

# Public consultation on a multilateral reform of investment dispute resolution

Fields marked with \* are mandatory.

## Purpose

This public consultation aims to gather views relating to the European Union's policy on possible options for multilateral reform of investment dispute resolution, including the possible establishment of a permanent Multilateral Investment Court. It builds on the Inception Impact Assessment (IIA) published by the European Commission on 1 August 2016. [\[1\]](#) The present questionnaire should be read in light of the IIA.

The results of this public consultation will feed into the Impact Assessment that the Commission services are currently preparing concerning options to engage in multilateral reform of the international investment dispute resolution system.

## Context of the present consultation

The past years have seen a significant debate in the EU and the rest of the world on the limitations of the system of investment dispute resolution (Investor-to-State Dispute Settlement - ISDS) included in many bilateral investment treaties and Free Trade Agreements (FTAs) in terms of legitimacy, neutrality, transparency, consistency and costs. Many countries are currently engaged in reflections on their approach to investment protection and investment dispute settlement in FTAs and investment treaties.

At EU level, following the 2014 public consultation on the EU's approach to investment protection and investment dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP), [\[2\]](#) the EU agreed on a reformed bilateral approach on investment dispute settlement to be included in all relevant EU agreements, whereby each trade and investment agreement is to include a fully transparent and institutionalised system for adjudicating investment disputes. The main feature of this new system – the Investment Court System (ICS) – is the establishment of a Tribunal of First Instance and an Appeal Tribunal with permanent judges and members to be appointed by the EU and its respective FTA/investment partner. So far the ICS has been included in two FTAs already negotiated by the EU (the Comprehensive Economic and Trade Agreement (CETA) with Canada and the FTA with Viet Nam) and is part of ongoing EU negotiations with third countries.

In parallel, discussions on multilaterally reforming the investment dispute settlement system have also taken place in the EU. The concept was raised by stakeholders in the 2014 public consultation, where it was pointed to as the preferable approach; and has been largely supported by EU Member States and the European Parliament. [3] In its Concept Paper of 5 May 2015 [4], the European Commission also indicated that, in parallel to the reform process undertaken in bilateral EU negotiations, work should be started on the establishment of a multilateral system for the resolution of international investment disputes. In the same vein, the Trade for All communication of 2015 [5] sets as an objective to engage with partners to build consensus for a fully-fledged, permanent Multilateral Investment Court in order to develop a coherent, unified and effective policy on investment dispute resolution.

The idea of a multilateral reform to address the shortcomings of the current ISDS system has also gained momentum in a number of third countries and been discussed in international organisations specialised in investment policy (UNCTAD, the OECD, UNCITRAL and the World Bank are all active in this field). While it is clear that full substantial consistency is not within reach until a single set of multilateral substantive investment rules (i.e. investment protection standards) comes into existence, this is not considered a realistic option at the moment. However, in view of the "spaghetti bowl" of 3200 investment agreements globally in place, the establishment of a multilaterally agreed system for investment dispute resolution could already confer a significant degree of predictability and coherence.

A number of concrete proposals for such multilateral reform have emerged in recent years. These proposals, which are briefly outlined in the Inception Impact Assessment (IIA), would allow addressing to various degrees and through different angles the shortcomings identified in the current system of investment dispute settlement.

It is to be noted that this initiative covers investment dispute resolution in trade agreements with third countries. Intra-EU investment treaties and disputes arising between EU Member States are outside the scope of this initiative. In this sense, the Commission considers that intra-EU investment treaties are incompatible with EU law and continues its infringement proceedings against Member States who have such treaties in force between them. [6] Therefore, this initiative does not concern intra-EU application of the Energy Charter Treaty (ECT).

**For more information or additional questions please contact:**

TRADE-F2-MULTILAT-INVEST-DS@ec.europa.eu

Please submit your replies by 15 March 2017.

**Relevant documents:**

[Inception Impact Assessment](#)

[2014 public consultation on the EU's approach to investment protection and investment dispute settlement in the TTIP](#)

[Concept Paper of 5 May 2015](#)

[Trade for all Communication of 14 October 2015](#)

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## PART 1

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### *I. TRANSPARENCY AND CONFIDENTIALITY*

Received contributions may be published on the Commission's website, with the identity of the contributor. Please state your preference with regard to the publication of your contribution.

