

INCEPTION IMPACT ASSESSMENT			
TITLE OF THE INITIATIVE	Establishment of a Multilateral Investment Court for investment dispute resolution		
LEAD DG – RESPONSIBLE UNIT – AP NUMBER	DG Trade – F2	DATE OF ROADMAP	01/08/2016
LIKELY TYPE OF INITIATIVE	Proposal for a Council Decision authorising the Commission to negotiate a Convention to establish a multilateral court on investment on behalf of the EU in line with Article 218 of the Treaty together with negotiating directives.		
INDICATIVE PLANNING	3rd quarter 2017		
ADDITIONAL INFORMATION	http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/		
<p>This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</p>			

A. Context, Subsidiarity Check and Objectives
<p>Context</p> <p>Relationship of this initiative with past and possible future initiatives, and with other EU policies</p> <p>The initiative to establish a permanent Multilateral Investment Court to adjudicate international disputes between investors and foreign governments is an integral and significant part of the EU's on-going efforts to develop a coherent, unified and effective policy on investment dispute resolution pursuant to existing and future investment agreements of the EU, its Member States and third countries. This objective has been included in the Commission's Communication "<i>Trade for all - Towards a more responsible trade and investment policy</i>"¹.</p> <p>In contrast to trade, which has been subject to multilateral rules negotiated and implemented within the auspices of a permanent institution (World Trade Organisation - WTO), and backed up by a standing dispute settlement system, there is currently no unified set of multilateral rules on investment protection and investment dispute resolution. In 1995, negotiations were started at the Organisation for Economic Co-operation and Development (OECD) on a Multilateral Agreement on Investment (MAI) but these were unsuccessful.</p> <p>As far as substantive disciplines are concerned, the negotiation of international investment rules has remained mainly bilateral. States have since the early 1960s been negotiating bilateral investment agreements (henceforth BITs) or investment provisions in regional agreements (e.g. NAFTA or TPP), or sectoral agreements (such as the 1994 Energy Charter Treaty - ECT) aiming at the promotion and reciprocal protection of investments.</p> <p>By the end of 2015, according to the United Nations Conference on Trade and Development (UNCTAD), there are 3286 international investment agreements (IIAs) in force². The EU or its Member States are currently signatories to about half of the existing BITs³.</p> <p>These existing agreements contain specific rules regarding the substantive treatment of foreign investments (investment protection standards). As regards the resolution of disputes about the application of the substantive investment protection standards, the agreements provide for investors to bring disputes. The agreements usually refer to different sets of arbitration rules, which are incorporated by reference into the investment agreements.</p> <p>This system, known as Investor-to-State Dispute Settlement (ISDS), allows individual investors to resort to international arbitration (on the basis of different arbitration rules such as the ICSID (World Bank) or the UNCITRAL (UN) arbitration rules), when seeking to enforce the substantive obligations included in the BITs against the host states of their investment. The disputes are normally adjudicated by ad hoc tribunals of three arbitrators appointed by the parties to the dispute. The tribunals are disbanded after the award is issued.</p>

¹ COM(2015) 497 final of 14.10.2015

² http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d1_en.pdf

³ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF>

For bilateral investment agreements notified by EU Member States: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:149:TOC>

This system has grown up as an effective means to ensure that international law can be enforced without requiring an investor to pass by its government, which may or may not be willing to bring its case. It has developed since the 1960s, and is now contained in virtually all of the more than 3000 such agreements in place. It is often the case that international law is not enforceable in the domestic legal system and that therefore an international investor cannot always be sure that the treatment which the country has accepted that it will provide in the international investment treaty will in fact be provided. ISDS only provides for the possibility of compensation, not for the reversal of laws or decisions, and the substantive rules are designed in such a way so as to ensure that the right to regulate of countries is not undermined.

