
Deutscher Industrie- und Handelskammertag

Public Consultation on a Multilateral Reform of Investment Dispute Resolution

Who we are:

As the umbrella organisation of the 79 Chambers of Commerce and Industry (IHK) in Germany, the Association of German Chambers of Industry and Commerce (DIHK) represents 3.6 million companies of all sizes and sectors (exempted are crafts, liberal professions and agricultural businesses). They are by law members of a Chamber of Commerce and Industry. The DIHK thus represents the overall interest of German business. The DIHK also coordinates the network of the 130 chambers of commerce abroad, delegations and representative offices of German business in 90 countries worldwide. It is registered in the transparency register of the European Commission (No. 22400601191-42).

Summary

The idea of a Multilateral Investment Court (MIC) for all future Bilateral Investment Treaties (BITs) concluded by the EU is charming: This could reduce the costs of the new Investment Court System (ICS) and make the system as a whole more efficient. The inclusion of existing BITs of the Member States would have advantages too: Investor-State Dispute Settlement (ISDS) proved its worth to protect investors but needs to be reformed. Via an international agreement on a MIC this reform could be implemented without changing all existing BITs, but merely via the ratification of the new agreement by the States concerned.

However, a MIC bears also risks: One concern is an increase in costs for States and investors: Bearing necessary effort and costs in mind, the establishment of a permanent court would only make sense and prove economically feasible if a sufficient number of States would participate. Furthermore, some enterprises are concerned whether a new MIC can really achieve a more uniform jurisdiction. By no means a centralised jurisdiction should lead to uniform standards on a lower level of protection. Where certain BITs guarantee more protection to investors than others this must be preserved. The new system must be more efficient than the existing one. Without assurance of an efficient new system, also in the first instance, the existing mechanisms should not be given up.

Moreover, the underlying concept of an ICS, as it is established already in CETA, needs further improvement in several aspects. Concerning the Appeal Tribunal, it is imperative that not every decision of the first instance will be appealed as this could cause a long-term delay of each proceeding. Therefore, an appeal must be restricted to legal errors only. In addition, an effective admission procedure for the Appeal Tribunal could ensure that only those cases are handled by it (and, hence, delayed) which are actually problematic. Strict deadlines are necessary. Like that improved a Multilateral Appeal Tribunal would already be sufficient to reform the current investment dispute settlement system even without a multilateral tribunal at the level of the first instance.

Relating to the selection of arbitrators in the first instance, the possibility to choose judges according to their experience in specific sectors or areas of law would be a real advantage for States and investors. This ensures that the judges have the necessary skills and experience to evaluate complex facts as well as economic and legal questions. Furthermore, the right to choose an arbitrator is a key aspect of arbitration. Closed lists of arbitrators could be counterproductive. Also a complete ban of the possibility to work as an arbitrator and counsel would lead to a considerable reduction of potential arbitral candidates, thus endangering the system as a whole. However, it would be useful to cap their fees, particularly in cases concerning SMEs or small claims, in order to reduce the costs.

Most important from the perspective of SMEs is a simplification and acceleration of the procedures as well as a reduction of the high costs. A significant part of those companies who doubt the usefulness of ISDS, the ICS or the MIC argue that it is too costly. Therefore, it is necessary to establish a schedule of fees for party representatives and arbitrators of the First Instance Tribunal, particularly for SME and small claims. Furthermore, restrictions to the document production and stricter deadlines for decisions both in a possible First Instance Tribunal and the Appeal Tribunal would be useful. Moreover, in order to eliminate or reduce the financial and organisational hurdles, there should be programs for SMEs at national and European level. National investment guarantees might be associated with legal expenses insurance. An EU Advisory Centre on Investment Law could give legal advice at reduced prices.

I. General reflections

Investment protection is **important for companies**, particularly amongst countries with less developed legal systems. It is a pillar of German and European foreign trade policy and pursues important goals and interests. First, it ensures robust protection of German/European foreign investments, granted to small and large companies alike. Second, it strengthens equal opportunities in competition in the respective market and thus the willingness to invest abroad. Third, it creates an incentive for good law-making and the development of a functioning legal system in the contracting

parties that protects human rights. This is a decisive condition for investment abroad. Thereby, it improves the investment climate in the countries concerned but also contributes to the development of the State concerned.