Please note that regardless of the option chosen, your contribution may be subject to a request for access to documents under Regulation (EC) No 1049/2001 on public access to European Parliament, Council and Commission documents. In such cases, the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.

\* Please, indicate your preference:

- My contribution may be published under the name indicated; I declare that none of it is subject to copyright restrictions that prevent publication
- My contribution may be published but should be kept anonymous; I declare that none of it is subject to copyright restrictions that prevent publication
- I do not agree that my contribution will be published at all. Please note that, unless respondents provide a substantial justification for their opposition to the publication of their contribution, contributions are published anonymously on the dedicated website.

### *II. About you*

\*1. You are welcome to answer the questionnaire in any of the 24 official languages of the EU. Please indicate in which language you are replying.

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

\*2. You are replying:

- as an individual in your personal capacity. Please go to question 3. After question 7, please go directly to question 27.
- in your professional capacity or on behalf of an organisation. Please go directly to question 8.

\*8. Respondent's first name:

Maryant

\*9. Respondent's last name:

Fernández Pérez

\*10. Respondent's professional email address:

maryant.fernandez-perez@edri.org

\*11. Name of the organisation:

European Digital Rights (EDRi)

\*12. Postal address of the organisation:

Rue Belliard 20 - 1040 Brussels

\*13. Type of organisation:

*Please select the answer option that fits best.*

- Investor (private enterprise or individual)
- Arbitrator
- Professional consultancy or self-employed consultant
- Legal practitioner
- Trade, business or employers' professional association
- Trade union, non-governmental organisation, platform or network
- Research and academia
- Churches and religious communities
- Regional or local authority (public or mixed)
- International or national public authority
- Other

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

*[Max 100 characters]*

European Digital Rights (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment. You can find our members here: <https://edri.org/members/>

Information technology has a revolutionary impact on our society. It has boosted freedom of communication and democracy but has also led to new approaches to surveillance and is increasingly used to impose restrictions on fundamental rights. Whenever citizens' rights and freedoms in the online environment are endangered by the actions of political bodies or private organisations, we ensure that they are respected.

EDRi's key priorities for the next years are privacy, surveillance, net neutrality and copyright reform.

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

- Yes
- No. Please go directly to question 21.

\* 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:

- Investor (private enterprise or individual)
- Business or trade association representative
- Trade union representative
- Academic
- Journalist
- Government institution
- International organisation
- Non-governmental organisation
- Private citizen
- Other

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

If your organisation is not registered, we invite you to register [here](#), although it is not compulsory to be registered to reply to this consultation. [Why a transparency register?](#)

- Yes
- No
- Not applicable

\* 24. If so, please indicate your Register ID number:

16311905144-06

\*25. Country of organisation's headquarters

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech
- Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

## PART II

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## Desirability of a multilateral reform of the investment dispute settlement system

A number of systemic shortcomings have been identified in the area of ISDS in recent years that would need to be addressed in order to ensure that the investment dispute resolution system works in a transparent, accountable, effective and impartial manner at global level.

These horizontal issues include greater legal certainty, consistency in the settlement of investment disputes, legal correctness through the possibility of an appeal, full impartiality in the decisions, legal predictability for users of the system and improved accessibility for Small and Medium Sized Enterprises (SMEs).

The current EU policy is to include in each EU trade and investment agreement an institutionalised procedural framework for resolving investment related disputes (the Investment Court System - ICS). It addresses to a significant degree important shortcomings identified with the ISDS system, notably as regards ensuring accountability, impartiality and legal correctness of the dispute settlement process that will apply in the EU's agreements with third countries.

Nevertheless, there are certain limits to what can be achieved through reforms at bilateral level as regards consistency, efficiency and costs. This was also highlighted by stakeholders in the 2014 public consultation who argued that the many concerns expressed in the EU and other parts of the world on the accountability, legitimacy and independence of the investment dispute settlement system would be more effectively addressed through multilateral reforms than through bilateral reforms (as initiated through the ICS approach).