There are a limited set of rules in the field of investment dispute resolution, such as the 1965 Washington Convention, which established the International Centre for Settlement of Investment Disputes (ICSID). The arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL) or of other international arbitral institutions (such as the Permanent Court of Arbitration or the International Arbitration Court of the International Chamber of Commerce) are also used to adjudicate international investment disputes.

With the entry into force of the Lisbon Treaty in 2009, investment became part of the common commercial policy, which is an exclusive competence of the EU. The Commission's Communication COM(2010)343 "*Towards a comprehensive European international investment policy*"⁴ had already outlined the Commission's vision on how to develop a European investment policy, by incorporating investment protection disciplines – building on those that have been earlier negotiated by EU Member States - in its free trade agreement (FTA) negotiations or in stand-alone investment agreements.

The 2010 Communication had identified certain characteristics of the ISDS system, which presented challenges that should be addressed in the EU's international investment policy: transparency, consistency, predictability and the possibility to appeal featured explicitly amongst those challenges.

In the years that followed, EU level negotiations of investment protection rules, notably in the context of the Transatlantic Trade and Investment Partnership (TTIP) agreement, raised public awareness of ISDS. There was growing controversy and concern about the perceived insufficient legitimacy, neutrality and transparency of the ISDS system. That concern has been raised in the last couple of years both within the EU but also internationally due to prominent ISDS cases such as Philip Morris vs Australia, Vattenfal vs Germany etc.

After an extensive reflection process, which also included a public consultation in 2014 on the EU's approach to investment protection and investment dispute resolution in TTIP, the Commission published on 5 May 2015 a Concept Paper "*Investment in TTIP and beyond – the path for reform*"⁵, which set out the EU's future path with regard to its policy on investment protection and investment dispute resolution, including in particular the establishment of the investment court system in bilateral agreements .

On that basis, the EU agreed in November 2015 on a new EU level policy on investment protection and investment dispute settlement to be proposed for TTIP and other EU negotiations for FTA or stand-alone investment agreements. The policy consists of two distinct but inter-related elements: (1) the replacement of ISDS by an institutionalised investment dispute resolution system (the Investment Court System (ICS) with both a Tribunal of First Instance and an Appeal Tribunal) with permanent judges appointed by the EU and its trade and/or investment agreement partners, with the objective of increasing the legitimacy, effectiveness and independence of the dispute settlement system in EU agreements; and (2) the inclusion of clearer and more precise provisions on investment protection, including on the right to regulate in order to strike the right balance between ensuring a high level of protection for investments and safeguarding the right of states to regulate in the public interest.

The EU has made significant progress in implementing this new policy, now included in two concluded FTA negotiations (the Comprehensive Economic and Trade Agreement with Canada (CETA) and the EU-Vietnam FTA, both concluded in the beginning of 2016).

The Concept Paper of 5 May 2015 also foresaw the establishment of a multilateral system for the resolution of investment disputes. This idea was put forward by a number of stakeholders in the public consultation conducted in 2014⁶.

Building on this, the "*Trade for all*" Communication 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*

⁴ http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf

⁵ http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

⁶ The report of the public consultation is available on: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

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 resolution⁷."

Evaluation of existing policy

The proposal comes out of a detailed review of existing policy on investment dispute settlement, including input received in the 2014 public consultation on the EU's approach to investment protection and investment dispute resolution in TTIP and discussions with stakeholders (EU Member States, European Parliament, civil society groups and other stakeholders) during 2014 and 2015.

The policy on investment dispute resolution is not part of the REFIT agenda.

Ensuring policy coherence

As set out in the 2015 Concept Paper, the development of a reformed system for resolving investment disputes is to be included in TTIP and in all other EU trade and/or investment negotiations in order for the EU to have an effective, coherent and consistent investment policy. Recent examples include the CETA and the EU-Vietnam FTA, which feature the EU's new policy on investment dispute resolution. The ICS also forms part of the EU negotiations with the US, China, Myanmar, Tunisia, Morocco, Japan, Philippines and Mexico, and planned negotiations with Indonesia, Australia, New Zealand and Chile, etc.