Investment protection requires **effective dispute settlement mechanisms**. Germany has concluded numerous bilateral investment treaties, especially with developing and emerging countries, which effectively protect German business. Currently, the European Union is negotiating investment treaties and investment chapters in the framework of free trade agreements – unfortunately with a lower level of protection concerning the substantive provisions.

ISDS has, in general, **proved its worth** to protect investors: Investors are protected even if domestic legal protection is deficient. Competent and experienced arbitrators decide the disputes in a procedure which is adapted to the needs of the parties; the awards are enforceable worldwide.

However, ISDS has some defects and **needs to be reformed**. The ISDS arbitration courts have caused concerns relating to their legitimacy because of a lack of transparency and because some awards were criticised due to a perceived lack of respect for the right to regulate. Furthermore, over the time they lost their inherent advantage as a simple, cost-efficient and effective means of dispute resolution: Often proceedings are long, costly and the results unpredictable. Particularly SMEs have difficulties to use ISDS.

During the last years, this need for reform has been discussed in detail. The EU, many States and international organisations have been engaged particularly in order to improve the impartiality of judges via codes of ethics and to improve the **transparency**. This aspect has been addressed recently with the Mauritius Convention.

However, the EU Commission wants to reform the system as a whole and replace ISDS with a new **ICS**, i.e. a permanent court with full-time judges and randomly composed tribunals. The concept of the MIC is based on the same characteristics and has, therefore, the same advantages and disadvantages. There is still **need of improvement** (see more details below, p. 5 et. seq.). There have been many proposals from stakeholders such as the DIHK, for example within the [TTIP consultation](#) and –after academic counsel– in the [Harnack-Haus Reflections](#). But several important aspects are still not or not sufficiently addressed: neither in CETA, nor in the Commission's ICS proposal for TTIP. They must be certainly addressed in a MIC.

Finally, until a good solution for an efficient MIC has been reached on a global level the **existing BITs should not be risked**. The currently critical discussions on international trade and globalisation and the termination of BITs by several developing States such as India, Indonesia and South Africa might lead to requests to weaken the substantive and procedural standards of investment protection, for example making proceedings more difficult for investors or requiring the exhaustion of domestic legal remedies. The idea to establish a MIC in order to strengthen

international law and investment protection might then –in the end– even weaken the current successful system thus negatively affecting the investment climate. However, the interest to establish the new MIC among as many States as possible should not lead to a reduction of the investment protection, neither concerning the substantive nor the procedural aspects. Without assurance of an efficient new system the existing mechanisms should not be given up. To keep existing BITs as they are would be better than an inadequate MIC.

II. Multilateral Investment Court

The idea of a MIC for all future BITs concluded by the EU is charming as this could –in comparison to own investment courts for every BIT– **reduce the costs** and make the system as a whole more efficient and less complex. The inclusion of existing BITs of the Member States would have advantages too: ISDS –even if it proved its worth in general– needs to be reformed. Via an international agreement on a MIC this **reform** could be implemented merely via the ratification of the new agreement by the States concerned without changing all existing BITs (just like the Mauritius Convention concerning transparency). The opt-in mechanism would give the possibility for more –currently perhaps sceptical– States to join later if the system has proven to be a success. Furthermore, a MIC –particularly a Multilateral Appeal Tribunal– could support the development of a uniform interpretation of the international investment law standards and, thereby, improve the predictability of the outcome. That is why some companies support the idea of a MIC.

However, the concept of a MIC has also **certain disadvantages** and the other part of business would, therefore, prefer to continue on the basis of the existing BITs and ISDS. One concern is an increase in costs for States and investors: Bearing necessary effort and costs in mind, the establishment of a permanent court would only make sense and prove economically feasible if a sufficient number of States would participate. Furthermore, it needs to be ensured that European investors are not at a disadvantage in comparison to investors from other States such as the United States and China if these States should not join the MIC.

Moreover, the companies are concerned whether a new MIC can really achieve a more uniform jurisdiction, but also whether this might even lead to a **decrease in protection**: The substantive provisions of international investment law are diverse as they stem from more than 3.000 BITs. Even if many provisions have a similar wording, there are still differences concerning the level of protection. Consistency could be reached only in the application of the same BIT or maximally BITs with identical or nearly identical wordings. However, a centralised jurisdiction could fix uniform standards not necessarily on a high level, as foreseen in German BITs, but –perhaps also for political reasons because of the critics– on a lower level, thereby reducing the protection of investors even where BITs guarantee more protection. Such a development might, ultimately, lead

to less investments. This effect has to be avoided if a MIC should be established. Substantive investment protection must be preserved as it is. The new system must be more efficient and offer the same or preferably more protection than the existing one.

