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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

**Multilateral reform of investment dispute resolution**

*Accompanying the document*

**Recommendation for a Council Decision**

**authorising the opening of negotiations for a Convention establishing a multilateral  
court for the settlement of investment disputes**

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## GLOSSARY

(In alphabetical order)

**Ad hoc tribunal:** A tribunal formed with a purpose of resolving a specific case.

**Appeal:** Tribunal reviewing decisions of the court of the first instance.

**Code of Conduct:** Set of rules governing the behaviour and ethical requirements of adjudicators.

**Developing countries:** Countries that are less developed than developed countries in the context of social and economic indicators.

**Fair and equitable treatment (FET):** The principle that requires that an investment is treated in a just, unbiased and equitable manner, which is in accordance with the rules.

**Foreign direct investment (FDI):** An investment, which is made by the investor from one country to another country, by which the investor obtains managing control over the investment.

**Host state:** A country in which a foreign investment is made.

**Investment Court System (ICS):** The system for the resolution of investment disputes included in EU trade and investment agreements from 2015 on, which includes the Tribunal of First instance and Appeal Tribunal with permanent tribunal members to be appointed by the EU and its respective FTA or investment treaty partner.

**Investor-State Dispute Settlement (ISDS):** Mechanism to resolve disputes between the foreign investors and host countries.

**"Loser pays" principle:** The principle that provides the unsuccessful party to the dispute to cover all costs of the procedure.

**Least-developed countries:** Countries that are least developed with respect to developed and developing countries in the context of social and economic indicators.

**Most-favoured nation treatment (MFN) principle:** The principle included in international agreements that requires not discriminating between countries. It requires that certain favourable treatment be granted to all the parties to an agreement.

**National treatment principle:** The principle included in international agreements that requires not discriminating between goods, services or investors of domestic and foreign goods and services. It requires granting foreign goods and services with the same treatment as domestic ones.

**Protection against uncompensated expropriation:** The principle that requires a just compensation in return for the expropriation of an investment.

**Principle of rule of law:** The principle that makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

**Right to fair trial:** The right to an independent and impartial tribunal established in accordance with the law.

**Right to an effective remedy:** The right to an effective remedy before an independent tribunal that ensures fair, public hearing within a reasonable period of time when rights are alleged to be violated.

**Small and Medium-sized Enterprises (SMEs):** According to EU legislation, enterprises which, among other criteria, employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

**Tribunal of First instance:** A tribunal that hears the first arguments and considers all the evidence to be contrasted to an appeal mechanism.

## **LIST OF ABBREVIATIONS**

(In alphabetical order)

**AB** (or **WTO AB**): Appellate Body of the World Trade Organisation

**ACWL**: Advisory Centre for WTO Law

**BIT**: Bilateral Investment Treaty

**CETA**: Comprehensive Economic and Trade Agreement

**CJEU**: Court of Justice of the European Union

**ECB**: European Central Bank

**ECT**: Energy Charter Treaty

**ECHR**: European Convention of Human Rights

**ECtHR**: European Court of Human Rights

**FDI**: Foreign Direct Investment

**FTA**: Free Trade Agreement

**GDP**: Gross Domestic Product

**ICC**: International Criminal Court

**ICJ**: International Court of Justice

**ICS**: Investment Court System

**ICSID**: International Convention for the Settlement of Investment Disputes

**IMF**: International Monetary Fund

**ISDS**: Investor-State Dispute Settlement

**ITLOS**: International Tribunal for the Law of the Sea

**NGO**: Non-Governmental Organisation

**OECD**: Organisation for Economic Co-operation and Development

**PCA**: Permanent Court of Arbitration

**SME**: Small and Medium-sized Enterprise

**TEU**: Treaty of the European Union

**TFEU**: Treaty on the Functioning of the European Union

**TTIP**: Transatlantic Trade and Investment Partnership

**UN**: United Nations

**UNCITRAL**: United Nations Commission on International Trade Law

**UNCTAD**: United Nations Conference on Trade and Development

**WTO**: World Trade Organisation

## INTRODUCTION

In recent years, the inclusion of investor-state dispute settlement (ISDS) in trade and investment agreements has become subject to increased public scrutiny and questioning. This has been the case in the EU with regards to EU agreements with partner countries but also in other parts of the world. In the EU, concerns around ISDS have been voiced particularly in the context of the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the United States, as became clear in the 2014 public consultation organised by the Commission on investment in TTIP.

In May 2015, in light of the public consultation, the Commission presented a concept paper "*Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*". The paper set out a two-step approach to reforming the current ad hoc ISDS system. The first step was the inclusion of an institutionalised court system for resolving investment disputes to apply in each future EU level trade and investment agreement (i.e. investment court system). The second step was that the EU should in parallel work towards the establishment of an international investment Court and appellate mechanism with tenured adjudicators. This Court would aim to replace all the bilateral Investment Court Systems (ICSs) included in the EU's trade and investment agreements. It would also provide the EU, EU Member States and partner countries with the possibility to replace the ISDS provisions featuring in their existing investment agreements with access to the multilateral investment Court.

Since 2016 the Commission has actively engaged with a large number of partner countries both at technical and political level to further the reform of the ISDS system and to build consensus for the initiative of a permanent multilateral investment Court.

In August 2016, the Commission launched an Impact Assessment process to examine the possible options and impacts of a reform of the ISDS system at multilateral level, including through the establishment of a permanent multilateral investment Court. The Impact Assessment is limited to examining options for reforming at multilateral level the dispute settlement system and does not examine the substantive investment protection standards, which are not intended to be addressed by this reform.

## **1. WHAT IS THE PROBLEM AND WHY IS IT A PROBLEM?**

### **1.1 What is the issue that may require an action, what is the size of the problem**

Since the 1950s, disputes between foreign investors and the host States of their investments are solved through ISDS. The ability to bring such a dispute is created by investment agreements. These are either standalone agreements (Bilateral Investment Treaties – BITs) or investment chapters in Free Trade Agreements (FTAs). According to the United Nations Conference on Trade and Development (UNCTAD) there are 3,328 such agreements in existence internationally.<sup>1</sup> The disputes concern claims that the investor's investment in a country has been treated inconsistently with certain core protection standards included in those agreements, i.e. guaranteeing equal treatment of different foreign investors (most-favoured nation), guaranteeing equal treatment as domestic investors (national treatment), protection against unlawful expropriation and ensuring fair and equitable treatment of investors and investments.

The core reason for ISDS proceedings is that it permits the standards of investment protection contained in international investment treaties to be enforced directly by the investor. It does not require an investor to persuade its government to raise the case through diplomatic or other channels at the inter-state level and avoids that a case is politicised through the intervention of the investor's home state.

Under the dispute settlement system included in these agreements, investment disputes are adjudicated by an ad hoc tribunal composed according to the rules also used for commercial arbitration, i.e. in general the disputing parties (investor and challenged state) appoint an arbitrator each and they either agree on a third arbitrator to serve as president of the tribunal or he or she is appointed by an appointing authority. These arbitral tribunals are disbanded after the award is issued and future tribunals are not legally bound by decisions of previous ones.

Arbitrators are remunerated by the disputing parties on the basis of a fee per day worked. The arbitration rules, i.e. the procedural rules to adjudicate investment disputes, are incorporated by reference into the investment agreements. The most frequently used arbitration rules are the Arbitration Rules under the International Convention for the Settlement of Investment Disputes (ICSID Convention)<sup>2</sup> or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),<sup>3</sup> although other rules may also apply.

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<sup>1</sup> UNCTAD International Investment Agreements Navigator. Data accurate on 13 April 2017.

<sup>2</sup> Available at: <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>.

<sup>3</sup> Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

Except where arbitration is conducted pursuant to more recent treaties, proceedings are confidential unless the disputing parties agree to make information on the dispute publicly available.

Awards issued by ISDS tribunals are final and cannot be appealed on the grounds of errors of law or misinterpretation of the facts. They can only, at the request of either disputing party, be cancelled (technically, "annulled" or "set-aside") in full or in part, under very limited procedural grounds. The enforcement of ISDS awards is governed either by the ICSID Convention or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>4</sup> and relevant domestic implementing legislation.

According to UNCTAD, as of 1 January 2017, there have been a total of 767 known ISDS cases based on international investment treaties.<sup>5</sup> 259 of them are currently pending, whereas 495 have been concluded.

Known treaty-based investor-State arbitrations	
Total	767
Pending	259
Concluded	495
Unknown	13

Figure 1: Known ISDS proceedings from international investment agreements. Source: UNCTAD (2017).<sup>6</sup>

UNCTAD figures show that more than one third of ISDS proceedings were concluded in favour of the state (36.4%), while slightly more than one fourth found in favour of the investor (26.7%). Almost another fourth (24.4%) were settled between the parties.

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<sup>4</sup> Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

<sup>5</sup> There is no legal obligation in these treaties to disclose the initiation of proceedings. Hence the precise number of cases cannot be stated with full certainty. The "known" cases are those for which there is at least some information in the public domain permitting them to be counted.

<sup>6</sup> See <http://investmentpolicyhub.unctad.org/ISDS>.

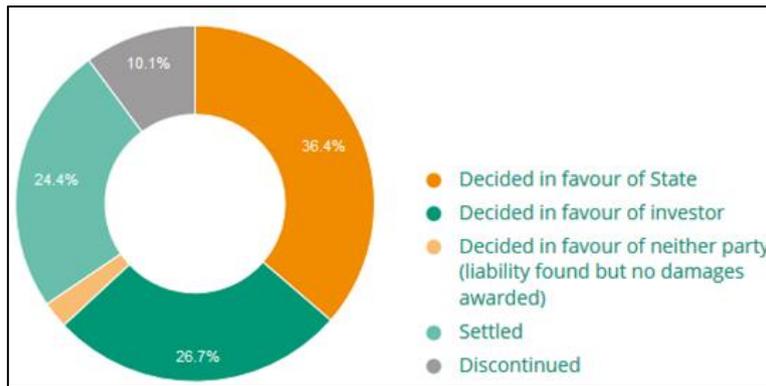
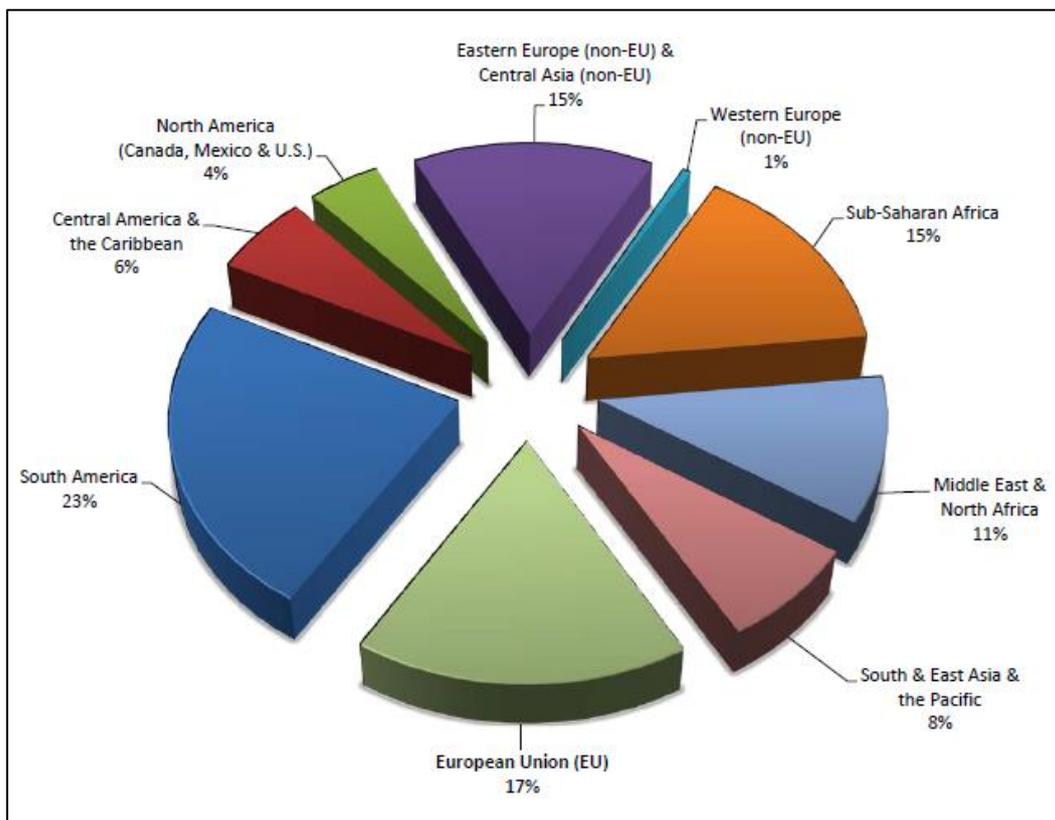


Figure 2: Concluded ISDS proceedings. Source: UNCTAD (2017).<sup>7</sup>

ICSID data from April 2017 indicate that 58% of the total of cases administered under the ICSID Convention involved investors from an EU Member State,<sup>8</sup> while 17% involved an EU Member State. Spain, Hungary and Romania have been most often involved as respondents (29, 13 and 13 disputes respectively as of April 2017).<sup>9</sup>



<sup>7</sup> See <http://investmentpolicyhub.unctad.org/ISDS?status=1000>.

<sup>8</sup> Data based on the nationality of investors as reported at the time of registration.

<sup>9</sup> In the 108 ICSID cases involving an EU Member State, 78% were commenced by an investor who was also from an EU Member State. These intra-EU investment treaties are not covered by this initiative (see footnote 13 below).

Figure 3: Geographic distribution of all cases registered under the ICSID Convention and Additional Facility Rules, by State Party involved. Source: ICSID (2017).<sup>10</sup>

In recent years ISDS has become subject to increased public scrutiny and questioning, in the EU and other parts of the world. In the EU, concerns have been voiced particularly in the context of the negotiations of the EU-United States (US) and EU-Canada trade and investment agreements, as was made evident in the 2014 public consultation carried on investment in the TTIP.<sup>11</sup>

A core concern by the public is the perceived limitation in terms of legitimacy of the existing system to deal with issues that concern acts of public authorities. Other concerns relate to the current ISDS system's deficiency in predictability and interpretative consistency of case-law, lack of possibility of review of decisions, lack of transparency and costs of the proceedings.

To address these limitations, the EU's approach since 2015 has been to institutionalise the system for the resolution of investment related disputes in EU trade and investment agreements, through the inclusion of the ICS.

The main feature of the ICS as proposed in EU negotiations is the establishment of a Tribunal of First Instance and an Appeal Tribunal with permanent tribunal members to be appointed by the EU and its respective FTA or investment treaty partner. Members are required to have qualifications similar to the judges of the International Court of Justice (ICJ). Cases are allocated to them on a random basis. Tribunal members are bound by a strict code of conduct that requires them to disclose any personal or professional relation that could impede or be perceived as impeding their independence and they cannot act as counsel in other investment cases.

Tribunal members jointly appointed by the Contracting Parties to an EU agreement are paid a monthly retainer fee in order to secure highly qualified individuals and their availability on short notice. They are also paid a daily fee per day actually worked. The costs of the monthly retainer fees and the daily fees for the Appellate Tribunal members are to be shared by the Parties to the agreement (i.e. the EU and its trade and/or investment treaty partner). Procedures are subject to the UNCITRAL Rules on Transparency,<sup>12</sup> meaning that hearings, documents and findings relating to the disputes are made public.

In this light, the initiative to engage on a multilateral reform of investment dispute settlement aims at addressing problems arising in the context of two situations:

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<sup>10</sup> World Bank. 2017. The ICSID caseload: statistics (special focus - European Union). Washington, DC: World Bank Group. Available at: <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20EU%28English%29April%202017.pdf>.

<sup>11</sup> See the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP): [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

<sup>12</sup> Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

1. *ISDS*: The traditional problems affecting ISDS continue to exist, inasmuch as this system is foreseen in the vast majority of the 3328 investment treaties. EU Member States have concluded 1384 of such treaties with third countries.<sup>13</sup> The EU itself is party to one such agreement, the Energy Charter Treaty (ECT). These traditional problems relate to **legitimacy, consistency and predictability, lack of possibility of review, transparency and high costs for users.**
2. *Coexistence of ISDS and ICS*: The introduction of an ICS in each EU trade and investment agreement addresses a number of important problems of ISDS notably legitimacy, lack of review and transparency, but it raises other issues, notably concerning **predictability and consistency of decisions across different EU agreements, use of EU resources and costs for the EU budget.**

1. Problems arising from ISDS

a) **Lack of legitimacy and safeguards for independence**

Independence, efficiency and quality are the main elements of an effective justice system.<sup>14</sup> The ISDS arbitration system has been criticised for lacking sufficient legitimacy, a perception based on concerns as to the effectiveness of the independence of arbitrators from disputing parties. Criticism along these lines was submitted by a large number of stakeholders from different backgrounds through the public consultation.

ISDS is based on the mechanisms of dispute resolution used in the field of arbitration, where disputes arise between private entities over a particular set of reciprocal contract-based obligations. As a result, ISDS differs significantly from traditional judicial systems, in particular as regards the safeguards to guarantee judicial independence. For one, disputes under ISDS are decided by arbitrators, i.e. individuals not holding judicial office appointed for a specific dispute. The system is funded by users, i.e. the parties to a dispute pay for the costs of the arbitration tribunal. Arbitrators are chosen by the disputing parties and decide only that specific case. ISDS tribunals are disbanded (i.e. dissolved) after issuing the award, meaning that arbitrators serving in these tribunals necessarily have other professional occupations.

However, ISDS tribunals are not comparable to one-off arbitration since ISDS tribunals are interpreting treaties which first, bear a great deal of similarity and second, need to be applied again and again.<sup>15</sup> Partly for this reason and partly because it is applied to solve disputes between an individual and a state, the use of ISDS has been broadly criticised.

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<sup>13</sup> EU Member States also have such agreements between themselves. The Commission takes the view that such agreements are inconsistent with EU law and hence cannot be covered by the current initiative. These are not included in this total number.

<sup>14</sup> See the EU Justice Scoreboard: [http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm).

<sup>15</sup> In fact, the ICSID system was mainly intended for investment contract litigation and it was not expected that it would be used to such an extent for investment treaty litigation. See J.C. Thomas and H.K. Dhillon; "The Foundations of Investment treaty Arbitration, The ICSID Convention, Investment Treaties and the review of Arbitration Awards" at p. 21 and 22, forthcoming in the ICSID Review.

In addition, there is a perception held by some that arbitrators may unduly favour investors in order to create future opportunities to serve as arbitrators rather than applying strictly the law in any particular case.<sup>16</sup> Such criticism was submitted by stakeholders in the context of the 2014 public consultation as well as in the consultation for this Impact Assessment. On the other hand, certain arbitrators are considered to be state-friendly and so are almost continually appointed by states.<sup>17</sup>

The importance of having a dispute settlement system in place that not only functions in an impartial manner but is perceived to be devoid of any undue interest becomes even more crucial due to the possible impact these cases may have on public budgets and public actions (to the extent that actions are inconsistent with the substantive rules of investment protection laid down in the agreements).

**b) Lack of consistency and predictability of case-law**

The ISDS system provides for decisions of tribunals that are composed on an ad hoc basis and dissolved after they have issued an award. There is no coordination between tribunals and therefore no formal possibility to align the interpretations of substantive rules of investment protection, although almost all of the 3328 treaties contain identical or very similar standards of protection. These include non-discrimination (national treatment and most-favoured nation (MFN) principles), protection against unlawful expropriation (i.e. compensation) and Fair and Equitable Treatment (FET).

Although the provisions on these standards are not worded in exactly the same way across agreements (there are differences, for example, to the standard US approach), the basic function of the standards is the same across agreements. Indeed, the fact that a majority of these treaties are bilateral and their provisions must be read in light of each agreement's context and negotiating parties' intention, does not mean that there is no margin for a significant degree of consistency to be achieved across agreements. An interpretation of a key standard, for example national treatment, can form the core of an interpretation of that standard as included in multiple agreements which is then adjusted, as appropriate, to take account of variations in drafting or context of other agreements which use similar or identical terms.

In ISDS there is no compelling incentive or requirement for the different tribunals to, when interpreting standards in a given treaty, be informed by past interpretations of those standards in the same or other agreements where it may be very similarly if not identically worded. ISDS arbitrators have therefore no mandate or incentive (for example through being reversed by an appeal mechanism) to build a coherent body of investment case law.

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<sup>16</sup> Considering that ISDS disputes can only be brought by investors, critics of the ad hoc system argue that it may be in the arbitrators' interest to unduly favour investors and expand jurisdiction to increase work load.

<sup>17</sup> Todd Tucker, "Inside the Black Box: Collegial Patterns on Investment Tribunals" available at <https://academic.oup.com/jids/article/7/1/183/2357930/Inside-the-Black-Box-Collegial-Patterns-on#37574807> quoting Kevin P Gallagher and Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal' (2011) 12 J World Invest Trade 919.

The lack of consistency of the case-law leads to limited predictability, which affects legal certainty and expectations for all actors (states, investors and other interested parties). In particular, it deprives stakeholders of the ability to rely on previous interpretations to calibrate their actions and anticipate the outcome of potential disputes. It means that certain arguments can be repeated time and again in the hope that a new tribunal will take them up, wasting time and resources. In the stakeholder consultation, the lack of consistency was regarded as problematic especially by academics.

The lack of consistency affects the interpretation and application of standards under the same agreement in different disputes; and standards contained in different agreements where the standard may be identically or very similarly worded.<sup>18</sup>

Conflicting decisions on the same investment treaty provisions are as a consequence not uncommon. A striking example are the ISDS cases brought under the Argentina-US BIT by US investors against Argentina in relation to very similar factual situations and measures adopted in the context of Argentina's financial crisis (2000-2002). While one tribunal (*LG&E*)<sup>19</sup> accepted Argentina's plea of necessity justifying the breach of the obligations, another tribunal (*CMS*)<sup>20</sup> found that the conditions for accepting the defence of necessity were not met. This meant that damages were payable in one case but not the other, although both cases were brought under the same treaty and based on the same facts.<sup>21</sup>

### **c) Lack of possibility of review**

The current ISDS rules only provide for a limited review of tribunal awards. Awards can only be annulled, in part or in full, or set aside on very limited procedural grounds (such as corruption on the part of a tribunal member, errors in the constitution of the tribunal, manifest exceeded powers or breaches by the tribunal of fundamental

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<sup>18</sup> With regards to the latter, BITs and FTAs contain a number of substantive investment protection standards that are contained in virtually all agreements (including most-favoured nation, national treatment, protection against unlawful expropriation and fair and equitable treatment). Save for marginal differences, these standards are worded practically identically across agreements. Of course, a very high degree of consistency could only be achieved if there was one single set of substantive standards but that is not the case at hand.

<sup>19</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1).

<sup>20</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8).

<sup>21</sup> Another example of conflicting decisions with regard to similar BITs on identical facts is the two cases brought by the company CME and its shareholder Ronald Lauder against the Czech Republic under this country's investment treaties with the Netherlands and the US. The tribunals gave two contradictory awards, with one dismissing the claim while the other awarded damages to CME. Among other provisions, the tribunals interpreted differently the scope of the standard of full protection and security. While one tribunal found that the standard may only be breached in case of physical violence or damage to the investment, the other tribunal adopted a much broader view encompassing also a duty to provide legal protection to investors. Source: Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edition, OUP Oxford (2012).

procedural rules). Conversely, ISDS awards cannot be reviewed on the grounds that decisions are legally incorrect or seriously factually flawed.<sup>22</sup>

This lack of legal review is problematic in cases where awards may be inaccurate from the perspective of the interpretation and/or application of the law and as regards manifest errors of fact (e.g. flawed fact finding, illogical or irrational examination of evidence).

It is problematic not only from a systemic point of view (it has a negative impact on the quality of the overall system by impacting consistency) but also on specific cases (that may be decided according to fundamentally wrong interpretations or based on a manifestly erroneous assessment of facts). Indeed, the possibility of review was considered important by a large number of stakeholders in the context of the public consultation.

#### **d) High costs**

ISDS proceedings are costly both for investors and states, which poses a problem of access to the system and availability of legal remedies. This was highlighted by stakeholders representing medium and smaller investors in the stakeholder meeting and reiterated in the online public consultation.

According to the Organisation for Economic Co-operation and Development (OECD), the costs of an ISDS dispute amount on average to USD 8 million.<sup>23</sup> The largest cost component is the expense incurred by each party (investor and state) for its own legal counsel and experts (about 82% of the overall cost of an ISDS case). Arbitrator fees average about 16% of costs and institutional costs payable to organisations that administer the arbitration and provide secretariat<sup>24</sup> generally amount to about 2% of the costs.

An OECD survey carried out between 2006 and 2011 of 100 ISDS cases indicates that almost a quarter (22%) of the claimants were either individuals or very small corporations with limited foreign operations (one or two foreign projects). Almost half the cases (48%) were brought by medium and large enterprises, varying in size from several hundred employees to tens of thousands of employees, while only 8% of these

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<sup>22</sup> As set out in the decision of the ICSID annulment committee in *CDC group pls v. Republic of Seychelles* "the main function of annulment is to provide a limited form of review of awards in order to safeguard the integrity of the proceedings". This ad hoc committee stated that "this [limited review] mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID drafters desire that the Awards be final and binding [...]". See *CDC group pls v. Republic of Seychelles* (ICSID case No. ARB/02/14), decision on Annulment, June 29, 2005, para 36 ("CDC v. Seychelles").

<sup>23</sup> David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris (2012). Available at: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, p. 19.

<sup>24</sup> Such as ICSID, the Permanent Court of Arbitration (PCA) or the Arbitration Institute of the Stockholm Chamber of Commerce.

were large multinational companies.<sup>25</sup> In 30 % of the cases there was little or no public information on the type of claimant.<sup>26</sup> Data on potential claimants who did not bring claims due to excessive costs is not available. It is possible that micro-enterprises are practically deprived from this dispute resolution route, given the average costs.<sup>27</sup>

**e) Lack of transparency**

ISDS cases are adjudicated on the basis of strict confidentiality criteria, in accordance with the tradition of commercial arbitration to protect the confidentiality of information. Although the various sets of arbitration rules provide for varied degrees of transparency in different aspects of the proceedings, these do not necessarily involve full disclosure of key elements such as the identity of the parties, submissions or awards.

Despite a significant increase in the transparency of ISDS in recent years and concerted action at international level, with some countries including requirements in their treaties and others putting it into practice, this is not systematic.<sup>28</sup> Submissions and awards are not necessarily made public nor hearings opened to the public. Concerns related to insufficient transparency in ISDS were consistently voiced by civil society groups and academia in the public consultation.

This uneven level of transparency contrasts with the publication of judgments and decisions of most national and international courts, which are mostly promptly accessible online.

**2. *Problems remaining under ICS or arising where ISDS and ICS coexist***

The ICS to be included in all EU trade and investment agreements addresses to a significant extent important shortcomings identified with the ISDS system, notably as

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<sup>25</sup> I.e. those appearing in UNCTAD's list of top 100 multinational enterprises.

<sup>26</sup> David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris (2012). Available at: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, p. 17.

<sup>27</sup> Based on the EU definition of SMEs, the turnover of micro companies equals or is less than EUR 2 Million. See: [http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition\\_en](http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en).

<sup>28</sup> The situation has also recently been improved at international level with the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (available at: <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>), which provide for a maximum access of the public to documents and hearings, as well as allowing interested third parties to make submissions. In addition, the Mauritius Convention on Transparency in ISDS - which will enter into force in October 2017 - has the potential to eventually apply the UNCITRAL transparency rules to all existing investment agreements. However, with respect to pre-existing investment treaties, these rules only apply where individual states have agreed to apply them via the Mauritius Convention. The continuing lack of transparency is a problem in itself and contributes to problems of consistency in case-law.

regards the system's legitimacy and independence, consistency and predictability of case-law within each EU agreement, possibility of review and transparency.

Nevertheless, there are certain limits to what can be achieved through reforms at bilateral level as regards predictability across agreements, costs for the EU budget and administrative burden for the EU. This was expressly highlighted by stakeholders in the 2014 public consultation on investment dispute settlement in the TTIP. Stakeholders argued that the many concerns expressed in the EU and other parts of the world on the legitimacy and independence of the investment dispute settlement system would be more effectively addressed through a multilateral reform than through bilateral reforms.<sup>29</sup>

**a) Limited consistency and predictability of case-law**

The ICS addresses the issue of a lack of consistency and predictability of case-law in relation to substantive standards contained in a given agreement, given that standards will be interpreted by a permanent body even if in different disputes. However, the same or very similar substantive rules across agreements will continue to be interpreted by different bodies without any incentive to be informed by previous decisions. In these cases, the risk of disparate interpretation of the same or very similar substantive rules remains.

**b) Costs**

Disputes under the ICS are funded by a mix of the Parties to the trade and/or investment agreement (i.e. the EU and its treaty partner) and users. Under the ICS, the disputing parties are still required to cover the legal fees (which make for the highest part of dispute-related costs) and some of the costs of management of the dispute (i.e. certain daily fees of tribunal members). Nevertheless, the cost of legal fees should be lower than under ISDS as legal counsel will not have to spend time anymore choosing an arbitrator and the increase in legal certainty should decrease the costs of legal advice (i.e. there will be less temptation to make arguments which had been clearly rejected by e.g. the Appeal Tribunal).

The inclusion of an ICS in each EU agreement has implications for the EU budget. It is estimated that each ICS, if active with one case before the First Instance Tribunal and one case under Appeal, would cost around EUR 800,000 per Contracting Party per year.<sup>30</sup> Calculations are based on permanent judges and members of the Tribunal of First Instance and of the Appeal Tribunal being part-time and remunerated on the basis of retainer fees and fees for day actually worked. In some EU trade and investment agreements (e.g. EU-Viet Nam FTA), it has been decided that the division of costs amongst the EU and its treaty partner will take account of the development level of the Parties, which in practice may mean that the EU would bear a significant amount of the costs.

