



## **Consultation Strategy**

### **Impact Assessment on the Establishment of a Multilateral Investment Court for investment dispute resolution**

#### **1. Scope and objective**

##### 1. 1 Consultation actions already carried out

The issue of reforming the current system of Investor-to-State Dispute Settlement (ISDS) was already subject to a wide-ranging public consultation at EU level in 2014, in the context of the development of the EU's policy on investment protection and investment dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP) agreement. The public consultation identified the need to further institutionalise the system for the resolution of investment disputes in external EU trade and investment agreements. The ensuing bilateral Investment Court System (ICS) was proposed by the EU for the TTIP negotiations, forms part of two negotiated EU FTAs (CETA and Vietnam) and is included in all ongoing negotiations.

The past consultation sought views from stakeholders on a possible EU approach to investment protection and dispute settlement in TTIP. The consultation focussed on twelve issues covering both the investment protection part and the investment dispute settlement provisions of the EU's text proposal for TTIP. Specifically on the investment dispute settlement part, comments were sought on: (1) Transparency in ISDS, multiple claims and relationship with domestic courts; (2) Arbitrator ethics; (3) Conduct and qualifications of arbitrators; (4) Reducing the risk of frivolous and unfounded cases; (5) Guidance by the parties on the interpretation of the agreement; and (6) Appellate mechanism and consistency of rulings. In addition, a final question allowed for general views and for submission of position papers.

The public consultation solicited a record number of responses. The Commission received individual replies from 3,000 citizens and from 450 organisations representing a wide spectrum of EU civil society (business organisations, trade unions, consumer organisations, law firms, academics, etc.).

In addition to comments on the EU's proposed approach, a number of stakeholders also indicated that a reform of the investment dispute settlement system should be started at the multilateral level. Indeed the concept of a multilateral approach was considered to be

more effective when dealing with issues such as the ethical conduct of arbitrators, frivolous claims and appeal of awards on the basis of errors of law or fact. A number of stakeholders specifically pointed at the establishment of a permanent Multilateral Investment Court as the most optimal solution to reform the global investment dispute settlement system covered by EU external trade and investment agreements, than reforms undertaken at the level of bilateral FTAs.

The results of the 2014 public consultation are summarised in a report.<sup>1</sup>

The public consultation was followed up in May 2015 by the Commission's Concept Paper "Investment in TTIP and beyond – the path for reform",<sup>2</sup> setting out the EU's future orientation on investment protection and investment dispute resolution, which also stipulated that work should start towards the establishment of a multilateral system for the resolution of investment disputes. The latter objective is also reflected in the public statements made by the Commission at the release on 12 November 2015 of the EU's proposed text for TTIP on investment protection and investment dispute settlement.<sup>3</sup> The initiative to establish a permanent Multilateral Investment Court is specifically mentioned in the report on the Progress on the European Commission's 10 priorities, issued in conjunction with Commission President Juncker's State of the Union address. It is included in the Commission's Communication "*Trade for all - Towards a more responsible trade and investment policy*".<sup>4</sup>

In terms of interest from outside the EU, the issue of a global reform of investment dispute resolution has gained momentum, with many countries engaged in internal reflexions on their approach to investment protection and investment dispute settlement. The possible establishment of a Multilateral Investment Court has gathered specific interest including from important FTA partners such as Canada, which has publicly supported the initiative. In fact, both CETA and the Vietnam-EU FTA contain a reference to the establishment of a permanent Multilateral Investment Court. In addition, a dedicated event co-chaired by the EU and Canada was held in the margins of the UNCTAD's World Investment Forum in July 2016 in Nairobi.

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<sup>1</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf)

<sup>2</sup> [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)

<sup>3</sup> The Commission stated that the "*European Commission will start work, together with other countries, on setting up a permanent International Investment Court [...] to, over time, replace all investment dispute resolution mechanisms in EU agreements, in EU Member States' agreements with third countries, and trade and investment treaties concluded between non-EU countries, with the International Investment Court. This would lead to the full replacement of the "old ISDS" mechanism with a modern, efficient, transparent and impartial system for international investment dispute resolution*".

<sup>4</sup> COM(2015) 497 final of 14.10.2015

(Kenya), where countries had the opportunity to learn more about the initiative. The proposal gathered considerable interest, with a significant number of countries willing to further explore the idea. The Commission will continue exploratory informal discussions with all relevant actors as part of an outreach exercise of this initiative.<sup>5</sup>

As for the Commission's internal process, initial steps have already been taken. The Inception Impact Assessment on the establishment of a MIC for investment dispute resolution was published on the Commission's Better Regulation website on 1 August 2016.<sup>6</sup>

### 1.2 Objective

As the possible establishment of a permanent Multilateral Investment Court has already been identified as an important outcome of the 2014 public consultation, the objective of the Consultation Strategy is to consult relevant stakeholders on the various options and their possible economic, social and environmental impacts relevant to the possible establishment of a Multilateral Investment Court.

Considering that the negotiation of investment agreements falls into the area of EU exclusive competence according to Article 207 of the Treaty on the Functioning of the European Union (TFEU), it is not foreseen to consult stakeholders on subsidiarity.

## **2. Mapping stakeholders**

The following key stakeholder categories and main areas of interest have been identified:

- Investors/companies by type: SMEs, larger business organisations, multinationals operating in the EU or in third countries; high interest;
- Investors/companies by sector: producers, manufacturers, service providers, traders operating in the EU or in third countries; high interest;
- Business organisations, business associations, chambers of commerce in the EU, at the sectoral, Member State or local level in the EU and in third countries; high interest;

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<sup>5</sup> In the Commission's view, this initiative would not apply to intra-EU bilateral investment treaties nor to the intra-EU application of the Energy Charter Treaty.

<sup>6</sup> [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_trade\\_024\\_court\\_on\\_investment\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf)

- Public authorities at EU, Member State and local level as well as third countries; high interest;
- Organisations, associations representing workers' interests (trade unions), consumers, environmental issues and civil society; high interest;
- Individuals active in the arbitrator community – e.g., practising lawyers, retired judges and law professors; high interest;
- Arbitration centres that handle investment disputes such as ICSID, International Chamber of Commerce, Stockholm Chamber of Commerce, Permanent Court of Arbitration and London Court of International Arbitration; high interest;
- Academia, specialised think tanks, consultancy; moderate interest; and
- Individual citizens; moderate interest.

### **3. Planned consultation actions and timing**

The following actions are foreseen as part of the consultation strategy:

- An open on-line public consultation of 12 weeks on "Your voice in Europe" platform. The consultation will be in the form of a questionnaire on the various options outlined and their likely impacts. The likely timing of the consultation would be October 2016 - January 2017.
- A stakeholder conference organised by the Commission on the main elements behind the idea of a permanent Multilateral Investment Court. Likely timing will be December 2016 or January 2017. The exact format and possible specific target groups remain to be decided.
- Academic conferences and seminars: Investment Treaty Dialogue in Paris organised by the OECD in October 2016 to discuss the establishment of a Multilateral Investment Court, other events being planned/considered.

The various consultations and events linked to the initiative will be announced and promoted via Commission press releases, EU TRADE News, social media and email listings to interested stakeholders.

### **4. Consultation webpage**

The present Consultation Strategy is published on the specific DG TRADE webpage along with the related Inception Impact Assessment. This website will also serve for announcing the planned dates for specific consultation activities, including the public consultation.