Both the CETA and the EU FTA with Vietnam include provisions anticipating the transition from the bilateral system included in the FTA to the permanent Multilateral Investment Court. To ensure policy coherence at EU level and support by EU's contracting partners, similar transitional provisions will also be proposed in the context of other trade and/or investment negotiations.

New investment agreements concluded by EU Member States with third countries will also be required to include provisions allowing the transition to the Multilateral Court when such agreements are authorised under Regulation No EU 1219/2012 of 20 December 2012.

Issue

Reasons underlying the initiative

The initiative is intended to tackle issues at several levels:

(1) EU and EU Member State level

- The continued existence of around 1400 EU Member State BITs with third countries with unreformed ad hoc ISDS provisions and the ECT, to which the EU and its Member States are party, cannot be disregarded. To remain consistent in its policy, the EU would need to align the dispute settlement systems available under the existing EU Member States' BITs and the ECT with the policy being negotiated in EU level trade and/or investment agreements.
- Having numerous ICS operating in parallel is sub-optimal in terms of policy effectiveness and increases the risk of creating inconsistencies in the application of substantive investment protection provisions. In addition, maintaining and managing 10-15 or more ICSs in EU trade and/or investment decreases the cost efficiency of these systems. The Commission, on behalf of the EU, will need to manage the establishment and future operation of the ICS including the selection and appointment procedures of judges to the First Instance Tribunal and members of the Appeal Tribunal in multiple ICS. It will also need to manage the associated budgetary and administration requirements.
- The current ad hoc ISDS system implies high costs and administrative burden for the EU and EU Member State governments when challenged by foreign investors. This adds to the lack of predictability and risk of inconsistency of decisions rendered against the EU or EU Member States.

(2) Third country level

- Under the current system, third country governments, notably developing countries, are faced with high costs to finance an ICS in their bilateral agreements with the EU, and with the ensuing complexities to operate these, notably the selection and appointment of judges/members.
- The lack of a legitimised solution at multilateral level leads to continued controversy in third countries

⁷ http://europa.eu/rapid/press-release_IP-15-6059_en.htm

around reforms of the investment dispute resolution mechanism.

Size and drivers of the problem

There is a need for an overall reform of the ISDS system, which has been under scrutiny in the past years. The need for such a reform has been acknowledged in various fora specialised in investment policy (such as UNCTAD, the OECD and the World Bank). The current policy pursued by the EU of including in each EU FTA or stand-alone investment agreement a reformed and transparent system already constitutes a very significant step forward to provide an alternative form of dispute resolution as compared to the ad hoc ISDS system that has been in place for the last 50 years.

However, this policy is only applicable to EU-level agreements and is oriented towards the future. It leaves in place the existing investment agreements with ISDS provisions (including all agreements that EU Member States have in place with third countries), which will continue to give rise to disputes. These will be adjudicated by ad hoc tribunals and without access to appeal for errors of law or fact, inasmuch as the current ISDS system only allows for the rejection of tribunal awards on very limited procedural grounds, such as corruption charges, errors in the composition of the tribunal, or breaches of fundamental procedural rules.

The current patchwork of investment agreements, the ad hoc nature of the ISDS tribunals and the lack of mechanisms for correcting legal and factual errors have given rise to inconsistencies across ISDS awards, even those rendered under the same investment agreements.

Finally, the general concerns expressed within the EU and in other parts of the world on the legitimacy and independence of the ISDS system will not be as effectively addressed through reforms at bilateral or regional level than through a permanent solution found at multilateral level. Indeed, a multilateral process would ensure better coherence of the reform efforts, and address the fragmentation of the current system.

