

Public consultation on a multilateral reform of investment dispute resolution

Response prepared by Transport & Environment (T&E)
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PART I

I. TRANSPARENCY AND CONFIDENTIALITY

T&E will respond “My contribution may be published under the name indicated; I declare that none of it is subject to copyright restrictions that prevent publication.”

PART II

Desirability of a multilateral reform of the investment dispute settlement system

27. The inclusion of an ICS in all relevant EU agreements has raised questions relating to the long-term efficiency of managing multiple bilateral dispute settlement instances in EU trade and investment agreements. There is also a cost aspect for the EU due to the fixed annual costs generated by each ICS (for each ICS approximately EUR 0.5 million/year on account of the remuneration of the permanent tribunal members and members of the appeal tribunal). To what extent do you consider that seeking to include an ICS in each EU agreement may be less optimal for the EU from the point of view of complexity and cost?

T&E will respond “I don’t know/I don’t have an opinion” to this question.

28. In your view how important how important is it that the same procedural rules for investment dispute settlement apply in EU Member States' existing BITs with third countries and in EU level trade and investment agreements with third countries?

T&E will respond “very important” to this question.

29. If you consider it important to have the same procedural rules apply, please indicate why:

Increases legal certainty for investors and states in the EU and in third countries	T&E will respond “very important” to this question.
Provides uniformity to the applicable dispute settlement rules	T&E will respond “very important” to this question.
Improves climate investment climate in the EU and in third countries	T&E will respond “not important” to this question.
It is important for the EU's credibility that the reform of ISDS also applies at the level of EU Member States' BITs	T&E will respond “very important” to this question.

29. If you consider it important to have the same procedural rules apply, please indicate why:

If it remains possible that the pre- 2015 ISDS is applicable in other FTAs, the reform loses its credibility. Private arbitration established under the flawed ISDS and BITs mechanisms are matters of the past and must be abolished. All existing and future investment treaties must be subjected to the jurisdiction of the MIC.

Possible features of a new multilateral system for investment dispute resolution

30. The specific features below are some of the most important elements at the basis of the EU's bilateral ICSs to be included in the EU's trade and investment agreements with third countries. If a multilateral reform were to be started to what extent do you consider that these elements should also be reflected?

Permanent dispute resolution structure (i.e. not disbanded after issuing a ruling)	T&E will respond “should certainly be included” to this question.
Appeal instances to correct errors of law and manifest errors of fact	T&E will respond “should certainly be included” to this question.
Full-time adjudicators	T&E will respond “should certainly be included” to this question.
Fixed remuneration for adjudicators	T&E will respond “should certainly be included” to this question.
High qualification criteria for selecting adjudicators	T&E will respond “should certainly be included” to this question.
Random allocation of cases	T&E will respond “should certainly be included” to this question.
Transparency/ full documentation disclosure requirements	T&E will respond “should certainly be included” to this question.
High ethical standards	T&E will respond “should certainly be included” to this question.

Safeguards for independence (e.g. random allocation, tenure, etc.)	T&E will respond “should certainly be included” to this question.
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31. Can you identify other possible features that you believe should be included in a new multilateral system?

The selection procedure and criteria must be transparent. Judges must be independent and employed full time, i.e. they cannot work as arbitrators in ISDS cases. Judges must be qualified for judicial office and have expertise in public international as well as domestic law. Proceedings should be transparent and documents published.

32. Do you think that discussions on a new multilateral system for investment dispute resolution should include special assistance to developing countries?

T&E will respond “I don’t know/I don’t have an opinion” to this question.

33. If the issue of special assistance for developing countries should be addressed, do you consider that centres that provide assistance to developing countries (such as the Advisory Centre on WTO Law - ACWL) which provide legal service and support in WTO dispute settlement proceedings, provide a useful model in this regard?

T&E will respond “I don’t know/I don’t have an opinion” to this question.

34. Please provide any additional comments that you may wish to add on how to take account of the special needs of developing countries within a multilateral reform of investment dispute settlement.