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?**

	0	1	2	3	4	5	I don't know / I don't have an opinion
From 0 (not problematic) to 5 (very problematic)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

28. The EU's reformed approach for investment dispute settlement can naturally only apply to future EU agreements. It leaves open the issue of what to do with the many existing investment treaties in force worldwide (3320 in force, as of November 2016 according to UNCTAD figures<sup>[1]</sup>), a very high number of which contain traditional ISDS provisions and could give rise to disputes using those dispute settlement provisions. Treaties between EU Member States and third countries alone account for around half of these existing treaties (1400 bilateral investment treaties (BITs) with third countries). The EU itself is party to the Energy Charter Treaty (ECT). It is not conceivable that such a high number of investment treaties could be renegotiated to allow to make changes to the ISDS provisions.

At EU level, this raises a particular issue, as there would be two sets of investment dispute resolution rules applicable in the EU and Member States' investment relations with third countries depending on which treaty is at issue: (i) ISDS provisions would apply if a dispute is brought by an investor under one of the existing Member State BITs or the ECT; (ii) ICS would apply if a dispute is brought by an investor under an EU level trade and investment agreement with a third country.

**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	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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	I don't know / I don't have an opinion
Increases legal certainty for investors and states in the EU and in third countries	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides uniformity to the applicable dispute settlement rules	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Improves investment climate in the EU and in third countries	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is important for the EU's credibility that reform of ISDS also applies at the level of EU Member States' BITs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other reasons why it is important to have the same procedural rules apply. Please specify.

*Text of 1 to 500 characters will be accepted*

The proposal does not provide adequate evidence about why foreign investors need to be provided with greater procedural rules than local investors. EU and Member State court systems provide equal access and an adequate, democratic scrutiny of legislation. This would not happen within this model. See, for instance <https://blog.ffii.org/multilateral-investment-court-strengthens-investments-vis-a-vis-democracy-and-fundamental-rights/>

**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	I don't know / I don't have an opinion
Permanent dispute resolution structure (i.e. not disbanded after issuing a ruling)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Appeal instance to correct errors of law and manifest errors of fact	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Full-time adjudicators	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fixed remuneration for adjudicators	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
High qualification criteria for selecting adjudicators	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Random allocation of cases	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Transparency / full documentation disclosure requirements	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
High ethics standards	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Safeguards for independence (e.g. random allocation, tenure, etc)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*Text of 1 to 500 characters will be accepted*

We are of the opinion that the Commission should not promote a flawed Multilateral Investment Court system: <https://edri.org/consultation-on-multilateral-investment-court-misses-the-point/>  
 The EU should depart from this approach and resort to domestic court systems to address any problems identified. We resort to the comments and recommendations made already in our response to the previous ISDS public consultation: [https://edri.org/wp-content/uploads/2014/07/EDRi\\_response\\_ISDS\\_Consultation.pdf](https://edri.org/wp-content/uploads/2014/07/EDRi_response_ISDS_Consultation.pdf)

**32. An important criticism commonly made of the current investment dispute settlement system is that developing or transition economies do not always have the resources and legal expertise to defend themselves effectively and adequately against claims made by investors.**

**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	I don't know / I don't have an opinion
From 0 (should not be addressed) to 5 (should certainly be addressed)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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	I don't know / I don't have an opinion
From 0 (not a useful model) to 5 (certainly a very useful model)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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.**

*Text of 1 to 500 characters will be accepted*

We are of the opinion that the Commission should not promote a flawed MIC system in developing countries. The EU should devote its efforts to help developing countries improve their judicial systems, where necessary and appropriate, just as the EU should devote its efforts in improving the judicial systems in their Member States. We reiterate our approach in our response to the previous public consultation: [https://edri.org/wp-content/uploads/2014/07/EDRi\\_response\\_ISDS\\_Consultation.pdf](https://edri.org/wp-content/uploads/2014/07/EDRi_response_ISDS_Consultation.pdf)

**35. Similarly, critics of the system have consistently argued that it is difficult for SMEs to access the investment dispute settlement system considering the associated costs (although these are largely made up of legal costs) and perceived complexity.**

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

- Yes
- No
- I don't know / I don't have an opinion

**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.**

*Text of 1 to 500 characters will be accepted*

Equal treatment is an essential quality of good judicial systems. We encourage the European Commission to depart from promoting a flawed Multilateral Investment Court System. See our responses above.