Furthermore, the underlying concept of an ICS, as it is established already in CETA, has in itself certain risks and disadvantages which would concern also a MIC. It needs **further improvement** in several aspects as shall be explained in the following paragraphs.

III. Multilateral Appeal Tribunal

A permanent Multilateral Appeal Tribunal would give investors and host States the possibility to correct legally erroneous arbitral awards if necessary. This Appeal Tribunal could also lead to a more uniform interpretation –at least of the same BIT or BITs with identical or nearly identical wordings (s. p. 4)– and thus enhance the legal certainty and predictability of arbitral awards. The presence of qualified judges from various legal traditions would ensure that legal principles, customs, and the parties' sensitivities are sufficiently considered. Establishing a Multilateral Appeal Tribunal **could be sufficient** to reform the current investment dispute settlement system even without a multilateral tribunal at the level of the first instance.

However, there is a need to establish **certain restrictions** and mechanisms in order to **avoid a delay** of every single case via an appeal of the unsuccessful party. Considerable delays in the settlement of disputes lead to significant cost burdens and, ultimately, inhibit the course of justice. Therefore, several aspects need to be changed in comparison to the Appeal Tribunal in CETA:

1. The **conditions of admissibility** of an appeal must be narrowly construed; such review must be limited at least to points of law. The main focus of the Appeal Tribunal must be to revoke arbitrary or abusive decisions or manifest errors of law.
2. The **admission of the legal remedy by the appeal tribunal** should be made a prerequisite (in analogy to the certiorari procedure before the U.S. Supreme Court); this could ensure that only those cases are dealt with, which are actually problematic.
3. There must be **strict deadlines** for document production and decisions; the deadlines for decision in CETA are too flexible. An appeal should, in general, not take longer than four months in total.
4. The **existing monitoring mechanisms** must be abolished –as far as this is legally possible– in order to avoid parallel mechanisms, which lead to a prolongation of the proceedings and might cause contradictory decisions.

Furthermore, the **size of the appeal tribunal**, i.e. the number of judges, must adapt to the Tribunal's workload, also in order to avoid unnecessary costs as it is planned to have full-time

employed judges that receive a regular monthly salary regardless of the individual workload. Therefore, the number of adjudicators of a permanent Appeal Tribunal should be tailored to the likely number of cases and not linked to the number of countries signatory to the agreement. Nevertheless, **all kind of legal traditions** must be represented appropriately in order to ensure that legal principles, customs and sensitivities of all sides are sufficiently taken into account. Particularly German law is often more efficient, cost-effective and predictable than other countries' legal structures, thus offering tangible benefits to the economy. The selection must certainly ensure the presence of continental European legal traditions and avoid any dominance of Anglo-American/Common Law concepts. **Knowledge** and expertise in public international law, international investment law and constitutional law is for the judges of the Appeal Tribunal of utmost importance.

Text proposal for the conditions of admissibility, the admission procedure and deadlines

Without subscribing to each, we strongly suggest to take into consideration the academic recommendations in the [Harnack-Haus Reflections](#), also on the Appeal Tribunal:

“Appeal Tribunal

- 1. An Appeal Tribunal is hereby established to review awards rendered under*
- 2. The Appeal Tribunal may uphold, modify or reverse a First Instance Tribunal's/an arbitral tribunal's partial or final award which amounts to an error of law (or even more restrict) an outrage, to bad faith, or to willful neglect of duty, on grounds of manifest errors of law which, if corrected, alter the ultimate result of the award.*
- 3. The appeal must be admitted or rejected as inadmissible for review by the Appeal Tribunal within four weeks upon its constitution on the basis of a summary evaluation.*
- 4. The final decision of the Appeal Tribunal on an appeal shall be rendered within further twelve weeks.*

(...)”

IV. Selection, employment and remuneration of arbitrators in the First Instance Tribunal

Investment law arbitration was until recently relatively closed and lacked transparency. This caused public concern regarding the independence and impartiality of arbitrators. In order to increase the legitimacy and acceptance of investment dispute settlement, the selection of arbitrators must become more transparent, objective and comprehensible. The Commission proposed first lists of preselected arbitrators, later a definitive catalogue of a few arbitrators, now a permanent investment court with full-time adjudicators with fixed remuneration and a random allocation of cases.

