

Expert meeting
13, 14 December 2016
Geneva (Switzerland)

Discussion paper

Establishment of a multilateral investment dispute settlement system

1. INTRODUCTION

1. The system of Investor-to-State Dispute Settlement (ISDS) has become subject to increased public scrutiny in recent years. Investment policy makers, negotiators, stakeholders and inter-governmental organisations in many countries are engaged in a reflection process about possible reforms of the system. This paper focuses on the procedural aspects of investment dispute settlement reform and does not cover substantive investment protection standards.
2. The idea of creating a multilateral system for the resolution of investment disputes has emerged in order to improve the current system and address its perceived limitations in terms of legitimacy, transparency, consistency and predictability and legal correctness. This idea has generated significant interest and, in order to advance and broaden the discussion, it is necessary to identify and analyse the underpinning rationale and considerations related to the functioning of such a multilateral system.
3. Guidance could be taken from the core characteristics common to highly respected and successful multilateral dispute resolution institutions such as the WTO Dispute Settlement System and the International Court of Justice. In addition, the approach featured in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) of 2016¹ may provide for some interesting ideas. However, it is not the intention of the European Commission nor of the Government of Canada to propose it as a model for the current discussions on the establishment of a permanent multilateral investment dispute settlement system.
4. This non-paper is co-sponsored by the European Commission and the Government of Canada and outlines some relevant considerations for discussion. It is without prejudice to the European Commission or the Government of Canada's position on the issues raised. Views expressed by attendees in the context of discussions on this paper are without prejudice to the views that governments may eventually take on the overall project and on any technical issues.

¹ The approach in CETA institutionalises the resolution of investment disputes and foresees that disputes be solved by a Tribunal of First Instance and an Appeal Tribunal to review possible errors of law. Under this approach, both instances are composed of Tribunal Members appointed by the two trade agreement partners, with the objective of increasing the legitimacy, effectiveness and independence of the dispute settlement system.

2. RATIONALE OF THIS INITIATIVE

2.1. Legitimacy

5. One of the main limitations of the current system of ISDS relates to the perceived lack of legitimacy of ad hoc arbitration panels. Given that they are disbanded (i.e. dissolved) after issuing the award, there is a perception that arbitrators are influenced by their concern about re-appointments. Moreover, because of the ad-hoc appointments arbitrators necessarily have other professional occupations. The fact that arbitrators may act as counsel and vice versa for investors and states in disputes where the same issues may arise also causes a higher perceived risk of conflicts of interest.
6. The perception that this mechanism is problematic would be corrected if investment disputes were to be decided by adjudicators that, in addition to having high qualifications and credentials, are devoted full-time to the resolution of disputes through a permanent multilateral system.

2.2. Predictability and interpretative consistency

7. A multilateral dispute settlement system is likely to contribute to creating a consistent interpretation and understanding of the substantive investment protection standards, such as most-favoured nation treatment, national treatment, protection against uncompensated expropriation and fair and equitable treatment. Consistency in the interpretation of these standards with respect to a particular treaty, and across treaties that contain identical or very similar legal drafting, would provide valuable predictability both to governments and investors.

2.3. Legal correctness

8. The establishment of an appeal mechanism with highly qualified tribunal members would significantly contribute to ensuring legal correctness in investment dispute resolution. Presently, the ad hoc ISDS system does not allow that awards be appealed and decisions can only be rejected on very limited procedural grounds, such as corruption, errors in the composition of the tribunal or breaches of fundamental procedural rules.
9. The appeal mechanism in the multilateral system will allow that decisions issued at first instance be reviewed for errors of law, thereby contributing to substantially improve legal correctness of dispute resolution, to the direct benefit of both governments (enhanced clarity of the interpretation of investment treaty provisions) and investors (increased predictability).

2.4. Growing number of treaties and cases

10. Supporting these considerations is the fact that international investment is key to economic growth of developed and developing nations alike. States have concluded an increasing number of agreements with investment protection provisions which have resulted in an increasing number of cases. In this context, the controversies that the current ISDS system has given rise to are not likely to dissipate and it may be desirable for governments to address concerns in a timely and coordinated manner.

11. Establishing a multilateral investment dispute settlement system would allow to address the perceived limitations of the current system.

3. ISSUES RELATING TO THE FUNCTIONING OF THE MULTILATERAL SYSTEM

3.1. Scope of application: Future and existing agreements

12. In order to address the concerns related to the current system, the multilateral investment dispute settlement system would have to be available for disputes arising under existing and future agreements.
13. A mechanism comparable to the one used to apply the UNCITRAL Transparency Rules on ISDS to existing agreements through the Mauritius Convention and allowing for a certain degree of flexibility would be desirable. Under such a mechanism, the multilateral system would apply to disputes under an agreement between countries A and B when both countries have ratified the instrument establishing the multilateral system and both countries have agreed that the investment agreement between them should be subject to the multilateral dispute settlement system, either through a negative or positive list.
14. This mechanism has the advantage of not requiring an amendment to each existing agreement to make them subject to the multilateral dispute settlement system and to follow an approach which is already established for the Mauritius Convention.
15. This would also imply that the substantive law being applied by the mechanism would be that found in the underlying agreements.
16. **Discussion point:** The suitability of an opt-in mechanism inspired by the Mauritius Convention and the availability of other options.

