European Federation for Investment Law and Arbitration

Submission of the European Federation for Investment Law and Arbitration (EFILA) to the public consultation organized by the European Commission on a multilateral reform of investment dispute resolution

(dated 15 March 2017)

Executive summary

- EFILA questions whether the creation of a multilateral investment court (MIC) will actually resolve all the perceived problems and shortcomings of the current investor-state arbitration system.

- It is by no means clear that the total costs of creating such a MIC and in parallel Investment Court Systems (ICS) in separate EU FTAs will actually be lower. Also, it remains unclear whether the desired consistency could be achieved in light of the more than 3,000 BITs/FTAs and other multilateral investment agreements.

- EFILA considers it highly important and necessary that a mechanism is set up, which guarantees a transparent and inclusive selection process of the members of the ICS/MIC. Inclusive process means that also the peers and users of the system can effectively take part in the selection process.

- EFILA also believes that it is important that a mechanism is in place, which allows for the removal of unfit/biased members of the ICS/MIC by an external, independent body with the necessary expertise and experience in investment law and arbitration.

- EFILA questions the need for any appeal mechanism. Indeed, EFILA questions whether this in the end will be cheaper than the current system.

- EFILA considers it important and necessary that appeals are limited to points of law, thus should not extend to points of facts.

- EFILA deems access to international arbitration mechanisms essential, in particular for SMEs and individuals. Expeditious and cost-effective procedures for low-value claims should be established. A legal advisory centre, which would be available for developing countries should also be available for SMEs and individuals.

1. The background for the public consultation according to the EC

Desirability of a multilateral reform of the investment dispute settlement system

A number of systemic shortcomings have been identified in the area of ISDS in recent years that would need to be addressed in order to ensure that the investment dispute resolution system works in a transparent, accountable, effective and impartial manner at global level.

These horizontal issues include greater legal certainty, consistency in the settlement of investment disputes, legal correctness through the possibility of an appeal, full impartiality in the decisions, legal predictability for users of the system and improved accessibility for Small and Medium Sized Enterprises (SMEs).

The current EU policy is to include in each EU trade and investment agreement an institutionalised procedural framework for resolving investment related disputes (the Investment Court System - ICS). It addresses to a significant degree important shortcomings identified with the ISDS system, notably as regards ensuring accountability, impartiality and legal correctness of the dispute settlement process that will apply in the EU's agreements with third countries.

Nevertheless, there are certain limits to what can be achieved through reforms at bilateral level as regards consistency, efficiency and costs. This was also highlighted by stakeholders in the 2014 public consultation who argued that the many concerns expressed in the EU and other parts of the world on the accountability, legitimacy and independence of the investment dispute settlement system would be more effectively addressed through multilateral reforms than through bilateral reforms (as initiated through the ICS approach).

2. The questions of the EC and the answers of EFILA

27. The inclusion of an ICS in all relevant EU agreements has raised questions relating to the long-term efficiency of managing multiple bilateral dispute settlement instances in EU trade and investment agreements. There is also a cost aspect for the EU due to the fixed annual costs generated by each ICS (for each ICS approximately EUR 0.5 million/year on account of the remuneration of the permanent tribunal members and members of the appeal tribunal).

To what extent do you consider that seeking to include an ICS in each EU agreement may be less optimal for the EU from the point of view of complexity and cost?
From 0 (not problematic) to 5 (very problematic)

0 1 2 3 4 5 I don't know / I don't have an opinion

28. The EU's reformed approach for investment dispute settlement can naturally only apply to future EU agreements. It leaves open the issue of what to do with the many existing investment treaties in force worldwide (3320 in force, as of November 2016 according to UNCTAD figures[1]), a very high number of which contain traditional ISDS provisions and could give rise to disputes using those dispute settlement provisions. Treaties between EU Member States and third countries alone account for around half of these existing treaties (1400 bilateral investment treaties (BITs) with third countries). The EU itself is party to the Energy Charter Treaty (ECT). It is not conceivable that such a high number of investment treaties could be renegotiated to allow to make changes to the ISDS provisions.