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

- Yes
- No
- I don't know / I don't have an opinion

40. In most international judicial systems, the enforcement of the ruling or award is a crucial element for the effectiveness of the system in question. The same applies to investment dispute resolution. Under the current system of ad hoc ISDS arbitration there are a number of ways to enforce arbitral awards. For instance, the rules that apply to dispute settlement under the International Centre for Settlement of Investment Disputes (ICSID) Convention ensure that the enforcement of pecuniary awards is obligatory in the domestic courts of every state party to the ICSID Convention. Consequently, domestic courts cannot refuse the enforcement of an ICSID award and their power is limited to verifying that the award is authentic. 159 countries signatory to the ICSID [Convention](#) have subscribed to this system, which ensures an effective enforcement system. Other awards can be enforced via the [United Nations New York Convention on the Enforcement of Arbitral Awards](#).

**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	I don't know / I don't have an opinion
From 0 (no, this is not needed) to 5 (yes, this is certainly needed)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*Text of 1 to 500 characters will be accepted*

Since the Commission has excessively limited the length of responses to this question, we have to point you to comments made previously, which can be accessed via the following links:  
<https://edri.org/consultation-on-multilateral-investment-court-misses-the-point/>  
<https://blog.ffii.org/defend-democracy-draft-answers-for-new-isds-consultation/>

## Options for a reform at multilateral level

### *A permanent Multilateral Investment Court*

The idea of establishing a permanent Multilateral Investment Court comprised of both a First Instance and an Appeal Tribunal (henceforth "single Multilateral Investment Court") has emerged. This single Multilateral Investment Court would be permanent and open to all countries interested to join. The adjudicators of both the First Instance and the Appeal Instance would be appointed for fixed terms and would be required to have comparable qualifications to members of other international tribunals. They would also be subject to the highest ethical standards.

42. A crucial aspect would be that such a single Multilateral Investment Court could potentially adjudicate disputes arising not just under future investment treaties but also under existing international investment treaties. This could for instance be achieved through a system of opt-ins where countries agree in the Treaty/Legal Instrument establishing the single Multilateral Investment Court to subject their investment treaties to the jurisdiction of the Court (a model could be the [United Nations Mauritius Convention on Transparency for Investor-State Dispute Settlement](#)). The single Multilateral Investment Court would thus in effect supersede ISDS provisions included in investment treaties of EU Member States with third countries or in investment treaties in force between third countries. It would also replace the ICS that would have been included in EU level agreements with third countries.

**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	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



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:**

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

	0	1	2	3	4	5	I don't know / I don't have an opinion
More predictability in investment dispute resolution	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Higher degree of legitimacy for this type of dispute settlement	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Increased consistency of case law and legal correctness through the permanent appeal tribunal	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Higher level of efficiency in the adjudication procedure (more efficient adjudication)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Lower costs for users (assuming some or all procedural costs would be borne by the states Party to the agreement)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other contributions which could be achieved by centralisation. Please specify

*Text of 1 to 500 characters will be accepted*

National court systems should be the preferred option. The Commission should not promote a flawed system that clearly has more risks for fundamental rights than benefits to the aim pursued. As a response to the ISDS Consultation, 97% of the respondents asked the Commission to abandon any kind of ISDS system. This is exactly what the Commission should do.

***A permanent Multilateral Appeal Tribunal***

44. Another option that has emerged is the establishment of a permanent Multilateral Appeal Tribunal, i.e. without changing the existing first instance tribunals. Thus a Multilateral Appeal Tribunal would be limited to deal with ISDS awards appealed on the grounds of errors of law and manifest errors of fact, which the current ISDS system does not allow for. This would address the issue of ensuring legal correctness and assist with consistency of case law.

The Multilateral Appeal Tribunal would rule on ISDS awards rendered under the ad hoc ISDS tribunals established under existing investment treaties (e.g. EU Member States' BITs) and under investment treaties in force between third countries. Such a Multilateral Appeal Tribunal would also replace the Appeal Tribunals included in the EU's ICSs in EU trade and investment agreements with third countries.

**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	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

Common to the proposal for a single Multilateral Investment Court and for a Multilateral Appeal Tribunal are questions on overall design and size. It would for instance be necessary to provide for mechanisms allowing the body established to adjust to a growing membership.