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<sup>29</sup> See above – online public consultation on investment protection and ISDS in the TTIP: [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

<sup>30</sup> This figure has been rounded. See Annex 4 for further details.

### c) **Use of financial and human resources**

The ICS approach foresees a multiplication through the inclusion in many agreements of institutional mechanisms that need to be managed and funded. The more ICSs are included in EU agreements, the more complex the management will be for the Commission services, which will have to bear the administrative burden in terms of time, workforce and financial resources.

#### **1.2 What are the drivers of the problem?**

A number of issues have been identified as the main drivers that would need to be addressed in order to solve the problems outlined above. Below are the drivers that lead to each problem:

##### *Lack of legitimacy and safeguards for independence in ISDS*

- ISDS is based on the mechanisms of dispute resolution used in the field of commercial dispute resolution as opposed to a judicial system; and does not provide for the safeguards for independence found in public international law tribunals or in domestic courts dealing with public law matters. The more specific drivers below emanate from this general one.
- ISDS procedures utilise different sets of arbitration rules, which gives leeway for investors to choose the most advantageous one on which to bring a case.
- Arbitrators deciding on ISDS disputes are not judges in the traditional sense, meaning that they are not backed by a state or an international institution. This has implications for their perceived independence and associated legitimacy.
- ISDS cases are decided by tribunals constituted on an ad hoc basis and are disbanded after issuing the award.
- Arbitrators serving in ISDS tribunals necessarily have other professional occupations and nothing prevents them from acting as counsel for investors and states in other ISDS disputes where the same issues may arise.
- ISDS arbitrators are appointed by the parties to the dispute, paid by those parties and therefore may have a professional interest in reappointment in future cases, which impacts on the perception that they are impartial. This point is widely raised by stakeholders as of particular concern.

##### *Lack of predictability and consistency of case-law*

- Although substantive standards of investment protection are contained in multiple agreements with a high degree of commonality, if not identity, there is no systemic coordination of ISDS cases, tribunals and decisions, consideration of precedent etc.
- The various existing sets of arbitration rules that may govern ISDS procedures do not guarantee substantive standards be interpreted by arbitrators in a consistent and predictable fashion.
- The inherently bilateral nature of ICS implies that predictability and consistency of case-law, where applicable, will be limited, i.e. within the limits of each ICS.

#### *Lack of possibility of review in ISDS*

- ISDS does not provide for mechanisms for correcting legal and factual errors, such as an appeal, while stakeholders consider such mechanisms important.
- ISDS awards can only be annulled on very limited procedural grounds, such as corruption, errors in the composition of the tribunal or breaches of fundamental procedural rules.

#### *High costs*

- In ISDS proceedings, fees of arbitrators and institutions are exclusively borne by the disputing parties.
- As highlighted in the stakeholder consultation, ISDS does not provide for avenues for Small and Medium-sized Enterprises (SMEs) not to have to face such important expenditures and is likely to pose significant problems of access to justice, in particular for small investors.
- The bilateral nature of ICS means that states Party to each trade and/or investment agreement must cover a substantial part of the costs of the ICS. This is especially significant for the EU, which may have to cover parts of the costs appertaining to its treaty partner in the event that it is a developing country.

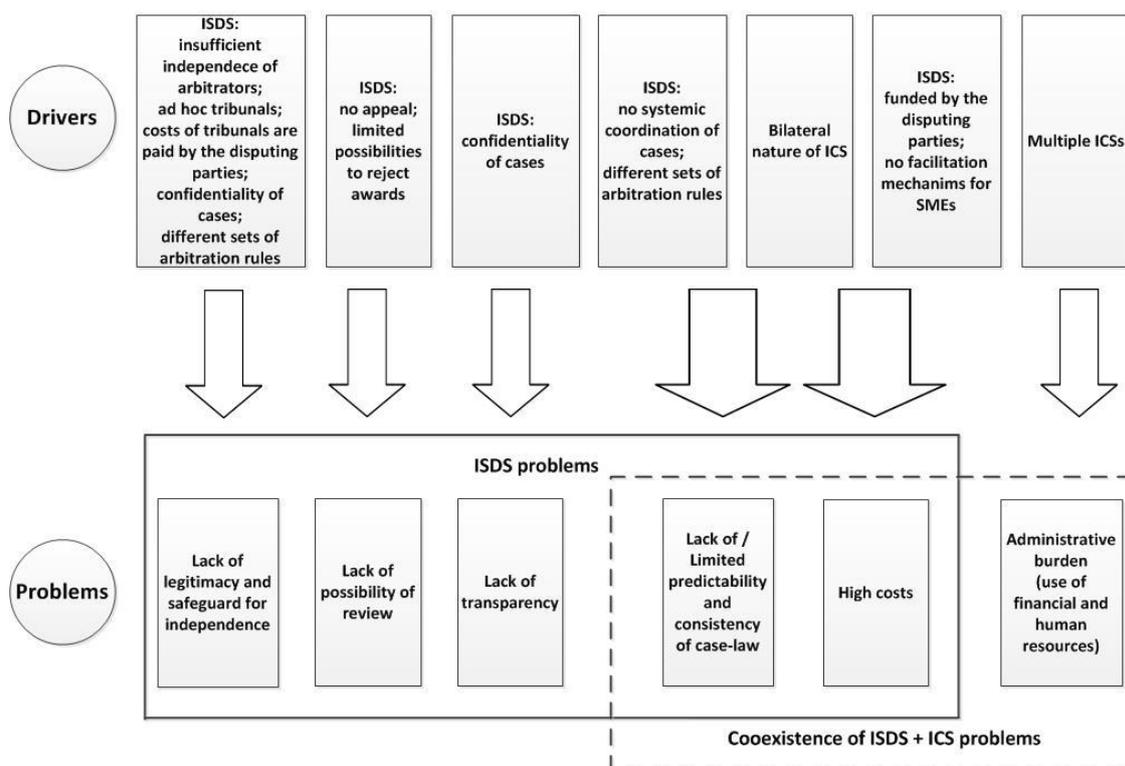
#### *Lack of transparency in ISDS*

- The recently developed transparency rules for ISDS cases are not yet in application to many existing treaties meaning that awards are not made available in a systematic manner, submissions are only provided in a sporadic way and hearings are mostly not public.

#### *Administrative burden of ICS for the EU or the Commission*

- Multiple ICSs trigger high costs and a significant administrative burden (in terms of workforce, time and financial resources) for the Commission.

### 1.3 Problem tree



### 1.4 Who is affected by the problem?

The problems previously described affect a number of actors that play a role in the settlement of investment disputes. The main affected stakeholders are:

#### a) Investors and businesses

When involved in an ISDS case, investors can be faced with a number of shortcomings of ISDS, specifically:

- Potential reputational damage in case the investor brings a dispute resulting from the generalised perceived lack of legitimacy of ISDS;
- Inability to get useful guidance from previous interpretations of the same substantive standard as a result of the lack of predictability and consistency of case-law in ISDS, costs resulting from this;
- Risk of receiving an award that may be legally incorrect and inability to have it reviewed due to the lack of possibility to appeal;
- Where an award is annulled in full, the situation is equivalent to that prior to launching the dispute, i.e. the investor has to restart the dispute, with the consequent important monetary losses and wasted time for the investor;
- Costs associated in appointing arbitrators (higher legal fees as a result of having to spend time on this issue);
- Particularly if the business is an SME, significant accessibility problems to ISDS, notably high costs, which may effectively deprive from access to ISDS.

This group of stakeholders consistently flagged this circumstance in the consultation.

In the event that the dispute arises under ICS, these problems are significantly overcome, as highlighted above.

These problems affect both EU investors when launching a case against a third state and foreign investors that may be launching a case against the EU or an EU Member State.

#### **b) General public**

In relation to disputes brought under ISDS, the general public (both in the EU and in third countries) may be negatively affected by:

- Public mistrust in ISDS;
- Taxpayers' money may have to be paid to investors as a result of a legally incorrect award, given that it cannot be appealed;
- Lack of information on how disputes involving important societal values are decided, due to the lack of transparency in ISDS proceedings.

Civil society platforms actively voiced these points in the consultation.

In the event that the dispute arises under ICS, these problems are addressed, as highlighted above.

#### **c) States (including the EU Member States and third countries) and the EU**

The EU and its Member States, as well as third countries, are affected by the problems at stake similarly to investors. In the event that they are challenged by a foreign investor and find themselves involved in ISDS procedures, they are affected by:

- Damage resulting from the generalised public mistrust in ISDS;
- Inability to get useful guidance from previous interpretations of the same substantive standards due to lack of predictability and interpretative consistency. This may affect states during ISDS proceedings but also in the normal operation of their BITs;
- As a result of the lack of appeal and very limited grounds of annulment, risk that they will have to enforce and abide by legally incorrect awards (i.e. possibly pay significant sums of taxpayers' money as compensation);
- Inability to provide to the public information on a case that may involve issues of public policy, where confidentiality rules prevent publication.
- High fees for legal counsel including as a result of lengthy procedural steps such as choosing arbitrators and inability to rely on previous interpretations.

These problems do not arise in the event of a dispute under the ICS. Nevertheless, the issue of interpretative consistency is not completely solved under ICS, which limits predictability to cases under the same agreement to which the ICS applies.

#### **d) The arbitrator community**

Under ISDS, individuals currently acting as arbitrators (e.g. arbitrators, practising lawyers, retired adjudicators and law professors) benefit from the professional

opportunities of being appointed arbitrators in ISDS tribunals for claims brought under the many existing investment agreements.

Under the ICS, some of such individuals may experience a loss of professional opportunities, since the strict requirements to be appointed and conditions applicable to act as judge or member of an ICS will render some of them ineligible.

**e) Existing arbitration centres**

Under ISDS, there are a number of arbitration centres that handle investment disputes, such as ICSID, the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Permanent Court of Arbitration or the London Court of International Arbitration.

Under the ICS, these centres may no longer have such a prominent role to play, inasmuch they will not in principle have a role in the administering of disputes or at least it is unlikely that all of them would and therefore may, over time and depending on the uptake of ICS, lose income.

**1.5 How would the problem evolve, all things being equal?**

The current EU policy of including in each EU trade and investment or investment agreement a bilateral ICS already constitutes a very significant step to provide an alternative form of dispute resolution as compared to ISDS. However, this policy alone fails to fully address the problems arising from ISDS as included in the nearly 1,400 BITs concluded by Member States and the Energy Charter Treaty (ECT), although it does to the extent that the Member State agreements are gradually replaced by EU level agreements.

In addition, the ICS itself presents certain limitations that would accentuate in the mid to long term, when the EU will likely have to operate a significant number of ICSs (around 20 are currently potentially envisaged). This is likely to lead to a number of operational challenges, in particular in terms of costs and administrative complexity. Each active ICS with one case before the First Instance Tribunal and one case under Appeal per year is expected to cost under EUR 800,000 per Contracting Party per year.<sup>31</sup> Clearly, the more ICSs are in place, the more significant the budgetary implications for the EU will be.<sup>32</sup> Administering numerous ICSs will create administrative burden as human resources within the Commission will be needed to manage the functioning of the ICS. In addition, a multiplication of ICSs would impact the interpretative consistency sought with the institutionalisation of ICS. Each ICS will create its individual cluster of interpretative consistency. While this does not appear to be overly problematic if only a few ICSs exist, inasmuch as judges/members can

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<sup>31</sup> For the calculations, see Annex 4.

<sup>32</sup> No transitional arrangements are considered necessary in relation to the costs that will arise from a progressive replacement of ISDS by ICS. Costs arising from ICS will be triggered when an ICS, as foreseen in a trade or investment agreement, enters into force.

reasonably stay abreast of developments in other ICSs, this would become impossible if bilateral ICSs start to multiply.

The ICS approach does not provide for an immediate phase-out of ISDS and its related problems, inasmuch as the numerous EU Member State BITs with unreformed ISDS provisions and the ECT would only be progressively replaced by EU agreements with an ICS.<sup>33</sup> Moreover, Member States can obtain EU authorisation to conclude new BITs with ISDS<sup>34</sup> and therefore be sued under such mechanism. To improve the investor-state dispute resolution in these BITs, when authorising Member States to negotiate, the Commission already requires that the prospective BIT embodies the principles of the ICS to the largest possible extent and that it includes a reference to the multilateral reform of investment dispute resolution.<sup>35</sup>

In this progressive replacement of ISDS with ICS, the problems related to ISDS would progressively disappear as the problems arising from the multiplication of ICS (limited overall predictability, higher costs for the EU budget and higher administrative burden) would increase. Lastly, this process of progressive replacement would likely take decades of negotiation and, at this point in time, no guarantee that all Member State BITs would be eventually covered by an ICS.<sup>36</sup>

## **1.6 Has any fitness check/retrospective evaluation been carried out of the existing policy framework?**

The ICS has been introduced only recently (the first agreement including it which has been approved by the European Parliament is the CETA between the European Union and Canada) and it is not yet in force, therefore no evaluation has yet taken place.

ISDS is included in bilateral agreements concluded by Member States<sup>37</sup> and in the ECT. The ECT is subject to periodical review under Article 34.7 of the ECT<sup>38</sup> which provides

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<sup>33</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries notes that at the time when foreign direct investment became an exclusive EU competence, EU Member States had many BITs with third countries in place. The regulation lays down the conditions for the continued existence of these BITs and their relationship with the EU's investment policy until they are progressively replaced by agreements concluded at the EU level with each third country in question.

<sup>34</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

<sup>35</sup> See Article 9.2 of Regulation 1219/2012 (see *supra*).

<sup>36</sup> The impacts of the baseline scenario are analysed in detail in Chapter 5.1.

<sup>37</sup> ISDS has been the subject of numerous academic studies on its functioning and shortcomings, some of the most relevant are quoted in the previous sections.

<sup>38</sup> Article 34(7) of the ECT provides that "*In 1999 and thereafter at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent to which the provisions of the Treaty*

that the functioning of the ECT be subject to regular review (of not more than five years) by its political body (i.e. the Charter Conference). This review must be conducted in light of the extent to which the provisions of the ECT and its Protocols have been implemented.

As Contracting Parties to the ECT, the EU and the Member States are shaping and actively participating in these reviews. The most recent review process has been ongoing since 2014 and focuses on core areas of the ECT, including investment promotion and protection and dispute settlement. The draft conclusions of such review find inter alia that further discussions including within other fora are needed. Discussions on the scope of the next review (to take place in 2019) will be held in 2018. In this sense, modernisation of the investment protection part of the ECT (including dispute settlement) remains an EU priority (although the preferred vector for dispute settlement remains the project described in this Impact Assessment).

## **2. WHY SHOULD THE EU ACT?**

Article 207 of the Treaty on the Functioning of the European Union (TFEU) foresees that foreign direct investment (FDI) is part of the EU's common commercial policy. In accordance with point (e) of Article 3(1) of the TFEU, the EU has exclusive competence with respect to the common commercial policy. This exclusive competence includes the possibility to negotiate and conclude international agreements covering FDI. According to Article 5(3) of the Treaty of the European Union (TEU), the subsidiarity principle does not apply to areas of exclusive EU competence.

The Court of Justice of the EU (CJEU) ruled in its Opinion 2/15 regarding the EU-Singapore FTA that the Union has exclusive competence with regard to all matters covered by the agreement but that the competences over portfolio investment and ISDS are shared between the EU and its Member States.<sup>39</sup> The impact of this ruling on this initiative is not significant, since the Commission has from the beginning expected that any multilateral reform of investment dispute settlement would need to be subscribed by Member States in addition to the EU, not least so that all BITs concluded by Member States can be brought into the reform too.

In its Opinion 2/13 concerning the accession of the EU to the European Convention on Human Rights (ECHR), the CJEU confirmed its consistent case-law that an international agreement providing for the creation of a court responsible for the interpretation of its provisions is not, in principle, incompatible with EU law. However, such a court should not have an adverse effect on the autonomy of the EU legal order or

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*and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat".*

<sup>39</sup> Opinion of the CJEU of 16 May 2017, C-2/15, EU:C:2017:376 pursuant to Article 218(11) TFEU on the competence of the European Union to conclude the Free Trade Agreement with Singapore.

negatively impact the level of protection of fundamental rights within the EU.<sup>40</sup> In this respect, the standards provided by the Charter of Fundamental Rights are an important source against which to measure the effectiveness of the reforms envisaged in this initiative.

It should be noted in passing that the multilateral reform scenario would significantly differ from the accession of the EU to the ECHR. Considering that currently tribunals in EU agreements only apply international law (i.e. the investment agreements) but not EU law, the reformed framework would not interpret EU law, but only be allowed to use it as matter of fact in its judgements. The autonomy of EU law would therefore remain unaffected.

A multilateral reform of investment dispute settlement could not be carried out at the Member State level for the basic reason that it would not achieve coverage of all existing investment treaties, leaving out all agreements concluded by the EU. Member States do not have competence for all the matters that would be dealt with in this initiative. The matters are either of the exclusive or shared competence of the European Union.

In line with the principle of proportionality, all reasonable policy options are presented below in order to assess the likely effectiveness of such policy action.

### **3. WHAT SHOULD BE ACHIEVED?**

#### **3.1 General objectives**

With the entry into force of the Lisbon Treaty in 2009, foreign direct investment became part of the common commercial policy. As regards non-direct investment, Treaty provisions on free movement of capital apply also to capital movements between Member States and third countries. With the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became fully part of the EU treaties.

As established by Article 205 of the TFEU, the common commercial policy also serves the more general objectives of the EU's External Action as described in Article 21 of the TEU.

Article 21(1) of the TEU specifies that, in the exercise of its external action, the EU is to be guided by the principles and objectives that inspired its own creation, including "*democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and*

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<sup>40</sup> Opinion of the CJEU of 18 December 2014, C-2/13, EU:C:2014:2454 on the compatibility with the Treaties of the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, para 169-170, 182-183. (see also Opinion of the CJEU of 14 December 1991, 1/91, EU:C:1991:490 on the draft agreement relating to the creation of the European Economic Area, para 40 and 70 and Opinion of the CJEU of 8 March 2011, C-1/09, EU:C:2011:123 on Patent Litigation System, para. 74).

*solidarity, and respect for the principles of the United Nations Charter and international law".*

Article 21(2) of the TEU envisages a number of objectives that the EU is to pursue through *"a high degree of cooperation in all fields of international relations"*. The most relevant objectives in relation to this initiative include: *"(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; [...] and (h) promote an international system based on stronger multilateral cooperation and good global governance"*.

Taking stock of the trade policy developments in the years that followed, especially the EU negotiations in the context of the TTIP, the Commission Communication *"Trade for all"*<sup>41</sup> from October 2015 sets out that the Commission will in parallel with its bilateral efforts *"engage with partners to build consensus for a fully-fledged, permanent International Investment Court"*.

At the public release on 12 November 2015 of the EU's proposed text for TTIP on investment protection and investment dispute settlement, the Commission stated that the *"Commission will start work, together with other countries, on setting up a permanent International Investment Court. [...] The objective is 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>42</sup>

The more recent Commission Reflection Paper on Harnessing Globalisation from May 2017 also contains an explicit reference when stating that *"[t]he EU will also continue its efforts to establish fair rules for the protection of international investments while allowing governments to pursue their legitimate policy objectives. Disputes should no longer be decided by arbitrators under the so-called investor-state dispute settlement. This is why the Commission has proposed a multilateral investment court that would create a fair and transparent mechanism; this is being discussed with our partners"*.<sup>43</sup>

On the occasion of the adoption by the Council of the decision authorising the signature of CETA, the Council stated that *"the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established, and according to the procedure foreseen in CETA"*.<sup>44</sup>

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<sup>41</sup> See [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

<sup>42</sup> See [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm).

<sup>43</sup> See [https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf).

<sup>44</sup> Statement 36 of the Statements and Declarations entered on the occasion of the adoption by the Council of the decision authorising the signature of CETA. Brussels, 27 October 2016.

Moreover, action by the EU at international level cannot compromise the level of protection of fundamental rights in the EU. This initiative is intended to create an additional remedy under international law for enforcing the obligations imposed upon States by international agreements. It is therefore without prejudice to the existing rights of foreign investors under domestic EU law and the laws of the Member States or to the remedies for enforcing such domestic law rights. Nevertheless, when assessing this initiative it is useful to evaluate the various options in the light of the objectives and principles foreseen in the EU Charter of Fundamental Rights, including in particular Article 47 of the Charter.<sup>45</sup>

### **3.2 Specific objectives**

More specifically, this initiative aims at bringing coherence to the EU's policy in investment dispute resolution, to align it with the EU's global approach in other areas of international dispute settlement favouring multilateral solutions. The objective is to set up a framework for investment dispute resolution that is:

- Permanent, independent and that enjoys the recognition of authority and legitimacy of citizens.
- Predictable, delivering consistent case-law in its functioning, ensuring that the interpretation of substantive standards is consistent.
- Allowing for an appeal of decisions in order to correct legal and factual errors.
- Transparent, in line with the fundamental expectations from citizens that justice is a public good.
- Efficient, in that it satisfies the needs of involved stakeholders through an effective use of financial and human resources.

## **4. WHAT ARE THE VARIOUS OPTIONS TO ACHIEVE THE OBJECTIVES?**

In the Inception Impact Assessment published on 1 August 2016, six options were identified to multilaterally reform the system of investment dispute settlement (options 1-6). Two additional options (numbered options 7 and 8) were suggested by stakeholders in the context of the public consultation and the stakeholder meeting of 27 February 2017.

### **Option 1 Baseline scenario**

Under the baseline scenario, the EU would continue to pursue its current policy of negotiating ICS in its bilateral trade and investment or investment agreements, while ISDS would continue to exist insofar as the treaties that utilise it have not been phased out by an EU agreement featuring ICS.

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<sup>45</sup> The Charter provides under its Article 47 that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".

While the problems related to ISDS would gradually decrease as the new agreements with the ICS will be concluded hence replacing existing MS BITs, the problems arising from the multiplication of ICS (limited overall predictability, higher costs for the EU budget and higher administrative burden) would increase.

The ICS only applies to future EU agreements. It does not address the ISDS problems that persist with regards to the 3,328 existing investment treaties worldwide, the vast majority of which contain traditional ISDS provisions. This is particularly problematic for the EU, considering that treaties between EU Member States and third countries alone account for 1,384 of those existing treaties, although these will be very gradually replaced. In addition, the EU itself is party to the ECT which also contains traditional ISDS. No significant evolution of either the ECT or Member States' existing BITs is expected in the short term, certainly as regards the objectives being examined in this assessment in the timeline envisaged under this initiative.

### **Option 2 Renegotiation of EU Member States' BITs and the ECT to include an ICS**

Under this policy option, the EU and its Member States would seek to renegotiate Member States' BITs with each relevant third country and the ECT in order to align the dispute settlement provisions therein with the ICS policy pursued at the EU level. Most notably, the reformed provisions would address ad hoc party appointments by conferring some degree of permanency to the dispute settlement system and detaching the appointment of adjudicators from the disputing parties. Such reformed provisions would also feature an appeal instance and include rules on transparency of proceedings.

This option is considered overly burdensome in terms of time and resources, as well as extremely complex and disproportionate to its likely use per BIT, as was highlighted by a majority of stakeholders in the public consultation. Moreover, since negotiations would need to be conducted individually with each partner country, there is a high risk that partner countries would use the opportunity to reopen negotiations on aspects of BITs other than dispute settlement. Additionally, it cannot be excluded that the outcome of such negotiations would be different across BITs to the detriment of the overall system's coherence and predictability.

This option is therefore considered not feasible and not analysed in further detail.

### **Option 3 Reform of international arbitration rules**

Option 3 would consist of reforming the several sets of arbitration rules that normally govern ISDS, e.g. rules of ICSID, of UNCITRAL or of the PCA in order to bring these rules in line with the principles of ICS, namely permanency, detachment of adjudicators from disputing parties and allowing an appeal.

However, this option would present a number of shortcomings. First, since there is no common institutional framework for the procedural aspects of ISDS, it would in effect mean renegotiating several sets of arbitration rules, some used predominantly for the adjudication of commercial and not investment disputes. Renegotiating each set of rules would also be extremely complex.

There are several reasons why reforming an existing forum so that it acts as multilateral court does not seem optimal. The main reason relates to the fact that ISDS operates under different rules, so reforming one institution or set of arbitration rules does not address litigation under another institution or arbitration rules. Moreover, some of these bodies already have an established jurisdiction (i.e. they apply certain established rules) that would require unanimity of their membership to amend. For instance, adding an appeal mechanism to the ICSID Convention (the main forum for ISDS cases) would most likely require the consent of all current 159 members to the ICSID Convention. This initiative is not considered feasible at the time of writing.

There are also reasons of perception and therefore closely linked to legitimacy at stake. For example, some of the organisations active in this field are closely associated with business interests.

Due to the complexity explained above, this option is not considered realistic and therefore it is discarded. Its impacts are not further analysed.

#### **Option 4      Establishment of a multilateral appeal instance**

This option envisages the creation of a permanent multilateral appeal instance competent to hear appeals based on errors of law and fact (i.e. presumably manifest errors in the appreciation of the facts). The multilateral appeal tribunal would hear appeals of decisions issued by ad hoc ISDS arbitral tribunals as well as by Tribunals of First Instance under the ICS. This option would therefore leave ISDS and ICS in place but add the possibility to appeal disputes arising from BITs and investment agreements.

This option would address a number of the problems examined presently. It would address the issue of limited legitimacy and independence by aligning the adjudicators' regime with that under the ICS (adjudicators would be permanent and subject to a strict ethical code of conduct including a regime of incompatibilities). A permanent multilateral Appeal instance would bring some degree of predictability and consistency of case-law as regards the interpretation of substantive standards, although it would be limited to the cases or aspects of cases that were appealed. The establishment of a permanent Appeal Tribunal would contribute to ensuring that decisions be legally correct. The issues of costs and transparency of proceedings could also be aligned with the principles of the ICS.

However, leaving ISDS in place for the first instance would make it extremely difficult to remand cases after revision by the Appeal Tribunal, since the ad hoc ISDS tribunal would already have been disbanded and its individuals would be engaged in other activities. Nor would it be feasible for the Appeal Tribunal to issue the award itself since this would frequently involve an examination of the facts, which would delay proceedings and often amount to a relitigation of the original proceedings. In the WTO dispute settlement system, divisions of the permanent Appellate Body only examine issues of law and do not have the possibility to remand cases to the ad hoc panel. This is an issue of concern to the EU in the WTO. The EU has made proposals to change the system.

Second, and most fundamentally, this option would not address the problems at first instance. An Appeal Tribunal would only address issues which were actually appealed, but it would leave out all other concerns relating to legitimacy, consistency and predictability, costs and transparency related to the first instance tribunals.

A majority of respondents to the public consultation acknowledged the potential benefits of setting up an appeal instance, although they also indicated that a permanent appeal without a permanent first instance would not suffice to address all the problems at stake.

For these reasons, this option is not further analysed.

### **Option 5      Establishment of a multilateral investment court**

This option foresees that the EU works with other interested third countries toward the creation of a permanent multilateral investment court.

This court would be composed of a Tribunal of First Instance and an Appeal Instance, and would adjudicate claims brought under investment treaties that countries have decided to assign to the authority of the Court. The Court would deal with the agreements (both existing and future ones) between the two countries when both countries have ratified the agreement establishing the multilateral investment court and both countries have agreed that the bilateral investment agreement between them should be subject to the multilateral court.<sup>46</sup> The Appeal Instance would hear appeals of the decisions of the First Instance Tribunal. Both instances would be staffed by tenured adjudicators remunerated on a permanent basis and should have a secretariat to support their daily work.

The precise design, functioning and technicalities of several aspects of the Court would depend on the multilateral negotiations. The likely impact of these sub-options is analysed in Chapter 5 and the preferred sub-options, as they will be reflected in the mandate, are identified in Chapter 6.

The features of the Court that present more than one possible sub-options include:

- Composition of the Court:
  - Number of adjudicators: linked to number of Contracting Parties or to volume of cases;
  - Terms of mandate: long or short and renewable or non-renewable;
  - Employment status of adjudicators: full-time or part-time;
  - Adjudicators' qualifications: experience-based or knowledge-based;
  - Adjudicators' ethical requirements: precluding any other professional activity or only those related to investment dispute settlement;
- Procedural aspects:

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<sup>46</sup> Similar mechanism is applied for the UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration to existing agreements (the Mauritius Convention).

- Appointment of adjudicators: by the Contracting Parties, by a separate body or by an independent body;
- Case allocation: random or according to disputing party's choice;
- Scope of appeal: allowing for a certain review of the facts;
- Institutional aspects:
  - Secretariat: creation anew or relying on an existing organisation;
  - Mechanism to be part of the Court: through and opt-in or re-negotiating each treaty;
  - Support to SMEs: yes or no;
  - Support to Developing Countries: yes or no;
- Financial aspects:
  - Allocation of costs among Contracting Parties: according to level of development or equally; and
  - Mixed financing (i.e. user fees): yes or no.

The fact that many aspects of the functioning of the Court would still need to be negotiated would allow room to discuss different views from interested countries within the common goal of creating a permanent multilateral court in line with certain broader requirements. These multilateral discussions should be carried out in a transparent and inclusive manner.

Moreover, this option would allow building on the appetite that has been detected internationally to reform investment dispute settlement multilaterally. It would be limited to negotiating a common dispute settlement framework, without going as far as trying to agree on multilateral substantive provisions (which as explained below is deemed politically unrealistic at this point in time). Indeed, the various informal exploratory discussions held in this regard have evidenced that there is considerable interest in engaging in potential discussions.

Stakeholders appear to largely agree with the principles of setting up a multilateral investment court, although questions remain in relation to specific details.

This option and its relevant sub-options are further analysed in Chapter 5.

### **Option 6      Negotiation of multilateral substantive investment rules**

Under this policy option, the EU would seek to negotiate multilateral substantive rules on investment protection as a wider framework for the negotiation of corresponding multilateral dispute settlement provisions.