At EU level, this raises a particular issue, as there would be two sets of investment dispute resolution rules applicable in the EU and Member States' investment relations with third countries depending on which treaty is at issue: (i) ISDS provisions would apply if a dispute is brought by an investor under one of the existing Member State BITs or the ECT; (ii) ICS would apply if a dispute is brought by an investor under an EU level trade and investment agreement with a third country.

In your view how important is it that the same procedural rules for investment dispute settlement apply in EU Member States' existing BITs with third countries and in EU level trade and investment agreements with third countries?

0 1 2 3 4 5 I don't know / I don't have an opinion

29. If you consider it important to have the same procedural rules apply, please indicate why:

From 0 (not important) to 5 (very important)

Increases legal certainty for investors and states in the EU and third countries 3

Provides uniformity to the applicable dispute settlement rules 3

Improves investment climate in the EU and third states 3

It is important for the EU's credibility that reform of ISDS also applies at the level of EU Member States BITs 3

Other reasons why it is important to have the same procedural rules apply. Please specify.

The lack of procedural consistency is not of concern. We also question the suggestion that it is important for the EU's credibility that reform of ISDS also applies at the level of EU Member States' BITs. When the EU enters into new trade and investment agreements, it is understood by the third party state that the new arrangements will supersede any existing bilateral arrangements and their dispute resolution provisions. It does not undermine the EU that Member States have different bilateral arrangements with other states with whom the EU does not have a trade/investment treaty. On a practical level, it seems unlikely that EU Member States will consider it a priority and will be willing to enter into renegotiations at an individual level with multiple third states.

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Possible features of a new multilateral system for investment dispute resolution

30. The specific features below are some of the most important elements at the basis of the EU's bilateral ICSs to be included in the EU's trade and investment agreements with third countries.

If a multilateral reform were to be started to what extent do you consider that these elements should also be reflected?
From 0 (should not be included) to 5 (should certainly be included)

Permanent dispute resolution structure (i.e. not disbanded after issuing a ruling) 4

Appeal instance to correct errors of law and manifest errors of fact 1

Full-time adjudicators 2

Fixed remuneration for adjudicators 2

High qualification criteria for selecting adjudicators 4

Random allocation of cases 4

Transparency / full documentation disclosure requirements 4

High ethics standards 4

Safeguards for independence (e.g. random allocation, tenure, etc) 4

31. Can you identify other possible features that you believe should be included in a new multilateral system?

The selection process of the members of the multilateral system must be fully transparent and must involve the users. It is of utmost importance that the proposed candidates are qualified regarding investment law and are independent and impartial. As the current proposals for the ICS in CETA and TTIP indicate, only the States which are contracting parties to CETA, TTIP, will have the power to select the members of the ICS. As EFILA has argued in its previous analysis on this topic, a clear danger exists that States will be tempted to appoint pro-State biased members, which would seriously undermine the impartiality of the ICS. Therefore, it is necessary to balance this one-sided power of the States by the possibility for the investor/claimant to be able to effectively dismiss any biased ICS members.

Accordingly, it would be important to include a **mechanism for dismissa**l of members of the court, which is currently not included in the CETA, TTIP ICS proposals.

Our proposal is inspired by the mechanism of dismissal of jury members of *the Cour d' Assises* as they exist for example in France (see Articles 297 et seq. of the French Code of Criminal Procedure). When the jury is being established, the defendant may request – without giving any reasons – the dismissal of any of the jurors, and that before the questioning of witnesses etc., in other words before the trial itself commences.

Tribunal of First Instance (TFI)

Under Article 9 (7) of Section 3 of the draft TTIP, it is the prerogatives of the President of the TFI to appoint the judges who will compose the chamber of the tribunal that is to adjudicate the dispute. No further steps are provided for.

Inspired by the aforementioned democratic French model, we propose that the investor party to a dispute, on the basis of a court composed of a total of 15 judges, be vested with three rights per dispute to dismiss the judges chosen by the President of the TFI. These dismissal rights may be exercised once or several times in the same dispute, during a preliminary phase, i.e., before the commencement of the

proceedings themselves. The investor would not be required to indicate the grounds for his dismissal of judges.