Stakeholder mapping

The main affected stakeholders are:

(a) Investors/ businesses are affected by the current multiplicity of investment agreements giving rise to different procedures in terms of investment dispute settlement (provisions in EU trade and/or investment agreements with an ICS and provisions with ad hoc ISDS arbitration in EU BITs or agreements by third countries). They are also affected by the lack of predictability of the case-law and the costs of using the system. Businesses also suffer from the reputational damage of bringing or winning a case, due to the lack of public trust that the awards are rendered in a fair and impartial manner under the current ISDS system.

(b) Society as a whole is also affected by the current scenario inasmuch as the absence of an appeal may lead to instances where countries hosting investments are unduly condemned to compensate investors. A Multilateral Investment Court will contribute to ensure that tribunal decisions are correctly and sufficiently justified, and therefore minimise the possibility of incorrect decisions.

(c) Member States are affected in the same way as investors by the operation of the current system.

(d) Third countries: EU trade and/or investment agreement partners, in particular developing countries, are affected by the costs of the ICS and the complexity of operating it. Third countries with which the EU is not negotiating a trade and/or investment agreement with an ICS are affected by the current ISDS system in the same way as Member States and investors.

(e) The arbitrator community: Individuals currently acting as arbitrators in ISDS cases (e.g. practising lawyers, retired judges or law professors) benefit from the professional opportunities of being appointed arbitrators in ISDS ad hoc tribunals for claims brought under the many existing investment agreements.

(f) The various arbitration centres that handle investment disputes such as ICSID, International Chamber of Commerce, Stockholm Chamber of Commerce, Permanent Court of Arbitration, London Court of International Arbitration, etc. are affected in that they currently provide institutional support for ISDS cases.

Challenges to arise in the event that no policy action is taken

Trade and investment matters are part of the EU's exclusive competence. The current EU policy of including in each EU agreement a bilateral investment court system already constitutes a very significant step forward to provide an alternative form of dispute resolution as compared to the traditional ad hoc ISDS system. However, this policy has certain limitations.

First, it does not provide an effective solution to the continued existence of numerous EU Member State BITs with unreformed ad hoc ISDS provisions and the ECT. As for the conclusion of new EU trade and/or

investment agreements with investment protection and ICS, it should lead to the replacement of the corresponding Member State BITs, but this process is likely to take many decades and there is no guarantee that it will eventually cover all Member State agreements. Moreover, it would not be realistic to attempt to negotiate an ICS into every Member State BIT, as this would likely be both too complex and disproportionate to its likely use per BIT.

In addition, the ICS in EU agreements consists of judges/members appointed by the EU and its trade and/or investment agreement partner to the Tribunal of First Instance and the Appeal Tribunal. Judges/members will be remunerated through a combination of retainer fees covered by the Parties to the agreement and daily fees paid by the disputing parties (i.e. the investor and the state involved in a dispute). This ensures the availability of highly qualified judges for the ICS in each trade and/or investment agreement without however paying them a full salary. This system of remuneration has been agreed in the interest of ensuring sound management of EU public money, in particular as it is impossible to predict how much the ICS will be used in each trade and/or investment agreement.

However, operating a large number of ICSs is likely to give rise to a number of operational challenges, in particular in terms of the costs and administrative complexity for the EU as opposed to having one single court. Similar considerations have also been advanced by a number of the EU's trade and/or investment agreement partners, in particular developing countries and countries in transition.

Finally, although the new EU policy of negotiating an ICS in each EU level trade and/or investment agreements has responded to the concerns raised by the EU Member States, the European Parliament and European stakeholders, legitimacy can be further improved through a single, permanent multilateral court with full time judges/members, and which is subscribed to by both developed and developing countries.

Subsidiarity check

The initiative falls under the exclusive competence of the EU according to Articles 3(1)(e) and 207 of the Treaty on the Functioning of the European Union (TFEU). Therefore, the subsidiarity principle does not apply.

Main policy objectives

The aim of this initiative is to increase the coherence and effectiveness of the EU's policy in this area by providing one permanent, predictable, efficient and cost effective procedural framework for investors, EU Member States and EU trade and/or investment agreement partners to enforce investment protection provisions under EU trade and/or investment agreements and the EU Member States' BITs. It also aims at offering a solution at multilateral level for the third countries that would like to engage in a reform of the currently prevailing ISDS system.