An attempt was made in the 1990s to start negotiations for a Multilateral Agreement on Investment within the OECD which ultimately failed. Despite the failure of this specific initiative, the Commission has continued to support the ultimate goal of agreeing on multilaterally-backed substantive investment protection rules and, in this vein, it has

striven to negotiate clearer and more precise substantive investment rules in the EU's most recent investment treaties.

However, although potentially desirable, it is not politically feasible at this moment in time to engage in multilateral negotiations for substantive investment protection rules. There is currently insufficient appetite across countries to re-start such negotiations, in part because countries do not agree on the broad parameters of what such a discussion should encompass. Also, nothing suggests that there is a willingness to leave legal approaches behind in favour of a unified approach to substantive investment standards.

The Commission agrees that reaching multilaterally-agreed investment substantive rules would be desirable but believes that it is not a realistic goal in the short term, hence the current project should proceed but be designed to potentially align with any such future multilateral substantive investment rules.

Therefore, this is not considered a feasible option to embark on at this moment and is not analysed further in this impact assessment.

### **Option 7 Improving ISDS in bilateral EU investment agreements and the ECT**

Several stakeholders have suggested that, instead of engaging in a radical reform of investment dispute settlement through a multilateral approach, the EU reforms the system of investment dispute resolution in its bilateral investment treaties by undertaking reforms that go beyond the current ICS policy.

Stakeholders have largely referred to the following features as desirable in such a reform:

- Introduction of more stringent ethical requirements for arbitrators in order to prevent possible conflicts of interest and overall address their neutrality and the system's legitimacy.
- Possibility for interested stakeholders to meaningfully intervene in ISDS proceedings.
- Introduction of the necessary flexibilities so that the fees system in ISDS is not prohibitive for SMEs.
- Extension of the type of remedies available under ISDS to introduce the possibility of non-pecuniary remedies, including mandating a change in the host State's legislation.
- Exhaustion of domestic remedies (i.e. obligation to seek redress at the host state's courts) as a pre-requirement to file an ISDS dispute.

However, this option includes points that are not part of the EU's or Member States' traditional approach in investment, such as exhaustion of domestic remedies. Similarly, investment policy makers have consistently rejected the idea of non-pecuniary remedies as being too intrusive on the right to regulate.

In addition, this option is based on a bilateral approach and would require the EU to re-negotiate the agreements where an ICS has been included and that it seeks to negotiate a further reformed system in future negotiations. It would therefore require large

resources and still not guarantee a uniform outcome to all such negotiations. For these reasons, this option is discarded and not further analysed in the assessment.

### **Option 8 Making national courts competent to decide on investment disputes**

Under this option, stakeholders propose that ISDS be phased-out and that disputes between foreign investors and host states be decided by the domestic courts of the host state. This would be equivalent to giving so-called direct effect to investment provisions in international trade and investment or investment agreements. This option has been proposed by stakeholders that regard ISDS as a system that grants an additional avenue to foreign investors, while the same is not available for national investors. It was also voiced at the meeting of 27 February 2017.

A variation of this option, also proposed by certain stakeholders in the context of the meeting, would be to implement a tailored approach depending on the trading partner. In other words, recourse to domestic courts would apply in host states that are considered to provide sufficient guarantees regarding their judicial systems. In those states that fail to give satisfactory guarantees, a parallel ISDS system would be in place.

This option needs to be distinguished from the scenario of disputes between EU investors and Member States arising from intra-EU investment treaties, which the Commission considers incompatible with EU law. In those circumstances, national courts and eventually resort to the CJEU based on EU law are considered an appropriate forum for conflict resolution.<sup>47</sup>

Making national courts competent to hear investment disputes arising from treaties with third countries would run counter to the main purpose of international dispute settlement systems (e.g. ICJ, WTO dispute settlement system and International Tribunal for the Law of the Sea (ITLOS)), which is to provide an international and neutral forum for the resolution of cross-border disputes. This builds on the assumption that a potential for bias exists where a foreign investor seeks redress in a domestic court of a partner country, especially against the government of that country. For this reason, international systems (i.e. different from national fora) for the resolution of disputes are considered necessary. International investment agreements are of course based on the principle of reciprocity – the idea is that both countries consider it desirable that their nationals, when operating in a third country, are afforded the opportunity to be heard by international tribunals and be protected under international law.

Furthermore, the option of giving direct effect (i.e. to allow the rules to be invoked in domestic courts) in EU treaties has been examined and rejected by the EU Institutions because, amongst other things, to be effective it requires that the other countries concerned also grant direct effect, which many countries do not do.<sup>48</sup>

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<sup>47</sup> This issue is currently being examined in proceedings before the CJEU in the Achmea case (C-284/16 Slovak Republic v Achmea BV).

<sup>48</sup> For an example, see Article 30.6 of the Comprehensive Economic and Trade Agreement between the European Union and its Member States and Canada OJ L 11/193 14.1.2017.

Moreover, putting this proposal into practice would require either removing all existing treaties and hence dismantling the existing system, or requiring that all such treaties be directly effective which is against the constitutional practices of a significant number of states.

For these reasons, this option is not considered a feasible avenue and is not further analysed.

## **5. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTIONS AND WHO WILL BE AFFECTED?**

This chapter analyses the impact of the baseline scenario (option 1, i.e. no policy change) and of option 5. Other options were discarded for the reasons explained in the previous chapter. The assessment is based on the analysis of the Commission services, input from the stakeholder consultations and research on existing multilateral dispute settlement systems. It must be noted that the analysis of option 5 is to a large extent a projection, inasmuch as the final outcome would depend on multilateral negotiations.

The analysis of the two options follows the same structure. First, the key features of each option are analysed with respect to the achievement of the objectives as laid down in Chapter 3 and their impacts. The analysis of key features is conducted through the following main categories: (1) Composition of tribunals, (2) Procedural aspects, (3) Institutional aspects, and (4) Financial aspects.<sup>49</sup> Where key features under option 5 present sub-options subject to negotiation, the analysis is carried out for each sub-option. Then, the overall impacts of the option are analysed.

### **5.1 Impacts of policy option 1: Baseline scenario**

This option requires no policy change. Under the baseline scenario, the EU would continue to negotiate ICSs in its bilateral trade and investment or investment agreements, while ISDS would continue to exist insofar as the treaties that utilise it have not been phased out.<sup>50</sup> These two regimes would therefore continue to coexist, which was considered problematic by a large number of stakeholders from different groups.<sup>51</sup>

#### ***5.1.1 Composition of tribunals***

*Where ISDS applies*

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<sup>49</sup> These categories have been created for practical purposes within this report only. They are not intended to affect any further work in this direction.

<sup>50</sup> See Section 1.5 for a description of the baseline scenario and its related problems.

<sup>51</sup> 51.2% of respondents with an opinion on the matter consider it important that the same procedural rules apply to disputes arising from both Member States' BITs with third countries and EU investment agreements with third countries.

ISDS does not bring any **permanency** to the system of investment dispute resolution, inasmuch as disputes are decided by ad hoc tribunals that are disbanded after issuing the award. Moreover, **independence** of adjudicators is perceived as not being guaranteed sufficiently to ensure the continued legitimacy of the system since they are appointed by the disputing parties, which in turn does not contribute to improving the system's **legitimacy**. In the public consultation, certain stakeholders from academia argued that ISDS puts the claimant into an undue advantageous position vis-à-vis the responding state (due to party-appointment and the ensuing possibility of conflicts of interest). Non-Governmental Organisations (NGOs), trade unions and consumer associations raised similar concerns.

The lack of security of tenure and the party-appointment mechanism are perceived to have a negative impact on the **right to a fair trial and effective remedy** because such features do not ensure the confidence of all stakeholders in the system.

#### *Where ICS applies*

The ICS contributes significantly to **permanency** in investment dispute resolution, since disputes are decided by judges sitting in a permanent First Instance Tribunal and Appeal Tribunal. The ICS significantly improves the **legitimacy** of the system, thanks to mechanisms that safeguard adjudicators' **independence**, such as removing the ability of disputing parties to appoint tribunal members and random allocation of cases, high qualification criteria and strict ethical rules. **Predictability** and **consistency** of case-law are achieved albeit only within the specific agreement, since the First Instance Tribunal and Appeal mechanism are integral part of each ICS.

In terms of **efficiency**, however, the multiplication of ICSs in bilateral agreements would require significant human and financial resources to manage. In the public consultation, stakeholders from the legal and business sector as well as certain NGOs agreed that the ICS leaves room for improvement in terms of efficiency.

Introducing tenure and permanency has a positive impact on the **right to a fair trial and an effective remedy** and contributes to the global objective of supporting the **principle of rule of law**.

#### **5.1.2 Procedural aspects**

##### *Where ISDS applies*

There is **no appeal** mechanism under ISDS, hence the objective to allow for an appeal cannot be achieved under ISDS. This was perceived as a disadvantage by a number of stakeholders in the public consultation, including certain trade unions. Although narrow grounds of annulment are available, this cannot be considered as comparable to an appeal. Enforcement of arbitral decisions is therefore due (subject to the specificities of the applicable regime, whether the ICSID Convention or the New York Convention) regardless of any possible legal or factual errors. This does not bring **legitimacy** to the system. **Predictability** and **consistency** of case-law are not achieved since arbitrators are not bound by previous decisions and there is no systemic requirement to take

account of them. The lack of uniform coverage of binding **transparency** rules (since enhanced requirements have only been adopted by some countries) only makes the system more opaque and inaccessible to citizens. Poor transparency was recognised as problematic by various groups of stakeholders, especially NGOs, consumer associations and trade unions, but also certain representatives of the business community.

The absence of an appeal and the limited transparency in the traditional ISDS system have a negative impact on the **right to a fair trial and effective remedy**.

#### *Where ICS applies*

The existence of an appeal instance brings **predictability and consistency of case-law** within given bilateral agreements. The appeal allows to prevent that any legally incorrect decision be enforced. Under the ICS, decisions are enforced under the same terms as under ISDS. This is done by referencing the relevant existing rules (e.g. ICSID Convention or New York Convention) in the underlying FTA.

**Transparency** is achieved through important disclosure requirements embodied in the UNCITRAL Rules on Transparency.

Introducing an appeal instance and providing for **transparency** rules has a positive impact on the **right to a fair trial and effective remedy** and contributes to the global objective of supporting the **principle of rule of law**.

### **5.1.3 Institutional aspects**

#### *Where ISDS applies*

ISDS is essentially an ad hoc system designed to solve specific disputes and therefore with no objective of **permanency** whatsoever. A number of fora administering the applicable procedural rules provide secretarial support to the resolution of specific disputes, notably ICSID<sup>52</sup> the Stockholm Chamber of Commerce, the International Chamber of Commerce and the Permanent Court of Arbitration (PCA). With small variations across organisations, these platforms provide for logistical, administrative and a certain amount of legal support throughout proceedings. The lack of permanency and fragmentation does not contribute to **predictable** and **consistent** case-law. These features do not contribute to the **legitimacy** of ISDS.

In addition, ISDS does not provide for any mechanisms of financial or legal assistance to SMEs to ensure access to effective justice for all investors, as was pointed out by certain business stakeholders in the public consultation. Similarly, no assistance is foreseen for developing countries in the event that they are challenged through ISDS.

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<sup>52</sup> Overall, 62% of all known ISDS cases have been filed under the ICSID Convention or under the ICSID Additional Facility Rules. UNCTAD IIA Issues Note 2015, see <http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf>.

By failing to provide special assistance or support to SMEs and developing countries, the ISDS system does not address the issue of effective **access to justice** of these entities.

#### *Where ICS applies*

The ICSID Secretariat provides secretarial support to the ICS included in the agreements with Canada and is intended to do so also for Viet Nam and further agreements. It will manage the payments to judges, provide for logistic support and act as repository for disputes. Having one forum act as secretariat for several ICSs is a significant contribution in terms of **efficient** use of resources.

ICS makes the system more accessible for SMEs. In particular, it includes (i) a specific provision on voluntary mediation to solve the dispute amicably before the first formal steps of dispute settlement; (ii) procedural deadlines intended to make proceedings faster and less costly; (iii) in certain cases, the possibility to submit claims to a sole judge; and (iv) limits to the costs the SME will be required to cover in case it loses a case or an appeal.

In relation to developing countries, the sharing of costs of the ICS is dependent on the Parties' respective level of economic development. This is for instance the case under the EU-Viet Nam FTA.

By introducing special provisions or mechanisms of support for SMEs and developing countries, ICS moves towards establishing mechanisms to ensure the effective **access to justice** of these entities.

#### **5.1.4 Financial aspects**<sup>53</sup>

##### *Where ISDS applies*

In general, under ISDS, costs borne by States are those related to their status as respondent in a given dispute, i.e. the arbitrator's fees, the fees of the arbitration institution handling the dispute, the costs of experts and the costs for legal counsel.

In some cases, arbitral tribunals have ruled that each disputing party should bear its own costs while others have applied the principle that "*costs follow the event*", making the losing party bear all or part of the costs of the proceeding and attorney fees.<sup>54</sup>

ISDS cases' costs are high. Research by the OECD indicates that the average legal and arbitration costs for a claimant are around USD 8 million.<sup>55</sup> These high costs can result

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<sup>53</sup> For a more detailed analysis of the allocation of costs under ICS and ISDS, please refer to Annex 4.

<sup>54</sup> Examples of arbitration on apportionment of costs are UNCITRAL Article 40(1) and ICSID Article 61(2). Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case. Article 61(2) of the ICSID Convention provides that: "[...] *the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of facilities of the Centre shall be paid. Such decision shall form part of the award*".

in discouraging smaller investors from bringing cases they might otherwise have brought successfully, meaning they will not be compensated for illegal actions.<sup>56</sup>

Annex 4 includes an estimation of the cost of those ISDS mechanisms that would remain in place for the EU and EU Member States because they would not be replaced in the short term by ICS mechanisms in EU agreements with third countries. The calculation includes only tribunal and institutional costs (i.e. not the legal fees) and does not take into account the allocation of costs decided by the tribunal in the individual cases. Conversely, the cost is assumed to be borne equally by the disputing parties. On this basis, it is estimated that the EU and Member States would continue to spend an average of around EUR 70,000 per year per ISDS case.<sup>57</sup>

#### *Where ICS applies*

In the scenario where the ICS is inactive (i.e. there are no cases pending before it), its costs are equally allocated between the two Contracting Parties. Consequently, the costs borne by the EU would amount in general to half of the costs of an inactive ICS, although the EU may cover a larger proportion in case its treaty partner is a developing country. The cost of an inactive ICS would amount to around EUR 400,000 per Contracting Party per year.<sup>58</sup> The sharing of costs of the ICS has in some cases been made dependent on the Parties' respective level of economic development, as is the case under e.g. the EU-Vietnam FTA.

The ICS is partly funded (in particular the appeal instance) by the Parties to the agreement, which diminishes the risk that costs discourage users from bringing cases.

Where the ICS is active, the EU proposal in the TTIP negotiations makes a distinction between costs that are borne equally by the Contracting Parties and costs that are allocated by the tribunal among the disputing parties. The tribunal will be able to order that all or part of the costs which fall to the respondent as a disputing party be borne by the unsuccessful disputing party according to the "*loser pays principle*".<sup>59</sup> To estimate the costs when ICS is active, an assumption of one case before the first instance tribunal and one case under appeal was made. This resulted in estimated costs of around EUR 800,000 per Contracting Party per year.<sup>60</sup>

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<sup>55</sup> David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris (2012). Available at: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, p. 19.

<sup>56</sup> Although some may be able to benefit from third party financing.

<sup>57</sup> See Annex 4.

<sup>58</sup> See Annex 4.

<sup>59</sup> Under the EU proposal in TTIP negotiations, "*reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case*" (Article 28(4)), available at: [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).

<sup>60</sup> See Annex 4.

There is an issue of **efficiency** (i.e. financial and administrative burden) where several ICSs coexist. This was flagged by legal practitioners and business representatives in the context of the public consultation, where they suggested that bringing all ICSs under a single institution would reduce costs for the EU and Member States.

### ***5.1.5 Overall impacts of policy option 1***

Where ISDS continues to apply, none of the specific objectives of the multilateral reform initiative are met.

The ICS addresses the specific objectives of multilateral reform to some extent, i.e. permanency, enhanced legitimacy and transparency and possibility of review of awards through an appeal instance.

This policy option, covering both ISDS and ICS, contributes only partially to the general objectives of this initiative, i.e. supporting the principle of rule of law (in the sense of designing a legitimate system to hear public law disputes) and promoting an international system based on stronger multilateral cooperation and good global governance.

In relation to the former, ISDS lacks the necessary tools to ensure effective application of the principles emanating from public law disputes (i.e. the **rule of law**), including inter alia fully independent and impartial courts and effective review ensuring the legitimacy of the system is upheld. Disputes are decided by arbitrators appointed by and paid for by the disputing parties, there is no appellate instance and therefore no real possibility to have decisions reviewed. Comparatively, the rule of law and its main principles are duly protected under the ICS, where disputes are decided by judges appointed on a permanent basis without any role for the disputing parties. The ICS includes an Appeal Tribunal to ensure that any errors in decisions issued by the First Instance are reviewed. Therefore, under the baseline scenario the optimal approach to public law adjudication (i.e. the rule of law) is unevenly projected.

The ICS constitutes an important improvement from the system that results from ISDS. However, the risk of fragmentation between the different ICS remains. Where no policy action is taken, the **costs** derived from the continued coexistence of ISDS and ICS will have a considerable impact on the EU budget (for the ICS) and on EU Member States budgets (for the remaining ISDS mechanisms). Whilst the costs of these mechanisms are significantly driven by the number of actual cases, it is estimated based on an assumption of two cases per ICS<sup>61</sup> and on an average over recent years (1997 to 2015)

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<sup>61</sup> For purposes of the calculation of the costs, and given the impossibility to anticipate how many disputes will on average the ICS have to hear, it has been assumed that one case before each instance (i.e. a total of two cases) is a reasonable scenario. This scenario is consistently used throughout this report.

of ISDS cases<sup>62</sup> that the impact on the EU and EU Member States budget of policy option 1 would amount to around EUR 9 million.<sup>63</sup>

In addition, the baseline scenario will require **high human and financial resources** to manage an increasing number of ICS with limited coordination across them.

As the reform being analysed here is the reform of the procedural elements of the dispute settlement system, not a reform of the substantive provisions, no further impacts (e.g. environmental and social impacts) are expected. It is only with regard to the substantive provisions that one can have a debate on such potential impacts.

## 5.2 Impacts of policy option 5

This option foresees that the EU works with other interested third countries toward the creation and establishment of a permanent multilateral investment court.

As stated in Chapter 4, there are a number of features that present sub-options to be discussed in future multilateral negotiations. In contrast, there are other features that form an inherent part of the policy option and for which there are no alternatives. These include the permanent nature and remuneration of adjudicators and the existence of an Appeal Tribunal. Both types of features, including their sub-options when relevant are analysed in this chapter.

### 5.2.1 Composition of the court

#### *Number of adjudicators of the first level tribunal and appeal tribunal*

The Court would be composed of a First Instance Tribunal and an Appeal Tribunal. The first level Tribunal would examine the legal submissions and evidence, conduct an analysis and render a decision, while the Appeal Tribunal would hear cases on appeal.

As highlighted in the problem definition the establishment of an appeal mechanism is necessary to ensure legal correctness of decisions to the benefit of both governments and investors. Moreover, an appeal instance would promote **consistency** of case-law, in turn enhancing **predictability**.<sup>64</sup> The majority of responses to the public consultation were in favour of setting up an Appeal. It was supported in particular by NGOs and part of the business sector.

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<sup>62</sup> The averages are of course variable. Some years have seen peaks in cases.

<sup>63</sup> This figure results from the sum of around EUR 8.5 million as cost of 11 ICSs for the EU (this assumes that all of the active negotiations reach satisfactory conclusions given the EU's objectives) and under EUR 135,000 for the cost of the remaining ISDS mechanisms for the EU and EU Member States. For the time being, it is assumed that the EU would bear the total cost of ICS in EU agreements. These figures do not include the costs of legal counsel, but only the specific costs of arbitration. For the calculations and reasoning, refer to the Annex 4.

<sup>64</sup> Katia Yannaca-Small, "Improving the System of Investor-State Dispute Settlement" OECD Working Papers on International Investment, 2006/01, OECD Publishing, Paris (2006). Available at: <http://dx.doi.org/10.1787/631230863687>.

Concerning the number of adjudicators under the two tribunals, two main alternatives are available:

- (i) Number **linked to the number of Contracting Parties**; or
- (ii) Number **linked to the volume of cases**.

(i) This sub-option is often used in international courts to ensure that there is at least one adjudicator from each Contracting Party. However, it means that less suitable candidates may become adjudicators (since origin may be prioritised over qualifications or competences). In addition, the number of adjudicators appointed might be too high unless there is a corresponding number of cases. Such a scenario risks leading to inefficiencies.

(ii) This sub-option would be more in line with the objective of **efficiency**. Considering that the number of Contracting Parties to the multilateral Court is unknown but would be expected to grow over time, the number of adjudicators should be flexible enough to adapt to the workload. This is the approach favoured by most recently established international courts (such as the International Criminal Court (ICC) and ITLOS). In fact, most responses to the public consultation argued that the number of adjudicators should be tailored to the number of cases.<sup>65</sup>

In terms of impacts, the estimated cost for the (fixed) remuneration of one adjudicator is around EUR 285,000 per year on the basis of the average annual remuneration level of judges in international courts and tribunals. It is impossible to be certain at the time of writing on the number of adjudicators but on the basis of a reasonable estimate (nine adjudicators at First Instance, five on appeal) the remuneration of adjudicators under the multilateral court is estimated to cost almost EUR 4 million per year (i.e. around EUR 2.5 million for the First Instance plus around EUR 1.5 million for the Appeal Tribunal).<sup>66</sup>

Regarding the number of adjudicators, it is likely that this figure would be lower if it were tailored to the effective workload, which would result in overall lower **costs** for the EU and indeed all participants. This sub-option would be more advantageous for the EU budget as well for the budgets of Member States (see details about cost estimation in Annex 4).

Regarding the achievement of other objectives, there is no difference between the two sub-options. Besides financial costs, there are no other (**economic, social or environmental**) **impacts** on any of the two sub-options. Tailoring the number of adjudicators in the First Instance and Appeal tribunals to the volume of cases would therefore appear to be the most efficient option although this would of course depend on the outcome of negotiations and of the future Court's overall structure.

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<sup>65</sup> In addition, stakeholders from different backgrounds considered important that certain additional considerations (such as representativeness of world legal systems among others) be taken into account.

<sup>66</sup> For calculation see Annex 4.

### Terms of mandate

Adjudicators should be appointed for a fixed period of time (i.e. permanent) as opposed to ad hoc (i.e. on a case-by case basis, as is the case under the current system). Indeed, permanent appointments (and remuneration) for a certain period of time would address the concerns regarding **impartiality** and **independence** of investment dispute resolution.<sup>67</sup> Academics stressed the importance of independence and impartiality of adjudicators through a secure tenure and fixed salaries.

Adjudicators appointed on a permanent basis would ensure that legal proceedings around investment follow procedures that are in line with Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights, according to which "*everyone is entitled to a fair hearing by an independent and impartial tribunal previously established by law*".<sup>68</sup>

Various sub-options are possible regarding adjudicators' terms of mandate.<sup>69</sup> Two main alternatives appear available:

- (i) **Long and non-renewable** mandate;
- (ii) **Long or short** mandate **renewable** (once).

(i) A long and non-renewable mandate, where adjudicators cannot be reappointed, would be most consistent with the goal of **independence**, inasmuch as adjudicators would carry out their functions knowing that, regardless of their decisions, they will not be re-appointed. Long mandates would lead to fewer appointment procedures (i.e. happening less often) and the associated administrative burdens.

(ii) Whether longer or shorter, renewable mandates allow the Parties to dispose of ineffective adjudicators after the end of their first mandate and to ensure that particularly effective or experienced ones serve for a longer period (i.e. for a second

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<sup>67</sup> The idea of permanent appointments was widely supported by stakeholders in the public consultation. NGOs in particular strongly support this feature on grounds that it would minimise exposure to conflicts of interests. On the other hand, certain stakeholders raised the idea of a system of semi-permanent judges, similar to WTO panels. However, the system of party-appointment of arbitrators, by its very nature, can generate an interest in future appointments, which runs counter to the objective of independence and enhanced safeguards for independence of adjudicators. For references to such arguments, see David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris (2012) <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, p. 47.

<sup>68</sup> Article 6 ECHR, available at: [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) and Article 47 of the Charter, available at: <http://fra.europa.eu/en/charterpedia/article/47-right-effective-remedy-and-fair-trial>.

<sup>69</sup> In some international courts, where adjudicators are appointed for a fixed period of time, their mandate can be renewed once (ICJ: 9 years renewable once; CJEU: 6 years renewable once; WTO Appellate Body: 4 years renewable once), although others provide for longer and non-renewable mandates (ECtHR: 9 years non-renewable mandate).

term). Certain stakeholders from the business sector expressed scepticism for renewable mandates, which they believe may cause bias in adjudicators' decision making. Indeed, this option would be less in line with the objective of the furtherance of the independence of the adjudicative system because adjudicators may act guided by their desire to be re-appointed.

Opting for a long and non-renewable mandate would be the best guarantee for **independence** of adjudicators in line with **the right to an effective remedy before an independent tribunal**. This option would also imply a **lower administrative burden** for the appointing authorities. Subject to the outcome of negotiations and of the overall structure of the future Court, it is therefore the preferred option.

#### Employment status and remuneration of adjudicators

Two broad alternatives are available in terms of status and remuneration of adjudicators:

- (i) Adjudicators could work **full-time**, be **employed by the Court** and receive a **fixed salary**; or
- (ii) Adjudicators could work **part-time**, be **self-employed** and receive monthly or daily **fees for service**.

(i) Full-time adjudicators with secure tenure and fixed remuneration would not be exposed to conflict of interests, hence enhancing their **independence** and **impartiality**. For these reasons this option received the most support among respondents to the public consultation, in particular from NGOs. Legal practitioners and academics were also in favour of full-time adjudicators. However, legal practitioners raised concerns that full-time adjudicators could be under-utilised yet unable to accept any other position in case that would be prohibited. On the other hand, this option might be relatively costly, require higher administrative resources and not be the most efficient if only a few cases are submitted to the Court. It is estimated that a full-time adjudicator, employed by the Court and receiving a fixed salary would cost, around EUR 285,000 per year (see Annex 4).

(ii) This second option complies less with the objective of independence and impartiality of the system given that the adjudicators could be exposed to conflicts of interests because of their other occupations. Possible conflicts of interest would therefore have to be managed through the ethics regime in the code of conduct. A number of respondents to the public consultation were of the opinion that part-time adjudicators would ensure expertise in the particular matter under dispute (e.g. energy). However, in reality most disputes (whether in the investment field or trade more generally) are not decided by specialists in the particular sector but by generalist arbitrators and panellists.<sup>70</sup> Moreover, adjudicators could rely upon experts provided by the parties or appointed by the Tribunal to analyse any given matter.

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<sup>70</sup> An example of this is the WTO dispute concerning hormone treated beef where the panellists were not scientists but relied upon the advice of scientists in examining the matters before them.

Compared to full-time adjudicators, part-time self-employed adjudicators would be less costly<sup>71</sup> (and may be more efficient when only few cases are submitted to the Court, which can be the situation in particular at the beginning of the functioning of the Court). In this sense, a number of stakeholders submitted that adjudicators should be part-time at the beginning, when the Court would have fewer cases to decide on, and become full-time and employed by the Court once the workload so demanded. This approach, which has been used in other courts (such as the European Court of Human Rights – ECtHR), might help ensure that high quality individuals be attracted to sit on the Court.

However, part-time self-employed adjudicators would not be the preferred approach, since it would address the issues of conflicts and of **legitimacy** to a lesser extent. Regarding the achievement of other objectives, in particular **permanence, transparency, predictability** and **consistency** there are no differences between the two options.

There are no **economic, social and environmental impacts** of the two options besides the costs related to the remuneration of adjudicators. However, the option of permanent adjudicators is more consistent with the **right to an effective remedy before an independent tribunal** (Article 6 ECHR and Article 47 of the Charter).

Despite the higher costs and administrative burden, the option that adjudicators be employed by the Court, receive a fixed salary and be entitled to benefits (e.g. health insurance and pensions) is the preferred option because it brings a higher level of **independence** and impartiality. However, the option that adjudicators be part-time before becoming full-time should not be excluded provided that possible conflicts of interest are effectively managed through the code of conduct.

### Qualifications

Adjudicators would have to meet high qualification criteria to sit on the Court in order to ensure the quality of justice. This was supported by an overwhelming majority of respondents to the public consultation, who stressed the relevance of high qualification requirements for the future development of the Court, its case-law and reputation.

Two approaches seem possible regarding the qualification criteria:

- (i) Criteria defined in **broader terms**; or
- (ii) Expertise in more **specific areas** required.

(i) Most existing international courts require qualifications identical or very similar to those required for the ICJ, the Statue of which states that "*[t]he Court shall be composed of a body of [...] judges, [...], who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are*

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<sup>71</sup> Since the actual level of fees has not been agreed and estimating the number of days adjudicators will work would be highly speculative, the calculation of a fee-based remuneration system for adjudicators is not carried out. It is likely that, a fee-based remuneration system alone would cost less than a fixed remuneration system. See Annex 4.

*jurisconsults of recognized competence in international law*".<sup>72</sup> Broadly defined criteria would ensure a **consistent** approach to dispute resolution across cases and contribute to **predictability** of case-law. A majority of stakeholders supported this sub-option and representatives of the business community in particular indicated that adjudicators should be highly qualified in areas of public law such as investment law, constitutional law and economic matters.

(ii) Qualification requirements could also be formulated in more specific terms, for instance, requiring that adjudicators have expertise in trade law, intellectual property and economics, experience in arbitration and mediation, background in the field of human rights, environmental, social and health law as well as domestic law. However, this approach risks excluding good candidates from the Court. NGOs and consumer associations argued that adjudicators should have expertise in specific areas of law, while certain business stakeholders expressed concerns that overly high qualifications could politicise procedures.