T&E will not provide a comment.

35. In the context of a multilateral reform, do you believe that there should be special provisions for SMEs?

T&E will respond “I don’t know/I don’t have an opinion” to this question.

37. Please provide any additional comments that you may wish to add on how to take account of the special needs of SMEs within a multilateral reform of investment dispute settlement.

T&E will not provide a comment.

38. In your view, should a multilateral dispute settlement mechanism be limited to investment treaties only?

T&E will respond “no” to this question.

39. If not, please identify what other issues relating to investment could be covered by a permanent multilateral dispute settlement mechanism

The duplication of parallel dispute settlement systems must be avoided. Access to justice for individuals must be guaranteed so that they can bring counter claims in case of enforcement problems in trade agreements.

40. Do you consider that in the context of discussions on a multilateral reform (which would include an appeal mechanism) a mechanism comparable to ICSID for the enforcement of decisions (i.e. that enforcement is not subject to domestic review) should be sought?

T&E will respond “yes, this is certainly needed” to this question.

Options for a reform at multilateral level

A permanent Multilateral Investment Court

42. Do you share the view that such a single Multilateral Investment Court should also be competent to adjudicate disputes arising under existing investment treaties, including EU Member State BITs with third countries, EU level trade and investment agreements and investment treaties in force between third countries?

T&E will respond “very important” to this question.

43. A number of potential positive effects have been identified which could result from centralising international investment dispute settlement in a single Multilateral Investment Court. Please indicate to what extent you agree that centralisation could contribute to the following:

More predictability in investment dispute resolution	T&E will respond “very likely” to this question.
Higher degree of legitimacy for this type of dispute settlement	T&E will respond “neutral” to this question.
Increased consistency of case law and legal correctness through the permanent appeal tribunal	T&E will respond “very likely” to this question.
Higher level of efficiency in the adjudication procedure (more efficient adjudication)	T&E will respond “I don’t know/I don’t have an opinion” to this question.
Lower costs for users (assuming some or all procedural costs would be borne by the state’s Party to the agreement)	T&E will respond “I don’t know/I don’t have an opinion” to this question.

Other contributions which could be achieved by centralisation:

Coherence across international treaties is important. Investors should not have the chance to profit from the old ISDS system. Treaty shopping must be avoided. In relation to this, the Energy Charter with the old ISDS has to be subjected to the jurisdiction of the MIC.

A permanent Multilateral Appeal Tribunal

44. Do you agree that the creation of a permanent Multilateral Appeal Tribunal would already be an important tool to improve legal correctness in

investment dispute resolution as argued above?

T&E will respond “completely disagree” to this question.

45. Do you consider that establishing a Multilateral Appeal Tribunal (i.e. without a multilateral tribunal at the level of the first instance) would be sufficient to satisfactorily reform the current investment dispute settlement system?

T&E will respond “completely disagree” to this question.

Design, composition and features of a single Multilateral Investment Court or a Multilateral Appeal Tribunal

46. Do you consider that it is important to ensure that each country party to the agreement establishing the single Multilateral Investment Court or Multilateral Appeal Tribunal should have the possibility to appoint one or more adjudicators?

T&E will respond “neutral” to this question.

47. Do you consider it important that the number of adjudicators should be tailored to the likely number of cases and not linked to the number of countries signatory to the agreement?

T&E will respond “I don’t know/I don’t have an opinion” to this question.

48. Do you have any further comments on the manner in which adjudicators should be selected?

Judges need to be selected by a transparent, established and measurable system and by an independent body. They must have a proven track record in public international law, investment law and experience as a national judge. In addition, their expertise must be in areas such as environment, public health, consumer protection. The selection criteria should include integrity,

impartiality and independence, including financial independence.

49. Do you consider that these qualifications would also be appropriate for a permanent multilateral mechanism, whether a single Multilateral Investment Court or a Multilateral Appeal Tribunal?

T&E will reply “fully appropriate” to this question.