However, the **free choice** of arbitrators has also advantages for States and investors: Such choice permits the selection of arbitrators who have particular expertise or experience in a specific sector or area of law. This ensures that the judges have the necessary skills and experience to evaluate complex facts as well as economic and legal questions. Even if experts for technical or scientific information might be called according to the Commission's plans, it can be helpful to have the technical knowledge not only among external experts but also among the adjudicators themselves. Regularly, former judges from international courts or national constitutional courts will not possess such qualifications. Furthermore, whilst the right to choose an arbitrator is a key aspect of arbitration, it should not be taken for granted that a court composed of judges appointed by the States alone would ensure neutrality in a case between a private investor from a third country and a State.

Therefore, it would be better to select the judges of the First Instance Tribunal not randomly but **according to their experience**. In order to achieve that, the number of qualified arbitrators that may be chosen must be increased significantly in order to prevent the system from being shaped by few. Closed lists of arbitrators could be counterproductive. Also a complete ban of the possibility to work as an arbitrator and counsel would lead to a considerable reduction of potential arbitral candidates, thus endangering the system as a whole.

However, the selection of arbitrators, especially the presiding arbitrator, must be made more **transparent and open**. The neutrality and professional qualifications of each arbitrator should be the decisive selection criteria. Conflicts of interests should be avoided with a code of conduct intended to ensure their independence and impartiality and with the possibility to challenge them in case of conflicts of interest as foreseen in CETA. Furthermore, also for the First Instance Tribunal it is necessary to have knowledge and experience in international investment law, even if experience in certain sectors and technical knowledge might be of importance as well. The presence of judges from different legal traditions could –just as for the Appeal Tribunal– ensure that legal principles, customs and sensitivities of all sides are sufficiently taken into account. The open list of arbitrators would ensure that at least one arbitrator from every participating State could be on the list.

The **remuneration and conditions of employment** need to be different for arbitrators from the First Instance Tribunal in comparison to the Appeal Tribunal: Arbitrators of the first instance, cannot be full-time employed with a fixed salary by the MIC but be paid only according to their workload. Otherwise the costs of the MIC would be too high. However, it would be useful to cap their fees, particularly in cases concerning SMEs or small claims, in order to reduce the costs. The amount needs to take the market prices into account. An EU Advisory Centre on Investment Law could be helpful as well. The DIHK has made a proposal (see below).

V. Small and Medium-Sized Enterprises/Small Claims

Most important from the perspective of SMEs is a simplification and acceleration of the procedures as well as a reduction of the high costs. A significant part of those companies who doubt the usefulness of ISDS, the ICS or the MIC argue that it is too costly. Furthermore, SMEs face special challenges in investment disputes with their host States: Often, they lack access to political and administrative channels of communication in their host or home States, by which possible conflicts can be resolved at an early stage. They are overwhelmed by the effort, complexity and cost of an investment arbitration, even if there are opportunities of third-party financing. The SME-related regulations in CETA and the TTIP ICS proposal do not address this problem sufficiently. More decisive action of EU and Member States, both domestically and in BITs and concerning the MIC is necessary. There are several ideas for reducing the costs of the proceedings and making it easier for SMEs; their scope of application could be based also on the value of the dispute:

Simplification and acceleration of proceedings

1. Simplified procedures for SMEs and/or small claims.
2. Restrictions and tighter deadlines for the document production, respecting the right to a fair trial and the right to be heard
3. Stricter deadlines for the decisions both for the First Instance Tribunal and the Appeal Tribunal
4. Flexible geographical hearing locations
5. Videoconferences for the oral hearings

Reduction of costs

1. Schedule of fees for party representatives and First Instance Tribunal arbitrators (see a text proposal below)
2. Legal expenses insurance, which might be associated with national investment guarantees or other programs for SMEs at national and/or European level that eliminate/reduce the financial hurdles
3. Option to agree on a single judge in the First Instance Tribunal
4. Enhanced possibilities to resort to mechanisms of alternative dispute resolution (such as mediation)

Support

It would be very useful to provide help to SMEs in order to make the access to investment protection easier for them. EU and/or national programs could be developed, similar to the concept of legal aid (“technical assistance”). Another option could be an EU Advisory Centre on Investment

Law which gives legal advice at reduced prices –also for filing mediation and consultation requests, claims or appeals– and which supports SME with trainings of in house lawyers and other staff. The Advisory Centre on WTO Law (AWL) could be a model.