B. Option Mapping

Baseline scenario – No EU policy change

Option 1: The base line scenario would mean retaining and operating multiple ICSs in EU trade and/or investment agreements.

Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation

This option is not applicable as there is no existing legislation on this policy.

Alternative policy approaches

Option 2 would be for the EU and the Member States to seek to renegotiate in existing BITs and the ECT with the third countries concerned to include reformed provisions (e.g. an ICS) in order to ensure coherence with the policy pursued by the EU in its trade and/or investment agreements.

Option 3: to reform the current arbitration rules - e.g. ICSID, UNCITRAL, PCA - to reform the mechanisms for ad hoc appointments and to introduce provisions allowing to appeal legal errors. Since there is no common institutional framework for the procedural aspects of dispute settlement, it would in effect mean renegotiating several sets of arbitration rules, some used predominantly for the adjudication of commercial and not investment disputes. In addition, 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. Finally, this option may also require amending all existing investment protection agreements which do not

provide for a dynamic reference to the applicable arbitration rules (this problem arose with the adoption of the UNCITRAL Transparency Rules for Treaty-based Investor State Arbitration which ultimately also required a multilateral approach (i.e. a multilateral convention) to make the new rules applicable to existing investment agreements).

Option 4: to create a permanent multilateral appeal instance competent to hear appeals based on errors of law and fact of ISDS awards rendered under existing EU Member State bilateral investment treaties and under agreements between third countries. It would replace the Appeal Tribunal included in the EU's ICSs in EU trade and/or investment agreements. Awards rendered by the Tribunal of First Instance of the EU's ICS would thus be appealed to this permanent multilateral instance. It would however still leave in place the current ad hoc arbitration system under existing agreements.

Option 5: work with other interested countries toward the establishment of a permanent Multilateral Investment Court with both a First Instance Tribunal and an Appeal Tribunal with full time judges/members. This builds further on the approach taken in the World Trade Organisation.

In terms of scope, the Court would be designed to be competent to hear disputes brought under both EU trade and/or investment agreements, EU Member States investment agreements and under agreements between third countries. The mechanism to achieve coverage of both existing and future agreements would be comparable to that permitting the application of the UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration to existing agreements. Under this mechanism, the Multilateral Investment Court would deal with disputes under an agreement between countries A and B 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 Investment Court (through a negative or positive list – the UNCITRAL Convention works on the basis of a negative list). If the Court were to apply to all of the EU and the EU Member States' agreements, coverage of half of the world's existing investment agreements would already be achieved.

If this option is pursued, there are a number of aspects/sub options that would need to be assessed:

- Qualifications of judges/members and tenure: In terms of qualification, clearly some specialisation in investment law would be desirable. In terms of tenure, a permanent court with professional full time judges and public tenure would be preferable, as it would significantly increase public trust within the EU and in the rest of the world that awards rendered are fair and impartial. In terms of numbers of judges, this would depend on the size of the court's membership (i.e. the number of Contracting Parties signing up to the Court).
- Remuneration of the judges/members: for the level and package of remuneration of judges and members, international courts tend to have standards similar as to those for the International Court of Justice.
- Coverage of operational costs of the court: several options would need to be examined including whether a system of specific user fees to bring a dispute should be envisaged together with block transfers from the membership, as is often applied in other international tribunals (e.g. determined on a key of repartition).
- Elasticity in the design of the multilateral court: it would be necessary to ensure that the structure of the court can evolve over time to take account of increased membership and activities.
- Secretariat: it is likely that a secretariat would need to be established. Issues related to the structure of the secretariat would need to be considered.
- Enforcement of the court's awards: it would need to be ensured that the awards of the court are fully enforceable.
- Future set-up: it would need to be examined at a later stage whether it should be a new stand-alone institution or be docked into an existing international organisation.

