explore fundamental reform of the ISDS system by examining the creation of a multilateral court.

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- I will continue to raise this issue, and to give it prominence in my interactions. I would encourage you to engage bilaterally with third countries on our Multilateral Investment Court initiative. My services have provided your services with documents for this purpose.

OUT OF SCOPE

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OUT OF SCOPE

MIC and UNCITRAL

Is the creation of a Multilateral Investment Court realistic? What would be the minimum of participating countries for starting such a process?

- We think it is realistic. It would focus on specific, concrete issues and avoid the ambition of previous failed initiatives like the Multilateral Agreement on Investment in the OECD in the 1990s. We would want to have an inclusive process, so open to all, which would gradually build up the concepts and then move to concrete texts. However, we think we can start negotiations in UNCITRAL, assuming we have sufficient support to explore the issues.

[Art. 4.1(a)]

[REDACTED]

[REDACTED]

[REDACTED]

What would an actual Multilateral Investment Court look like? What would be its main features?

- That would be the main issue for the negotiations. What we have in mind is a first instance tribunal with an appeal. Judges would be full time and have permanent appointments. A secretariat would be required, but it may be possible to build this onto existing secretariats. Effective enforcement would be vital. But of course, all of this is to be discussed and negotiated.

<div style="font-size: 48pt; color: red; text-align: center;">L</div>	<p style="text-align: center;">BRIEFING</p> <p style="text-align: center;"><i>Origin: DG TRADE</i></p>	<ul style="list-style-type: none"> ○ Subject: State of play of on-going negotiations ○ Meeting: FAC TRADE ○ Date: 9 November 2018 ○ Place: Brussels
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MIC at UNCITRAL

In July 2017, UNCITRAL (United Nations Commission on International Trade Law) gave its Working Group III a broad mandate to (1) identify and consider concerns regarding investor-state dispute settlement (ISDS); (2) consider whether reform is desirable; and (3) develop any relevant solutions. Working Group III has held three meetings so far on this issue (November 2017, April 2018 and October 2018), the most recent on 29 October – 2 November 2018. The Working Group finalised discussions on the concerns of ISDS under step 1 in April 2018 and identified the duration and costs of proceedings, lack of transparency, lack of consistency and coherence in the interpretation of substantive principles, limited mechanisms to review awards, problems related to the appointment of arbitrators and their ethical requirements, lack of guarantees of independence and impartiality of arbitrators and third party funding as concerns. Completion of step 1 was however without prejudice to any additional concerns that may continue to be flagged and discussed by the Working Group. There was a high degree of commonality in the room that ISDS is affected by serious limitations and warrants reform. UNCITRAL discussions are government-led but also benefit from the participation of numerous civil society organisations and NGOs that are accredited observers.

At the meeting last week, the Working Group concluded that ISDS reform is desirable to address the concerns it had identified. The Working Group is expected to finalise phase 2 of the mandate regarding any other concerns at the beginning of its next meeting in April 2019. Discussions also touched upon process and delegations will discuss more thoroughly in April how to organise work under phase 3 (design of solutions). It would appear, although it has to be carefully nurtured, that there will be sufficient support to start more detailed work on the multilateral investment court in Autumn 2019 after the Working Group has reported to the UNCITRAL Commission in June-July 2019.

As immediate next steps, DG TRADE will continue to reflect internally on key technical aspects of the multilateral investment court and in parallel work to ensure that the Working Group starts to produce significant and tangible results in the short- to mid-term. The Commission will continue its outreach with third countries to clarify remaining questions and strengthen confidence in the need and viability of the project. It would be necessary that Member States administrations are also active in this field and address the topic in their bilateral relations with third countries at the political but also technical level.

Contact person:

[Art. 4.1(b)] , TRADE A2  [Art. 4.1(b)] 25/10/2018