Text Proposal of a schedule of fees for small claims

Without subscribing to each, we strongly suggest to take into consideration the academic recommendations in the [Harnack-Haus Reflections](#), also on the schedule of fees (the numbers are proposals and need to be discussed):

“A special schedule of fees for arbitrators at the First Instance Tribunal and for party representatives is established for disputes with a value of not more than 10 Million Euros (“small claims”).

1. *The fee of an arbitrator or presiding arbitrator respectively, including any expenses may not exceed:*

15,000 or 22,000 Euros if the value of the dispute equals 500,000 Euros or less;

25,000 or 35,000 Euros if the value of the dispute equals 1,000,000 Euros or less;

35,000 or 45,000 Euros if the value of the dispute equals 5,000,000 Euros or less;

40,000 Euros or 50,000 Euros if the value of the dispute exceeds 5,000,000 Euros.

2. *The total fees of party representatives or a disputing party may not exceed:*

50,000 Euros if the value of the dispute equals 500,000 Euros or less,

85,000 Euros if the value of the dispute equals 1,000,000 Euros or less,

150,000 Euros if the value of the dispute equals 2,000,000 Euros or less,

200,000 Euros if the value of the dispute equals 3,000,000 Euros or less,

300,000 Euros if the value of the dispute equals 4,000,000 Euros or less,

400,000 Euros if the value of the dispute equals 6,000,000 Euros or less,

500,000 Euros if the value of the dispute exceeds 6,000,000 Euros.”

VI. Other aspects

1. Admissibility Review in the First Instance: It is important to have an efficient set of rules governing admission of a claim to investment dispute settlement that is aiming at the rejection of abusive or obviously unfounded claims in an early stage of proceedings. Claims which only put the respondent State under pressure must be identified and stopped immediately. Even pursuing

pending claims can lead to a large administrative burden, and can pressure the State to making concessions, not only because they bind human and financial resources, but also because of the legal uncertainty they cause. This admission procedure should be as straightforward, quick and inexpensive as possible, not entail considerable procedural effort and be based on clear criteria. The facts put forward must be taken for granted. However, the mere assertion of a violation may not be enough, at least not if it is contradictory, implausible, or unlikely, or if the respondent conclusively contradicts the exposition of the facts. The burden of presentation and proof of an infringement should be imposed on the claimant: The claimant would initially have to demonstrate that an infringement appears possible.

Without subscribing to each, we strongly suggest to take into consideration the academic recommendations in the [Harnack-Haus Reflections](#), also on the admissibility review:

“In order to admit a claim, the Tribunal shall, on its own motion and in appraising the relevant legal and factual information submitted by the disputing parties, establish that an award in favour of the claimant may not seem entirely improbable from the outset. In doing so, the Tribunal shall assume the alleged facts to be true unless the violation of the substantial standard is improbable or implausible or the allegations are contradictory.”

2. Shorter Proceedings: Another problem are lengthy proceedings. Even if the Commission’s ICS proposal and CETA foresee certain deadlines, the attempts to reduce them are not strong enough. Stricter and shorter deadlines for both the First Instance Tribunal and the Appeal Tribunal as well as restrictions for the document production –particularly in cases concerning SMEs and small claims– would be helpful.

3. Enforcement: The simple and effective enforcement of the decisions is of great importance to business. This is guaranteed for ISDS by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the New York Arbitration Convention for awards of arbitral tribunals (New York Convention). It must be assured that decisions of a MIC can also be enforced in this way. The defences in order to refuse the enforcement must remain as limited as legally possible, if an Appeal Tribunal is introduced.

4. Transparency and Ethics: The continued existence of international investment protection depends also on the positive perception of the rule of law of this field. This requires next to (cost-) efficiency, in particular, independence, impartiality and transparency concerning the selection of arbitrators, the dispute settlement process itself, and the publication of the award. Unlike commercial arbitration, investment dispute settlement mechanisms have to be designed as transparent as possible because legitimate public interests arise from the participation of States. This is a prerequisite for the acceptance of ISDS in the population of the participating countries. At the same time, it is important to protect business secrets and to avoid bureaucratic burden.

Mechanisms such as the blackening of the relevant sections in documents and the timely exclusion of the public from the hearing as well as the confidentiality of business documents, even if they are evidence, are necessary. The EU, many States and international organisations have been engaged in order to improve this and addressed it recently with the Mauritius Convention. Furthermore, codes of ethics have been developed or improved during the last years. In this context, it is helpful to use and improve existing regulations instead of creating new regulations.