Option 6: to seek to negotiate substantive multilateral rules on investment and corresponding dispute settlement provisions. An attempt was made in 1995 to start such negotiations within the OECD which ultimately failed.

Alternative policy instruments

Not applicable.

Alternative/differentiated scope

SMEs are also users of investment dispute resolution provisions. They could potentially see their costs of

<p>bringing a case reduced as compared to the current ad hoc ISDS system (where the disputing parties cover the arbitration costs) in particular if this was recognised in the design of any specific user fee structure. In order to further help SMEs use the court, lighter procedures such as fast track or single judges to adjudicate a dispute could be envisaged under this initiative. SMEs would therefore be expected to benefit from a Multilateral Investment Court.</p>
<p>Options that take account of new technological developments</p> <p>Not applicable. The multilateral court would make use of the same technological aspects available to other courts/tribunals to ensure effective transparency of its work and easy access for users to documents etc.</p>
<p>Preliminary proportionality check</p> <p>The major political initiative establishing a permanent investment court constitutes a coherent measure to achieve the necessary fundamental reform of the ISDS system. As EU based investors account for more than half of all ISDS cases brought worldwide and the EU is the largest exporter and importer of foreign direct investment in the world, the EU bears a special responsibility to bring about a wider reform of the system not only to retain coherence in its investment policy but also to provide EU investors with a level playing field and a predictable environment for investment dispute settlement.</p>
<p style="text-align: center;">C. Data Collection and Better Regulation Instruments</p>
<p>Data collection</p> <p><u>1.Data collection on the organisational aspects of the proposed court</u></p> <p>This pertains to the procedure for the appointment of members/judges and the daily management of the court (secretariat).</p> <p>Available data and experience from existing international tribunals and courts (WTO or International Tribunal of the Law of the Sea, International Court of Justice) could be collected and analysed.</p> <p><u>2. Data collection on the cost impact of the proposed court</u></p> <p>The economic impact of this proposal could be ascertained in two ways:</p> <p>Firstly, data to assess costs to operate such a multilateral court in absolute terms (administration).</p> <p>Here, information from existing international courts/ tribunals (including the salary of judges, the costs of a secretariat, administration and other costs could be used as a benchmark, e.g. the International Tribunal for the Law of the Sea which costs around EUR 9 million per year or the WTO Appellate body at around EUR 6.3 million per year).</p> <p>Secondly, there are the relative costs to the EU of being a member of this court.</p> <p>Most international dispute settlement mechanisms, including the WTO dispute settlement mechanism, are financed on the basis of contributions/transfers by members on the basis of a given repartition key. The EU contribution could be compared to the costs of the base scenario (total costs of operating ICSs in multiple trade and/or investment agreements). The costs per member country in the Multilateral Court would of course depend on the overall size of the membership and the system for repartition of the costs. Over time, the operating costs are also likely to decrease as the circle of membership grows and the institution gains in efficiency. It is highly likely that the costs for the EU budget would quickly be less than the combined costs of operating permanent bilateral ICSs for all EU agreements.</p> <p>A cost-benefit analysis of the proposed multilateral court will be part of the impact assessment, but will to a certain extent need to be based on estimates, since the operational costs of the multilateral court will depend on the final structure of any agreement, as well as on how many countries sign up to the court.</p> <p><u>3. Data on the social and environmental impact of the proposed court</u></p> <p>No need for data on this aspect as no impacts expected. The underlying substantive investment rules will not be touched by this initiative.</p>
<p>Consultation approach</p> <p>The Commission has already conducted a public consultation on the matter of the reform of the EU's investment policy in 2014. This initiative is one of the elements flowing from that consultation process.</p>