**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	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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	I don't know / I don't have an opinion
From 0 (not important) to 5 (very important)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*Text of 1 to 500 characters will be accepted*

We encourage the Commission to depart from this approach. Please, see the comments already made in the previous "consultation": [https://edri.org/wp-content/uploads/2014/07/EDRi\\_response\\_ISDS\\_Consultation.pdf](https://edri.org/wp-content/uploads/2014/07/EDRi_response_ISDS_Consultation.pdf)

49. Also common to both proposals whether to establish a single Multilateral Investment Court or a Multilateral Appeal Tribunal, are considerations on the qualifications required to be a permanent adjudicator.

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	I don't know / I don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*Text of 1 to 500 characters will be accepted*

Since the space is excessively limited, we resort to comments made in the following links:  
<https://edri.org/consultation-on-multilateral-investment-court-misses-the-point/>  
<https://blog.ffii.org/defend-democracy-draft-answers-for-new-isds-consultation/>

51. An important consideration would be the remuneration and conditions of employment of these adjudicators. 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	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

52. Under the EU's ICS set out in EU level agreements, tribunal members must adhere to high standards of ethical conduct. In particular, they cannot act as counsel in investment disputes (so-called "double hatting"). This is also a safeguard ensuring their impartiality. The legal text in EU agreements establishing the ICS foresees the possibility that tribunal members become full-time and hence would, in principle, not be allowed to have external activities.

**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	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

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	I don't know / I don't have an opinion
From 0 (completely disagree) to 5 (completely agree)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

54. Another important consideration relates to the financing of a single Multilateral Investment Court or a Multilateral Appeal Tribunal, including salaries for adjudicators, staff and related administration expenses. For instance, under the EU's ICS, the Parties to the Agreement (i.e. the EU and the other country signing the trade and investment agreement) share the fixed operational costs of the ICS.

A repartition key, for instance based on the level of economic development, is often used to determine the contribution of states that are members of international organisations.

**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	I don't know / I don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	I don't know / I don't have an opinion
From 0 (not appropriate) to 5 (fully appropriate)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**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	I don't know / I don't have an opinion
From 0 (no contribution at all) to 5 (very strong contribution)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**57. If yes, please indicate the specific reasons:**

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

	0	1	2	3	4	5	I don't know / I don't have an opinion
Higher acceptability of investment dispute settlement	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Higher consistency of case law	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unified dispute settlement system	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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.

*Text of 1 to 500 characters will be accepted*

While the Commission's proposals would represent an improvement, if they were to work as expected, the European Commission should exclude any form of ISDS, including MICS, from every trade agreement. This system is not needed and is detrimental for democracy, the rule of law and human rights, including human rights and fundamental freedoms in the digital environment.



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	I don't know / I don't have an 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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Reduced costs for users (investors, states) from having one single multilateral mechanism because of increased predictability	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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.

*Text of 1 to 500 characters will be accepted*

As already explained, this system is not needed and it gives foreign investors preferential treatment over national ones. Democratically-decided rules should not be assessed by a unique forum, such as the MIC or a Multilateral Appeal Tribunal.

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?**

- Yes
- No
- No opinion

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?**

- Yes
- No
- I don't know / I don't have an opinion

**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.**

*Text of 1 to 500 characters will be accepted*

The Inception Impact Assessment's baseline scenario is just one sentence long and doesn't expect the court to have social (or environmental) impacts. In light of the need to protect fundamental rights, the EU cannot ignore, legitimise, or perpetuate increasing impacts, e.g. on the rights to data protection and privacy. With a baseline scenario showing growing impacts on fundamental rights, the Commission should work out scenarios which will decrease them. See <http://bit.ly/2mIgJsB>

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

## **GLOSSARY**

ACWL Advisory Centre on WTO Law

BITs Bilateral Investment Treaties

CETA Comprehensive Economic and Trade Agreement

CJEU Court of Justice of the European Union

ECHR European Court of Human Rights

ECT Energy Charter Treaty

FDI Foreign Direct Investment

FTAs Free Trade Agreements

ICJ International Court of Justice

ICS Investment Court System

ICSID International Centre for Settlement of Investment Disputes

IIA Inception Impact Assessment

ISDS Investor-to-State Dispute Settlement

OECD Organisation for Economic Co-operation and Development

SMEs Small and Medium-sized Enterprises

TTIP Transatlantic Trade and Investment Partnership

UNCITRAL United Nations Commission on International Trade Law

UNCTAD United Nations Conference on Trade and Development

WTO World Trade Organisation

## **Contact**

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