5. Scope of application: Investment contracts between a State and an investor could also be covered by a MIC if the contractual provisions on dispute settlement refer to ISDS and the investor agrees. In contrast, other aspects such as the protection of other human rights, social and environmental standards should be subject of special provisions with their own implementation mechanisms (e.g. European Court of Human Rights). The situations are too different in order to apply the same rules.

6. Special needs of developing countries: Investment Protection and an effective dispute settlement mechanism are important for developing countries as this creates an incentive for good law-making and the development of a functioning legal system that protects human rights as well as the right to regulate. They contribute to uniform international legal standards that bring public and private interests in a reasonable balance and to realise fundamental principles such as the rule of law. EU and national programs should support developing countries in improving their domestic legal systems, e.g. with dialogues, knowledge transfer and exchange of good best practices. UNCTAD is giving advice and assisting as well.

Links:

DIHK response to the TTIP consultation (Link: http://www.dihk.de/themenfelder/recht-steuern/eu-internationales-recht/recht-der-europaeischen-union/dihk-positionen-zu-eu-gesetzesvorhaben/investitionsschutz-ttip/at_download/file?mdate=1405323311853)

Without subscribing to each, we strongly suggest to take into consideration the academic recommendations in: DIHK/Free University Berlin, Harnack-Haus Reflections. Essentials of a Modern Investment Protection Regime – Objectives and Recommendations for Action, 2015 (Link: http://www.dihk.de/ressourcen/downloads/harnack-haus-reflections-engl/at_download/file?mdate=1453731785898)

Annex: DIHK Response to the online questionnaire concerning the public consultation on a multilateral reform of investment dispute resolution

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DIHK Response to Online Questionnaire

<https://ec.europa.eu/eusurvey/runner/multilateralinvestmentcourt>

Part I

I. Transparency and confidentiality

My contribution may be published under the name indicated; I declare that none of it is subject to copyright restrictions that prevent publication.

II. About you

Language: *English*

2. You are replying: *in your professional capacity or on behalf of an organisation.*

8. Respondent's first name: *Patricia Sarah*

9. Respondent's last name: *Stöbener de Mora*

10. Respondent's professional email address: *stobener.patricia@dihk.de*

11. Name of the organisation: *Deutscher Industrie- und Handelskammertag (DIHK) e. V. / Association of German Chambers of Commerce and Industry*

12. Postal address of the organisation: *Breite Straße 29 | D-10178 Berlin | Germany*

13. Type of organisation: *Trade, business or employers' professional association*

15. Please indicate your organisation's main area/sector of activities/interest:

DIHK represents the interests of German business and coordinates the chambers of commerce abroad.

17. If you are a trade, business or employers' professional association, please provide information on your members (numbers, names of member organisations).

Umbrella organisation of 79 Chambers of Commerce and Industry with 3.6 million enterprises of all sectors and size as legal members (exempted are crafts, liberal professions and agricultural businesses).

18. Have you or has your organisation ever been directly involved in an international investment dispute?

No.

21. If you answered "no" to question 18, but you have an interest in the matter, please indicate in what capacity you are following this issue:

Business or trade association representative

23. Is your organisation included in the Transparency Register? *Yes*

24. If so, please indicate your Register ID number: *22400601191-42*

25. Country of organisation's headquarters: *Germany*

PART II

Desirability of a multilateral reform of the investment dispute settlement system

27. 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?

	0	1	2	3	4	5	No opinion
From 0 (not problematic) to 5 (very problematic)					x		

28. In your view 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?

	0	1	2	3	4	5	No opinion
From 0 (not important) to 5 (very important)				x			

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

From 0 (not important) to 5 (very important)

	0	1	2	3	4	5	No opinion
Increases legal certainty for investors and states in the EU and in third countries				x			
Provides uniformity to the applicable dispute settlement rules				x			
Improves investment climate in the EU and in third countries				x			
It is important for the EU's credibility that reform of ISDS also applies at the level of EU Member States' BITs				x			

Other reasons why it is important to have the same procedural rules apply. Please specify.
A MIC could reduce costs and make the system more efficient. ISDS could be reformed (e.g. Appeal Tribunal, special rules for SME) without changing all BITs, but merely via ratification of the new agreement. However, without assurance of an efficient new system the existing functioning mechanisms with countries with less developed legal systems should not be risked. Then better keep existing BITs. MIC should not lead to less investor protection.