<p>A new public consultation of twelve weeks will be carried out.</p> <p>It is also intended to consult all stakeholders on the outlines of the main elements behind the idea of a permanent court via a conference to be organised in the second part of 2016.</p>
<p>Will an Implementation plan be established?</p> <p><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>No implementation plan is foreseen as negotiations will be conducted according to Article 218 of the TFEU.</p>
<p>D. Information on the Impact Assessment Process</p>
<p>An impact assessment will be carried out during 2016-2017. An Inter-Service Steering Group (ISG) will be established with the participation of all relevant services of the Commission – SG, SJ, AGRI, BUDG, CLIMA, CNECT, COMM, COMP, DEVCO, DIGIT, EAC, ECFIN, ECHO, EEAS, EMPL, ENER, ENV, ESTAT, FISMA, FPI, GROW, HOME, JRC, JUST, MARE, MOVE, NEAR, OLAF, REGIO, RTD, SANTE, TAXUD.</p>
<p>E. Preliminary Assessment of Expected Impacts</p>
<p>Likely economic impacts</p> <p>In terms of economic impact, at a general level an efficient, well-functioning Multilateral Investment Court, in which all parties have confidence, will positively impact the investment climate and can thus foster investments and growth.</p> <p>At the level of specific users, an effective dispute settlement system will lead to time and cost savings for the disputing parties (investors and responding states). Investors and states would benefit from increased predictability and from having a single procedural framework for adjudicating disputes. There would also be a benefit from lower costs due to the streamlining of procedures and from the fact that the judges in the Multilateral Investment Court, plus their support structure, would be expected to be financed through transfer contributions from the states that are members of the Court.</p>
<p>Likely social impacts</p> <p>There are no social impacts expected. The substantive obligations under the investment protection standards already exist in the EU level trade and/or investment agreements or are currently negotiated with third countries for which the EU is acting on the basis of negotiating directives adopted by the Council, as well as in the BITs entered into by EU Member States. These will not be affected by the negotiations on the Multilateral Investment Court.</p> <p>Those agreements, for example, guarantee the right of EU governments to regulate on social and environmental issues.</p> <p>The investment dispute settlement mechanism that will be included under the EU's trade and investment agreements would be removed when the Multilateral Investment Court becomes applicable between the EU and the country concerned.</p>
<p>Likely environmental impacts</p> <p>There are no environmental impacts expected for the same reason as there are no social impacts.</p>
<p>Likely impacts on simplification and/or administrative burden</p> <p>The initiative could simplify access to dispute settlement by providing a single entry point and possibly providing one set of procedural rules for investors and states. Through its centralising function, the Court would facilitate access to case related documents and over time to case law on investment disputes in general.</p>
<p>Likely impacts on SMEs</p> <p>SMEs are likely to be positively impacted by this initiative. Lighter procedures could be envisaged under the Multilateral Investment Court such as a fast track procedure for clear cut cases. The initiative would also reduce procedural costs for SMEs because the judges would be paid a full and regular salary by the states members of the Court. Under the current ad hoc ISDS arbitration system and partly under the ICSs in EU trade and/or investment agreements, SMEs must still cover the procedural costs of the dispute (e.g. the daily fees of</p>

the arbitrators or judges).

Likely impacts on competitiveness and innovation

The effectiveness of a permanent, professionalised and impartial dispute settlement system will contribute towards more predictability in the international investment field to the benefit of states and companies alike.

Likely impacts on public administrations

The transition to a Multilateral Investment Court may also lessen the administrative burden for states that are respondents in disputes, as it will reduce costs as compared to handling disputes under the current ISDS rules.

Likely impacts on third countries, international trade or investment

There is likely to be a benefit for third countries, in particular developing countries in terms of costs. The court will also be a better guarantor of impartiality and independence than party-appointed ad hoc tribunals without an appeal system and would afford an even greater degree of legitimacy.

A permanent, efficient and well-functioning multilateral investment court, in which all parties have confidence, is likely to increase the acceptance of the fairness and impartiality of awards. It would thus impact positively on the investment climate, hence fostering more investments and enabling better retention of investments.