High qualification criteria are necessary to ensure **legitimacy** and **independence** of adjudicators, as well as **consistency and predictability** in the functioning of the Court. They are also essential to ensure that **the right to a fair hearing** is effectively observed. Neither of these options will produce any **environmental** impacts. These options would also not produce any **economic** impacts. However, overly strict requirements would have negative **social** impacts on a reduced group of persons, i.e. the pool of candidates who would otherwise be eligible. Defining qualification criteria according to broader terms would appear preferable, although the most important criterion for the functioning of the system is having highly effective adjudicators.

### Ethics

Like international and domestic courts, the multilateral Court would need to function on the basis of certain ethical rules to ensure the independence of its adjudicators and prevent conflicts of interest.

International courts have similar approaches to ethical requirements based on those of the ICJ, which stipulates that "[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character [...]".<sup>73</sup> The independence requirement (i.e. that adjudicators not be affected by other government branches) is part of all models of international courts and should certainly be included in a potential multilateral investment Court.<sup>74</sup> Impartiality (i.e. that

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<sup>72</sup> Article 2 of the Statute of the ICJ.

<sup>73</sup> Article 2 of the Statute of the ICJ.

<sup>74</sup> ECtHR: "During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office". ICJ: "No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. No member of the Court may act as agent, counsel, or advocate in any case. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a

adjudicators treat all parties equally and not be biased) is also deemed key. Inclusion of these two requirements is supported by a majority of responses to the public consultation. Some stakeholders, especially from academia and the legal sector, also raised the possibility that adjudicators be removed in case of breach of their obligations of independence.

There are different sub-options with regards to the regime of incompatibilities of adjudicators, in other words whether they should be precluded to exercise:

- (i) **Any other professional activity;** or
- (ii) **Only legal activities related to other investment disputes.**

(i) A broad regime of incompatibilities encompassing any professional activity would be fully aligned with the objective of **independence** and impartiality of adjudicators, although it may be **less efficient** in that it may discourage good candidates from taking office particularly at the beginning of the operation of the Court. A number of academics and NGOs were specifically in favour of this sub-option.

(ii) Under the second sub-option, adjudicators would only be precluded from exercising certain activities carrying a high risk of bias (such as having a role in other investment disputes). This approach would achieve less satisfactory results in terms of **independence** and impartiality of adjudicators, inasmuch as it might expose them to potential conflicts of interest. It would however be **efficient**, in that it would not risk discouraging good candidates (although the question of encouragement would derive also from other factors). Most respondents from the business sector went even further and supported that adjudicators should be able to work as professional lawyers and academics, which would bring in valuable knowledge and competencies. However, allowing adjudicators to work as lawyers would expose them to undue conflicts, as was submitted by a number of NGOs and consumer associations. Certain respondents from universities believed that adjudicators should nonetheless be able to work as academics, which seems less likely to expose them to conflicts.

Setting out high ethical standards and safeguards would be consistent with the **right to an independent adjudicator**. The regime of incompatibilities should be sufficiently strict to effectively prevent conflicts of interest, although it should not result in driving away good potential candidates to serve as adjudicators. This issue is also related to whether adjudicators are employed full time. An overly strict regime of incompatibilities may have a certain **social** impact on the professional opportunities of the potential candidates to serve as adjudicators. Neither sub-option would produce any **environmental or economic impact**. The first option would be the preferred option, consistent with other international courts where the adjudicators are full time.

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*commission of enquiry, or in any other capacity." ITLOS: "1. No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed. 2. No member of the Tribunal may act as agent, counsel or advocate in any case".*

## 5.2.2 Procedural aspects

### Appointment of adjudicators

Adjudicators need to be appointed to form part of a pool of adjudicators serving under the Court, who will later be allocated to hear specific cases.

Different systems for the appointment of adjudicators can be envisaged:

- (i) **Directly** by the **Contracting Parties** (i.e. States);
- (ii) By a **separate body composed by Contracting Parties and other stakeholders**; or
- (iii) By an **independent body**.

Although the first and second sub-options have been traditionally favoured in international courts and tribunals,<sup>75</sup> there is a recent trend to move towards models like the third sub-option.<sup>76</sup>

(i) Allowing the states party to the agreement to directly appoint adjudicators is the sub-option that disincentivises the most any bias in favour of investors. A large number of respondents to the public consultation submitted that the Contracting Parties should appoint adjudicators. However, this sub-option is seen by some as not contributing significantly to the **independence** of adjudicators, on the argument that the appointment process could be subject to undue influence from other government branches.

(ii) A different sub-option would be to appoint adjudicators through a separate body where other stakeholders groups such as investors<sup>77</sup> were represented in addition to the Contracting Parties. By allowing broader groups of stakeholders (i.e. potential plaintiffs in addition to respondents) to be involved in the appointment of adjudicators, this possibility would bring a higher degree of **legitimacy** and **independence** to the Court and its adjudicators.

(iii) Under this sub-option, an independent body where neither Contracting Parties nor investors would be represented would have a key role in the appointment or screening of adjudicators. It could be made up, for example, of senior serving or former judges or senior academics (as is the case of the Article 255 Committee established for the CJEU and the practice of national councils for the judiciary in Member States). This approach would ensure the highest degree of depoliticisation and hence of **legitimacy and independence**, since no potential disputing party would be involved in the appointment.

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<sup>75</sup> Judges are nominated directly by Contracting States in the ITLOS and by “National Groups” in the ICJ. Subsequently, judges are selected by vote (ITLOS), common accord (CJEU) or by consensus (WTO AB) of the Contracting States or by the UN General Assembly and Security Council for the ICJ.

<sup>76</sup> In the case of the Caribbean Court of Justice, judges are nominated and selected by an independent body, namely the Regional Judicial and Legal Services Commission (RJLSC).

<sup>77</sup> The modalities to identify the groups are not specified at this stage.

However, this may be politically difficult to achieve, since countries might want to have a say in the appointment of adjudicators. This was the sub-option most favoured by NGOs.

Subject to the outcome of multilateral negotiations, the third sub-option would be the preferred approach since it would bring the highest degree of **independence and legitimacy** and be most consistent with the logic behind Article 6 ECHR and Article 47 of the Charter on the **right to an effective remedy before an independent tribunal**. The exact details would however largely depend on how exactly the procedure was designed and how this would interact with the initial nomination.

### Case allocation

Cases arriving to the Court would need to be allocated to adjudicators of the Court for deciding on their merit. Two main alternatives are available:

- (i) According to **objective criteria (i.e. random allocation)**; or
- (ii) Allowing **the disputing parties to intervene**.

(i) Allocation of cases without the involvement of disputing parties is the principle before international and domestic courts.<sup>78</sup> In fact, most respondents to the public consultation strongly support the idea of an allocation of adjudicators not involving the disputing parties and consider it a necessary safeguard to ensure the independence of adjudicators. Academics stressed that random allocation would be in line with the aim of increasing **independence and legitimacy** of the adjudicative body.

(ii) Conversely, allowing the disputing parties to have a say would run counter to the goal of moving the resolution of investment disputes onto a basis that is more legitimate, independent and impartial. Certain business stakeholders indicated that by randomly allocating cases, valuable expertise could be lost. However, specific expertise can always be brought in through experts, as is the case in most international and domestic courts, where trained generalist judges handle cases with specific expertise as necessary. In addition, a number of respondents from the legal sector and partly from the business sector considered it important that adjudicators not hear cases against their own home states.

Random allocation of cases would increase adjudicators' **independence** and impartiality and improve the system's **legitimacy**, in compliance with the right to **an effective remedy before an independent and impartial tribunal**. The two sub-options would not have any **economic, social or environmental impacts**. Random allocation of cases is therefore the preferred option.

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<sup>78</sup> Judges of the ICJ are allocated to a specific case by decision of the Court; in other courts they are distributed by lot drawing from a list (Iran-US Claims Tribunal) or cases are allocated to chambers (CJEU, ECtHR); while a system of rotation is provided for members of the WTO Appellate Body.

### Scope of appeal

At a minimum it should be possible to appeal a decision issued at First Instance in the event of procedural errors and substantial errors of law. This is in line with the practice of domestic and some international tribunals (particularly those where a first request for judicial review goes to part of the same court structure) and contributes to the system's **legitimacy** and adjudicators' **independence**, as well as to **consistency and predictability of case law**.

In addition to the procedure and the law, it could be argued that the appeal should also carry out a certain examination of the facts. In this sense, the Appeal Tribunal could conduct:

- (i) A **complete fresh analysis of the facts**; or
- (ii) An analysis limited to check **manifest errors in the appreciation of facts**.

(i) Allowing for a complete fresh analysis of the facts would be burdensome since it would amount to relitigating the case and have a negative impact on the **efficiency** of the Court system because it would be equal to a second analysis of the case. Since this would translate in additional workload, this sub-option would increase the **costs** of the Court and of the secretariat, which would have to be borne by the budgets of the EU and its Member States, as well as other Contracting Parties. This sub-option could also extend litigation proceedings and increase the **costs** for the disputing parties (i.e. legal advice and preparation of the facts).

(ii) The second alternative would give the possibility of review and correction of errors of fact made by the First Instance Tribunal that are manifestly wrong. This approach strikes a good balance between the need of having an **efficient** dispute settlement system and reasonable administrative and budgetary burden for the Contracting Parties. It would not increase the length of proceedings and/or **costs** for disputing parties dramatically. It would therefore not impact all parties' **access to justice** and to a **fair trial**. A number of stakeholders from the business sector supported the appeals both on legal and factual grounds. Some respondents from the legal sector had reservations on the possibility of the review of questions of fact and indicated that the grounds of appeal should be clearly defined in order to prevent any abuses.

The second sub-option, which favours an appeal in cases of manifest errors in the appreciation of facts (in addition to procedural errors and substantial errors of law) is the preferred approach inasmuch as it ensures the right **to an effective remedy** without requiring a high budgetary or administrative burden for the Contracting Parties and disputing parties. It therefore brings **efficiency**. It secures the objectives of having an appeal that provides for **consistency and predictability of case-law** and secures legal

correctness of decisions but limits the necessary resources by circumscribing the cases where a factual review can be conducted.<sup>79</sup>

### 5.2.3 Institutional aspects

#### Secretariat

Adjudicators and the Court will need secretarial support. It can be expected to cover legal analysis to assist them in their substantive work, registrar services to manage the flow of cases and general administrative tasks.

Two sub-options exist with regards to the provision of such support:

- (i) Creating a **self-standing secretariat**; or
- (ii) Housing **that secretariat in an existing organisation**.

(i) The main advantage of setting up a new secretariat and employing new staff would be not being obliged to fit the new system into an existing one. However, this sub-option would be more **costly**. It is estimated that it would cost under EUR 6 million per year (see Annex 4). It would also be more burdensome to set up, since the whole system, including staff regulations for the employees, would need to be designed anew.

(ii) The second alternative would have lower **cost implications**<sup>80</sup> and be more **efficient** because the Court would rely on the expertise and experience of an existing organisation. The issue of which organisation could host the Court's secretariat would have to be decided through a careful examination of which organisations are willing to do so and some key aspects such as their existing membership, voting rules and public perception. In any event, such a scenario could only exist if the existing organisation takes the decisions to permit this to happen. This may be possible, but is impossible to determine at this stage.

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<sup>79</sup> The issue of enforcement does not directly relate to any of the problems identified above, but it will have to be addressed when establishing the Court. Presently, arbitral awards are mostly enforced through the 1966 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The ICSID Convention provides for the enforcement of the award without review at domestic level in any country party to the ICSID Convention. Except for the limited possibilities of annulment, awards are final and parties may not seek another remedy before another tribunal. The domestic court is therefore limited to verifying that the award is authentic. Conversely, awards rendered under the New York Convention can be subject to review at domestic level but no annulment is available. Under the multilateral Court, it would be overall most efficient to rely on an existing framework, considering that no new system would have to be designed and a significant administrative burden and costs would therefore be saved for the EU and its Member States. The model of the ICSID Convention without domestic review would bring added consistency and predictability to the system. By not allowing for unnecessary additional litigation opportunities, it would ensure the right to a fair process and independence.

<sup>80</sup> Since the actual level of fees has not been agreed and estimating the number of days staff will work would be highly speculative, the calculation of a fee-based remuneration system for staff was not carried out. Undoubtedly, a fee-based remuneration system alone would cost less than a fixed remuneration system. See Annex 4.

In terms of impacts, creating a self-standing secretariat would entail higher **financial implications**. It would have a positive impact on **global governance** to the extent that specific expertise would be developed without borrowing it (from other organisations) and would also ensure the complete **independence** of the staff, which would increase the Court's **legitimacy**. None of the sub-options would have any **environmental or social** impacts besides the effect on employment of potential staff of the new self-standing secretariat and the staff of the current institutions, the extent of which is however difficult to estimate at this stage. The first alternative seems preferable, despite higher costs, because it can better achieve the objectives. However, in the event that existing organisations offered to host the Court's secretariat, such opportunities should be nonetheless considered.

#### *Mechanism to be part of the multilateral Court*

It is expected that the membership of the Court grows over time. Therefore a mechanism must be in place to accommodate a growing number of members and of treaties under its scope. Because this issue will only arise with the creation of the Court, it does not directly relate to any of the problems of the current scenario. It is however examined here due to the interest it gathered among stakeholders and the fact that it will be an issue to be addressed in the negotiations.

Two sub-options are available regarding the mechanism to become part of the Court:

- (i) An **opt-in system**; or
- (ii) **Re-negotiating and/or amending each treaty**.

(i) Through an opt-in system, countries would agree in the legal instrument (e.g. convention) establishing the multilateral Court to subject their investment treaties to the jurisdiction of the Court. The Court would then supersede ISDS or ICS provisions in investment treaties of the EU and EU Member States with third countries or between third countries. This mechanism would be highly **efficient** in that it would discharge states from the potentially complex and lengthy processes of re-negotiating the underlying investment treaties to amend their dispute settlement rules to submit them to the jurisdiction of the Court.

There are important precedents of mechanisms of this type, such as the United Nations Mauritius Convention on Transparency for Investor-State Dispute Settlement<sup>81</sup> and the

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<sup>81</sup> The Mauritius Convention on Transparency extends the scope of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (which ensure transparency and public accessibility to treaty-based ISDS proceedings) to investment treaties concluded before 1 April 2014. The Mauritius Convention therefore makes it possible for states (and organisations like the EU) to agree to apply the UNCITRAL Transparency Rules in their investment treaties that are already in effect. For countries who decide to sign it, the Convention would apply automatically to all their treaties, unless the country specifically lists investment agreements where it does not want the Transparency Rules to apply. The Mauritius Convention on Transparency is set to enter into force on 18 October 2017, following the three necessary ratifications (from Mauritius, Canada and Switzerland).

OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.<sup>82</sup>

An opt-in mechanism would allow submitting existing and future investment treaties to the jurisdiction of the Court.<sup>83 84</sup> It would bring a certain degree of flexibility to the system which would need to be balanced with objectives such as **consistency of case-law**.<sup>85</sup> This approach would bring **permanency** and **transparency** to the system, since all agreements under the scope of the Court would be referred to in the Convention establishing the Court.

Half of respondents to the public consultation<sup>86</sup> considered it important that the Court be competent to adjudicate disputes arising under existing and future investment treaties. National business groups argued in favour of a mechanism that effectively aligns dispute settlement in all investment treaties and large environmental platforms specifically noted that an opt-in system would be the best way forward. However, certain other business groups suggested that an opt-in mechanism would entail a potentially long transition period with a certain level of fragmentation until the Court has completely replaced ISDS. Although it is true that such period could entail **financial and administrative resources** for states that have opted-in to the Court but continue to be challenged before ISDS tribunals, such risks would be transitional and would be lessened over time.

(ii) A second approach could be to re-negotiate or amend each investment treaty that is to be brought under the jurisdiction of the Court. For the reasons set out above, this

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<sup>82</sup> This Convention is one of the outcomes of the OECD/G20 Project to tackle Base Erosion and Profit Shifting (BEPS Project). It aims implementing at a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises. In order to transpose those measures into the more than 2000 relevant tax treaties worldwide, countries will opt-in to the multilateral convention, set to be signed in June 2017.

<sup>83</sup> Gabrielle Kaufmann-Kohler and Michele Potestà; "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap"; CIDS – Geneva Centre for International Dispute Settlement; 2016.

<sup>84</sup> It would be important to foresee the different scenarios where in practice the multilateral court would be competent to hear a case, e.g. to allow it only where both the host state and the investor's state have opted-in to the court, or catering for instances where only one or none of them have but agree to on an ad hoc basis. In addition, it may be worth considering the possibility to allow for states to record reservations and/or declarations to tailor their level of involvement to the multilateral court. Reservations could entail excluding specific investment agreements from the scope of the court; and declarations whether the multilateral court would apply exclusively or alternatively with respect to ISDS.

<sup>85</sup> Treaty law issues connected to the relationship between the opt-in Convention and the existing investment treaties would also have to be considered, inasmuch as they will co-exist. Consideration should be given to whether the opt-in Convention is to be regarded as an amendment to existing investment treaties or as a subsequent treaty with the same subject matter, which seems more appropriate. The choice is important in terms of applicability of treaty law rules.

<sup>86</sup> 50% of respondents to the public consultation with an opinion on the matter consider it important that the court be able to hear cases under existing and future investment treaties.

approach would be **inefficient** (large resources needed) and run counter to the objective of **predictability** (since the outcome of negotiation for each treaty would be uncertain). It would not necessarily be **transparent** (in the sense of easily available) since the results of potentially many different negotiations would have to be examined.

An opt-in mechanism allowing to replace all existing treaties at once would be **efficient** and have lower **cost impacts** than the potentially complex and lengthy processes of re-negotiating the totality of underlying investment treaties to amend their dispute settlement rules. This approach would also contribute more to the objective of **transparency** and would give enhanced **predictability** to future agreements (e.g. between parties that have already signed up to the convention establishing the Court). It is therefore the preferred sub-option.

### Support to SMEs

The current system poses accessibility problems for companies with a smaller size or turnover. Concerning SMEs, two sub-options could be envisaged:

- (i) To create **specific measures** to ensure access to the Court for SMEs such as simplified procedural rules or the waiving of certain costs; or
- (ii) **Not to create any specific procedure** for SMEs.

(i) Having specific assistance in place for SMEs would ensure that the high costs of litigation do not prevent any investor from resorting to an effective dispute settlement system. In this sense, it would contribute to the goal of **efficiency** and to ensuring an **effective remedy**.

A number of support measures could be envisaged for SMEs. Although stakeholders did not show an overwhelming support for special rules for SMEs, those in favour put forward a number of ideas including legal assistance, simplified proceedings (stricter deadlines and/or limited document production) and incentivised use of alternative methods of dispute resolution. More specific proposals include allowing cases to be heard by one sole adjudicator, the possibility to conduct proceedings online or via teleconference and to allow for flexible hearing locations. The idea of setting up an Advisory Centre for SMEs funded partly by the EU and partly by users of the Court, and providing for legal advice and possibly for financial support, has also been raised. More broadly, the idea has been flagged that any support granted to developing countries should also be extended to SMEs. In addition, respondents representing SMEs submitted that a holistic approach rather than specific measures would be necessary to ensure that smaller investors enjoy full access to the multilateral investment court. These possibilities are not analysed individually since that would require making an overly large number of assumptions.

On the downside, this approach meets political difficulties such as agreeing on a definition of SMEs and that the Contracting Parties agree to bear the costs of any such

assistance. This sub-option would therefore have **financial implications** for the EU and its Member States.<sup>87</sup>

(ii) A different approach would be not to grant any additional assistance to SMEs, considering inter alia that the size of the disputants is not necessarily related to the importance, significance or difficulty of such case. Bigger businesses consider that enhanced support for SMEs risks creating categories within investors and that simplified procedures should apply according to the size of the claim instead.

Still, not assisting SMEs may result in smaller businesses being unable to utilise the protection laid down in the agreements even in cases of blatant violations of investment protection due to the high costs and complexities associated with litigation. This second approach would have less **financial implications** for the EU and its Member States, but compromise **access to justice** of smaller companies.

Securing SMEs access to the multilateral system according to the first sub-option would be more costly for the EU, but such costs would be outweighed by positive implications on the **EU's economy** and **competitiveness** (since 99% of EU companies are SMEs).<sup>88</sup> The first approach should therefore be further explored.

#### Support to developing countries

A criticism commonly made in relation to ISDS is that it puts developing countries and least-developed countries at a disadvantageous position vis-à-vis investors, as the former do not always have the budget and/or the expertise to effectively defend themselves in arbitration proceedings.

The question in relation to developing countries is whether:

- (i) There should be a **more favourable system** of support to developing countries to ensure access to the multilateral investment Court; or
- (ii) There should be **no specific procedures** for developing countries.

(i) Ensuring that the Court caters for the special needs of these countries would contribute to making the system more **legitimate**. Although it is not possible to estimate the costs at this stage, it would be more **costly** for developed countries. The benefits would in all likelihood however outweigh costs.

A majority<sup>89</sup> of respondents to the public consultation agreed that discussions should cover the issue of special assistance to developing countries. Of them, a good number

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<sup>87</sup> The costs related to special assistance for SMEs have not been calculated in Annex 4 as large number of assumptions would have to be made for the different possibilities.

<sup>88</sup> European Commission, DG GROW (2017).

<sup>89</sup> 60.9% of respondents to the public consultation with an opinion on the matter support that negotiations cover the issue of special assistance to developing countries. It is notable however that more than one third of overall respondents did not express an opinion.

suggested that support to developing countries should materialise before disputes arise, for example through training to government officials (dialogues, knowledge transfer and exchange of best practices) or development aid. A smaller number instead deem it preferable that assistance takes the form of legal advice during disputes and/or financial aid to cover the litigation costs. The idea that there should be a special structure of costs for developing countries was also flagged.

Based on the model of the Advisory Centre for WTO Law (ACWL), an advisory centre to provide legal advice and training to developing and least-developed countries could be set up.<sup>90</sup> The ACWL precedent was considered a relatively useful precedent by a number of stakeholders.<sup>91</sup> Interestingly, a parallel idea was discussed at the OECD a decade ago.<sup>92</sup>

Indeed, support could take different forms. These possibilities are not analysed individually since that would require making an overly large number of assumptions.

(ii) A number of respondents representing business platforms submitted that the existing mechanisms to support developing countries are sufficient and that no additional assistance is needed. While it is true that most if not all states allocate budget lines to dispute settlement, many of them are affected by financial and human resource constraints that do not affect developed countries. Mechanisms allowing for assistance seem therefore to be worth exploring.

Facilitating access for developing countries to the multilateral system (or failing to do so) will have important implications on the inclusiveness of the multilateral project. A system of support for developing and least-developed countries would ensure an effective **access to justice** for all states in the event that they are sued by a foreign investor, regardless of their size and GDP. Granting some sort of special assistance to developing and least-developed countries would therefore be the preferred approach. The specific features of that assistance will however have to be negotiated.

## 5.2.4 Financial aspects

### *Allocation of costs among members*

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<sup>90</sup> The Advisory Centre for WTO Law (ACWL) provides developing and least-developed countries legal advice on all procedural and substantive issues arising under WTO law, support at all stages of WTO dispute settlement and training on topical issues of interest of WTO law.

<sup>91</sup> In any event, the ACWL experience would not be directly transferrable to a parallel Centre under the multilateral investment Court mainly due to the very distinct nature of disputes at stake (the ACWL works on state-to-state disputes and in both offensive and defensive standpoints).

<sup>92</sup> The idea was put forward that, in order to create a level playing field for developing countries in their disputes against foreign investors, relevant organisations could jointly create an advisory facility to assist developing countries involved in ISDS. The mooted Advisory Facility for Dispute Settlement would be a forum for information and advice on international investment law and arbitration generic issues, technical assistance and capacity building for all countries, with additional support to developing countries.

In order to ensure that the multilateral investment court can fully operate, sufficient financing will have to be provided. Since the Court aims to include countries with different levels of economic development, there are two main possibilities of apportionment of the costs of the Court:

- (i) A system that **reflects the level of development of members**, as operated by different international organisations; or
- (ii) A system that **equally** allocates costs among members.

(i) Allocating costs according to Parties' level of development would be in line with the practice of other international organisations<sup>93</sup> and tribunals such as the WTO,<sup>94</sup> the ECtHR<sup>95</sup> and the ICJ,<sup>96</sup> which have different formulas in place calculating costs according to development-related factors. Other international platforms ensure coverage of costs through a repartition key. For instance, the allocation of costs of the World Bank is based on the International Monetary Fund (IMF) quotas, which take into consideration the development of the country, established on the elements of the national GDP, openness (the annual average of the sum of current payments and current receipts), variability of current receipts and net capital flows; and reserves.<sup>97</sup>

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<sup>93</sup> The UN lists of Developing Countries and Least-Developed Countries are available on the UN website. See considerations on world Economic Situation and prospects ([http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf)) and UN list of Least-Developed Countries ([http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_list.pdf](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf)).

<sup>94</sup> The WTO is financed from the contributions of its member states which are based on the shares of the member states in international trade, considering the trade in goods, services and IP rights in the past five years. Additionally, this method also determines the minimum contribution for member states that has a share in the international trade smaller than the set value. See [https://www.wto.org/english/thewto\\_e/secret\\_e/contrib\\_e.htm](https://www.wto.org/english/thewto_e/secret_e/contrib_e.htm).

<sup>95</sup> The ECtHR is financed from the budget of the Council of Europe, which divides the costs between the member states based on the formula involving national GDP and the annual national population. See: [http://www.echr.coe.int/Documents/Budget\\_ENG.pdf](http://www.echr.coe.int/Documents/Budget_ENG.pdf) and Council of Europe, Committee of Ministers, Resolution (94)31 on the Method of Calculating the Scale of Member States' Contributions to Council of Europe Budget (Adopted by the Committee of Ministers on 4 November 1994 at the 519 bis meeting of the Ministers' Deputies), available at: [http://www.echr.coe.int/Documents/Budget\\_ENG.pdf](http://www.echr.coe.int/Documents/Budget_ENG.pdf).

<sup>96</sup> The expenses of the ICJ are included in the UN budget, which are allocated on the basis of a "scale of assessment" which is annually recalculated. This method takes into consideration Gross National Income and relief measures (debt burden adjustment and low per capita income adjustment) and sets the minimum and maximum contribution that a member shall pay. United Nations, New York, 2015, Report of the International Court of Justice 1 August 2014 – 31 July 2015, available at: [http://www.icj-cij.org/court/en/reports/report\\_2014-2015.pdf](http://www.icj-cij.org/court/en/reports/report_2014-2015.pdf), p.58/61. And United Nations, New York, 2016, Report of the Committee on Contributions Seventy-sixth session (6-24 June 2016), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/71/11](http://www.un.org/ga/search/view_doc.asp?symbol=A/71/11), Chapter III, pp. 8-28. And United Nations, New York, 2015, Report of the Committee on Contributions Seventy-fifth session (1-26 June 2015), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/11](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/11), Chapter III, pp. 9-37.

<sup>97</sup> These figures are rounded. International Monetary Fund: Reform of Quota and Voice in the International Monetary Fund – Report of the Executive Board to the Board of Governors, 28 March 2008, p. 3.

This sub-option would be in line with the principles of fostering **multilateral cooperation and good global governance**. This sub-option would have higher **budgetary implications** for the EU and its Member States, to the extent that they are developed countries and would need to pay higher contributions than other less developed Contracting Parties. The majority of respondents to the public consultation supported the use of a repartition key as a method of allocation of costs among Contracting Parties.

It should be stressed that the exact contribution is almost impossible to estimate since is highly dependent on the design of the system, the number of adjudicators and staff, the number of participants and the formula used for allocation of costs amongst participants, all factors which cannot be determined in advance. It was estimated that if, for example, one was to take the approach of the World Bank contributions, and assuming a membership of 35 Contracting Parties,<sup>98</sup> the impact on the EU and EU Member States' budgets of the policy option of establishing a multilateral investment Court with the preferred features delineated in the paragraphs above would amount to around EUR 2.7 million per year for Member States and to around EUR 2.7 million per year for the EU.

(ii) In contradistinction, although setting up a system that allocates costs among members on the basis of equal shares would be less expensive for the EU and its Member States, it would however be contrary to the practice of main international organisations and courts and would run counter to the general objective of promoting an international system based on **stronger multilateral cooperation and good global governance** as it would make participation of developing and least developed countries in the system too **costly** for their available financial means. Consequently, this system would render the whole Court overall **less efficient**, in that it could hamper access for countries with less means available.

For the EU and its Member States and all developed countries, a system that takes into account countries' level of development would entail additional **costs**. However, these costs would be outweighed in terms of **efficiency**, inclusiveness and global reach of the multilateral project, enhancing **multilateral cooperation and good global governance**.

#### Mixed financing

It would need to be decided who bears the costs of establishing and operating the multilateral Court. The costs of the Court could be covered by:

- (i) **Contracting Parties' contributions exclusively**; or
- (ii) **Contracting Parties' contributions and user fees**;

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<sup>98</sup> 35 Contracting Parties, including the EU, its 28 Member States and six third countries.

(i) Dispute settlement mechanisms between states<sup>99</sup> and dispute settlement mechanisms set up by states for claims by individuals<sup>100</sup> do not generally require a filing fee for claimants. The current ISDS system deviates from this practice and requires claimants to pay their share.<sup>101</sup> Respondents to the public consultation from the legal sector argued that this sub-option seemed overly friendly to investors and could lead to an increased number of manifestly unfounded claims. However, these claims could be discouraged by the application of the "loser pays" principle and dismissed on an expedited basis before they reach the First Instance as already provided for in EU agreements. This would be even more likely when adjudicators are not paid by case and therefore have an interest in case management rather than being appointed to as many cases as possible.