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?

From 0 (should not be included) to 5 (should certainly be included)

	0	1	2	3	4	5	No opinion
Permanent dispute resolution structure				x			
Appeal instance to correct errors of law and manifest errors of fact				x			
Full-time adjudicators			x				
Fixed remuneration for adjudicators			x				
High qualification criteria for selecting adjudicators						x	
Random allocation of cases			x				
Transparency/ full documentation disclosure					x		
High ethics standards						x	
Safeguards for independence						x	

31. Can you identify other possible features that you believe should be included in a new multilateral system?

- *Appeal mechanism restricted to legal errors.*

- *Admission procedure for the appeal tribunal: could ensure that only those cases are dealt with which are actually problematic.*

Thus, the number of appeals is reduced and a long-term delay of each case could be avoided.

- *Possibility to choose judges of the First Instance Tribunal according to their experience in specific sectors/areas of law; this could ensure that they have the necessary skills to evaluate complex facts and economic questions.*

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

	0	1	2	3	4	5	No opinion
From 0 (should not be addressed) to 5 (should certainly be addressed)							x

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?

	0	1	2	3	4	5	No opinion
From 0 (not important) to 5 (very important)							x

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.

Investment Protection and an effective dispute settlement mechanism are in itself an important means to support developing countries by creating incentives for good law-making and the development of a functioning legal system that protects human rights as well as the right to regulate. Also beyond, EU and national programs should support developing countries in improving their domestic legal systems, e.g. with dialogues. UNCTAD is giving advice and assisting as well.

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

Yes

36. If yes, please rank the importance of the following proposals for making it easier for SMEs to resolve disputes:

From 0 (not important) to 5 (very important)

	0	1	2	3	4	5	No opinion
Simplified procedures, including shorter timeframes						x	
If fees are applicable during the procedures, capped fees						x	
Flexible geographical hearing locations						x	

Enhanced possibilities to resort to mechanisms of alternative dispute resolution (such as mediation)						x		
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Other ideas for making it easier for SMEs to resolve disputes. Please specify

Special rules for SMEs or better depending on the value of the dispute (e.g. ≤ 10 Mio. €):

- restrictions and tighter deadlines for the document production
- schedule of fees for party representatives/judges
- legal expenses insurance associated with national investment guarantees or other programs for SMEs at national and/or European level
- help similar to the concept of legal aid (“technical assistance”), e.g. EU Advisory Centre for Investment Law which gives legal advice at reduced prices

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.

SMEs face special challenges. Often, they lack access to political and administrative channels of communication in their host or home states, by which possible conflicts can be resolved at an early stage. They are overwhelmed by the effort, complexity and cost of an investment arbitration. The SME-related regulations in CETA do not address this problem sufficiently. More decisive action of EU and Member States both domestically and in BITs and concerning the MIC is necessary.

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

No

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

Investment contracts between a state and an investor could also be covered by a MIC if the provisions on dispute settlement refer to ISDS and the investor agrees. In contrast, other aspects such as the protection of other human rights, social and environmental standards should be subject of special provisions with their own implementation mechanisms. The situations are too different.

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?

	0	1	2	3	4	5	No opinion
From 0 (no, this is not needed) to 5 (yes, this is certainly needed)						x	

41. Please provide any additional comments that you may wish to add on the enforcement of awards.

The simple and effective enforcement of the decisions on investment protection is of great importance to business. This is guaranteed by the ICSID Convention and the New York Arbitration

Convention for awards of arbitral tribunals. It must be assured that decisions of an MIC can also be enforced in this way. The defences in order to refuse the enforcement must remain limited, particularly if an appeal tribunal is introduced.

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?

	0	1	2	3	4	5	No opinion
From 0 (not important) to 5 (very important)				x			

43. Please indicate to what extent you agree that centralisation could contribute to the following:

From 0 (not likely) to 5 (very likely)

	0	1	2	3	4	5	No opinion
More predictability in investment dispute resolution					x		
Higher degree of legitimacy for this type of dispute settlement				x			
Increased consistency of case law and legal correctness through the permanent appeal tribunal				x			
Higher level of efficiency in the adjudication procedure (more efficient adjudication)				x			
Lower costs for users (assuming some or all procedural costs would be borne by the states Party to the agreement)						x	

Other contributions which could be achieved by centralisation. Please specify
A MIC could reduce complexity and costs. Furthermore, reforms, e.g. concerning an appeal tribunal and special rules for SME, would apply to all BITs. However, there is a risk that a MIC decides more political. Moreover, centralised jurisdiction should not lead to uniform standards on a lower level of protection where certain BITs guarantee more protection. Without assurance of an efficient new system the existing mechanisms should not be risked.