3.2. Institutional set-up

17. An important structural question relates to the relation of the multilateral investment dispute settlement system to existing international organisations and institutions. A choice arises between establishing a new international mechanism completely independent from existing institutions or docking it onto an already existing framework.
18. If the multilateral system were to be fitted into an existing international organisation, or designed to build upon an existing framework or organisation, the design choices mentioned above would likely be impacted by the existing nature and structure of the existing organisation. A number of aspects would need to be carefully examined, including the organisation's acquired experience in dispute resolution, its expertise in international investment law, its existing membership and voting rules, its resources, its public perception, etc.
19. Conversely, creating a new international framework may grant negotiators more freedom to design an effective system without needing to fit such a system into an existing system or to take into account other potential policy considerations resulting from the existing frameworks. However, in that case other logistical and practical issues may have to be

addressed, such as the need to create a self-standing secretariat, the need to design staff regulations for the adjudicators and the employees, etc.

20. **Discussion point:** The optimal approach to the multilateral system's institutional set-up.

3.3. Adaptation to expanded membership

21. While the multilateral dispute settlement system should aim at securing the broadest possible membership hence applying to as many investment agreements as possible, there may be a desire to have it start operating already as soon as a threshold number of states (to be determined) have agreed to it. The Mauritius Convention possibly provides an example of a convention signed to date by 16 countries but that enters into force with three ratifications.
22. A key challenge in this sense would be to ensure that the multilateral system factors the necessary flexibilities allowing it to progressively adapt as it grows organically. Similarly, the necessary mechanisms to ensure that such system successfully faces the challenges raised by an expanding membership (e.g. in terms of geographical representativeness of adjudicators, allocation of costs between Parties, etc.) should be put in place, for instance through specifically designed review clause.
23. **Discussion point:** Optimal mechanisms for permitting the multilateral system to adapt over time to a growing membership.

3.4. Coordinated functioning of a first instance and an appeal mechanism

24. Thought would need to be given to the structure of the multilateral dispute settlement system, i.e. how a first instance would operate together with an appeal mechanism.
25. The first instance would consist of a number of permanent adjudicators. Further thought would need to be given to operative issues such as whether adjudicators sit in divisions, whether chambers are constituted and on the basis of what criteria they hear cases, among others. Similar considerations apply to the appeal mechanism.
26. The idea of establishing only an appeal mechanism has been discussed, for example by ICSID in 2006. However, an important advantage of existing domestic dispute settlement systems is the ability of appeal mechanisms to remand (i.e. send back a case for completion) to a lower first instance tribunal. Applied to the existing system of investment dispute settlement, this would however be extremely difficult if the lower instance tribunals are established under another agreement and where the lower instance tribunals are disbanded after they have delivered their award. Hence, it could be preferable to have both the first instance and the appeal mechanism lodged in the same organisation with a permanent status. It could also be argued that consistency will be better ensured where the first instance and appeal mechanism are part of the same overall organisation.
27. **Discussion point:** Best structure in terms of first instance tribunals and/or appeal mechanisms and whether both elements of the multilateral mechanism are essential to its functioning.

3.5. Appointment and selection of adjudicators

28. Consideration would need to be given to the manner in which adjudicators are appointed. A possibility is that they be appointed directly by the Parties to the convention establishing the multilateral system, whereby each Party would have one or several adjudicators. Such an approach would ensure that the Parties' judicial culture and system be evenly represented at the multilateral system, but it would also present certain significant challenges. Another possibility would be that all Parties be able to propose candidates out of which the adjudicators would be selected by voting of all Parties together. In that system the adjudicators would not be linked to a Party so that additional criteria ensuring an appropriate geographical balance might be appropriate. Other possibilities to consider include the option that adjudicators would not be directly appointed by the Parties, but by an independent body deciding on criteria other than their origin.
29. Linked to the appointment system is the question of the appropriate number of adjudicators that should be appointed. If all Parties to the agreement are allowed to appoint adjudicators one would need to decide, for example, whether all Parties appoint the same number of adjudicators, whether there should be a rotation system in case there are many Parties in relation to the number of agreements/cases, or whether groups of countries should make the appointment e.g. regionally.
30. Another issue to be considered is the manner in which adjudicators are selected for particular cases.
31. **Discussion point:** Approach to adjudicators' appointment and selection.

3.6. Adjudicators' qualifications

32. In order to confer the highest degree of competence and credibility to the multilateral investment dispute resolution mechanism, it would be necessary to ensure that adjudicators deciding on disputes possess an adequate level of qualifications and credentials.
33. Recognised institutions such as the International Court of Justice (ICJ) require that its members be qualified to hold the judicial office in their country or be recognised jurists. Additional qualifications, such as expertise in public international law and previous experience in international investment law would also be desirable to ensure that disputes are decided by highly qualified and experienced individuals with a top notch understanding of the field. On the other hand, this consideration should be balanced with a need for greater diversity and representativeness. Adjudicators' expertise should be without prejudice to their ability to call on experts for technical or scientific information.
34. **Discussion point:** Level of qualifications and credentials for adjudicators.