This sub-option would bring added **legitimacy** to the system by limiting financial control of the Court to the Contracting Parties, thereby contributing to approximate investment dispute resolution to international and domestic tribunals. Although it would be more **costly** for states, it may help reduce the upfront costs which may be attractive for more participants.

(ii) A system of user fees could be introduced to cover the costs of the Court in addition to the contributions of Contracting Parties. Such user fees would obviously not be equal to those that apply under the current system, but could be destined to cover specific services like the registrar. This approach would be **less costly** for the EU and Member States' budgets, however it is not possible at this stage to estimate the amount of users' contributions in a meaningful way. A large number of respondents to the public consultation supported that part of the operational costs be at least partly funded by user fees.

Limiting the Court's funding to Contracting Parties would improve the system's **legitimacy**, while requiring users to contribute to the **costs** would relieve EU and Member States budgets to some extent. Both options seem to present pros and cons and, although the first sub-option appears preferable at this stage, it cannot be excluded that a certain system of user fees needs to be introduced. In any event, such fees should not be prohibitive for users, particularly SMEs, turning into a *de facto* barrier to **access**.

## 5.2.4 Overall impacts of policy option 5

The multilateral investment Court would build upon the **principle of the rule of law** (in the sense of ensuring the legitimacy of adjudicators of public matters) by addressing at global level issues raised previously concerning the traditional ISDS system regarding predictability and independence (including impartiality) and legitimacy which are addressed by the ICS but only at bilateral level. First, the multilateral Court would

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<sup>99</sup> ICJ, WTO, Iran-US Claims Tribunal.

<sup>100</sup> CJEU, ECtHR, Inter-American Court of Human Rights.

<sup>101</sup> In ICSID, for instance, the party instituting proceedings must pay a lodging fee, see <https://icsid.worldbank.org/en/Pages/Services/Cost-of-Proceedings.aspx>.

introduce some fundamental features of independence and legitimacy in the field of settlement of international investment disputes, notably by ensuring that the principle of independence, including impartiality, of adjudicators (who would no longer be appointed by the disputing parties to hear specific cases, but appointed *ex ante* and for fixed terms by the Contracting Parties) is absolutely upheld.

Second, the multilateral Court would ensure transparency. Third, differently from the decentralised structure of ISDS and the bilateral nature of ICS, and thanks to the very significant similarity across investment agreements, which essentially contain the same standards of protection,<sup>102</sup> a permanent and multilateral body would enhance legal certainty of the system by improving consistency in decision-making and predictability in the outcomes of cases when the situations so allow.

It is expected that dispute settlement procedures under the multilateral Court would be more expedient than under the current scenario basically due to the fact that procedures would be streamlined and that certain procedural steps that are currently lengthy would be eliminated (i.e. choice of arbitrators). In addition, the higher predictability of case-law would contribute to faster decisions. Shorter procedures should bring cost-savings the value of which is however impossible to quantify at this stage.

In addition, the multilateral investment Court would serve the general objective of promoting an international system based on **stronger multilateral cooperation and good global governance**, inasmuch as it would have to be designed in a manner that secured inclusiveness of all interested countries and ensuring that countries' level of development not be an obstacle to an effective use of the Court.

The multilateral investment Court scenario favours the general goal of **simplification** in EU policy-making. It is intended that once operational, the Court would replace bilateral ICSs that will have been included in EU agreements and any other ISDS mechanisms included in investment treaties of Member States.<sup>103</sup> As regards treaties in force between non EU-countries, such countries will have to decide whether they want to be Parties to the mechanism establishing the Court and thus replace the existing ISDS provisions of their agreements by this new dispute settlement mechanism.

Concerning the **economic impact**, the option of the multilateral Court is expected to have different budgetary implications depending on the sub-options that are eventually retained. The budgetary implications of some of these sub-options (i.e. number of adjudicators, fixed remuneration systems for adjudicators and staff, allocation systems of costs among members and exclusive Contracting Parties' contributions) are estimated to be around EUR 5.4 million for the EU and EU Member States' budgets under the sub-

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<sup>102</sup> For further background, see description on the lack of consistency and predictability problem in Chapter 1.1 above.

<sup>103</sup> The Convention establishing a multilateral investment Court would provide specific rules on replacement mechanisms of ICS and ISDS mechanisms in place with the multilateral Court system and any transitional arrangement where applicable. Costs arising from the functioning of the multilateral Court (as per Annex 4) will be triggered when the Convention establishing the multilateral investment Court enters into force.

options identified as preferred, while the costs of other sub-options (namely, fee-based remuneration systems for adjudicators and staff, special assistance for SMEs and developing countries and user fees) cannot be quantified at this stage.<sup>104</sup>

In addition, better access by SMEs to the Court may result in a higher number of cases, but that cannot be estimated at this stage. Since the multilateral Court initiative only addresses procedural (i.e. dispute settlement) rules and not substantive rules (which are included in the underlying investment agreements), there are no likely economic impacts beyond the costs mentioned above.

No **environmental impacts** are expected to result from the establishment of the Court. Nonetheless, the combination of preferred sub-options coupled with the contribution to the principle of the rule of law, is expected to bring the system more in line with other international and domestic courts, moving it away from ad hoc ISDS. In so doing, the functioning of the multilateral Court would be closer to other areas of public law (safeguarding public interests) instead of being based on commercial law (based on the protection of private interests). As the example of the WTO Appellate Body demonstrates, the permanency associated with such bodies, which creates a concern with the long-term interpretation of the underlying substantive rules provides a better balance between the objectives pursued by international trade and investment agreements (i.e. ensuring freedom to trade and investment whilst respecting the ability of states to regulate to protect e.g. the environment).

Minor **social impacts** have been anticipated regarding the professional opportunities of the arbitrator/judge community in becoming adjudicators under the Court. The same applies to the professional opportunities of potential staff of the Court's secretariat.

## 6. HOW DO THE OPTIONS COMPARE?

This chapter compares the positive and negative impacts of the baseline scenario and of option 5 with its sub-options as identified in the analysis in Chapter 5. The comparison has been conducted according to the criteria of effectiveness in achieving the objectives, efficiency and coherence with overarching EU policy objectives. The analysis has also taken into account the economic, social, environmental, budgetary and administrative impacts as well as impacts on human rights.

### 6.1 Positive and negative effects of the policy options

#### *Option 1: Baseline scenario*

The baseline scenario, where ISDS and the ICS coexist, would only address the problems partially and would only allow the EU to achieve the identified objectives to a limited extent.

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<sup>104</sup> The budgetary impacts of the multilateral investment Court can be reasonably expected to materialise in the context of the next Multiannual Financial Framework (after 2020).

The baseline scenario would have important implications for the EU in terms of the human and financial resources that would be necessary to manage the coexistence of ISDS and ICS. The costs are estimated to be around EUR 9 million for the EU and Member States budgets (see Annex 4). In addition, the baseline scenario runs counter the general goal of simplification in EU-policy making because multiplying bilateral agreements with an ICS without phasing out the ISDS mechanism adds further complexity. The baseline scenario also has an uneven impact on access to fair trial and effective remedy.

*Option 5: Establishment of a multilateral investment court*

Option 5 has the potential to allow for a satisfactory attainment of the policy objectives. The degree of contribution of this option to the specific objectives will be however conditional upon the outcome of multilateral negotiations reflecting the various sub-options that at this stage seem preferable.

Compared to the baseline scenario this option would have a clear positive impact on human rights regarding the right to a fair trial and an effective remedy. It will also alleviate the administrative burden by centralising all disputes under a single set of procedural rules. Regarding the costs for the EU and Member States budgets, it is estimated that the multilateral Court will annually cost around EUR 5.4 million to the EU and Member States.

## **6.2 Summary table of the effects of the different policy options**

The table below summarises the contribution of each option to the general and specific objectives. The baseline scenario is considered to include the coexistence of ISDS and ICS and no distinction is made between the two regimes. The assessment under option 5 is broken down into sub-options as analysed in Chapter 5.

Table 1: Summary of options' contribution to the objectives

			Specific objectives					General objectives		
			Permanency and independence	Predictability and consistency	Appeal	Transparency	Efficiency	Supporting the principle of the rule of law	Promotion of stronger multilateral cooperation and good global governance	Simplification
<b>Option 1: Baseline scenario</b>										
<b>Composition of tribunals</b>			=	=	=	=	=	=	n.a.	-
<b>Procedural aspects</b>			=	=	n.a.	n.a.	=	=	n.a.	n.a.
<b>Institutional aspects</b>			=	=	n.a.	=	-	-	=	-
<b>Financial aspects</b>			n.a.	n.a.	n.a.	n.a.	-	n.a.	n.a.	n.a.
<b>Option 5 : Establishment of a multilateral investment court</b>										
<b>Composition of tribunals</b>	Number of adjudicators	Linked to Contracting Parties	n.a.	n.a.	n.a.	n.a.	-	n.a.	n.a.	n.a.
		Linked to caseload					+			
	Terms of mandate	Long non renewable	+	n.a.	n.a.	n.a.	+	+	n.a.	+
		Renewable	-				-	-		-
	Status and remuneration	Full-time, fixed salary	+	=	n.a.	=	-	+	n.a.	n.a.
		Part-time, fees	-	=		=	+	-		
	Qualifications	Broad requirements	n.a.	+	n.a.	n.a.	+	n.a.	n.a.	+
		Specific requirements		=			=			-
	Ethics	Broad incompatibility regime	+	n.a.	n.a.	n.a.	-	+	n.a.	n.a.
		Narrow incompatibility regime	-				+	+		
<b>Procedural aspects</b>	Appointment	By Contracting Parties	-					-	-	
		By a separate body	+	n.a.	n.a.	n.a.	n.a.	+	+	n.a.

		By an independent body	+					+	+	
	Case allocation	Random	+					+		
		By the disputing parties	-	n.a.	n.a.	n.a.	n.a.	-	n.a.	n.a.
	Scope of appeal	Complete analysis of facts	n.a.	+	+	n.a.	-	+	n.a.	n.a.
		Limited analysis of facts		+	+		+	+		
<b>Institutional aspects</b>	Secretariat	Self-standing	n.a.	n.a.	n.a.	n.a.	-	n.a.	+	n.a.
		Existing organisation					+		=	
	Membership	Opt-in	+	+	n.a.	+	+	n.a.	+	+
		Re-negotiations	-	-		-	-		-	-
	SMEs	Support	n.a.	n.a.	n.a.	n.a.	=	+	n.a.	n.a.
		No support					=	-		
Developing Countries	Support	n.a.	n.a.	n.a.	n.a.	=	+	+	n.a.	
	No support					=	-	=		
<b>Financial aspects</b>	Allocation of costs	Level of development	n.a.	n.a.	n.a.	n.a.	=	n.a.	+	n.a.
		Equal					-		-	
	Mixed financing	Yes	=	n.a.	n.a.	n.a.	=	n.a.	n.a.	n.a.
No		+				=				

Legend:

+	Positive contribution
-	Negative contribution
=	Limited contribution
n.a.	Not applicable

### **6.3 Identification of a preferred policy option**

From the analysis in Chapter 5 as well as from the above table it is evident that the best option to address the problems described in Chapter 1 of this Impact Assessment is option 5 including specific features to secure the highest attainment of the specific objectives linked to this initiative.

In particular, the multilateral Court should include a First Instance and an Appeal Tribunal composed in turn by a certain number of adjudicators to be determined by the effective workload. It would be preferable that adjudicators be appointed for a fixed period of time on a long and non-renewable mandate. Adjudicators would need to meet high qualifications. They would be subject to high ethical requirements and mechanisms should be in place to ensure adjudicators' independence and impartiality, including random allocation of cases and a certain regime to ensure ethical concerns are upheld. They would be ideally appointed by an independent body or an independent body would have a significant role in the selection process.

There are important procedural aspects that would need to be considered. Resort to the Appeal Tribunal should certainly be possible in cases of procedural errors and substantial errors of law in First Instance, and preferably also in cases of manifest errors in the appreciation of facts.

Among the most relevant institutional aspects that would have to be considered, it is clear that the court would need secretarial support, preferably by a self-standing body created anew. It seems that an opt-in mechanism which would not require to re-negotiate existing agreements would be the most legally sound avenue for countries to be part of the Court system and bring their investment treaties under its jurisdiction. Systems to ensure that SMEs and developing countries enjoy effective access to the Court would need to be put in place.

Concerning the financial aspects of the permanent Court, it would have to be decided how to allocate costs among member countries, preferably according to a repartition key that takes into account their level of development, as is common practice across the main existing multilateral courts. The possibility of charging user fees to cover some of the Court services should also be considered. It is estimated that option 5 would cost the EU and Member States around EUR 5.4 million annually, compared to around EUR 9 million of the baseline scenario.<sup>105</sup>

The identification of preferred sub-options above is conducted on the basis of the analysis in Chapter 5 and for purposes of this Impact Assessment. The actual features of the multilateral Court will be subject to negotiations the outcome of which cannot be anticipated at this stage. Negotiations can be expected to cover issues such as available remedies of the multilateral court. In general, older investment agreements are unclear whilst more modern treaties limit the remedies to the option of compensation to repair the damage. Current practice differs

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<sup>105</sup> For the detailed calculations and reasoning, refer to the Annex 4.

across international courts and tribunals,<sup>106</sup> although EU agreements, like most modern investment agreements, only foresee compensation.

Another important issue concerns the enforcement of decisions of the multilateral court. The model of the ICSID Convention without domestic review would bring added consistency and predictability to the system and would be consistent with the idea of a self-contained regime, including an appeal instance. By not allowing for unnecessary additional litigation opportunities, it would ensure the right to a fair process and independence.

## **7. HOW WOULD ACTUAL IMPACTS BE MONITORED AND EVALUATED?**

### **7.1 Operational objectives**

The operational objectives are derived from the specific objectives and take into account the preferred sub-options for the multilateral investment Court as identified in Chapters 5.2 and 6.3. The following operational objectives are identified:

- Ensuring independence (particularly impartiality) of adjudicators;
- Ensuring efficient dispute settlement proceedings;
- Ensuring access to investment dispute settlement for all investors;
- Building up consistent case law including ensuring legally correct decisions;
- Improving transparency.

### **7.2 Future monitoring and evaluation of the functioning of the multilateral investment court**

Since the parameters and functioning of the multilateral investment Court will necessarily depend on the outcome of a multilateral negotiation process, it is difficult at this stage to establish stable monitoring indicators. Also, the Court may have to adjust to a growing membership in the first years.

However, once the Court is operational, regular annual monitoring would be carried out by the European Commission to measure its success rate in reaching the objectives set out in the Impact Assessment. It is also expected that monitoring would be complemented by regular dialogue with EU Member States and EU stakeholders. In addition, the Commission would regularly audit the use of the EU's financial contributions to the costs of the Court.

The table below presents indicators to be used by the European Commission to monitor the progress in achieving the operational objectives. The last two columns, "*Baseline*" and "*Target*", are not considered useful at this stage, as it is not possible to say when the Court would start operating.

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<sup>106</sup> E.g. the WTO Dispute Settlement Body requires countries to bring the relevant measures in line with WTO law; while the ICJ and ITLOS can decide on compensation as well as oblige countries to bring their national laws into compliance with their international obligations.

*Table 2: Indicators to monitor achievement of operational objectives as set out in this Impact Assessment*

<b>Operational objectives</b>	<b>Indicator and unit of measurement</b>	<b>Source of data</b>	<b>Frequency of measurement</b>
Ensuring independence (particularly impartiality) of the adjudicators	- Number of successful challenges brought against individual adjudicators and members	- Secretariat of the Court - Independent reviews and articles specialised in investment law	Annual
Ensuring access to investment dispute settlement for all investors	- Statistics on cases brought to the Court broken down per type of investor - Average cost per case per different type of investor	- Secretariat of the Court - Academic articles	Annual
Ensuring efficient dispute settlement proceedings	Average length of proceedings and resources spent per case	-Secretariat of the Court - User feedback	Annual
Building up coherent case-law including ensuring legally correct decisions	- A qualitative analysis of case law - Percentage of decisions upheld by the Court	- Secretariat of the Court - Academia	Annual
Improving transparency	Setting up a website, a documentation centre and a repository	User frequency of website of the Court and requests for information	Annual

The monitoring foreseen by the European Commission in relation to the operational objectives identified in this Impact Assessment is without prejudice to the monitoring of the functioning of the multilateral investment Court to be undertaken by the Court itself. The

Court should establish relevant indicators, particularly regarding the effectiveness of its functioning, and present the results of the regulator monitoring to the Contracting Parties.

The multilateral Court should undertake an evaluation of its functioning and discuss the evaluation results with the Contracting Parties.

In addition, in line with the Better Regulation requirements, the Commission should undertake its own evaluation of the functioning of the Court when it has been in force for a sufficient period of time to ensure availability of meaningful data. The creation of academic networks to evaluate the functioning of the Court should be encouraged.

The Commission will communicate the results of its evaluation to the European Parliament and the Council. The Commission will inform the membership of the Court about the evaluation results and may propose adjustments to the functioning of the Court as necessary.

## **ANNEXES**

## ANNEX 1

### PROCEDURAL INFORMATION

The Impact Assessment was led by DG TRADE Unit F2.

The agenda planning/Work Programme reference is 2016/TRADE/024 (Convention to establish a multilateral court on investment).

The Inception Impact Assessment was published and open for comments on 1 August 2016. It is available on the Commission's "Better Regulation" website at the following address: [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).

The Inception Impact Assessment is also linked on DG TRADE's page on dispute settlement.<sup>107</sup>

Five meetings and one on-line consultation of the Inter-service Steering Group were called in the course of this Impact Assessment. The following Commission Directorates-General (DGs) and services were invited: Agriculture and Rural Development (AGRI), Budget (BUDG), Climate Action (CLIMA), Competition (COMP), Communications Networks, Content & Technology (CNECT), International Cooperation and Development (DEVCO), Economic and Financial Affairs (ECFIN), Employment, Social Affairs and Inclusion (EMPL), Energy (ENER), Environment (ENV), Financial Stability, Financial Services and Capital Markets Union (FISMA), Internal Market, Industry, Entrepreneurship and SMEs (GROW), Justice and Consumers (JUST), Maritime Affairs and Fisheries (MARE), Mobility and Transport (MOVE), European Neighbourhood Policy and Enlargement Negotiations (NEAR), Regional and Urban Policy (REGIO), European External Action Service (EEAS), Eurostat – European Statistics (ESTAT), Service for Foreign Policy Instruments (FPI), Joint Research Centre (JRC), European Anti-Fraud Office (OLAF), Research and Innovation (RTD), Legal Service (SJ) and Secretariat-General (SG).

The draft Impact Assessment Report was entirely prepared in-house by DG TRADE services. No external services or consultants were involved.

The evidence used for the impact assessment includes input by stakeholders through various channels as per the Consultation Strategy (Annex 2) and relevant case law and academic literature.

Considering that the multilateral reform of investment dispute settlement remains subject to multilateral negotiations with third countries, this report is partially based on assumptions that, to the largest possible extent, are based on evidence (literature or stakeholder input). In any event, the results presented in the Impact Assessment Report constitute, at this point in time, the most exhaustive and far-reaching endeavour in this direction.

The draft Impact Assessment Report was submitted to the Regulatory Scrutiny Board (RSB) on 21 June 2017 and was examined at the meeting of 19 July 2017. The Board issued its

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<sup>107</sup> See <http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/>.

opinion regarding the Impact Assessment Report on 24 July 2017. The table below summarises how the recommendations from the RSB were taken into account in the current version of the report:

*Table 3*

<b>Recommendations from the RSB</b>	<b>Modifications to the Impact Assessment Report</b>
Existing arbitration systems.	Clarifications added to description of Option 3 under Chapter 4.
Implications of the CJEU opinion 2/13.	Language added in Chapter 2.
Investment standards and available remedies.	Clarification added to Chapter 5.2 (section on overall impacts of Option 5) and in the description of the lack of consistency and predictability problem in Chapter 1.1.  On the issue of remedies, language added in Chapter 6.3.
Cost split between EU and Member States.	Annex 4.
Success indicators and stakeholder views.	Explanatory language in Annex 1 and Chapter 4.

In parallel to the preparation of this Report, the Commission has held preliminary exploratory discussions with Member States and third countries on the multilateral reform of investment dispute settlement. In this context, Member States have consistently expressed support for the idea of establishing a multilateral investment court, although the position regarding individual design elements of the system remain to be discussed.

In its 50th session (10 July 2017), the UNCITRAL Commission entrusted Working Group III with a mandate to work on the possible reform of the current system of investment dispute resolution. This was supported by all UNCITRAL members, which will now discuss possible ISDS reform, including on the possible establishment of a multilateral system for the resolution of investment disputes. Since design elements still need to be negotiated under a broad multilateral discussion, it is not yet possible to identify support for particular elements of the mechanism.

## ANNEX 2

### STAKEHOLDER CONSULTATIONS

*The information and views in this Annex do not necessarily reflect the official position of the European Commission. This Annex summarises the input submitted by the stakeholders who participated in the consultation on options for a multilateral reform of investment dispute settlement.*

The Commission has actively engaged with stakeholders and conducted a comprehensive consultation throughout the Impact Assessment process. The Consultation Strategy<sup>108</sup> set out a number of actions for the Commission to organise as part of the consultation process, notably an online public consultation, a stakeholder meeting and academic conferences. In addition to all these, the Commission has held bilateral meetings with certain stakeholders as part of its targeted outreach.

#### **1. Feedback received on the Inception Impact Assessment**

The Commission received seven reactions to the Inception Impact Assessment, although some of these contributions fall outside the scope of the topic. Reactions originated from environmental and development NGOs, EU and national consumer associations, EU platforms in the field of healthcare and academia. All submissions have been published on the relevant Commission website.<sup>109</sup>

In their contributions, stakeholders give their initial views on the possible establishment of a multilateral investment court and highlight key issues of interest to them. In general, submissions tend to welcome the Commission's initiative for a multilateral reform of investment dispute settlement. Other submissions adopt a more technical approach and dig into the features of such multilateral system, outlining the broader lines that, in their view, the reform process should pursue. Academic papers on issues related to this initiative were also received. Views expressed through these contributions are in line with the more specific input received at a later stage through the online public consultation.

#### **2. Online public consultation**

The online public consultation was launched on 21 December 2016 and remained open for a standard 12-week period until 15 March 2017. It was launched on DG Trade's website through EU Survey (i.e. the Commission's online tool for conducting public consultations). The consultation consisted of a questionnaire of 63 questions including 14 open questions. Contributors had the possibility to upload a position paper. The online public consultation

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<sup>108</sup> See [http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc\\_154997.pdf](http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_154997.pdf).

<sup>109</sup> See [http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\\_155496.pdf](http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155496.pdf).

relayed 193 replies, 54 of them enclosing a position paper.<sup>110</sup> The Commission received eight additional independent contributions in the form of comments or position papers sent directly to the dedicated functional mailbox. On 11 April 2017, all contributions were published on the dedicated website.<sup>111</sup>

The online public consultation also triggered a petition from specific NGOs.<sup>112</sup> The Commission replied directly in writing by letter of 3 May 2017.<sup>113</sup>

## **2.1 Overview of respondents**

Respondents contributed to the online public consultation both in their personal (34.7%) and professional (45%) capacity. Those that responded personally reside mainly in Belgium (11.4%), Germany (7.4%), Austria (5.7%) and the United Kingdom (5.2%). More than half (51.3%) of them declined to specify their country of residence. Respondents answering in their professional capacity mostly represent trade unions and NGOs (28.5%) and trade, business or employers' associations (11.4%), although almost half of them (48.7%) declined to specify what type of organisation they represent. These organisations are mostly established in Belgium (12.4%), Germany (8.8%) and Austria (5.7%), although almost half of them (48.1%) declined to specify this point.

The map below shows the distribution of respondents in the EU.

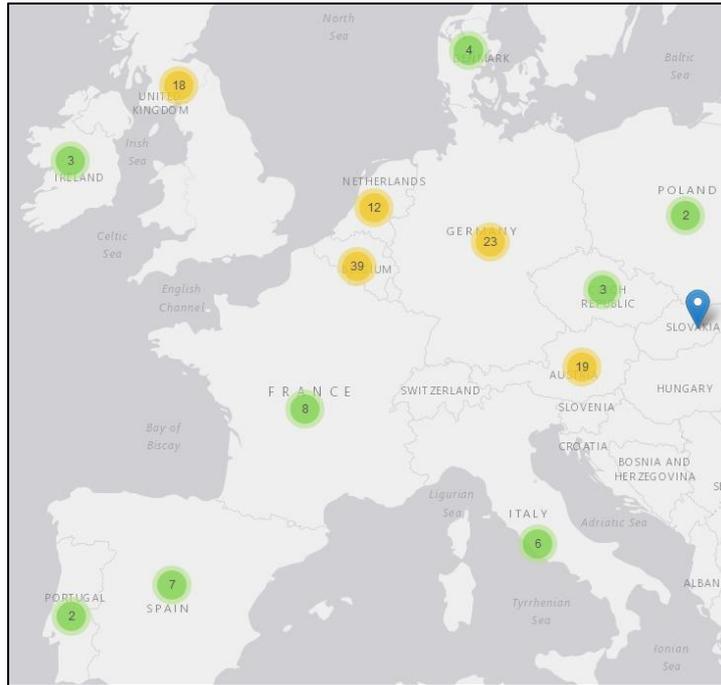
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<sup>110</sup> 45 different position papers were received since a few of them were repeated. Two additional replies to the questionnaire were received after the closing deadline. Although for technical reasons these do not count for statistical purposes, they are considered as independent contributions and analysed in this Annex.

<sup>111</sup> See [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=233](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233). Separated lists were put together taking into account contributors' preferences with regards to the publication of their personal data.

<sup>112</sup> Given the impossibility of conducting the petition through the online public consultation (due to the presence of a "captcha" at the end of the questionnaire), these NGOs collected signatures that were handed to the Cabinet of the Commissioner for Trade, Cecilia Malmström, on 15 March 2017 together with a position paper and a leaflet. The position paper had also been submitted through the online consultation.

<sup>113</sup> Letter to Campact e.V. Demokratie in Aktion.



Source: DORIS (2017)<sup>114</sup>

Despite the high rate of respondents declining to volunteer information about their affiliation or origin, a comprehensive range of stakeholders were represented in the replies. Responses originate both from EU-wide and national/regional platforms not necessarily connected to the countries mentioned above. This stems from an analysis of the open questions and position papers rather than from the statistical results.

## 2.2 *Limitations of the consultation*

Firstly, as in any such online consultation, we note that the replies submitted by respondents cannot be regarded as a representative sample of all stakeholders and have to be interpreted with caution. This is intrinsic to this method of consultation, where inter alia the number of questions and the length of the questionnaire have to be balanced with the aim to collect as much and as comprehensive information as possible, in the period of three months.

Despite the Commission's efforts to elaborate a balanced consultation in that sense, the questionnaire was criticised by some stakeholders for being too technical, too long and not allowing respondents sufficient margin to express their views. Most of these respondents submitted however a position paper where they explained their views without the perceived constraints of the questionnaire.

In particular, critical respondents regretted that the consultation did not ask about the desirability of investment dispute resolution in general and only sought views on the technical details of a multilateral reform path. These respondents lamented that the questionnaire did not allow giving views on the degree of the reform that is needed. Generally, these respondents argue that the current regime grants foreign investors excessive rights and that a

<sup>114</sup> For an explanation of the DORIS tool, see section 2.3 below. This map is purely illustrative. The blue mark means one submission from Slovakia.

deep and comprehensive reform of the entire investment regime is necessary. This is made clear in several answers to open questions, where a number of respondents do not address the question but indicate their express rejection to ISDS. This input is treated as referring to ISDS and not to the proposed multilateral initiative. However, where they respond to the actual questions, these respondents tend to agree to some extent with the option for a multilateral reform, although they deem such option insufficient and not targeted to the real problems.

The Commission sought to clarify this issue with concerned stakeholders in the context of the stakeholder meeting of 27 February 2017. In the Commission's view, the 2014 public consultation on investment protection and ISDS in the TTIP already consulted stakeholders on those broader considerations and provided sufficient elements in that regard.<sup>115</sup> The Commission considered that the consultation at hand would thus build on the 2014 public consultations and aim at seeking more specific information about the options for such multilateral reform. Admittedly, however, this was not well understood and the perception of traditional ISDS blurred the scope of the consultation.

Secondly, as mentioned above, the vast majority of respondents were either trade unions, NGOs or business associations (almost 40% combined). Of course these groups cover important categories of stakeholders affected by the intended multilateral reform, but are not the only affected ones. The participation of other relevant groups (private investors, arbitrator community/legal practitioners and academia) was either low (5.5% combined) or impossible to measure (since almost half of respondents answering in their professional capacity declined to specify what type of organisation they represent). In addition, a number of questions relayed relatively high percentages of "I don't know" or "I don't have an opinion" answers. For purposes of this report, percentages only take into account those respondents who expressed an opinion. Those who expressed no opinion are discounted. In instances where this approach could be misleading, the absolute number of responses is specified. In any case, the results of the online public consultation must be interpreted in this context.

### ***2.3 Summary of stakeholders' contributions by topic***

The Commission analysis of stakeholders' submissions was twofold. First, a careful analysis of each individual submission, especially of the answers to open questions and position papers, was conducted. In addition, the Commission utilised the automated system DORIS,<sup>116</sup> which produced statistics of responses according to different parameters. The analysis by way of clustering was particularly useful to confirm the individual assessment of replies. The assessment below is the result of the two methods of analysis jointly and reference to one method or another is only specified where relevant.

The questionnaire followed a clear structure starting from the identification of the problems, following the identification of options, technical questions about such options and concluding with a reflection on possible impacts.

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<sup>115</sup> The report of the 2014 consultation is available online: [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)

<sup>116</sup> DORIS (Data ORiented Services) is a new tool developed by the European Commission to provide data analytics services of public consultations directed at supporting policy making and operational needs.