For example: the President of the TFI selects a chamber of judges A, B and C for a given dispute. The investor can simultaneously dismiss all three individuals. In this case, he has exhausted all his rights to dismiss TFI judges in that dispute. Alternatively, the investor may, for example, initially, wish to dismiss judge A. In this case, the President of the TFI must propose a new composition of the whole chamber, i.e., new judges A, B and C. The investor can then, for example, request the dismissal of judge C, because he believes that the new composition is not suitable. Thus, only after the investor shall have used all his three rights of dismissals will the composition of the chamber be finalized.

Appeal Tribunal (AT)

Investors should also benefit from the same dismissal rights in case of an appeal.
As Article 10 (2) of the above-mentioned Section 3 of TTIP provides for six judges for the AT, investors would only have two rights to dismiss judges of the AT per dispute. Giving investors more dismissal rights would risk paralyzing the functioning of the AT.

In addition, we consider it important to include the **option of permanent removal**. If a judge of the TFI or the AT was dismissed more than three times, in three separate disputes, such judge would be removed immediately and permanently from all lists of judges of the TFI and the AT. Furthermore, that individual would from that moment be ineligible for life to become judge of the TFI or the AT. A judge being subject to three independent dismissals would constitute an irrebuttable presumption of his or her inadequacy.

Moreover, the current mechanism for the treatment of conflicts of interest is insufficient. This issue is regulated by Article 11 of the aforementioned Section 3 TTIP. The EU proposal provides that if a party to a dispute considers that a judge of the TFI or the AT has a conflict of interest, only the Presidents of the TFI and the AT respectively may address this issue.

It is feared that those Presidents may hesitate to take a negative decision against one of their peers.

We therefore propose to **establish a Commission of Conflicts of Interest**, which would be neutral and independent from the States and the investors and have the authority to decide such particularly sensitive and serious matters upon the request of one of the parties to the dispute. This Commission would be composed of three individuals: the Secretary General of ICSID, the President of the Court of Arbitration of the ICC and the Chair of the Appellate Body of the WTO. The Commission would thus be composed of two individuals from international organizations, which are independent from the parties and one individual with very extensive experience regarding the removal of arbitrators in case of conflicts of interest. The costs of this Commission of Conflict of Interest would have to be paid by the contracting parties of CETA, TTIP etc.

Finally, for smaller claims, a cheaper and faster system should be created in order to make the system accessible for SMEs and individuals.

Also, as is the case within the WTO dispute settlement system or the European Court of Human Rights, appeals should be limited to points of law only.

A multilateral system will only go so far if it is going to interpret treaty texts that are not identical.

32. An important criticism commonly made of the current investment dispute settlement system is that developing or transition economies do not always have the resources and legal expertise to defend themselves effectively and adequately against claims made by investors.

Do you think that discussions on a new multilateral system for investment dispute resolution should include special assistance to developing countries?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (should not be addressed) to 5 (should certainly be addressed)

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33. If the issue of special assistance for developing countries should be addressed, do you consider that centres that provide assistance to developing countries (such as the Advisory Centre on WTO Law - ACWL) which provide legal service and support in WTO dispute settlement proceedings, provide a useful model in this regard?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not a useful model) to 5 (certainly a very useful model)

34. Please provide any additional comments that you may wish to add on how to take account of the special needs of developing countries within a multilateral reform of investment dispute settlement.

Given that many developing countries have already incurred the costs of acceding to ICSID, due consideration needs to be given to the impact on such developing countries of introducing a further, separate, body to resolve investment disputes.
CETA envisages that ICSID is involved in the ICS as a secretariat and developing multilateral reform under the auspices of ICSID (particularly given that it is considering rule revisions) may be worthwhile. While not directly linked to the dispute resolution process, it is also worth considering whether developing countries need assistance at the negotiation stage of treaties.

The PCA has a Special Assistance Fund available, which was used eg in the *Abyie* arbitration in which the Fund covered all parties' costs. (For more see The Government of Sudan/The Sudan People's Liberation Movement/Army (Abeyi Arbitration) PCA Case No 2008-07.