3.7. Independence and neutrality

35. Another important issue to ensure the credibility of the multilateral investment dispute settlement mechanism is to secure its adjudicators' unquestionable independence, neutrality and impartiality when hearing and solving investment disputes.
36. It would be advisable to have mechanisms in place to ensure that members of the multilateral dispute resolution mechanism are appointed through open and transparent processes, comply with an ethical code and are free of any potentially problematic conflict of interest. An issue to consider will be the potential overlap of multiple applicable codes of conduct.
37. **Discussion point:** Mechanisms to preserve the independence and impartiality of adjudicators.

3.8. Enforcement

38. A key feature of any fully-functional, credible and legitimate investment dispute settlement system is the enforcement of its decisions. Presently, different ISDS rules provide for different rules for enforcement. The reference rules in the area are the ICSID Convention provisions, which when applied in a dispute settlement case, allow for the enforcement of the award without review at domestic level in any country party to the ICSID Convention.
39. Applying and retaining the successful and effective system of enforcement comparable to that of ICSID (i.e. with no review at domestic level given the appellate mechanism) should be an important policy objective. This would confer decisions issued by the multilateral system a high level of authority and would prevent political interference on the application of investment agreement provisions. For this reason, it would seem important to recreate the effects of an enforcement system comparable to the ICSID one in the context of the establishment of the multilateral system.
40. **Discussion point:** The best approach to ensure enforcement of the awards.

3.9. Costs

41. An equitable system to finance the multilateral investment dispute settlement system would need to be agreed on. Operational costs of the system would include (but not be limited to) salaries of adjudicators and staff who, inasmuch as tenured, would be employed by the multilateral system regardless of the effective workload.
42. One option could be that costs be covered by the Parties to the convention establishing the multilateral system. A number of criteria could be used to determine the amount of contributions, e.g. level of development of each Party (measured in terms of for example GDP), investment flows, number of cases brought, etc. In that case, it would seem evident that developing countries would be requested to make lower financial contributions to the multilateral system.

43. One may consider also whether Party contributions could be topped with user fees, so that investors bringing a dispute against a host state would need to cover (at least some) of the expenses incurred by such dispute.
44. **Discussion point:** Allocation of costs of the multilateral system

3.10. Transparency

45. Any future mechanism would, consistent with recent developments in investment treaty making, need to ensure a certain level of transparency.

3.11. Possible special assistance for developing countries

46. Another key issue would be to decide whether economies in transition and developing countries and/or least-developed countries are to benefit from any special treatment and/or special assistance within the multilateral investment dispute settlement system. Ideally, the multilateral system should cater for the necessary mechanisms to ensure that any country's level of development does not hamper its ability to effectively participate in the system.
47. Importantly, a mechanism providing legal assistance financed by the rest of the Parties to the multilateral system could be set up. In this sense, the design and functioning of the Advisory Centre on WTO Law (ACWL) could be a good source of inspiration.
48. **Discussion point:** Mechanisms to grant special treatment and/or special assistance to developing countries.

4. NEXT STEPS IN THE NEGOTIATING PROCESS

49. Any negotiation for the establishment of a multilateral investment dispute settlement system must be inclusive and effective. Considerations on where and when to conduct negotiations, as well as how such negotiations are to be conducted, must ensure that all countries interested in the project are given the opportunity to effectively participate.

4.1. Negotiating forum

50. The first question that arises is whether discussions should be held within an institutionalised framework as opposed to any ad hoc setting. The former could offer some practical advantages in terms of facilities and logistics, but the public perception of any such framework must be carefully considered too. This question should be distinguished from the issue of whether the final multilateral system, as already negotiated, should be docked onto an existing international organisation (see above).
51. In relation to the negotiating forum, a number of different organisations have held discussions regarding procedural reform of ISDS and many have collaborated in helping advance the discussion. It is to be noted that UNCITRAL has held discussions on the possibility of establishing a multilateral body to solve disputes arising from investment agreements. As an outcome of those discussions, UNCITRAL is set to decide whether it would work on the establishment of a multilateral investment dispute settlement

mechanism by July 2017. In any case, at this stage these developments are without prejudice to the reflection process at hand triggered by the European Commission and the Government of Canada.

52. **Discussion point:** Possible fora to host negotiations or other formulas (e.g. ad hoc settings) to manage negotiations.

4.2. Features of any negotiating process

53. Ideally, the negotiating process should feature the following characteristics:

- Multilateral negotiating process open to all governments with an interest in the project of establishing a multilateral investment dispute settlement system.
- Negotiations should be conducted on the basis of governmental representation.
- International organisations with an interest in the multilateral system should be allowed to get meaningfully involved in the process.
- Full transparency must be ensured throughout the process, including through possible consultations.

54. **Discussion point:** Desirable features of the negotiating process.

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