### *Desirability of a multilateral approach*

A majority of respondents (68.2%) agrees that multiplying ICSs in EU bilateral agreements may be problematic from the viewpoint of complexity and costs and more than half (51.2%) supports that the same rules on dispute settlement should apply to Member States' BITs and EU agreements with third countries. Where respondents support this idea, they point at reasons of uniformity (62%), legal certainty (49.1%), credibility (44.4%) and improvement of investment climate (34.3%).

### *Possible features of a multilateral dispute settlement system*

More than half of respondents consider it important that specific features of the functioning of the ICS be reflected in a multilateral system, notably permanency (52.8%), appeal (67.2%), full-time adjudicators (55.3%), fixed remuneration for adjudicators (61.4%) and random allocation of cases (60.6%). Respondents show even higher support for traits concerning the adjudicators' regime and transparency of proceedings, notably high qualification requirements (82.8%), high ethical standards (86.8%), safeguards for independence such as tenure (78.8%) and full disclosure criteria for documentation (79.3%).

Respondents also suggest other features that a new multilateral system should reflect, including that effective enforcement of decisions be ensured. Certain health-centred interest groups expressly advocate for a carve-out in the scope of the multilateral system for decisions aimed at protecting public health. Respondents consistently underline that the duration of proceedings must remain reasonable, that mediation should remain available and that full disclosure requirements are necessary (with respondents from the business and arbitration communities stressing that the latter should not hamper the protection of trade secrets).

Not strictly related to the multilateral dispute resolution system, but depending on the underlying treaties or domestic law, stakeholders defending a deeper reform of the investment system favour the inclusion of requirements on the exhaustion of domestic remedies and that states or citizens be able to bring cases against investors.

60.9% of respondents<sup>117</sup> agree that discussions on a new multilateral system should include the possibility of special assistance to developing countries and 45.6%<sup>118</sup> support that the existing ACWL could be used as a model. A good number of respondents across stakeholder groups suggest that this support should materialise before disputes arise through training to government officials (e.g. dialogues, knowledge transfer, exchange of best practices) or development aid. A smaller number of respondents instead deem it preferable that assistance takes the form of legal advice during disputes and/or financial aid to cover litigation costs. The idea that there should be a special structure of costs for developing countries was also flagged. It has also been submitted that assistance be provided at the negotiation stage of investment treaties and that enhanced mediation opportunities be provided for in case of a dispute.

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<sup>117</sup> 75 of 193 (36.2% of respondents did not have an opinion on this matter).

<sup>118</sup> 36 of 193 (59.1% of respondents did not have an opinion on this matter).

At the other side of the spectrum, a number of respondents mostly representing business platforms submit that the existing mechanisms to support developing countries are sufficient. On a side note, a number of respondents also signal the need to establish objective criteria to define "developing countries", as is the case with "least developed countries".

More than half of respondents support that the multilateral system include special provisions for SMEs (59.8%).<sup>119</sup> More specific proposals such as simplified procedures, lower fees, flexible hearing locations and enhanced possibilities to resort to methods of alternative disputes resolution are supported by more than 75% of respondents on average. Other proposals from stakeholders representing trade unions, NGOs and businesses include that cases be heard by one sole adjudicator and that proceedings be conducted online or via teleconference. The idea of setting up an advisory centre for SMEs funded partly by the EU and partly by users of the court, and providing for legal advice and possibly for financial support, has also been raised. More broadly, the idea has been flagged that any support granted to developing countries should also be extended to SMEs.

In addition, respondents representing SMEs submit that a holistic approach rather than specific measures would be necessary to ensure that smaller investors enjoy full access to the multilateral system. Conversely, bigger businesses consider that enhanced support to SMEs risks creating categories within investors and submits that simplified procedures should apply to small claims instead.

Respondents to the public consultation are divided on whether the multilateral dispute settlement system should only apply to investment treaties (54.7% in favour versus 45.3% against).<sup>120</sup> Stakeholders with mostly a business background suggest that the system could apply to investment contracts as well, while disputes related to the protection of human rights or social and environmental standards should be subject of special mechanisms. Conversely, respondents from NGOs and similar platforms advocate for an extended scope that includes claims related to such areas and brought by third parties.

More than half of respondents (55.1%)<sup>121</sup> believe that an enforcement mechanism comparable to ICSID is needed under a multilateral system. Indeed, the business community emphasises the importance of legal certainty, transparency and effectiveness regarding the enforcement of awards as provided by the existing systems. To this group of stakeholders, an enforcement system that is at least comparable to the existing ones is necessary. Conversely, other stakeholders underline the importance of domestic review in light of national public policy considerations. The possibility to allow domestic review only in states with a developed judicial system was also raised. This idea was also flagged by certain academics at the stakeholder meeting of 27 February 2017.

#### *Options for a multilateral reform: multilateral court or appeal instance*

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<sup>119</sup> 107 of 193 (55.3% of respondents did not have an opinion).

<sup>120</sup> 60.7% of respondents did not have an opinion on the matter.

<sup>121</sup> 70 of 193 (34.2% of respondents did not have an opinion).

In the event that a multilateral investment court was established, 50% of respondents<sup>122</sup> agree that it should be competent to hear disputes under existing investment treaties and not only under future agreements. Among the main benefits of the centralisation that would be achieved by a court, respondents point at enhanced predictability (56.6%) and consistency of case-law (48%), while they show less support for higher legitimacy, efficiency and lower costs (35% approximately on average).

There is overall agreement among respondents that centralisation is beneficial. Respondents from academia suggest that it would bring integrated substantive coherence ultimately resulting in an overall reduction of disputes and their costs, while legal practitioners argue that it would lead to enhanced clarity and certainty on the applicable obligations (especially if a system of precedent is introduced). A large number of respondents representing inter alia the business community indicate that such benefits will not emerge immediately but after a transitional period of co-existence of the current system and a multilateral court. These respondents also indicate that the benefits of centralisation will be dependent upon the functioning of the court in practice.

Some respondents acknowledge that centralisation also carries certain risks, including a possible tendency to lower the standards of protection or that the whole system be politicised. Certain anti-globalisation platforms are concerned that centralisation would legitimise existing perceived undesirable social and environmental inequalities.

When presented with the possibility of a multilateral appeal tribunal (i.e. without a multilateral first instance), a majority of respondents (65%)<sup>123</sup> agree that such mechanism would not be sufficient (while 11.7%<sup>124</sup> believe it would suffice). Respondents are divided on whether such a mechanism would contribute to improving investment dispute resolution (35.6% agree versus 40.5% that disagree).

Regarding several technical features of a potential new multilateral system, whether a court or an appeal tribunal, about half of respondents support that all contracting parties should be able to appoint at least one adjudicator (50.9%).<sup>125</sup> Practically the same percentage (50.5%)<sup>126</sup> defends that the total number of adjudicators should instead be linked to workload rather than to the number of countries signatory to the agreement.

Stakeholders stress that adjudicators must have relevant experience (submissions being divided between the need for specific investment or sectorial experience and general legal experience) and be subject to sanctions in case of breach of ethical standards. Responses are divided on whether nationality should be the deciding factor, with a number of submissions indicating that instead adjudicators should be selected based on qualifications and experience

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<sup>122</sup> 38 of 193 (39.9% of respondents did not have an opinion).

<sup>123</sup> 78 of 193 (37.8% of respondents did not have an opinion on this question).

<sup>124</sup> 14 answers of 193.

<sup>125</sup> 56 of 193 (43% of respondents did not have an opinion).

<sup>126</sup> 53 of 193 (45.6% of respondents did not have an opinion).

and securing a balance of age, gender and religion, and countries' legal systems and level of development. The idea of a selection committee formed by states, business representatives, international organisations, NGOs and academia has been flagged. These ideas have been raised by stakeholders from different backgrounds. Conversely, among stakeholders arguing in favour of a strict balance of nationalities, NGOs tend to suggest that adjudicators be appointed by states, while business groups highlight the importance that investors be involved in the appointment as well.

More generally, responses largely support that adjudicators meet high qualification criteria, including being qualified to hold judicial office in their country or being recognised jurists, in addition to having expertise in public international law and previous experience in international investment law (67.8%).<sup>127</sup> A number of respondents with an NGO or academic background advocate for the strictest approach whereby candidates having previously worked (or presently working part time) for a business or as legal practitioners or lobbyists should be disqualified. Conversely, other respondents representing businesses and a sector of academia defend that this approach would preclude professionals with valuable skills. Stakeholders across stakeholder groups agree that compliance with a code of conduct is fundamental. Certain respondents highlight the importance that states be able to vet adjudicators selected by other states.

There seems to be support towards the idea that as part of their remuneration adjudicators receive a regular monthly salary not linked to their workload (68.4%)<sup>128</sup> and that adjudicators be subject to high ethical standards (63.9%).<sup>129</sup> A similar proportion of respondents consider it important that cases be allocated on a random basis (68.9%)<sup>130</sup> to ensure impartiality and independence.

In relation of the financing of the multilateral system, about two thirds of respondents support that a repartition key (based e.g. on the level of Parties' economic development) be applied (66.4%)<sup>131</sup> while more than half support that user fees be considered (55.5%).<sup>132</sup>

### *Possible impacts*

Respondents only partially agree that a multilateral investment court or appeal tribunal will improve the global investment climate (24.4%), but express higher support that it will contribute to a higher acceptability of investment dispute settlement (45.6%), bring higher consistency of case-law (55.4%) and unify the dispute settlement system (51.2%). NGOs argue that a multilateral system will politicise disputes and negatively impact states' ability to

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<sup>127</sup> 80 of 193 (38.3% did not have an opinion).

<sup>128</sup> 78 of 193 (40.9% did not have an opinion).

<sup>129</sup> 78 of 193 (36.8% did not have an opinion).

<sup>130</sup> 80 of 193 (39.9% did not have an opinion).

<sup>131</sup> 71 of 193 (44.6% did not have an opinion).

<sup>132</sup> 65 of 193 (39.4% did not have an opinion).

regulate in the public interest. Respondents across stakeholder groups welcome the multilateral initiative as innovative but note that any positive effects remain to be seen. Others argue that such system will bring added consistency and efficiency to investment dispute settlement.

As for the economic impacts of establishing a multilateral system, respondents are divided on whether it will lead to a reduction of costs for the EU (45.4% due to unification) and for users (31.2% due to increased predictability and 33.4% thanks to adjudicators' permanent remuneration). A number of stakeholders mainly from civil society submit that a permanent multilateral system will boost reform and growth thereby driving sustainability and economic growth in developing countries. More specifically, respondents from a variety of backgrounds underline that shorter proceedings are likely to be less costly. On the other hand, a few stakeholders representing business groups are concerned that such system will make taxpayers cover for adjudicators' remunerations regardless of their actual workload, and that the possibility of appeal will make proceedings longer and therefore more expensive. Development groups argue that a multilateral system will only bring positive economic impacts for developing countries if their expenses are covered by developed countries. Certain NGOs and individual citizens also flag the idea that it is social and human rights impacts, and not economic impacts, which should drive the multilateral reform process.

More than two thirds of respondents (67.1%)<sup>133</sup> believe the establishment of a multilateral system will produce environmental impacts, but inputs on the reasons are considerably vague. Numerous stakeholders representing NGOs and other environmental and civil society groups argue that environmental protection measures will continue to be at the mercy of the multilateral court or tribunal and many of them call for a carve-out for measures taken in the public interest. A majority of these respondents acknowledge that such mechanism would relate to the underlying investment agreements and not to the functioning of the court or appeal tribunal. Other stakeholders note the absence of any binding international obligations for investors related to environment (and other areas such as human rights) and call for UN action in this regard.

A large percentage of respondents (72.4%)<sup>134</sup> think that the establishment of a multilateral court or appeal tribunal will have social impacts. Again, inputs are not specific. Numerous submissions indicate that what is indicated with regard to environmental impacts applies to social impacts as well. A number of NGOs and civil society groups are concerned that the multilateral system will negatively impact on acquired social rights (e.g. the right to strike) while on the other side of the spectrum other stakeholders argue that a multilateral system will allow for more effective policy-making and improve the perception of investment dispute resolution. The idea has been flagged that as a result of the required qualifications for adjudicators, adjudicators' age will increase and thereby exclude younger professionals and professionals from minorities from the system.

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<sup>133</sup> 96 of 193 (25.9% did not have an opinion).

<sup>134</sup> 110 of 193 (32.7% did not have an opinion).

### **3. Stakeholder meeting**

On 27 February 2017, the Commission hosted a stakeholder meeting on a multilateral reform of investment dispute resolution including the possible establishment of a multilateral investment court. The meeting was held in Brussels (Belgium) and included the participation of the EU Trade Commissioner Ms Cecilia Malmström. The meeting was recorded and web streamed and questions were allowed via the social network *Twitter*.

Around 100 stakeholders participated. More than one third of attendants (35.9%) constituted individual investors, business representatives or trade associations operating in different sectors. More than one fourth of attendants (28.4%) represented NGOs and trade unions at the global, national or regional level. Several public authorities attended the meeting (12.2%), including international organisations, representatives of third countries and of regions in Member States. Academia and legal practitioners were represented by 10% and 7.5% of attendants respectively. Media (4.5%) and consultants (1.5%) were also represented.

Participants showed an interest in the rationale of the multilateral approach, particularly after the EU's bilateral reform through the ICS has just been included in two EU FTAs. Some participants especially from business groups proposed to address the shortcomings of the current system through less radical reforms. A few of them, including academia representatives, considered that the project is hasty given that the EU's bilateral reform has not yet been put to practice.

On the other side of the spectrum, a number of stakeholders from environmental and civil society groups called for a deeper reform of investment rules beyond investment dispute settlement. Business platforms and trade unions raised the issue of possible multilateral negotiations of substantive investment rules.

Some participants representing environmental and development groups suggested that the court should be able to decide on disputes arising from national law and private contracts apart from international investment treaties, while others expressed concern that a single body would interpret rules included in different legal instruments.

The design and functioning of the court gathered considerable interest. Stakeholders were interested in the profile of adjudicators, in particular whether they would have specific expertise in fields such as human rights, labour law or investment. Methods to ensure adjudicators' independence, their appointment and the configuration of tribunals, as well as the democratic oversight of the overall process, were also raised.

On the need for an appeal instance, while a number of industry representatives expressly supported it, others indicated that it may result in unnecessarily long proceedings. National chambers of commerce were interested in whether the multilateral mechanism would provide for flexibilities for SMEs.

Participants from different backgrounds stressed the importance that decisions of the multilateral court be effectively enforceable, i.e. at a level comparable to the one provided under ICSID rules. The need for the court to operate transparently was also highlighted.

Environmental and development groups asked whether resort to the court would be dependent on exhaustion of domestic remedies and whether the court's decisions would benefit from direct effect. These groups also referred to the desirability of systems to filter frivolous claims and of institutional mechanisms of restraint.

A number of participants representing the arbitration community expressed concerns about the impact of the court on the current system. Some civil society stakeholders also suggested that resort to the court should not be restricted to investors but be open also to claims from states or third parties. Furthermore, participants from public authorities referred to the remedies that the multilateral court will be able to award, noting that investment tribunals function very differently to ordinary international tribunals. The opt-in instrument to adhere to the multilateral court also gathered significant interest.

Stakeholders from different backgrounds showed an interest in the (at the time) pending opinion of the Court of Justice of the EU in the EU-Singapore FTA and its possible implications for the establishment of a multilateral investment court. Questions on the role of Member States, the Council and the European Parliament in this process were raised.

A variety of participants expressed an interest in the position of third countries, especially key EU trading partners and in light of recent political events. These stakeholders called for a negotiating process that effectively includes developing countries.

#### **4. Academic conferences and seminars**

With the aim of gathering views from academia, the Commission has participated in a number of academic events during the Impact Assessment process.

Although these events presented different settings and formats, they generally allowed for good exchanges of views with academics and other relevant actors such as former government officials and legal practitioners. The geographical coverage differed across meetings, some being focused on the national level and others covering global or nearly global representation. Not all these meetings allowed for issues of substance to be discussed in depth and some of them were focused on key procedural aspects. However, they constituted useful opportunities to exchange views on the pros and cons of the current system with a view to reforming it. Where discussions were held on a non-prejudice basis, participants displayed views and arguments that are rarely heard in more formal, government-represented negotiations, which was particularly illustrative.

The relevant events include:

- Investment Treaty Dialogue (OECD), Paris, France (October 2016)
- Singapore International Arbitration Academy, Singapore (November 2016)
- King's College, London, UK (October 2016)
- University of Cologne, Germany (January 2017)
- Centre for International Dispute Settlement, UNCITRAL University of Geneva, Geneva, Switzerland (March 2017)

## **5. Targeted outreach to key stakeholders**

In addition to the activities foreseen in the consultation strategy, and in order to further exchange with stakeholders, the Commission has met business organisations, trade unions, national associations and NGOs concerned with, inter alia, sustainable development and environment protection. In these meetings, the Commission provided clarifications on the rationale of the initiative and on the state of play and timeline of the Impact Assessment work and the public consultation. Stakeholders provided additional details on their submissions to the public consultation and key aspects thereof were discussed. The Commission took note of these discussions and they have been taken into account as part of the stakeholder consultation.

The Commission also discussed this initiative with third countries, including in the margins of the UNCTAD's World Investment Forum in July 2016 in Nairobi (Kenya). In December 2016, the Commission co-hosted a dedicated expert meeting with the Government of Canada in Geneva (Switzerland). Almost 170 delegates from more than 60 countries and 8 international organisations participated. The meeting included initial exploratory discussions on the possible establishment of a multilateral investment dispute settlement system and its rationale, its possible functioning and next steps.

This initiative was raised at the political level at the informal ministerial breakfast meeting co-hosted by the Commission and the Government of Canada in January 2017 in Davos (Switzerland) in the margins of the World Economic Forum. The Commission held a number of bilateral meetings with third countries in the margins of these events.

Outside the context of these meetings the Commission has exchanged bilaterally with a number of third countries. The main purpose of these exchanges has been to provide information on the ongoing Commission work and to hold exploratory talks with a view to testing their potential interest on the matter. These countries showed from moderate to considerable degrees of interest and willingness to engage. They consistently requested to be informed of any development and mostly promised to share more concrete views after additional internal reflection.

### **ANNEX 3**

#### **WHO IS AFFECTED BY THE INITIATIVE AND HOW?**

Establishing a multilateral investment court that provides for the desired sub-options as specified above would have practical implications for a number of stakeholders including investors, states, legal practitioners and the arbitrator community and the general public.

Table 4: Implications for stakeholders

	<b>Option 5: Establishment of a multilateral investment court</b>			
	<i>Composition of the court</i>	<i>Procedural aspects</i>	<i>Institutional aspects</i>	<i>Financial aspects</i>
<b>Investors</b>	No role in the selection of adjudicators for specific disputes.	Possibility to be involved in the appointment of adjudicators.  Ability to appeal first instance decisions with procedural errors or substantial errors of law, and possibly also with manifest errors in the appreciation of facts.	Resort to the court conditional upon their home state opting-in to the Convention establishing the court.  Possibility for SMEs to benefit from assistance.	Will face lower costs, possibility of user fees, possibility for SMEs to benefit from assistance.
<b>States</b>	Prominent role in the appointment of adjudicators.	Prominent role in the appointment of adjudicators.  Ability to appeal first instance decisions with procedural errors or substantial errors of law, and possibly also with manifest errors in the appreciation of facts.	Lower resources to manage court thanks to the existence of a secretariat.  Ability to decide on the jurisdiction (i.e. scope) of the court when negotiating investment treaties.  Ability to opt-in or not.  Possibility to benefit from assistance to developing countries.	Budgetary implications (costs of functioning to be at least mostly covered by states).
<b>Legal practitioners / Arbitrator community</b>	Ability to participate as legal counsel  Provided that is not against the ethical requirements, ability to sit as adjudicators.	Possibility to be involved in the appointment of adjudicators.	Possible lower workload due to existence of a secretariat.	Lower legal fees charged as a result of streamlined proceedings and certain procedural steps being eliminated (e.g. choice of arbitrators).
<b>General public</b>	N.a.	Possibility to be involved in the appointment of adjudicators in the event that an independent body be set up.	Easier access to documents through the secretariat.	Taxpayers' money spent on funding the court.

		Additional guarantees of procedurally, legally and possibly factually correct decisions thanks to the possibility to appeal.		
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## ANNEX 4

### EXPLANATION OF COSTS ANALYSIS

#### 1. INTRODUCTION

This annex presents the analysis of the expenses that the establishment and functioning of a Multilateral Investment Court for investment dispute resolution would entail. The analysis compares estimates of the expenses of the Multilateral Investment Court (i.e. option 5) with the costs of the existing system of international investment disputes for the European Union (EU) and for its Member States, which encompasses the Investment Court System (ICS)<sup>135</sup> and the traditional Investor-State Dispute Settlement (ISDS) system<sup>136</sup> (i.e. option 1 - baseline scenario).

After a description of the methods, rules and assumptions employed (**section 2. Methodology**), the expenses of the two scenarios were separately estimated (**section 3. Baseline scenario** and **4. Multilateral Investment Court scenario**) and then compared in the final section (**5. Comparison of the costs of the baseline scenario and the Multilateral Investment Court scenario**).

#### 2. METHODOLOGY

The quantitative and qualitative analysis of the budgetary impact of the initiative of establishing a multilateral dispute settlement mechanism follows a two-step approach of establishing the costs of the baseline scenario (section 3), as well as constructing the expenses of the multilateral investment Court scenario (section 4).

The quantitative analysis draws on available and reliable data and statistics to project the potential impact of the two scenarios on the EU budget and the budget of Member States. It is fundamental to recall that both the ICS and the multilateral investment Court models are not yet operating. Consequently, given the lack of concrete and precise data for some key variables (e.g. caseload, number of adjudicators, number of staff), the figures and numbers found in this Annex are estimates based on projections of most likely features based on the best available information:

- For ICS, estimates are based on the EU proposal in the Transatlantic Trade and Investment Partnership (TTIP) negotiations, which is the basis for all ICS negotiations with third countries<sup>137</sup>.

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<sup>135</sup> ICS has been included in all investment agreements negotiated or under negotiations between the EU and third countries.

<sup>136</sup> EU Member States' Bilateral Investment Treaties (BITs) generally contain provisions on ISDS. In addition, the EU is a Contracting Party to the ECT, which provides for ISDS procedures (Article 26: Settlement of Disputes between an Investor and a Contracting Party).

<sup>137</sup> EU proposal in the Transatlantic Trade and Investment Partnership (TTIP) negotiations, Chapter II - Investment, Section 3 Resolution of Investment Disputes and Investment Court System, Sub-Section 4: Investment Court System, Articles 9-10, available at: [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf). See para. 3.1 below.

- For ISDS, averages are based on available and reliable data of past cases published in the arbitral awards, in surveys conducted by the United Nations Conference on Trade and Development (UNCTAD), the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA)<sup>138</sup>.
- For the multilateral investment Court, the assessment relies on budgetary information of other international courts and tribunals<sup>139</sup>.

The main cost components of investor-state dispute settlement are: (i) tribunal fees and expenses, (ii) institutional costs payable to the organisation administering the dispute and providing the secretariat and (iii) expenses incurred by each disputing party (investor and state) for their own legal counsels and experts. As explained in the problem definition, the largest cost component is the third one, which amounts to ca. 82% of the overall costs of an ISDS case, while arbitrator fees average about 16% of costs and institutional costs are low, generally amounting to about 2% of the costs<sup>140</sup>.

This reform initiative acknowledges the problem of high costs of ISDS as a barrier to access to justice and seeks to lower these costs in a number of ways:

- Directly for tribunal and institutional costs, by redesigning their amount and allocation rules; and
- Indirectly for other costs (legal counsel and expert fees), *inter alia* as a consequence of the streamlining of the procedural rules that both ICS and multilateral investment court policy options intend to address, e.g. by agreeing on timelines for the conduct of the proceedings which are absent from most of today's ISDS arbitration systems.

For the purposes of costs calculations in this Annex, however, on one side it is possible to estimate the tribunal and institutional costs of the policy options, on the other side, it is not possible to calculate how much legal counsel and expert fees will be reduced as a consequence of the institutional reforms to lower ISDS costs overall.

Consequently, the types of costs considered in this quantitative assessment are:

- Tribunal costs;<sup>141</sup> and
- Institutional costs.<sup>142</sup>

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<sup>138</sup> See para. 3.2 below.

<sup>139</sup> See section 4 below.

<sup>140</sup> David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, Paris (2012). Available at: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>, p. 19.

<sup>141</sup> Tribunal costs essentially cover the remuneration of adjudicators. There are two types of remuneration: (i) fixed or (ii) fee-based. In the former case, adjudicators (who are in an employment relationship) are paid a base remuneration per month plus benefits (health insurance, pensions, etc.). In the latter case, adjudicators (who are self-employed and are thus responsible for their own social security) are generally paid a monthly retainer and a daily/hourly fee.

<sup>142</sup> Institutional costs mainly cover the administrative expenses of the institution administering the case, i.e. the costs of the secretariat/registry. These costs include the time spent by the legal and administrative staff

Conversely, types of costs that are omitted in this analysis include:

- Legal counsel and expert fees; and
- Additional costs that, at the moment of writing, could be highly speculative (e.g. costs related to the rental of premises).

The costs considered are the expenses of active dispute settlement mechanisms (in turn, ICS, ISDS and Multilateral Investment Court) with an assumption being made of 2 cases (or 1 case at first instance plus 1 appeal) per year for those mechanisms for which the level of costs varies according to the number of cases (ICS and ISDS; on the contrary, for the Multilateral Investment Court the same costs would not be case-dependant). The potential apportionment of costs between the disputing parties was not taken into consideration since this entails speculation given that it is dependent on the specific circumstances of the case and the decision of the judicial authority.<sup>143</sup>

All costs expressed in currencies different from the Euro were converted to Euro at the 2016 average exchange rate set by the European Central Bank.<sup>144</sup>

When calculations produced a result that was not a whole number, that number was rounded down to the nearest whole number if it was less than 0.5 and up to the nearest whole number if it was 0.5 or more.

The quantitative analysis was corroborated by qualitative analysis. The qualitative analysis was based on research of the most relevant and up to date literature and on stakeholder inputs to identify selected indicators and issues. With regards to stakeholder contributions, the analysis incorporated information generated by the extensive and continuous stakeholder consultation, both through the stakeholder meeting, the completion of the online questionnaire which closed on 15 March 2017 and the other position papers received. The qualitative analysis thus allowed for a more accurate picture of the impact of the different scenarios on the EU budget.

### **3. BASELINE SCENARIO**

The baseline scenario corresponds to the coexistence of the ICS at EU level and ISDS at EU and EU Member State level. More specifically, this scenario would imply retaining and operating both multiple ICSs in EU trade and/or investment agreements with third countries

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allocated to a case, the assistance of the Secretary at hearings and the financial management of the case account.

<sup>143</sup> Possible costs related to any additional support to SMEs and/or developing countries (sub-options considered above but subject to negotiations) have not been calculated in this Annex as this would have been an overly speculative exercise.

<sup>144</sup> The average 2016 exchange rates are: 0.819483074 (for GBP); 1.11 (for USD) and 1.090155253 (for CHF). The reference exchange rates of the ECB are available at: [https://www.ecb.europa.eu/stats/policy\\_and\\_exchange\\_rates/euro\\_reference\\_exchange\\_rates/html/index.en.html](https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/index.en.html). No rate of inflation was added.

and those remaining ISDS mechanisms in EU Member States' BITs and in the ECT for the EU that are not replaced by ICS.<sup>145</sup>

There were two questions that had to be addressed to determine the overall cost of the baseline scenario, namely:

- The cost for the EU of multiple ICSs currently in EU bilateral trade and/or investment agreements (para. 3.1); and
- The cost of the remaining ISDS mechanisms in place for the EU and the EU Member States (para. 3.2).

The sum of these two calculations resulted in the overall cost of the baseline scenario (para. 3.3).

### **3.1 Calculating the cost for the EU of multiple ICSs in EU bilateral trade and/or investment agreements**

To establish the cost of multiple ICSs in EU trade and/or investment agreements a three-step process was followed:

1. The cost of a single ICS per year (para. 3.1.1);
2. The cost of a single ICS per year only for the EU budget was calculated (para. 3.1.2); and
3. The latter amount was multiplied by the number of ICSs currently projected or reasonably foreseeable to be included in EU bilateral trade and/or investment agreements (para. 3.1.3).

This three-step process resulted in the annual cost for the EU of multiple ICSs in its bilateral trade and/or investment agreements with third countries.

#### **3.1.1 Cost of a single ICS per annum**

In order to calculate the yearly total cost of a single ICS, the following core cost components were taken into account:

- Remuneration of adjudicators per year (para. 3.1.1.1); and
- Cost of secretariat per year (para. 3.1.1.2).

The sum of these cost components resulted in the overall cost of one ICS per annum (para. 3.1.1.3).

##### ***3.1.1.1 Remuneration of adjudicators***

Data on remuneration of adjudicators is based on the remuneration proposals presently contained in the EU standard approach to investment dispute settlement<sup>146</sup>. According to this text, First Instance Tribunal adjudicators:

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<sup>145</sup> For the purposes of this analysis, only extra-EU BITs (i.e. investment treaties between EU Member States and third countries) and the ECT (to which the EU is also part) are considered. Intra-EU BITs (i.e. BITs between EU Member States) fall outside the scope of this analysis. The cut-off date to distinguish between intra-EU and extra-EU BITs is the accession date of the Member State.