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?

	0	1	2	3	4	5	No opinion
From 0 (completely disagree) to 5 (completely agree)						x	

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?

	0	1	2	3	4	5	No opinion
From 0 (completely disagree) to 5 (completely agree)						x	

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?

	0	1	2	3	4	5	No opinion
From 0 (not important) to 5 (very important)			x				

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?

	0	1	2	3	4	5	No opinion
From 0 (not important) to 5 (very important)					x		

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

Whereas the judges of an Appeal Tribunal should be allocated randomly, for the First Instance Tribunal it would be preferable to leave it for the investor and the State to choose the adjudicators according to their experience in specific sectors and areas of law; this could ensure that they have the necessary skills to evaluate complex facts and economic questions. Closed lists are

counterproductive. A ban to work also as counsel would reduce the number potential candidates considerably.

49. In the EU's Investment Court System (ICS), there are a number of criteria that adjudicators must meet for being eligible, including being qualified to hold judicial office in their country or being recognised jurists, as required by the International Court of Justice (ICJ) or the European Court of Human Rights (ECHR). Under the ICS, judges must also have expertise in public international law and previous experience in international investment law. It is assumed that adjudicators would be able to call on experts for technical or scientific information. 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?

	0	1	2	3	4	5	No opinion
From 0 (not appropriate) to 5 (fully appropriate)					x		

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

For the First Instance Tribunal and even more for the Appeal Tribunal the presence of judges from different legal traditions could ensure that legal principles, customs and sensitivities of all sides are sufficiently taken into account. The selection must certainly ensure the presence of continental European legal traditions. Particularly German law is often more efficient, cost-effective and predictable than other countries' legal structures, thus offering tangible benefits to the economy.

51. Judges in the International Court of Justice (ICJ), the World Trade Organisation (WTO) Appellate Body or the Court of Justice of the EU (CJEU) receive a regular monthly salary which is not linked to their workload. Do you consider that adjudicators in a single Multilateral Investment Court or a Multilateral Appeal Tribunal should be remunerated in a similar manner?

	0	1	2	3	4	5	No opinion
From 0 (completely disagree) to 5 (completely agree)				x			

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?

	0	1	2	3	4	5	No opinion
From 0 (completely disagree) to 5 (completely agree)				x			

53. In most international and domestic courts, including under the EU's ICS, disputes are allocated on a random basis to divisions of adjudicators to ensure impartiality and independence. 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?

	0	1	2	3	4	5	No opinion
From 0 (completely disagree) to 5 (completely agree)			x				

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?

	0	1	2	3	4	5	Don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)						x	

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)?

	0	1	2	3	4	5	No opinion
From 0 (not appropriate) to 5 (fully appropriate)						x	

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?

	0	1	2	3	4	5	No opinion
From 0 (no contribution at all) to 5 (very strong contribution)					x		

57. If yes, please indicate the specific reasons:

From 0 (no impact) to 5 (strong impact)

	0	1	2	3	4	5	No opinion
Higher acceptability of investment dispute settlement					x		
Higher consistency of case law					x		
Unified dispute settlement system			x				

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. *Investment protection contributes to the development of uniform international legal standards that bring public and private interests in a reasonable balance and to realise fundamental principles such as the rule of law. A Multilateral Appeal Tribunal would strengthen this.*

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.

From 0 (disagree) to 5 (fully agree)

	0	1	2	3	4	5	No opinion
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				x			
Reduced costs for users (investors, states) from having one single multilateral mechanism because of increased predictability				x			
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			x				

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.

A MIC has –as investment protection in general– positive economic impacts, particularly in countries with less developed legal systems. It ensures robust protection of foreign investments for small and large companies alike. It strengthens equal opportunities in competition in the respective market and thus the willingness to invest abroad. It creates an incentive for good law-making and the development of a functioning legal system which is a decisive condition for development and investment.

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?

No

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?

No

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

DIHK Position Paper on a Multilateral Reform of Investment Dispute Resolution