50. Do you have any further comments on the qualifications of adjudicators under such a mechanism?

In addition to public international and investment law, judges must also be qualified in areas such as environment, public health, consumer protection, etc. Prior experience as a national judge is a must. Judges must have adhered to codes of conduct. During the consultation, the assumption that experts are called for technical or scientific information is not enough. Experts always have to be called when public policy issues are at stake. Their appointment has to be fully transparent.

51. Do you consider that adjudicators in a single Multilateral Investment Court or a Multilateral Appeal Tribunal should be remunerated in a similar manner?

T&E will reply “completely agree” to this question.

52. Do you agree that adjudicators in a single Multilateral Investment Court or in a Multilateral Appeal Tribunal should be full-time with no external activities?

T&E will reply “completely agree” to this question.

53. Do you agree that a similar approach should be followed for the distribution of cases in a potential multilateral investment mechanism, whether a single Multilateral Investment Court or in a Multilateral Appeal

Tribunal?

T&E will reply “completely agree” to this question.

54. In your view, would it be appropriate to employ a repartition key to determine the share of the contracting Parties in the operational costs?

T&E will reply “fully appropriate” to this question.

55. In your view, should it also be considered that some of the operational costs could be funded in part by user fees (i.e. by investors and/or states)?

T&E will reply “fully appropriate” to this question.

Possible impacts

56. Do you consider that the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal could contribute in a positive way to improving the global investment climate?

T&E will reply “no contribution at all” to this question.

57. If you consider there would be any other impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

The question of whether investment resolution ultimately improves the global investment climate and increases foreign direct investment (FDI) is controversial. Several studies have shown that the correlation between investment resolution and increased FDI is marginal. It is, therefore, misleading to argue that the MIC would contribute to the investment climate.

58. The following preliminary economic impacts have been identified as resulting from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal for the settlement of investment disputes.

Please indicate to which extent you share this assessment.

<p>Reduced budgetary expenditure for the EU as a result of phasing out multiple Investment Court Systems (ICSs) in EU agreements in favour of a single multilateral mechanism</p>	<p>T&E will respond “I don’t know/I don’t have an opinion” to this question.</p>
<p>Reduced costs for users (investors, states) from having one single multilateral mechanism because of increased predictability</p>	<p>T&E will respond “I don’t know/I don’t have an opinion” to this question.</p>
<p>Reduced costs because arbitrators' fees and fees of arbitral institutions (in current ISDS system) no longer necessary because remuneration of permanent adjudicators and court borne by Parties</p>	<p>T&E will respond “I don’t know/I don’t have an opinion” to this question.</p>

If you consider there would be any other economic impacts, please specify and explain the link with the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

Without an IA, it is difficult to answer this question.

59. No environmental impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal. Do you consider that there could be any environmental impacts?

T&E will reply “yes” to this question.

60. If you consider there would be any environmental impacts, please specify and explain the link with the establishment of a single Multilateral

Investment Court or a Multilateral Appeal Tribunal.

A negative ruling related to an environmental measure will certainly have an impact. Even a mere threat of a claim could induce a regulatory chill effect. While the MIC could be an improvement in terms of procedure, substantial provisions on investment are not touched upon. The right to regulate in the public interest must be protected with a carve-out clause. Any measure aiming to contribute to the public interest—such as environmental protection—is not a breach of the investment provisions.

61. No social impacts have been identified that would result from the creation of a single Multilateral Investment Court or a Multilateral Appeal Tribunal since there would be no change to the substantive investment rules.

Do you consider that there could be any social impacts?

T&E will respond “yes” to this question.

62. If yes, please specify the social impacts and explain how they are linked to the establishment of a single Multilateral Investment Court or a Multilateral Appeal Tribunal.

There could be social impacts in the case of a negative ruling. A mere threat of a claim can induce a regulatory chill effect.

63. You may also upload a position paper to support the opinions expressed in this questionnaire.

A detailed position paper was uploaded.