- Would be **15** in number;
- Would be paid a **monthly retainer fee** (to be determined by decision of the Committee) that is suggested by the EU to be around 1/3rd of the retainer fee for WTO Appellate Body members (i.e. around **EUR 2,000 per month**);<sup>147</sup>
- The President of the Tribunal would receive a **fee for each day worked in fulfilling the functions of President** of the Tribunal suggested by the EU to be around the same as for WTO Appeal Tribunal members (i.e. CHF 600 – plus CHF 435 for meals and accommodation – per day, which is equivalent to **EUR 949 per day**);<sup>148</sup> and
- Would receive a **fee for each day worked as an adjudicator** determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the submission of the claim (i.e. USD 3,000 per day, which is equivalent to **EUR 2,710**).<sup>149</sup>
- A survey conducted by ICSID among cases administered by ICSID shows that the average time spent by each arbitrator per case is of **53 days a year per case**.<sup>150</sup>

According to the same text, Members of the Appeal Tribunal:

- Would be **6** in number;
- Would be paid a **monthly retainer fee** (to be determined by decision of the Committee) that is suggested by the EU to be around the same as for WTO Appellate Body members (i.e. CHF 7,000 per month, which is equivalent to **EUR 6,421 per month**);<sup>151</sup>
- The President of the Appeal Tribunal and, where applicable, the Vice-President, would receive a **fee for each day worked in fulfilling the functions of President** of the Appeal Tribunal suggested by the EU to be around the same as for WTO Appeal Tribunal members (i.e. **EUR 949 per day**);<sup>152</sup> and

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<sup>146</sup> The EU proposal in the TTIP negotiations of 12 November 2015 is the reference text for all EU proposals on investment dispute settlement (hereinafter, the EU standard approach). In particular, see Article 9 (Tribunal of First Instance) and 10 (Appeal Tribunal) of Section 3 (Resolution of Investment Disputes and Investment Court System) of Chapter II (Investment).

<sup>147</sup> See [https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjwsMDEwL3TAhXrC8AKHSseAcEQFgglMAA&url=https%3A%2F%2Fdocs.wto.org%2Fdoc2fe%2FPages%2FFE\\_Search%2FExportFile.aspx%3Fid%3D88355%26filename%3DQ%2FWT%2FBFA%2FW109.pdf&usg=AFQjCNGEZW75uMaTI5Fyxr\\_z5wcMc9CnXg&sig2=OjSIsoBbw98C2\\_wIKMInpQ&cad=rja](https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjwsMDEwL3TAhXrC8AKHSseAcEQFgglMAA&url=https%3A%2F%2Fdocs.wto.org%2Fdoc2fe%2FPages%2FFE_Search%2FExportFile.aspx%3Fid%3D88355%26filename%3DQ%2FWT%2FBFA%2FW109.pdf&usg=AFQjCNGEZW75uMaTI5Fyxr_z5wcMc9CnXg&sig2=OjSIsoBbw98C2_wIKMInpQ&cad=rja).

<sup>148</sup> See the EU proposal in the TTIP negotiations.

<sup>149</sup> ICSID Cost of Proceedings, available at: <https://icsid.worldbank.org/en/Pages/Services/Cost-of-Proceedings.aspx>.

<sup>150</sup> Meg Kinnear, Secretary-General of ICSID, *Appointment of Adjudicators to a Multilateral Investment Court, Presentation in Geneva*, Experts Meeting, 14 December 2016.

<sup>151</sup> See the EU proposal in the TTIP negotiations.

<sup>152</sup> *Ibid.*

- Would receive a **fee for each day worked as a Member** of the Appeal Tribunal that is suggested by the EU to be around the same as for WTO Appellate Body members (i.e. **EUR 949 per day**)<sup>153</sup>.
- As for the adjudicators of the First Instance Tribunal, the ICSID survey shows that the average time spent by each arbitrator per case is of **53 days a year per case**<sup>154</sup>.

In addition, the EU standard approach provides that the fee-based remuneration system may be permanently transformed into a fixed salary system for both adjudicators of the First Instance Tribunal and Members of the Appeal Tribunal. In such an event, the adjudicators would serve on a full-time basis and the Committee would fix their remuneration and related organisational matters. Indeed, there is an intention to move in that direction.<sup>155</sup>

### *3.1.1.2 Cost of secretariat*

The standard approach also establishes that the Secretariat of ICSID shall act as Secretariat for the First Instance Tribunal and Appeal Tribunal and provide it with appropriate support.<sup>156</sup>

ICSID charges its parties for its services of an **annual fee**, currently USD 32,000,<sup>157</sup> which is equivalent to **EUR 28,909**, covering the time spent by all members of the dedicated case team, including the assistance of the Secretary at hearings and the financial management of the case account. This fee is usually divided equally between the parties. It applies to all ICSID cases and non-ICSID cases administered by ICSID. Consequently, it would apply also to ICS cases.

### *3.1.1.3 Overall cost of a single ICS per annum*

Table 5 below provides an overview of the likely costs of a single ICS (First Tribunal and Appeal Tribunal) for its Contracting Parties per year under three scenarios according to the number of cases pending before the court:

- Scenario 1: ICS inactive (with no cases);
- Scenario 2: ICS active with 1 case pending before the First Instance Tribunal; and
- Scenario 3: ICS active with 1 case pending before the First Instance Tribunal and 1 case pending before the Appeal Tribunal (i.e. with a total of 2 cases).

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<sup>153</sup> *Ibid.*

<sup>154</sup> Meg Kinnear, Secretary-General of ICSID, Appointment of Adjudicators to a Multilateral Investment Court, Presentation in Geneva, Experts Meeting, 14 December 2016.

<sup>155</sup> See Statement n. 36 by the Commission and the Council on investment protection and the Investment Court System (ICS), to be entered on the occasion of the adoption by the Council of the decision authorising the signature of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, available at: <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>.

<sup>156</sup> See for instance Article 8.27.16 of CETA, available at: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>157</sup> ICSID Cost of Proceedings, available at: <https://icsid.worldbank.org/en/Pages/Services/Cost-of-Proceedings.aspx>.

Table 5: Estimate of expenses for the ICS per annum under EU trade and investment agreements based on various scenarios of workload

Scenarios	Estimated annual costs of ICS for its Contracting Parties (EU and trading partner)
<b>Scenario 1:</b> <b>ICS inactive</b> <b>(No cases)</b>	1. Fixed annual operating costs of ICS <sup>158</sup> : <ul style="list-style-type: none"> <li>• Base remuneration for the 15 adjudicators at First Instance Tribunal<sup>159</sup>: EUR 360,000.</li> <li>• Base remuneration for the 6 Appeal Tribunal members<sup>160</sup>: EUR 462,312.</li> </ul> <b>= Total cost of Scenario 1: EUR 822,312</b>
<b>Scenario 2:</b> <b>ICS active:</b> <b>(1 case at First Instance)</b>	1. Fixed annual operating costs of ICS: EUR 822,312 (as under Scenario 1) + 2. Case-related costs at First instance: <ul style="list-style-type: none"> <li>• Fees for days worked as adjudicators in case 1<sup>161</sup>: EUR 430,890</li> <li>• Fees for days worked as President of the First Instance Tribunal<sup>162</sup>: EUR 50,297</li> <li>• Fees for case handling (secretariat/registry costs)<sup>163</sup>: EUR 28,909</li> </ul> <b>= Total cost of Scenario 2: EUR 1,332,408</b>
<b>Scenario 3</b> <b>ICS active:</b> <b>(1 case at First Instance and 1 appeal)</b>	1. Fixed annual operating costs of ICS: EUR 822,312 (as under Scenario 1) + 2. Case-related costs at First Instance: EUR 510,096 (as under point 2, Scenario 2) + 3. Case-related costs at Appeal Instance: <ul style="list-style-type: none"> <li>• Fees for days worked as Members in case 1<sup>164</sup>: EUR 150,891</li> </ul>

<sup>158</sup> In the scenario in which the ICS is inactive because there are no cases pending before it, there would be no costs for the Secretariat of ICSID nor for the Registry of the PCA.

<sup>159</sup> I.e. EUR 2,000 x 15 x 12 months. See para. 3.1.1.1 above.

<sup>160</sup> I.e. EUR 6,421 x 6 x 12 months. See para. 3.1.1.1 above.

<sup>161</sup> I.e. EUR 2,710 x 3 judges (according to the EU TTIP proposal the Tribunal of First Instance would hear cases in divisions consisting of three judges, Article 9(6)) x 53 days worked in 12 months. See para. 3.1.1.1 above.

<sup>162</sup> I.e. EUR 949 x 53 days worked as President in 12 months. See para. 3.1.1.1 above.

<sup>163</sup> EUR 28,909 is the annual fee charged by ICSID for its services. See para. 3.1.1.2 above.

	<ul style="list-style-type: none"> <li>• Fees for days worked as President of Appeal Tribunal<sup>165</sup>: EUR 50,297</li> <li>• Fees for case handling (secretariat/registry costs)<sup>166</sup>: EUR 28,909</li> </ul> <p><b>= <u>Total cost of Scenario 3: EUR 1,562,505</u></b></p>
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### 3.1.2 Calculating the cost of a single ICS only for the EU budget

In order to calculate the impact on the EU budget of a single active ICS (with 1 case at first instance and 1 case at appeal) per year, it was necessary to:

- Divide the total cost obtained under Scenario 3 between the 2 parties (3.1.2.1); and
- Consider whether specific circumstances may change the share of cost to be borne by the EU (3.1.2.2).

#### 3.1.2.1 Costs that are born by the EU

The EU standard approach makes a distinction between costs that are born equally by the Contracting Parties and costs that are allocated by the tribunal among the disputing parties. A portion of costs could be borne by the unsuccessful disputing party according to the "loser pays" principle. In fact, under the EU standard approach, *"reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the case"* (Article 28(4)).

However, it is impossible to make an estimate of the apportionment the Tribunal would make on the basis of the "loser pays" principle or different "exceptional circumstances". For this reason, the apportionment of costs between the disputing parties made by the Tribunal was not taken into consideration for ICS, ISDS and the multilateral investment Court.

Consequently, it was considered that the costs borne by the EU amount to half of the total costs of Scenario 3 (EUR 1,562,505), i.e. **EUR 781,253 per party per year given the assumption of 2 cases in that year** (1 case before the First Instance Tribunal and 1 case before the Appeal Tribunal).<sup>167</sup>

#### 3.1.2.2 Special circumstances

It is possible that the EU would be covering more of the fixed costs of the ICS in case it is concluding an agreement with a transition or developing country. Therefore, the sharing of costs of the ICS could be made dependent on the Parties' respective level of economic development. This is for instance the case under the EU-Vietnam FTA<sup>168</sup> and the EU-

<sup>164</sup> I.e. EUR 949 x 3 judges (according to the EU TTIP proposal the Appeal Tribunal would hear cases in divisions consisting of three judges, Article 10(8)) x 53 days worked in 12 months. See para. 3.1.1.1 above.

<sup>165</sup> I.e. EUR 949 x 53 days worked as President in 12 months. See para. 3.1.1.1 above.

<sup>166</sup> EUR 28,909 is the annual fee charged by ICSID for its services. See para. 3.1.1.2 above.

<sup>167</sup> It is assumed that the EU will bear the full budgetary impact of the ICS.

<sup>168</sup> The text of the EU-Vietnam FTA is available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

Myanmar/Burma Treaty (almost finalised at the time of writing).<sup>169</sup> However, it is not possible to estimate the precise amount of this extra cost for the EU, which is thus not computed into the cost calculation of this impact assessment.

### 3.1.3 Impact of multiple ICSs on the EU budget

In order to obtain the overall impact on the EU budget of all ICS in EU trade and/or investment agreements, the result obtained under para. 3.1.2.1 (EUR 781,253) was then multiplied by the number of concluded, ongoing and prospective negotiations in which the EU has or will introduce the ICS.

Four categories of trade and or/investment treaties including ICS with trading partners can be identified depending on the current stage in the process of negotiations:

1. Negotiations that are concluded (3): Canada, Vietnam and Myanmar/Burma;
2. Negotiations that are ongoing (8): Singapore, China, Indonesia, Japan, Malaysia, Mexico, Morocco and Philippines;
3. Negotiations for which the EU has the Council mandate, but they are not ongoing (6): Egypt, Jordan, Russian Federation, Thailand, Tunisia and United States of America; and
4. Negotiations that are foreseen in the Trade for All Communication<sup>170</sup> and for which the Council mandate is foreseen in the short-medium term (6): Australia, Chile, Hong Kong (China), Chinese Taipei, South Korea<sup>171</sup> and New Zealand.

Therefore, the total annual cost for the EU of active ICSs with 2 cases (1 before the First Instance Tribunal and 1 before the Appeal Tribunal) contained in all EU trade and/or investment agreements listed in categories 1-4 above (23 agreements) was found to be EUR 17,968,819 per year.<sup>172</sup> If we consider, instead, only those agreements listed in categories 1-2 (11 agreements), for which negotiations have either been concluded or they are ongoing, the total annual cost for the EU would amount to **EUR 8,593,783 per year**.<sup>173</sup> This latter value

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<sup>169</sup> See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/myanmar/>.

<sup>170</sup> Trade for All Communication, pp. 9, 31-33, available at: [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

<sup>171</sup> With respect to South Korea, at the moment of writing it is not possible to foresee when the EU would start the process of negotiating directives. However, the EU-South Korea Agreement contains a rendez-vous clause for investment. See the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Chapter Seven on Trade In Services, Establishment And Electronic Commerce, Section B on Cross-Border Supply Of Services, Article 7.16 on Review Of The Investment Legal Framework, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN>, pp. 29-30.

<sup>172</sup> EUR 781,253 x 23 agreements. The total does not take into account potential extra costs for the EU linked to the level of development of the trading partners.

<sup>173</sup> EUR 781,253 x 11 agreements. The total does not take into account potential extra costs for the EU linked to the level of development of the trading partners.

will be considered for comparison with the scenario of the multilateral investment court given the more advanced status of the negotiations under categories 1 and 2 above.<sup>174</sup>

For the same reasons outlined under paragraph 3.1.2.2, this cost could be higher for the EU, in light of the level of development of its treaty partner, but as explained under paragraph 3.1.2.2, this was not considered in the current cost estimation.

### **3.2 Calculation of cost of remaining ISDS mechanisms for the EU and EU Member States**

The procedural framework for settling international investment disputes for the EU and its Member States that would remain in place despite the introduction of ICS in EU trade and/or investment agreements with third countries would comprise also the ISDS mechanisms included in:

- a) The ECT to which the EU and all but one of its Member States are Contracting Parties<sup>175</sup>; and
- b) Investment treaties between EU Member States and those third countries with which the EU has not concluded or does not envisage to conclude a bilateral trade and/or investment agreement including provisions on ICS.<sup>176</sup>

Investment treaties between EU Member States and those third countries with which the EU has concluded or envisages to conclude in the near future a bilateral trade and/or investment agreement (as defined in categories 1-4 in para. 3.1.3) were not considered in this analysis. This is because the ICS in EU level agreements will replace the ISDS mechanisms in the investment treaties with those third countries the EU has negotiated an ICS with.

In general, in the traditional ISDS system, the costs borne by States are costs related to the status of disputing party (respondent) in an investment arbitration dispute. There are no additional costs in connection with the status of being member or party of an institution administering investment arbitration disputes.

Consequently, in order to estimate the costs deriving from ISDS mechanisms that would remain in place for the EU and EU Member States, an analysis has been undertaken of all past disputes arising from investment treaties (a) and (b) and between the EU or EU Member States (acting as respondents) and investors with the nationality of those third countries that are not countries with which the EU has negotiated or currently envisages to negotiate a trade and/or investment agreement.

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<sup>174</sup> As explained above, it is assumed that the EU will bear the full budgetary impact of the ICS.

<sup>175</sup> Italy's withdrawal from the ECT took effect on 1 January 2016, see <http://www.energycharter.org/who-we-are/members-observers/countries/italy/>.

<sup>176</sup> I.e. excluding the agreements with treaty partners listed in categories 1-4 under para. 3.1.3 above. The objective of the calculation is to estimate the average cost per ISDS case per year and not the total cost of ISDS cases. Since for calculating this average there is no considerable difference between excluding disputes arising from all categories of agreements 1-4 or excluding only disputes arising from categories 1-2, the most comprehensive approach excluding all categories of agreements was adopted (1-4).

The analysis is based on the sections on costs of the arbitral tribunals' awards. As clarified in the section on methodology (section 2 above), only tribunal and institutional costs were considered and not legal counsel and expert fees. In addition, for consistency with the analysis of costs of ICS, the tribunals' decisions on apportionment of costs among disputing parties were not taken into account<sup>177</sup> and costs were considered to be borne by the disputing parties in equal shares.

Table 6 below shows the results of this research.<sup>178</sup>

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<sup>177</sup> On apportionment of costs, depending on the circumstances of the case, some arbitral tribunals have ruled that each party should bear its own costs, while others have applied the principle that “costs follow the event,” making the losing party bear all or part of the costs of the proceeding and attorney fees. Examples of arbitration on apportionment of costs are UNCITRAL Article 40(1) and ICSID Article 61(2). Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case. Article 61(2) of the ICSID Convention provides that: “[...] *the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of facilities of the Centre shall be paid. Such decision shall form part of the award*”.

<sup>178</sup> The research was conducted on <http://investmentpolicyhub.unctad.org/ISDS> by selecting all 28 EU Member States as respondent States and by excluding both pending and discontinued cases (for which a decision on costs is not present). The research produced a total of 82 results. No cases were brought against the EU. Out of the 82 cases, 12 cases were excluded because they concerned disputes between a EU Member State and an investor with the nationality of a country with which the EU has negotiated or is in the process of negotiating a trade and investment agreement that includes provisions on ICS. 59 cases concerned intra-EU disputes. Out of these, the disputes considered were disputes arisen after the date of accession to the EU of the respondent Member State and before the date of accession of the investor's host State. Consequently, 13 results were found to be relevant for this analysis.

Table 6: ISDS cases between EU Member States and investors that are third country nationals (excluding nationals of EU treaty partners; including nationals of Member States before date of accession to the EU).

Case	Applicable IIA <sup>179</sup> and Nationality of disputing parties	Arbitral rules and Administering Institution	Outcome of proceedings	Tribunal and institutional costs borne by respondent State (assuming 50/50)	Duration of proceedings	Tribunal and institutional costs borne by respondent State per year
<i>Flemingo DutyFree v. Poland</i> <sup>180</sup>	India - Poland BIT (1996)  Respondent State(s): Poland  Home State(s) of investor: India	UNCITRAL  PCA	Decided in favour of investor	EUR 414,711 <sup>181</sup>	2 years:  Year of initiation: 2014  Award dated: 12 August 2016	EUR 207,356
<i>Almås v. Poland</i> <sup>182</sup>	Norway - Poland BIT (1990)  Respondent State(s): Poland	UNCITRAL  PCA	Decided in favour of State	EUR 121,422 <sup>183</sup>	3 years:  Year of initiation: 2013	EUR 40,474

<sup>179</sup> International Investment Agreement (IIA).

<sup>180</sup> Award, paras. 964-975, [https://www.italaw.com/sites/default/files/case-documents/italaw7709\\_3.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf).

<sup>181</sup> This amount includes 50% of the Tribunal fees, travel and other expenses incurred by the arbitrators and cost of expert advice, registry service and other assistance as established by the Tribunal in paras. 964-967 of the Award. It does not take into account any costs of legal representation for coherence with the analysis of ICS costs and as explained in Section 2. on Methodology.

<sup>182</sup> Award, paras. 300-308, <http://www.pcacases.com/web/sendAttach/1872>.

<sup>183</sup> This amount includes 50% of the Tribunal fees and expenses, fees for registry services and other tribunal costs, as established by the Tribunal in paras. 301-303 of the Award.

	Home State(s) of investor: Norway				Award dated: 27 June 2016	
<b>Bryn Services v. Latvia</b> <sup>184</sup>	Latvia - Switzerland BIT (1992)  Respondent State(s): Latvia  Home State(s) of investor: Switzerland	None (ad hoc)  No administering institution	Settled	No data available	Year of initiation: 2013	Data not available
<b>Emmis v. Hungary</b> <sup>185</sup>	<i>Inter alia</i> Hungary - Switzerland BIT (1988) Respondent State(s): Hungary  Home State(s) of investor: <i>inter alia</i> Switzerland	ICSID  ICSID	Decided in favour of State	USD 165,634 <sup>186</sup> , i.e. EUR € 149,637	2 years  Year of initiation: 2014  Award dated: 16 April 2016	EUR 74,819
<b>IGB Spain</b> <sup>187</sup>	Spain - Venezuela BIT (1995)	ICSID  ICSID	Decided in favour of State	No data available	3 years:  Year of initiation:	Data not available

<sup>184</sup> For information on the case, see <http://investmentpolicyhub.unctad.org/ISDS/Details/610>.

<sup>185</sup> Award, paras. 256-264, <https://www.italaw.com/sites/default/files/case-documents/italaw3143.pdf>.

<sup>186</sup> These costs include 50% of the ICSID's administrative fees and expenses and tribunal's fees and expenses, as ordered by the arbitral Tribunal in paras. 262-263 of the Award.

<sup>187</sup> Award, paras. 210-213, <https://www.italaw.com/sites/default/files/case-documents/italaw7474.pdf>.

	Respondent State(s): Spain  Home State(s) of investor: Venezuela				2012  Award dated: 14 August 2015	
<b><i>Dede v. Romania</i></b> <sup>188</sup>	Romania - Turkey BIT (1996)  Respondent State(s): Romania  Home State(s) of investor: Turkey	ICSID  ICSID	Decided in favour of State	USD 153,515 <sup>189</sup> , i.e. EUR 138,689	3 years:  Year of initiation: 2010  Award dated: 5 September 2013	EUR 46,230
<b><i>Alps Finance v. Slovakia</i></b> <sup>190</sup>	Slovakia - Switzerland BIT (1990)  Respondent State(s): Slovakia  Home State(s) of investor: Switzerland	UNCITRAL  No administering institution	Decided in favour of State	Data not publicly disclosed	3 years:  Year of initiation: 2008  Award dated: 5 March 2011	Data not available
<b><i>Phoenix Action</i></b> v.	Czech Republic - Israel BIT (1997)	ICSID	Decided in favour of State	USD 178,000 <sup>192</sup> , i.e. EUR 160,809	3 years:	EUR 53,603

<sup>188</sup> Award, paras. 265-273, <https://www.italaw.com/sites/default/files/case-documents/italaw5010.pdf>.

<sup>189</sup> These costs include 50% of arbitrators' fees and expenses and ICSID administrative charges, as ordered by the arbitral Tribunal in para. 277 of the Award.

<sup>190</sup> Award, paras. 253-270, <https://www.italaw.com/sites/default/files/case-documents/ita0027.pdf>.

<b><i>Czech Republic</i></b> <sup>191</sup>	Respondent State(s): Czech Republic  Home State(s) of investor: Israel	ICSID			Year of initiation: 2006  Award dated: 15 April 2009	
<b><i>Parkerings v. Lithuania</i></b> <sup>193</sup>	Lithuania - Norway BIT (1992)  Respondent State(s): Lithuania  Home State(s) of investor: Norway	ICSID  ICSID	Decided in favour of State	Only data on costs available refers to total costs and expenses, i.e. including costs of legal representation (EUR 1,340,716) <sup>194</sup>	2 years:  Year of initiation: 2005  Award dated: 11 September 2007	Data not available
<b><i>Pren Nreka v. Czech Republic</i></b> <sup>195</sup>	Croatia - Czech Republic BIT (1996)  Respondent State(s): Czech Republic  Home State(s) of investor: Croatia <sup>196</sup>	UNCITRAL  No administering institution	Decided in favour of investor	Data not available	2 years:  Year of initiation: 2005  Award dated: 5 February 2007	Data not available

<sup>192</sup> This amount covers 50% of the fees and expenses of the members of the Tribunal and of the ICSID Secretariat as established by the Tribunal at para. 152 of the Award.

<sup>191</sup> Award, paras. 148-152, <https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf>.

<sup>193</sup> Award, paras. 457-464, <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>.

<sup>194</sup> The award does not specify the exact content of this amount, therefore there is the risk that the costs of legal representation of the respondent are included therein. Accordingly, it is not included in the calculation of the average.

<sup>195</sup> For information on the case, see <https://www.italaw.com/cases/756>.

<b><i>Telenor v. Hungary</i></b> <sup>197</sup>	Hungary - Norway BIT (1991)  Respondent State(s): Hungary  Home State(s) of investor: Norway	ICSID  ICSID	Decided in favour of State	USD 150,000 <sup>198</sup> , i.e. EUR 135,513	2 years:  Year of initiation: 2004  Award dated: 13 September 2006	EUR 67,757
<b><i>Sancheti v. Germany</i></b> <sup>199</sup>	Germany - India BIT (1995)  Respondent State(s): Germany  Home State(s) of investor: India	Data not available  Data not available	Settled	Data not available	Year of initiation: 2000	Data not available
<b><i>Mafezzini v. Spain</i></b> <sup>200</sup>	Argentina - Spain BIT (1991)  Respondent State(s): Spain  Home State(s) of	ICSID  ICSID	Decided in favour of investor	No data available	3 years:  Year of initiation: 1997  Award dated: 13 November 2000	Data not available

<sup>196</sup> Croatia acceded to the EU on 1 July 2013, therefore in 2005 its investor was a third country national.

<sup>197</sup> Award, para. 108 and Schedule of Costs, <https://www.italaw.com/sites/default/files/case-documents/ita0858.pdf>.

<sup>198</sup> This amount covers 50% of the ICSID costs including the fees and expenses of the Tribunal, as established by the Tribunal at para. 108.

<sup>199</sup> For information on the case, see <http://investmentpolicyhub.unctad.org/ISDS/Details/46>.

<sup>200</sup> Award, paras. 98-100, <https://www.italaw.com/sites/default/files/case-documents/ita0481.pdf>.

	investor: Argentina					
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In order to estimate the annual cost for the EU and for EU Member States per ISDS case, the average cost that EU Member States have spent per year per case was calculated among those cases above. For those cases for which data on costs was not available, an average cost per year was attributed (calculating it among the other cases).<sup>201</sup> For those cases for which data on duration of proceedings was not available, an average duration was attributed (calculating it among the other cases).<sup>202</sup>

It was found that EU Member States have spent on average **EUR 67,133 per year per ISDS case** in disputes with investors that are nationals of third countries (non EU trading partners), considering only institutional and tribunal costs as borne by the disputing parties in equal shares.

Table 7 below shows the results of this calculation.

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<sup>201</sup> The average cost per year is EUR 81,706.

<sup>202</sup> The average duration of cases is 2 years.

Table 7: Average cost per case per year

	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997
<i>Flemingo DutyFree</i>	207,356	207,356																	
<i>Almås</i>	40,474	40,474	40,474																
<i>Bryn Services</i>		81,706	81,706																
<i>Emmis</i>	74,819	74,819																	
<i>IGB</i>		81,706	81,706	81,706															
<i>Dede</i>				46,230	46,230	46,230													
<i>Alps Finance</i>						81,706	81,706	81,706											
<i>Phoenix Action</i>								53,603	53,603	53,603									
<i>Parkerings</i>										81,706	81,706								
<i>Pren Nreka</i>										81,706	81,706								
<i>Telenor</i>											67,757	67,757							
<i>Sancheti</i>															81,706	81,706			
<i>Maffezzini</i>																	81,706	81,706	81,706
<b>TOTAL (per year)</b>	322,648	486,060	203,886	127,936	46,230	127,936	81,706	135,309	53,603	217,015	231,169	67,757	0	0	81,706	81,706	81,706	81,706	81,706
<b>Number of cases</b>	3	5	3	2	1	2	1	2	1	3	3	1	0	0	1	1	1	1	1
<b>Cost per case per year</b>	107,549	97,212	67,962	63,968	46,230	63,968	81,706	67,655	53,603	72,338	77,056	67,757	0	0	81,706	81,706	81,706	81,706	81,706
<b>Average cost per year</b>	132,094																		
<b>Average cost per case per year</b>	67,133																		

Since for calculating the costs of ICS we used the assumption of an active court with 1 case at first instance and 1 appeal per year, the same assumption of 2 cases per year was used here for ISDS. The result was that the EU and EU Member States would spend on average **EUR 134,266 per year per 2 ISDS cases.**<sup>203</sup> These assumptions are of course very much subject to variations in reality.

### **3.3 Total cost of baseline scenario**

In light of the analysis conducted in para. 3.1 and para. 3.2 it was possible to conclude that the overall annual cost of the baseline scenario assuming 2 cases per year was estimated to be the sum of:

- The estimated cost of 11 active ICSs with 2 cases each, i.e. **EUR 8,593,783 per year** (the estimated cost of 23 active ICSs with 2 cases each would amount to EUR 17,968,819, but the estimate of 11 active ICSs is preferred given the more advanced status of the negotiations);<sup>204</sup> and
- The estimated cost of 2 ISDS cases per year (in relation to those ISDS mechanisms that would be replaced by ICS in the short term), i.e. **EUR 134,266 per year.**

The sum of these two calculations gave us the overall cost of the baseline scenario, i.e. **EUR 8,728,049.**

## **4. MULTILATERAL INVESTMENT COURT SCENARIO**

This scenario estimates the costs of a permanent multilateral investment Court, which is assumed to include a First Instance Tribunal and an Appeal Tribunal with full-time adjudicators.

The precise cost of this Court is hard to predict with a high level of accuracy because this data will ultimately depend on a number of factors, such as its concrete design, methods of functioning, its size, arrangements relating to possible user fees and on the concrete outcome of future negotiations.

Nevertheless, it was possible to construct an estimate of the cost of this Court on the basis of a comparative analysis with corresponding budgetary data of other international dispute settlement mechanisms. Specifically, the fees and expenses of the following international courts and tribunals were analysed:

- The International Court of Justice (ICJ);
- The International Criminal Court (ICC);

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<sup>203</sup> In addition, no additional costs were found connected to membership in one of the arbitral institutions. In particular, there is no cost to join or maintain membership in ICSID, <https://icsid.worldbank.org/en/Documents/about/Guide%20to%20Membership%20in%20the%20ICSID%20Convention.pdf>, p. 2.

<sup>204</sup> As explained above, it is assumed that the EU will bear the full budgetary impact of the ICS.

