



STATE OF THE UNION 2017



A MULTILATERAL INVESTMENT COURT



'Trade is about exporting our standards, be they social or environmental standards, data protection or food safety requirements. Europe has always been an attractive place to do business. Open trade must go hand in hand with open policy making.'

European Commission President Jean-Claude Juncker, State of the Union Address, 13 September 2017

A NEW SYSTEM FOR RESOLVING DISPUTES BETWEEN FOREIGN INVESTORS AND STATES IN A FAIR AND EFFICIENT WAY

The EU is the world's biggest recipient and source of foreign direct investment. That investment creates growth and jobs, at home and abroad.

To invest in other countries, investors need to know they will:

- be treated fairly
- not face discrimination
- be able to transfer funds freely
- be compensated for any expropriation
- be able to enforce their rights.

Since the 1960s, this has been ensured through a system known as Investor to State Dispute Settlement, or ISDS: a model of ad hoc dispute settlement found in virtually all the **3000-plus international investment agreements** in force today around the world. EU Member States are party to some 1400 of these agreements.

However, the EU has recently made clear that it is determined to move away from this old-style system as its ad hoc nature does not sufficiently guarantee impartiality and predictability. That is why, after a long and thorough debate with all relevant stakeholders, the EU replaced ISDS in all its negotiations with a **permanent Investment Court System**.

Today's proposal of a multilateral investment court is a logical next step in the approach to set up a **more transparent, coherent and fair system** to deal with investor complaints under investment protection agreements.

What is the multilateral investment court?

The multilateral investment court would be an **international court** empowered to hear disputes over investments between investors and states that will have accepted its jurisdiction over their bilateral investment treaties.

The EU's intention is to champion the creation of an international court and ensure that the EU's policy for resolving international investment disputes mirrors the EU's approach to settling international disputes more generally. This approach favours **multilateral solutions** and adds a much needed piece to the **multilateral system**. The multilateral investment court should be for investment dispute settlement what the World Trade Organisation is for trade dispute settlement, thus upholding a multilateral rules-based system.

Why is the EU taking the lead on the multilateral investment court?

The EU's goals with a multilateral investment court are twofold:

1. to address the limitations of the existing ISDS system

ISDS is based on the principles of commercial arbitration. Parties who have a dispute appoint arbitrators who hear and resolve cases, often in secret.

In 2014, the European Commission launched a public consultation on investment protection and ISDS in the framework of the then ongoing trade negotiations with the US. Following that, an **intense debate** and consultation process took place, involving the European Parliament, EU governments and civil society at large. This led to the Commission presenting in September 2015 a **proposal to include in all EU trade and investment negotiations** a permanent institution for resolving investment disputes. This new mechanism is known as the Investment Court System and the EU's trade agreements with Canada and Vietnam already include it.

2. to make the system more efficient

The Investment Court System in EU trade and investment agreements already addresses all the main shortcomings identified in the old ISDS system. But due to its bilateral nature, it only applies to the specific parties to each agreement. It can't address the problems outlined above **at a global level**. For example, it does not cover the many Member States' agreements.

Moreover, it would be much more efficient to have just **one, multilateral institution** to rule on investment disputes covered by all the bilateral agreements in place.

Who else is on board? How will the EU make it a truly international body?

The Commission has discussed the multilateral investment court with interested third countries. We have also promoted discussions in multilateral bodies. These discussions, which Canada has co-sponsored, have shown that there is **broad agreement among numerous governments** across the globe that ISDS needs reform.

In July 2017 the **United Nations Commission on International Trade Law (UNCITRAL)** agreed to discuss possible multilateral approaches to address ISDS reform.

How will the composition of the court look like and who will appoint its members?

These questions will be subject to the upcoming negotiations among the countries that will sign up to the court. The number of judges will depend on the number of participating countries and also on the number of cases the court will have to deal with.

For the EU the guiding principles of this process are quite clear: the court should be formed by highly qualified permanent and full time judges, completely independent of investors and states. The selection process should be independent and objective.

Who will pay?

The interested parties would need to negotiate the budget and financing of the multilateral investment court. Like all other international organisations, **the contracting parties** would in principle finance the court. Its costs would depend on:

- the number of employed judges
- the size of the secretariat
- the number of contracting parties.

How is the multilateral investment court different from what exists now?

The court would be an institution that would **address all the main issues** which beset the current system. The table below lists the differences between the main features of ISDS and the multilateral investment court.

What are the next steps?

The Commission recommends to the Council to authorise the Commission to **open negotiations** to set up a multilateral court for settling investment disputes.

Once the Council formally adopts the Commission's recommendation, the EU would **discuss the proposal further** and work with other countries to establish a framework for **negotiations to set up the court**. A potential place for such talks is the United Nations Commission on International Trade Law (UNCITRAL). This is the core legal body of the UN system in the field of international trade law.

 Key features: Investor to State Dispute Settlement (ISDS) VS Multilateral investment court			
At present – ISDS		In the future – multilateral investment court	
Ad hoc	Tribunals are only set up on a case by case basis	Permanent	The court would be a permanent international institution
Risks of Partiality	The disputing parties nominate arbitrators, who could have potential conflicts of interest	Independent	States who are members would appoint permanent, fully qualified judges, free of any conflicts of interest or interest in the outcome of cases
Unpredictable	Tribunals often interpret investment protection standards differently, since they are only appointed to hear a particular case	Predictable	By sitting permanently and deciding cases over time, judges would deliver consistent decisions
One-stop shop	Parties have very limited grounds on which to appeal against ISDS decisions - essentially if the tribunal has not followed its rules properly (violation of due process)	Comprehensive	The court would allow either party to appeal against a decision
Inefficient	ISDS (but also the EU's current approach of including ICS in bilateral EU trade agreements) duplicates the same framework for each deal. It is costly and doesn't cover the large number of treaties	Cost-effective	The court would allow for economies of scale, as it could cover disputes arising under the bilateral investment agreements which all members of the multilateral investment court have in place
Opaque	There is currently limited published information about: <ul style="list-style-type: none"> • the existence of investment disputes • the procedure of the dispute • the substantive aspects of the case • the results of the disputes 	Transparent	The court would: <ul style="list-style-type: none"> • publish online details of all aspects of its work, including its decisions • open all hearings to the public • Allow third parties (NGOs, trade unions, consumer groups, business associations) to make submissions