The European Commission could also provide training to developing countries on relevant aspects of investment dispute settlement.

The creation of an Legal Assistance Centre as is the case for WTO disputes could also be envisaged, which would be financed by developed countries.

35. Similarly, critics of the system have consistently argued that it is difficult for SMEs to access the investment dispute settlement system considering the associated costs (although these are largely made up of legal costs) and perceived complexity.

In the context of a multilateral reform, do you believe that there should be special provisions for SMEs?

Yes

No

I don't know / I don't have an opinion

36. If yes, please rank the importance of the following proposals for making it easier for SMEs to resolve disputes:
From 0 (not important) to 5 (very important)

Simplified procedures, including shorter timeframes 5

If fees are applicable during procedures, capped frees 5

Flexible geographical hearing locations 4

Enhanced possibilities to resort to mechanisms of alternative dispute resolution (such as mediation) 3

Other ideas for making it easier for SMEs to resolve disputes. Please specify.

The most helpful input for SMEs will be in terms of the cost of bringing an action. One might offer limited free advice to SMEs and individuals on their rights under such treaties. One could potentially limit security for costs and certain procedural tactics as a tool against SMEs and one could also limit the ability of States to challenge third party funding for SMEs. One could also consider establishing a legal fund for SMEs to utilise.

In general, the assistance that is given to developing states (eg an advisory centre) could be extended to SMEs and individuals.

Whether or not a flexible hearing location will be of help is rather dependent on what the EU envisages that the multilateral investment court will have a set establishment or will function on a more ad hoc basis.

37. Please provide any additional comments that you may wish to add on how to take account of the special needs of SMEs within a multilateral reform of investment dispute settlement.

Size of the enterprise of an investor/claimant is a blunt tool for changing the process of the dispute resolution process.
It certainly does not follow that the amount being claimed by the SME will necessarily be smaller than a larger investor, or that the legal questions raised will be any less complex. It will also not be in an SME's interests if a "lesser" process, potentially raises the chance of an appeal and thereby greater cost.
It would be better to have a more flexible process based on value and potential expedition based on that than on the size of the enterprise bringing the case (see, for example, the arbitral institutions have different processes for smaller value claims).
A request by the SME for a sole arbitrator/judge procedure should in principle always be honoured. Also, a fast track simplified procedure should be available on the request of the SMEs or individuals.

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38. In your view, should a multilateral dispute settlement mechanism be limited to investment treaties only?

Yes

No

I don't know / I don't have an opinion

39, If not, please identify what other issues relating to investment could be covered by a permanent multilateral dispute settlement mechanism?

The EU's agreements are broader than just simple "investment treaties" and deal with trade and broader harmonisation. CETA contains a separate chapter 29 for dispute resolution state-to-state which involves an arbitration process. It may be possible to use the ICS process for some state-to-state disputes.

In this context, the WTO should be used as inspiration. The WTO disciplines cover a wide range of issues and the plurilateral treaties (e.g. TISA) that are currently negotiated at the back of the WTO indicate that the multilateral dispute settlement mechanism should have a broad and flexible mandate that can be easily modified as required.

Investment treaties often provide for investment promotion and protection, but only protection is subject to dispute settlement. It should be at least considered whether making investment promotion provisions also subject to it could make a difference in leading BITs to actually attract investment, which it has currently not been established that they do.

40. In most international judicial systems, the enforcement of the ruling or award is a crucial element for the effectiveness of the system in question. The same applies to investment dispute resolution. Under the current system of ad hoc ISDS arbitration there are a number of ways to enforce arbitral awards. For instance, the rules that apply to dispute settlement under the International Centre for Settlement of

Investment Disputes (ICSID) Convention ensure that the enforcement of pecuniary awards is obligatory in the domestic courts of every state party to the ICSID Convention. Consequently, domestic courts cannot refuse the enforcement of an ICSID award and their power is limited to verifying that the award is authentic. 159 countries signatory to the ICSID Convention have subscribed to this system, which ensures an effective enforcement system. Other awards can be enforced via the United Nations New York Convention on the Enforcement of Arbitral Awards.