- The Appellate Body of the WTO (AB WTO);
- The Court of Justice of the European Union (CJEU);
- The International Tribunal of the Law of the Sea (ITLOS); and
- The European Court of Human Rights (ECtHR).<sup>205</sup>

In order to establish what would be the impact on the EU budget of the cost of the multilateral Court per year, a two-step process was followed:

1. Calculating the overall cost of the multilateral investment Court for all its Contracting Parties per year (para. 4.1); and
2. Calculating the share of cost that has to be borne by the EU budget and Member States budgets per year (para. 4.2).

#### **4.1 Calculation of overall cost of the Multilateral Investment Court per year**

In order to calculate the yearly total cost of the multilateral investment Court, the following core cost components were taken into account:

- Remuneration of adjudicators per year (para. 4.1.1); and
- Expenses for staff/secretariat per year (para. 4.1.2).

The sum of these cost components resulted in the overall cost of the multilateral investment Court for its Contracting Parties per annum (para. 4.1.3).

##### **4.1.1 Remuneration of adjudicators**

As illustrated for the ICS, there are two main types of remuneration of adjudicators: (i) fixed or (ii) fee-based. In the former case, adjudicators (who are in an employment relationship) are paid a base remuneration per month plus benefits (health insurance, pensions, etc.). In the latter case, adjudicators (who are self-employed and are thus responsible for their own social security) are generally paid a monthly retainer and a daily/hourly fee.

The preferred option for the multilateral investment Court would be to have permanent adjudicators employed full time and remunerated with fixed salary as it is the case for most international courts and tribunals (see Table 8 below). However, the alternative or the addition of a mechanism allowing for a fee-based system of remuneration is not excluded. Since the actual level of fees has not been agreed and estimating the number of days adjudicators will work would be highly speculative, the calculation of a fee-based remuneration system for adjudicators is not carried out.

For the purposes of the projection carried out below, it is assumed there are 9 adjudicators for the First Instance Tribunal and 5 adjudicators for the Appeal Tribunal. Table 8 below shows a

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<sup>205</sup> Budget information of other international courts were searched, but they were not publicly available, namely the Inter-American Court of Human Rights, the Iran-US Claims Tribunal, the Caribbean Court of Justice (CCJ) and the Arab Investment Court.

comparative analysis of remuneration of adjudicators in other international courts and tribunals.

Table 8: Remuneration of adjudicators in international courts

<b>International Court or Tribunal</b>	<b>Remuneration per year (Salary + Benefits or Retainer + Fees)</b>	<b>Total average per adjudicator per year in EUR</b>
<b>International Court of Justice (ICJ)</b> <sup>206</sup>	Fixed remuneration system.  For the biennium 2016-2017 the ICJ budgeted for its 15 judges USD 15,167,600 covering judges' salaries, other entitlements and pensions, i.e. EUR 13,702,735, i.e. EUR 6,851,368 per year.	EUR 456,758
<b>International Criminal Court (ICC)</b> <sup>207</sup>	Fixed remuneration system.  For 2017 the ICC budgeted for its 18 judges EUR 5,950,000 covering judges' salaries and entitlements.	EUR 330,556
<b>World Trade Organization Appellate Body (WTO AB)</b>	Fee-based remuneration system.  For 2017 the WTO budgeted for its 7 Appellate Body Members CHF 791,000, i.e. EUR 725,585, to fully finance the fees 7 Appellate Body Members for one year <sup>208</sup> .  A different source provided data on the different components of the remuneration of Appellate Body Members: <ul style="list-style-type: none"><li>• Retainer CHF 7,000 per Member per month;</li><li>• Daily fee CHF 600 plus CHF 435 allowance for</li></ul>	EUR 103,655

<sup>206</sup> Proposed programme budget for the biennium 2016-2017, Seventieth session of the General Assembly, 21 April 2015, Table 7.6 Resource requirements: Members of the Court, p. 6, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/6%28Sect.7%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/6%28Sect.7%29).

<sup>207</sup> Proposed Programme Budget for 2017 of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016, Annex VI (e), p. 191, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf)

<sup>208</sup> 2016-2017 Budget proposals by the Director-General, Table 23. Section 2: Temporary Assistance, p. 26, available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=134952,134411,120331,119761,102411,49810,100892,76277,56560,3697&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=134952,134411,120331,119761,102411,49810,100892,76277,56560,3697&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

	meals and accommodation; <ul style="list-style-type: none"> <li>• CHF 300 per member per month allowance for administrative expenses<sup>209</sup>.</li> </ul>	
<b>Court of Justice of the European Union (CJEU)</b> <sup>210</sup>	Fixed remuneration system.  For 2017 the EU budgeted for its 85 Members (40 Members of the Court of Justice, including 28 judges, 11 Advocate Generals and 1 Registrar; 45 Members of the General Court, including 28 judges, 16 Advocate Generals and 1 Registrar) EUR 33,493,500 for their remunerations, other entitlements and allowances.	EUR 394,041
<b>The International Tribunal of the Law of the Sea (ITLOS)</b> <sup>211</sup>	Fixed remuneration system.  For 2017-2018 ITLOS budgeted for its 21 judges: <ul style="list-style-type: none"> <li>• EUR 4,393,000 for remuneration and other allowances;</li> <li>• EUR 1,857,300 for pensions; and</li> <li>• EUR 2,221,000 for case-related expenditures for judges</li> </ul> For a total of EUR 8,471,300, i.e. 4,235,650 per year.	EUR 201,698
<b>The European Court of Human Rights (ECtHR)</b> <sup>212</sup>	For 2017, the remuneration of the 47 judges of the ECtHR include: <ul style="list-style-type: none"> <li>• A basic salary per judge that equals to step 6 of the grade A7 pay scale for Council of Europe staff members based in France, i.e. EUR 15,259.15 per month, i.e. EUR 183,110 per year;</li> <li>• A displacement allowance per judge equal to 12,5% of the basic salary, i.e. EUR 22,888 per year;</li> </ul>	EUR 226,825

<sup>209</sup> Committee on Budget, Finance and Administration, Letter from the Chairman of the Appellate Body, 18 March 2004, p. 3, available at: [https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKewjuh5jM1uXTAhXQEVAKHSqnD0MQFggsMAE&url=https%3A%2F%2Fdocs.wto.org%2Fdocl2fe%2FPages%2FFE\\_Search%2FExportFile.aspx%3Fid%3D88355%26filename%3DQ%2FWT%2FBFA%2FW109.pdf&usq=AFQjCNGEZW75uMaTI5Fyxr\\_z5wcMc9CnXg&cad=rja](https://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKewjuh5jM1uXTAhXQEVAKHSqnD0MQFggsMAE&url=https%3A%2F%2Fdocs.wto.org%2Fdocl2fe%2FPages%2FFE_Search%2FExportFile.aspx%3Fid%3D88355%26filename%3DQ%2FWT%2FBFA%2FW109.pdf&usq=AFQjCNGEZW75uMaTI5Fyxr_z5wcMc9CnXg&cad=rja).

<sup>210</sup> General Budget of the European Union for the financial year 2017, Section IV Court of Justice of the European Union, L 51/2000, available at: <http://eur-lex.europa.eu/budget/data/General/2017/en/SEC04.pdf>.

<sup>211</sup> Draft Budget Proposals of the International Tribunal for the Law of the Sea for 2017-2018, Twenty-sixth meeting of State Parties, New York, 20-24 June 2016, Annex I Budgets of the Tribunal from 2011-2012 to 2017-2018, pp. 26-27, available at: <http://undocs.org/SPLOS/2016/WP.1>.

<sup>212</sup> Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights, adopted by the Committee of Ministers on 23 September 2009, 1066th meeting of the Ministers' Deputies, Article 3 – Remuneration, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c0ce3#\\_ftn4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c0ce3#_ftn4).

	<ul style="list-style-type: none"> <li>• Additional annual remuneration for the President of the Court of EUR 13,885; and</li> <li>• Additional annual remuneration for the Vice-President of the Court of EUR 6,942</li> </ul> <p>For a total of EUR 226,825.</p>	
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Considering that the above courts and tribunals have very different expenses, types of remuneration, workload and number of Contracting Parties, an average has been calculated to have an idea of how much the remuneration of the multilateral investment Court would cost. A cost (including salary, benefits for pensions and for expenses and allowances) totalling **EUR 285,589 per adjudicator per year** was obtained.

As the table above illustrates, the number of adjudicators varies among the different international courts examined for a number of factors, including the different workload, functioning and set-up of these courts. For this reason, it is difficult to extrapolate a meaningful number of adjudicators from the information we have available. Consequently, for the purposes of the calculation of the number of adjudicators, it is assumed there are 9 adjudicators for the First instance tribunal and 5 adjudicators for the Appeal tribunal, for a total of 14 adjudicators to allow several three-adjudicator divisions to hear cases simultaneously.

The annual cost of remuneration per adjudicator was multiplied by the number of adjudicators foreseen for the Court (i.e. 14, 9 for the First Instance Tribunal and 5 for the Appeal Tribunal) and an estimate of **EUR 3,998,246 per year** for the remuneration of the adjudicators of the Multilateral Investment Court was obtained.

#### 4.1.2 Expenses for staff

The expenses for staff include:

- Remuneration of permanent staff (professional and general service staff);
- Remuneration of temporary staff; and
- Other expenses of the Secretariat related to staff (e.g. training, hospitality, consultancy and official travel).

In relation to remuneration, as analysed for adjudicators, the types of remuneration of staff can be: (i) fixed or (ii) fee-based. In the former case, members of staff are paid a salary, they would be employed by the Court, which would be responsible for staff benefits (health insurance, childcare, pension, etc.). In the latter case, members of staff are generally paid a monthly retainer and a daily/hourly fee, they would be employed by the arbitral institution, which would be responsible for staff benefits.<sup>213</sup>

The preferred option for the multilateral investment Court would be to employ its staff on fixed terms as it is the case for most international courts and tribunals (see Table 9 below for a

<sup>213</sup> Two examples of fee-based registries (with no available data on costs) are the Eritrea-Ethiopia Claims Commission and the Standing Arbitral Tribunal for The Bank for International Settlements.

comparative analysis). However, as explained for adjudicators, the alternative or the addition of a mechanism allowing for a fee-based system of remuneration is not excluded. Since the actual level of fees has not been agreed and estimating the number of days staff will work would be highly speculative, the calculation of a fee-based remuneration system for staff is not carried out.

Table 9 below shows a comparative analysis of expenses for staff in other international courts and tribunals.<sup>214</sup>

*Table 9: Expenses for staff in international courts*

<b>International Court or Tribunal</b>	<b>Expenses of the Secretariat per year</b>	<b>Average of expenses per member of staff per year in EUR</b>
<b>International Court of Justice (ICJ)</b> <sup>215</sup>	<p>Salary-based staff/secretariat.</p> <p>For the biennium 2016-2017 the ICJ budgeted for its 119 Registry staff members assisting 15 judges:</p> <ul style="list-style-type: none"> <li>• USD 25,968,600 for remuneration of permanent staff (professional staff and general service staff); and</li> <li>• USD 3,052,600 for remuneration of temporary staff and other expenses</li> </ul> <p>For a total of USD 29,021,200, i.e. EUR 26,218,374, i.e. 13,109,187 per year.</p>	EUR 110,161
<b>International Criminal Court (ICC)</b> <sup>216</sup>	<p>Salary-based staff/secretariat.</p> <p>For 2017 the ICC budgeted for its 980 Secretariat posts assisting its 18 judges:</p> <ul style="list-style-type: none"> <li>• EUR 85,949,000 for remuneration of permanent staff (professional staff and general service staff);</li> <li>• EUR 19,010,300 for remuneration of temporary staff; and</li> <li>• EUR 39,328,700 for other expenses</li> </ul>	EUR 147,233

<sup>214</sup> The resources of staff indicated in the Table 9 broadly include remuneration of permanent staff (professional and general service staff) and temporary staff and other expenses of the Secretariat related to staff, including hospitality, consultancy, after service medical and related costs and official travel.

<sup>215</sup> Proposed programme budget for the biennium 2016-2017, Seventieth session of the General Assembly, 21 April 2015, Table 7.8 Resource requirements: Registry, p. 9, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/70/6%28Sect.7%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/70/6%28Sect.7%29).

<sup>216</sup> Proposed Programme Budget for 2017 of the International Criminal Court, Fifteenth session, The Hague, 16-24 November 2016, Table 2: Total ICC: Proposed budget for 2017, p. 27; Annex VI (a), p. 189; available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP15/ICC-ASP-15-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-10-ENG.pdf).

	For a total of EUR 144,288,000 per year.	
<b>World Trade Organisation Appellate Body (WTO AB)</b> <sup>217</sup>	<p>Salary-based staff/secretariat.</p> <p>For 2017 the WTO budgeted for its 25 posts assisting the 7 Appellate Body members:</p> <ul style="list-style-type: none"> <li>• CHF 4,573,000 for (permanent) staff expenditure (remuneration, pensions, benefit and other expenditure);</li> <li>• CHF 81,000 for temporary assistance; and</li> <li>• CHF 51,000 for other expenses (travel and hospitality)</li> </ul> <p>For a total of CHF 4,705,000, i.e. EUR 4,315,899 per year.</p>	EUR 172,636
<b>Court of Justice of the European Union (CJEU)</b> <sup>218</sup>	<p>Fixed remuneration system.</p> <p>For 2017 the EU budgeted for its 2,063 staff assisting its 85 Members:</p> <ul style="list-style-type: none"> <li>• EUR 249,717,500 for remuneration and other entitlements, allowances of officials and temporary staff;</li> <li>• EUR 22,985,500 for expenditure for other staff and external services; and</li> <li>• EUR 6,140,000 for other expenditure relating to persons working with the CJEU</li> </ul> <p>For a total of EUR 278,843,000 per year.</p>	EUR 135,164
<b>The International Tribunal of the Law of the Sea (ITLOS)</b> <sup>219</sup>	<p>Salary based staff/secretariat.</p> <p>For 2017-2018 ITLOS budgeted for its professional staff</p>	EUR 136,308

<sup>217</sup> 2016-2017 Budget proposals by the Director-General, Table 22. Section 1: Staff Expenditure; Table 23. Section 2: Temporary Assistance; Table 24. Part B – Other Resources (only section 4. Travel & Hospitality Total); pp. 26-27, available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=134952,134411,120331,119761,102411,49810,100892,76277,56560,3697&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=134952,134411,120331,119761,102411,49810,100892,76277,56560,3697&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

<sup>218</sup> General Budget of the European Union for the financial year 2017, Section IV Court of Justice of the European Union, L 51/2001-2002, available at: <http://eur-lex.europa.eu/budget/data/General/2017/en/SEC04.pdf>.

<sup>219</sup> Draft Budget Proposals of the International Tribunal for the Law of the Sea for 2017-2018, Twenty-sixth meeting of State Parties, New York, 20-24 June 2016, Annex I Budgets of the Tribunal from 2011-2012 to

	<p>(18 members) and general service staff (20 members) of the registry assisting its 21 judges:</p> <ul style="list-style-type: none"> <li>• EUR 8,577,200 for remuneration and other expenditures of (permanent) staff;</li> <li>• EUR 1,499,200 for remuneration and other expenditures of temporary staff (under recurrent expenditures and case-related costs); and</li> <li>• EUR 283,000 for other expenses (training, representation allowances, official travel, hospitality)</li> </ul> <p>For a total of EUR 10,359,400, i.e. EUR 5,179,700 per year.</p>	
<b>The European Court of Human Rights (ECtHR)</b> <sup>220</sup>	<p>The only budget information available for 2017 is that:</p> <ul style="list-style-type: none"> <li>• The Secretariat is composed of 614 posts;</li> <li>• The overall budgetary resources for staff/judges, non-staff, CoE contributions to JP/AP amount to EUR 71,279,600.</li> </ul>	No specific data available – not computed in the calculation

The average cost of expenses per member of staff was calculated among available data on expenses of international courts and tribunals, amounting to **EUR 140,300 per member of staff per year**.

As the table above shows, the number of staff working for the international courts examined varies substantially for a number of factors linked to the different functioning and set-up of these courts. For this reason, it is difficult to extrapolate a meaningful number of staff from the information we have available. Consequently, for the purposes of the calculation of the expenses for staff, it is assumed there are 3 members of staff per adjudicator: 1 legal assistant, 1 secretary and 1 case manager and translator. Having assumed 14 adjudicators (9 for the First Instance Tribunal and 5 for the Appeal Tribunal), the total members of staff would be 42.

Consequently, the total cost of expenses per 42 members of staff amount to **EUR 5,892,600 per year**.

Nevertheless, this amount could vary depending on the extent to which the Court is included in an existing institution. Table 10 below illustrates a spectrum of alternatives.<sup>221</sup>

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2017-2018, pp. 26-27; Annex II Professional Staff of the Registry in 2017-2018, p. 28; Annex III General Service Staff of the Registry in 2017-2018, p. 29; available at: <http://undocs.org/SPLOS/2016/WP.1>.

<sup>220</sup> Council of Europe Programme and Budget 2016-2017, p. 20, available at: <https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=2864512&SecMode=1&DocId=2342508&Usage=2>.

<sup>221</sup> Dirk Pulkowski, *Costs. From present-day investment arbitration to a multilateral court system, presentation, Experts meeting*, Geneva, 14 December 2016.

Table 10: Scenarios of inclusion of the multilateral investment court in an existing institution

Scenario 1	Scenario 2	Scenario 3	Scenario 4	Scenario 5
<ul style="list-style-type: none"> <li>• Court legally independent</li> <li>• Court provides full registry services</li> </ul>	<ul style="list-style-type: none"> <li>• Court legally independent</li> <li>• Court provides some registry services</li> <li>• Supported by Institution</li> </ul>	<ul style="list-style-type: none"> <li>• Court legally independent</li> <li>• Court employs core admin. staff</li> <li>Registry services by institution</li> </ul>	<ul style="list-style-type: none"> <li>• Court legally independent but employs no staff</li> <li>• Administrative &amp; registry services by institution</li> </ul>	<ul style="list-style-type: none"> <li>• Court legally part of institution</li> <li>• Administrative &amp; registry services by dedicated unit of institution</li> </ul>

Given the numerous caveats in the variables of the table above, calculating estimates of costs under the different scenarios would be highly speculative. For this reason, these estimates were not calculated.

**4.1.3 Overall cost of the multilateral investment Court per year**

The overall estimated annual cost of the multilateral investment Court was thus fund summing the two cost components of:

- Remuneration of adjudicators per year, i.e. EUR 3,998,246 per year; and
- Expenses for staff per year i.e. EUR 5,892,600 per year.

The sum of these cost components amounted to **EUR 9,890,846 per year**.

**4.2 Calculation of cost of the Multilateral Investment Court for the EU and EU Member States per year**

In order to calculate the impact of the multilateral investment Court on the EU and Member States budget per year, it was necessary to assess different principles for the allocation of costs, namely:

- Considerations on the overall number of participants and rules on allocation of costs among them (4.2.1); and
- Considerations on mixed financing (4.2.2).

#### 4.2.1 Allocation of costs among Contracting Parties

The estimated cost of EUR 9,890,846 per year will have to be shared by Members. It was supposed that the multilateral investment Court would start operating with the EU, its 28 Member States and 16 other Contracting Parties with different levels of economic development. Of these, it was assumed that:

- 5 Members would be "high income" countries (according to the World Bank classification);
- 7 Members would be "upper middle income" countries (according to the World Bank classification); and
- 4 Members would be "lower middle income" and "low income" countries (according to the World Bank classification).

One basis for allocating the costs of the multilateral investment Court among its Contracting Parties would be to follow the rules on allocation rules of the IMF. Each Member country of the IMF is assigned a quota, based broadly on its relative position in the world economy.<sup>222</sup>

The IMF quota formula includes four quota variables (GDP, openness, variability and reserves), expressed in shares of global totals, with the variables assigned weights totalling to 1.0. The formula also includes a compression factor that reduces dispersion in calculated quota shares. The formula is:

$$\text{CQS} = (0.5*Y + 0.3*O + 0.15*V + 0.05*R) k$$

Where:

- CQS = calculated quota share;
- Y = a blend of GDP converted at market rates and PPP exchange rates averaged over a three year period. The weights of market-based and PPP GDP are 0.60 and 0.40, respectively;
- O = the annual average of the sum of current payments and current receipts (goods, services, income, and transfers) for a five year period;
- V = variability of current receipts and net capital flows (measured as a standard deviation from the centred three-year trend over a thirteen year period);
- R = twelve month average over a year of official reserves (foreign exchange, SDR holdings, reserve position in the Fund, and monetary gold); and
- k = a compression factor of 0.95. The compression factor is applied to the uncompressed calculated quota shares which are then rescaled to sum to 100.<sup>223</sup>

The variables of the formula were calculated first in absolute terms based on data of 2014 available on the IMF website (SDR Millions) and then in shares (Shares %) for: the 28 EU

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<sup>222</sup> Quotas - Data Update and Simulations, IMF Policy Paper, September 2016, available at: <http://www.imf.org/external/np/pp/eng/2016/080916.pdf>.

<sup>223</sup> For the quota formula see Quotas - Data Update and Simulations, IMF Policy Paper, September 2016, Box 2. Quota Formula. p. 22, available at: <http://www.imf.org/external/np/pp/eng/2016/080916.pdf>.

Member States, 16 anonymised third countries (with different levels of economic development as explained above) and the EU (for which the variables are equal to all Member States values).<sup>224</sup> Then the IMF formula was applied to calculate the quota for each Contracting Party and then normalised to add up to 100%. The results of the calculations are shown in Table 11 below.

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<sup>224</sup> For the updated individual member country data for the variables used in the quota formula and calculated quotas based on the quota formula see Quotas - Data Update and Simulations - Statistical Appendix, IMF Policy Paper, September 2016, Table A6. Distribution of Quotas and Updated Quota Variables—by Member (concluded) (in SDR millions), pp. 44-49 for figures in SDR millions. Available at: <http://www.imf.org/external/np/pp/eng/2016/081016.pdf>.

Table 11: Simulation of allocation of costs

<b>SDR Millions</b>								
<b>Countries</b>	<b>Income Level</b>	<b>GDP</b>	<b>Reserves</b>	<b>Variability</b>	<b>PPP GDP</b>	<b>Openness</b>		
<b>28 EU MS</b>	-	11747248	538866	309819	11918482	12386721		
<b>EU only</b>	-	11747248	538866	309819	11918482	12386721		
Country1	High income	1188272	49693	16372	1008211	840665		
Country2	High income	984900	33653	12148	693324	492287		
Country3	High income	3394254	822571	47090	3065528	1406256		
Country4	High income	861989	235092	8445	1117665	893073		
Country5	High income	486752	487489	22934	1008154	415862		
Country6	Upper middle income	358259	17247	4024	606798	127476		
Country7	Upper middle income	6434582	2600450	75379	11157060	3301487		
Country8	Upper middle income	1498366	242729	15699	2095469	430624		
Country9	Upper middle income	817995	123077	14462	1362728	548167		
Country10	Upper middle income	1316498	274740	23996	2291627	759510		
Country11	Upper middle income	237310	29404	2965	449020	169654		

	income								
Country12	Upper income	middle	527337	73040	9762	947699	299648		
Country13	Lower income	middle	112328	22979	2947	313502	169469		
Country14	Lower income	middle	1265388	194161	13087	4478365	708255		
Country15	Lower income	middle	594444	69238	6452	1651587	282730		
Country16	Low income		4988	807	67	10977	3653		
<b>Shares %</b>									
<b>Countries</b>	<b>Income Level</b>		<b>GDP</b>	<b>Reserves</b>	<b>Variability</b>	<b>PPP GDP</b>	<b>Openness</b>	<b>Quota</b>	<b>Normalised Quota</b>
<b>28 EU MS</b>	-		27.0	8.5	34.6	21.2	34.8	24.0	<b>27.24</b>
<b>EU only</b>	-		27.0	8.5	34.6	21.2	34.8	24.0	<b>27.24</b>
Country1	High income		2.7	0.8	1.8	1.8	2.4	2.1	2.40
Country2	High income		2.3	0.5	1.4	1.2	1.4	1.5	1.74
Country3	High income		7.8	12.9	5.3	5.5	3.9	5.5	6.27
Country4	High income		2.0	3.7	0.9	2.0	2.5	2.0	2.26
Country5	High income		1.1	7.7	2.6	1.8	1.2	1.8	2.00
Country6	Upper income	middle	0.8	0.3	0.4	1.1	0.4	0.7	0.75

	income								
Country7	Upper income	middle	14.8	40.9	8.4	19.9	9.3	12.7	14.39 <sup>225</sup>
Country8	Upper income	middle	3.4	3.8	1.8	3.7	1.2	2.5	2.81
Country9	Upper income	middle	1.9	1.9	1.6	2.4	1.5	1.8	2.03
Country10	Upper income	middle	3.0	4.3	2.7	4.1	2.1	2.8	3.20
Country11	Upper income	middle	0.5	0.5	0.3	0.8	0.5	0.6	0.63
Country12	Upper income	middle	1.2	1.1	1.1	1.7	0.8	1.2	1.32
Country13	Lower income	middle	0.3	0.4	0.3	0.6	0.5	0.4	0.47
Country14	Lower income	middle	2.9	3.1	1.5	8.0	2.0	3.2	3.66
Country15	Lower income	middle	1.4	1.1	0.7	2.9	0.8	1.4	1.56
Country16	Low income		0.0	0.0	0.0	0.0	0.00	0.0	0.02

<sup>225</sup> Country4 in the table is a large country with high values for GDP, openness, variability and reserves.

It is intended that the EU and each Member State would be separate Parties to the Convention establishing the multilateral investment Court, each for its respective international investment agreements.

In Table 11 above, the entry "28 EU MS" refers to the sum of all EU Member States' GDP, reserves, variability, PPP GDP, openness and, as a result, weighted quotas in application of the IMF formula. The formula on weighted contributions would be applied also to Member States, as separate Parties. Consequently, also Member States' individual contributions will be dependent on their individual level of development (i.e. by following the IMF formula, on their GDP, reserves, variability, GDP PPP and openness).

As a consequence, according to the IMF quota system, the EU and Member States' contributions would correspond to the following quotas of the total annual cost of the multilateral investment Court (i.e. EUR 9,890,846):

- All EU Member States would cover 27.24% of the total annual cost of the multilateral investment Court (i.e. **EUR 2,694,266 per year**); and
- The EU would cover 27.24% of its total annual cost (i.e. **EUR 2,694,266 per year**).

As explained in section 2 on the general methodology and then clarified in paragraphs 3.1.2.1 and 3.2, costs for ICS and ISDS are dependent on the number of cases. Therefore, the cost obtained per year was multiplied by 2 cases. Conversely, for the multilateral investment Court, given the assumptions of fixed remunerations and expenses for adjudicators and staff, the same costs do not vary depending on the number of cases pending before the court. Consequently, no additional calculation has to be made.

Over time, the operating costs are also likely to decrease as the circle of membership grows and the institution gains in efficiency.

Other systems of allocation of costs exist in international organisations. However, the IMF system best takes into account the level of development of Contracting Parties. Table 12 below shows Member State contributions in a number of international organisations.

*Table 12: Weighted Member State contributions<sup>226</sup>*

<b>International organisation</b>	<b>Contribution of Members</b>	<b>Allocation system</b>
<b>World Trade Organisation</b>	Contributions range between CHF 29,325-CHF 22,114,960	Based on share of world trade
<b>United Nations</b>	Contributions range between USD 27,136-USD 654,778,938	Based (mostly) on estimates of Gross National Income
<b>Permanent Court of Arbitration</b>	Contributions range between EUR 535 and EUR 53,550	Based on the Universal Postal Union contribution class system ranging from ½ to 50 units (1 unit = EUR 1,071)

<sup>226</sup> Dirk Pulkowski, Costs. From present-day investment arbitration to a multilateral court system, presentation, Experts meeting, Geneva, 14 December 2016.

## 4.2.2 Mixed financing

The overall cost for establishing and operating the multilateral investment Court could be:

- Entirely financed by Contracting Parties' contributions (as in para. 4.2.1 above);
- Partly financed by Contracting Parties' contributions and partly financed by users, i.e. investors bringing cases (e.g. for registry/staff services); or
- Entirely financed by users.

Therefore, a potential other source is user fees. These could not be the same as for the current situation, where users pay for the whole exercise, including the work of the adjudicators. However, it is possible that a fixed user fee be charged which would cover at least some of the expenses of the mechanism.

Inter-State dispute settlement mechanisms<sup>227</sup> and dispute settlement mechanisms set up by States for claims by individuals<sup>228</sup> do not generally require a filing fee for claimants. However, claimants must pay their share in the current ISDS system.<sup>229</sup>

In the scenarios in which users contribute to the financing of the multilateral investment Court, the contribution of the EU and of EU Member States shown in paragraph 4.2.1 above would be reduced. However, since the assumptions about such mixing financing would have been highly speculative, it was not possible to calculate it in this analysis.

## 5. COMPARISON OF THE COST OF THE BASELINE SCENARIO AND THE MULTILATERAL INVESTMENT COURT SCENARIO FOR THE EU AND MEMBER STATES

Annual cost of <b>Baseline scenario</b>		Annual cost of <b>Multilateral Investment Court scenario</b>	
Cost of 11 ICSs for the EU	Cost of remaining ISDS for the EU <sup>230</sup> and for EU Member States	Cost for the EU	Cost for EU Member States
<b>EUR 8,593,783</b>	<b>EUR 134,266</b>	<b>EUR 2,694,266</b>	<b>EUR 2,694,266</b>

<sup>227</sup> ICJ, WTO, Iran-US Claims Tribunal.

<sup>228</sup> CJEU, ECtHR, Inter-American Court of Human Rights.

<sup>229</sup> In ICSID, for instance, the party instituting proceedings must pay a lodging fee, <https://icsid.worldbank.org/en/Pages/Services/Cost-of-Proceedings.aspx>.

<sup>230</sup> For the EU under the ECT.

<b>Total cost for the EU and Member States =</b> <b>EUR 8,728,049</b>	<b>Total cost for the EU and Member States =</b> <b>EUR 5,388,532</b>
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