Do you consider that in the context of discussions on a multilateral reform (which would include an appeal mechanism) a mechanism comparable to ICSID for the enforcement of decisions (i.e. that enforcement is not subject to domestic review) should be sought?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (no, this is not needed) to 5 (yes, this is certainly needed)

41. Please provide any additional comments that you may wish to add on the enforcement of awards.

The European Commission has constantly referred to the creation of a Multilateral Investment Court(MIC) that reflects the values of the EU. Given the nature of this type of new investment agreements, it could be expected that some public international values are interpolated into these trade negotiations between the EU and new third treaty partners.

There is one value, that it is almost automatically expected the EU will also follow. This is the value of *pacta sunt servanda*, which crystalizes customary international law at expressing that parties should comply with their international obligations where reliance on their domestic law cannot excuse them of complying with previously agreed international obligations. This seems unclear from the status of the Micula award. For more details see *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20.*

Recognition and enforcement is of utmost importance for any system, but looking at the attitude of the EC in the *Micula* case, it would be especially important that any

system is respected by the EU, including the CJEU, Most importantly it should also respect certain values.

Given that the EC's current approach refers to a "court" rather than considering this to be an arbitration process, the question arises whether a new convention for the recognition and enforcement of decisions of the multilateral ICS is needed. Given the low uptake so far for the Hague Convention, it seems unlikely that there would be sufficient political will to have the necessary global coverage. We would suggest it would be better to endeavour to operate within the ICSID system or to utilise the existing enforcement powers of the New York Convention.

Options for a reform at multilateral level

A permanent Multilateral Investment Court

The idea of establishing a permanent Multilateral Investment Court comprised of both a First Instance and an Appeal Tribunal (henceforth "single Multilateral Investment Court") has emerged. This single Multilateral Investment Court would be permanent and open to all countries interested to join. The adjudicators of both the First Instance and the Appeal Instance would be appointed for fixed terms and would be required to have comparable qualifications to members of other international tribunals. They would also be subject to the highest ethical standards.

42. A crucial aspect would be that such a single Multilateral Investment Court could potentially adjudicate disputes arising not just under future investment treaties but also under existing international investment treaties. This could for instance be achieved through a system of opt-ins where countries agree in the Treaty/Legal Instrument establishing the single Multilateral Investment Court to subject their investment treaties to the jurisdiction of the Court (a model could be the United Nations Mauritius Convention on Transparency for Investor-State Dispute Settlement). The single Multilateral Investment Court would thus in effect supersede ISDS provisions included in investment treaties of EU Member States with third countries or in investment treaties in force between third countries. It would also replace the ICS that would have been included in EU level agreements with third countries.

Do you share the view that such a single Multilateral Investment Court should also be competent to adjudicate disputes arising under existing investment treaties, including EU Member State BITs with third countries, EU level trade and investment agreements and investment treaties in force between third countries?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not important) to 5 (very important)

43. A number of potential positive effects have been identified which could result from centralising international investment dispute settlement in a single Multilateral Investment Court.

Please indicate to what extent you agree that centralisation could contribute to the following:
From 0 (not likely) to 5 (very likely)

0 1 2 3 4 5 I don't know / I don't have an opinion

More predictability in investment dispute resolution 3

Higher degree of legitimacy for this type of dispute settlement 3

Increased consistency of case law and legal correctness through the permanent appeal tribunal 3

Higher level of efficiency in the adjudication procedure (more efficient adjudication) 3

Lower costs for users (assuming some or all procedural costs would be borne by the states Party to the agreement) 3

Other contributions which could be achieved by centralisation. Please specify

Centralisation may help in bringing clarity and certainty to treaty language. This will only be built up over many, many years as cases are brought on the same issues. However, even after a centralized system has been created, the fact remains that the texts of the various investment treaties will continue to contain – sometimes – significant differences, which cannot be "harmonized away" by interpretation. Whether this will happen will also obviously depend on a system of binding precedent.

A system which the EU and all states which have signed trade agreements with the EU sign up to will create consistency for the EU's treaties. However, from a global perspective, it will just create a second "centralized" system, alongside ICSID, along with other forms of ad hoc or institutional arbitration.

The consultation suggests that a convention similar to that of the Mauritius Convention might be a way forward. A multilateral convention could of course achieve such a result in principle, but again this is likely to be difficult to negotiate given different political priorities and viewpoints. The Mauritius Convention itself took many years to negotiate, and affects the procedure to be adopted between a state and an investor once an arbitration has been commenced, not the method of dispute resolution itself. It has also only been ratified by two states to date.

In this regard, this difficulty in amending Member States' BITs would seem to apply equally to both the M-ICS and the MAT. The MAT does not appear to us to be any more straightforward to adopt than a new M-ICS, since both would likely require a re-negotiation of existing BITs and the acceptance of a new dispute resolution body (notwithstanding the implication given by question 45 of the consultation). The MAT ought therefore to be considered on its own merit, in our view, and not because it may be a more easily achieved system of reform.

Also, the jurisprudence of the multilateral court can change over time – sometimes even in a surprising unforeseen manner – as has been the case with CJEU or the WTO AB.

An appeal system does not automatically mean that the "legal correctness" will be higher, especially not if contracting parties can adopt binding interpretations, which

bind the multilateral court. This also inhibits the danger that any intended consistency of the court can be undermined by binding interpretations of the contracting parties.

The fact that the current ICS proposal also covers appeal on points of facts, could actually decrease the efficiency compared to the current system.
The suggested times lines for the court will most likely not be realistic, as the experience of the WTO AB shows, which is limited to review only points of law.
Finally, the possibility of appeal will actually increase the costs for claimants and Respondents with regard counsel.

So, the idea of centralisation creates new problems and obstacles, which should be seriously taken into account.

A permanent Multilateral Appeal Tribunal

44. Another option that has emerged is the establishment of a permanent Multilateral Appeal Tribunal, i.e. without changing the existing first instance tribunals. Thus a Multilateral Appeal Tribunal would be limited to deal with ISDS awards appealed on the grounds of errors of law and manifest errors of fact, which the current ISDS system does not allow for. This would address the issue of ensuring legal correctness and assist with consistency of case law.

The Multilateral Appeal Tribunal would rule on ISDS awards rendered under the ad hoc ISDS tribunals established under existing investment treaties (e.g. EU Member States' BITs) and under investment treaties in force between third countries. Such a Multilateral Appeal Tribunal would also replace the Appeal Tribunals included in the EU's ICSs in EU trade and investment agreements with third countries.

Do you agree that the creation of a permanent Multilateral Appeal Tribunal would already be an important tool to improve legal correctness in investment dispute resolution as argued above?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (completely disagree) to 5 (completely agree)

45. Do you consider that establishing a Multilateral Appeal Tribunal (i.e. without a multilateral tribunal at the level of the first instance) would be sufficient to satisfactorily reform the current investment dispute settlement system?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (completely disagree) to 5 (completely agree)

Design, composition and features of a single Multilateral Investment Court or a Multilateral Appeal Tribunal

Common to the proposal for a single Multilateral Investment Court and for a Multilateral Appeal Tribunal are questions on overall design and size. It would for instance be necessary to provide for mechanisms allowing the body established to adjust to a growing membership.

46. Do you consider that it is important to ensure that each country party to the agreement establishing the single Multilateral Investment Court or Multilateral Appeal Tribunal should have the possibility to appoint one or more adjudicators?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not important) to 5 (very important)

47. Do you consider it important that the number of adjudicators should be tailored to the likely number of cases and not linked to the number of countries signatory to the agreement?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not important) to 5 (very important)

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48. Do you have any further comments on the manner in which adjudicators should be selected?

We propose the following **selection mechanism** for members of the court.

Building on the model of the Supreme Court of the United States, which is both democratic and professional, we suggest that the individuals proposed (or appointed) by the Contracting Parties for positions as judges of the TFI or the AT be submitted to a "public hearing" before an **Independent Approvals Commission (ICA),** such public hearing to be broadcast (TV) and accessible to the public.

To ensure neutrality thereof, the IAC would include (i) for one-third, professors having a permanent Chair, at a university or at a Grande Ecole, in public international investment law, (ii) for one third, representatives of the private sector and (iii) for one-third, Supreme Court Judges of EU Member States and the USA, e.g., in the case of France, judges of the Cour de Cassation.

The IAC would be responsible, after studying the Curriculum Vitae of all candidates and their relevant judicial decisions, for questioning such candidates in order to ensure that they are professionally and ethically fit and proper for the targeted position.

In order to be appointed for the post of judge, the candidate must, after the extensive oral questioning, receive the minimum vote of two-thirds of the IAC members, each member thereof having one vote. The appointment of any candidate as a judge would require, after the public hearing of such candidate, a two-third majority favourable vote of the IAC members, each such member having one vote.

The oral examination and the approval by the IAC would take place prior to any involvement of the candidate in the resolution of investment disputes under the Multilateral Investment Court?.

49. Also common to both proposals whether to establish a single Multilateral Investment Court or a Multilateral Appeal Tribunal, are considerations on the qualifications required to be a permanent adjudicator.

In the EU's Investment Court System (ICS), there are a number of criteria that adjudicators must meet for being eligible, including being qualified to hold judicial office in their country or being recognised jurists, as required by the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR). Under the ICS, judges must also have expertise in public international law and previous experience in international investment law. It is assumed that adjudicators would be able to call on experts for technical or scientific information.

Do you consider that these qualifications would also be appropriate for a permanent multilateral mechanism, whether a single Multilateral Investment Court or a Multilateral Appeal Tribunal?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not appropriate) to 5 (fully appropriate)

50. Do you have any further comments on the qualifications of adjudicators under such a mechanism?

Some previous experience/knowledge in international investment law should be required and not only "desirable" as is currently suggested in the ICS.

51. An important consideration would be the remuneration and conditions of employment of these adjudicators. Judges in the International Court of Justice (ICJ), the World Trade Organisation (WTO) Appellate Body or the Court of Justice of the EU (CJEU) receive a regular monthly salary which is not linked to their workload.

Do you consider that adjudicators in a single Multilateral Investment Court or a Multilateral Appeal Tribunal should be remunerated in a similar manner?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (completely disagree) to 5 (completely agree)

52. Under the EU's ICS set out in EU level agreements, tribunal members must adhere to high standards of ethical conduct. In particular, they cannot act as counsel in investment disputes (so-called "double hatting"). This is also a safeguard ensuring their impartiality. The legal text in EU agreements establishing the ICS foresees the possibility that tribunal members become full-time and hence would, in principle, not be allowed to have external activities.

Do you agree that adjudicators in a single Multilateral Investment Court or in a Multilateral Appeal Tribunal should be full-time with no external activities?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (completely disagree) to 5 (completely agree)

53. In most international and domestic courts, including under the EU's ICS, disputes are allocated on a random basis to divisions of adjudicators to ensure impartiality and independence.

Do you agree that a similar approach should be followed for the distribution of cases in a potential multilateral investment mechanism, whether a single Multilateral Investment Court or in a Multilateral Appeal Tribunal?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (completely disagree) to 5 (completely agree)

54. Another important consideration relates to the financing of a single Multilateral Investment Court or a Multilateral Appeal Tribunal, including salaries for adjudicators, staff and related administration expenses. For instance, under the EU's ICS, the Parties to the Agreement (i.e. the EU and the other country signing the trade and investment agreement) share the fixed operational costs of the ICS.

A repartition key, for instance based on the level of economic development, is often used to determine the contribution of states that are members of international organisations.

In your view, would it be appropriate to employ a repartition key to determine the share of the contracting Parties in the operational costs?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not appropriate) to 5 (fully appropriate)

55. In your view, should it also be considered that some of the operational costs could be funded in part by user fees (i.e. by investors and/or states)?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (not appropriate) to 5 (fully appropriate)

Possible impacts

56. Do you consider that the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal could contribute in a positive way to improving the global investment climate?

0 1 2 3 4 5 I don't know / I don't have an opinion

From 0 (no contribution at all) to 5 (very strong contribution)

57. If yes, please indicate the specific reasons:
From 0 (no impact) to 5 (strong impact)

0 1 2 3 4 5 I don't know / I don't have an opinion

Higher acceptability of investment dispute settlement

Higher consistency of case law

Unified dispute settlement system

If you consider there would be any other impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

The global investment climate is not going to improve simply by creating such a multilateral court. The investment climate will only improve by improving the Rule of Law situation in most countries in the world. Indeed, the World Rule of Law index illustrates that in most states of the world there is a lot of room for improvement. Investment law and arbitration are important tools in enforcing and enhancing the Rule of Law track record of states. The effective protection of investments and investors and availability of effective arbitration rules must be an integral part of the Rule of Law policy of each state. Much more attention and resources should be paid by states to improve their Rule of Law situation, which would not only benefit foreign investors but their own citizens and investors as well.

58. The following preliminary economic impacts have been identified as resulting from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal for the settlement of investment disputes.

Please indicate to which extent you share this assessment.
From 0 (disagree) to 5 (fully agree)

0 1 2 3 4 5 I don't know / I don't have an opinion

Reduced budgetary expenditure for the EU as a result of phasing out multiple Investment Court Systems (ICSs) in EU agreements in favour of a single multilateral mechanism 2

Reduced costs for users (investors, states) from having one single multilateral mechanism because of increased predictability 3

Reduced costs because arbitrators' fees and fees of arbitral institutions (in current ISDS system) no longer necessary because remuneration of permanent adjudicators and court borne by Parties 3

If you consider there would be any other economic impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

The possible costs benefits of either system will depend on the Commission's intentions in terms of scope and on the type of body being considered. For example, it is difficult to answer whether it will be more cost effective to maintain an M-ICS than a separate ICS for each of the EU's investment agreements, as it will depend heavily on the type of "court" envisaged. The larger the "court", the more likely it is to need headquarters, infrastructure and a secretariat (as noted in Q 54). The cost of maintaining such an establishment to deal with, what is, in reality, a limited number of disputes, may be difficult to justify. Paying a limited number of "adjudicators" a retainer under separate agreements, allowing them to be called to deliberate on an ad hoc basis without the need for a formal establishment to house them may allow the parties to avoid the costs of a standing establishment and result in less cost and bureaucracy.

Broader economic impacts are also difficult to ascertain with certainty. For example, introducing an M-ICS over all of the EU's agreements with a system of binding precedent and an appellate structure, may, over time increase predictability and reduce cost. However, since the number of cases brought under the same treaties on the same legal or factual points may be small, there will likely be a relatively long period of time where the costs involved for both states and investors are higher, as parties seek to appeal more decisions until a consistent body of jurisprudence is developed.

Meanwhile, introducing a MAT (depending on its scope on law and fact) may increase cost over the existing system. Only very limited grounds for challenge are permitted under the New York Convention for non-ICSID awards and annulment challenges under ICSID may only be brought on specific grounds. The Commission should also consider the additional cost that would rest with states in maintaining two different multilateral systems of dispute resolution under both ICSID and either a M-ICS or MAT (depending on the scope of the system), and whether the benefits of the M-ICS or MAT are sufficient to warrant that additional cost.

Of course, consistent with the standard commercial arbitration model, the existing ad hoc arbitration system preferred by other states worldwide for their investment disputes would appear to be the most cost-efficient, since the cost is borne directly by the users.

59. No environmental impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Do you consider that there could be any environmental impacts?

Yes

No

No opinion

European Federation for Investment Law and Arbitration

60. No social impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal since there would be no change to the substantive investment rules.

Do you consider that there could be any social impacts?

Yes

No

I don't know / I don't have an opinion

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On behalf of EFILA, Brussels, 15 March 2017,

Prof. Dr. Nikos Lavranos, LLM
Secretary General of EFILA