European Economic and Social Committee

REX/501
Multilateral Investment Court

OPINION

European Economic and Social Committee

Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes
[COM(2017) 493 final]

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1. Conclusions and recommendations

1.1 The EESC fully acknowledges that investor-state dispute settlement (ISDS) in trade and investment treaties has become ever more controversial to a number of stakeholders over questions of legitimacy, consistency and transparency. These criticisms include, but are not restricted to, procedural and substantive considerations.

1.2 The EESC has participated actively throughout the debate around the reform and modernisation of investment protection. It adopted opinion REX/464 and REX/411, and both opinions expressed several concerns and issued recommendations.

1.3 Hence, the EESC welcomes the EU Commission's efforts towards a multilateral reform of ISDS under the auspices of UNICITRAL and considers it vital that the EU remains open to all approaches and ideas that have surfaced regarding ISDS reform.

1.4 The EESC particularly welcomes the increased commitment towards transparency, allowing non-governmental organisations to monitor and even participate in the discussions.

1.5 The EESC considers it vital that Working Group III of UNCITRAL will welcome the input of all relevant stakeholders in an effort to increase inclusiveness, and calls for an improved and more balanced invitation of stakeholders. The EESC further calls on the Commission to use its best endeavours to involve the EESC actively in the work of Working Group III.

1.6 The EESC has always recognised that FDI is an important contributor to economic growth and that foreign investors must have global protection against direct expropriation, be free from discrimination and enjoy equivalent rights to domestic investors.

1.7 However, equally, the EESC has always underlined that the right of the States to regulate in the public interest must not be undermined.

1.8 In the context of establishing a Multilateral Investment Court (MIC), the EESC underlines that a number of fundamental questions have to be addressed: the scope, the protection of public interest, accessibility and relations with domestic courts.

1.9 The scope: Although the EESC believes that a more holistic approach covering both concerns about substantive and procedural aspects of investment protection would be preferable, the EESC notes that the mandated scope has been limited to the procedural aspects of the settlement of disputes between investors and states.

1.10 The public interest: The EESC considers it vital that the MIC should not in any way affect the ability of the EU and Member States to fulfil their obligations under international environmental, human rights and labour agreements as well as protection of consumers and to have procedural safeguards against claims that target domestic public interest legislation. Therefore, the EESC is of the opinion that this could only be sufficiently achieved by the inclusion of a hierarchy clause and a public interest carve-out.

1.11 Third party rights and counterclaims: While the EESC considers permitting *amicus curiae* submissions as a first step that, however, needs to essentially ensure their due consideration by judges, it welcomes the inclusion in the mandate of the possibility of third-party interventions and recommends investigating the role of third parties that can be local residents, workers, unions, environmental groups or consumers.

1.12 Relations with domestic courts: The EESC considers that the MIC may under no circumstances affect negatively the EU's judicial system and the autonomy of EU law. It notes that the question of the relationship between domestic courts and the MIC is viewed differently by different stakeholders, but encourages the Commission to further investigate the issue of the exhaustion of local remedies and how it could work in the context of the MIC.

1.13 Independence and legitimacy of the judges: The appointment of judges on a permanent basis is key in starting to build case law and improve predictability, while their qualifications require a demonstrable expertise in a wide area range of law. The EESC welcomes the commitments on setting clear and high-level criteria to ensure the rule of law and public trust and calls on the selection process to be transparent and subject to principles of public scrutiny.

1.14 An effective system: While a secretariat should be tasked with the effective administration of the MIC, sufficient resources need to be guaranteed for its functioning, and administrative costs should be covered by the Parties on an equitable basis taking into account different criteria. SMEs should enjoy the same level of protection and access to dispute settlement at reasonable conditions and costs and all decisions of the MIC should be enforceable and made public.

1.15 High level of protection and potential transition period: It is important to note that none of the agreements concluded by the EU or Member States will be automatically placed under the jurisdiction of a MIC and that during a potential transition period the agreed dispute settlement procedures shall continue to apply in order to guarantee a high level of protection of investments, given the constitutionality and viability of a MIC under EU law.

2. Background

2.1 Developed by more than 3200 treaties since the 1970s, the system of investment protection comprises substantive investment protection clauses and the dispute settlement procedure clauses that foresee a mechanism where foreign investors can put forward claims against host states (ISDS) in accordance with legal provisions foreseen in the treaties.

2.2 The EESC notes a recent publication in the framework of the OECD Working Papers on International Investment, by policy analyst Joachim Pohl, entitled "societal benefits and costs of international investment agreements – a critical review of aspects and available empirical evidence"[1].

[1] http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en

2.3 In recent years, the reform of investor-state dispute settlement (ISDS) has been central in the debate around the EU's investment policy with the system of investment protection attracting ever more controversy over questions of the legitimacy, of consistency and transparency from a number of stakeholders. These criticisms include, but not exhaust, procedural and substantive considerations.

2.4 These concerns were expressed in particular during two public consultations organised by the European Commission – the first during the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)[2] in 2014, the second in the framework of multilateral reform efforts regarding investment dispute resolution[3] in 2017.

2.5 The European Parliament in its TTIP resolution of 8 July 2015 requested the Commission "to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives"[4].

Developments at EU level

2.6 In response to critics of the current ISDS system and to pressure from civil society on the need to reform it, the Commission proposed the Investment Court System (ICS), a system of investor-state dispute settlement, and included it in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore and the EU-Vietnam Free Trade Agreements.

2.7 In this context, in CETA a specific provision is envisaged in Article 8.29, calling on the Parties to consider the possibility of establishing a Multilateral Investment Court (MIC) in the future: "the Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements".

2 http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

3 http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233

4 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN

2.8 However, none of the above-mentioned agreements is ratified yet, and there is also a case related to the ICS included in CETA pending at the Court of Justice of the European Union[5]. A decision will not be reached for several months.

2.9 The EESC takes note that no investment protection chapter was included in the EU-Japan Economic Partnership Agreement, due to the fact that Japan was not able to accept the EU proposal on the ICS.

Involvement of the EESC

2.10 Throughout this process, the European Economic and Social Committee (EESC) has participated actively in the debate around the modernisation and reform of investment protection, and the ISDS system in particular, also by organising two public hearings in June 2016[6] and most recently in February 2018[7]. In this context, the EESC adopted Opinion REX/464 "The position of the EESC on specific key issues relating to the Transatlantic Trade and Investment Partnership (TTIP) negotiations"[8] as well as Opinion REX/411 on "Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries"[9].

2.11 The EESC recognised that FDI is an important contributor to economic growth, and foreign investors must have global protection against direct expropriation, be free from discrimination and enjoy equivalent rights as domestic investors.

2.12 At the same time the EESC underlined that a state's right to regulate in the public interest is paramount and must not be undermined by the provisions of any International Investment Agreement (IIA). An unambiguous clause which horizontally asserts this right is essential.

2.13 In conclusion, the EESC considered that the European Commission's proposal for the ICS was a step in the right direction but must be further improved in a number of areas in order to function as an independent international judicial body. In addition, the EESC took note that some stakeholders question the need for a separate investment arbitration system in properly functioning and highly developed domestic legal systems.

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5 On 6 September 2017, Belgium requested an Opinion from the Court of Justice of the European Union on the compatibility of the ICS with (1) the exclusive competence of the CJEU to provide the definitive interpretation of European Union Law; (2) the general principle of equality and the "practical effect" requirement of European Union Law; (3) the right of access to the courts and; (4) the right to an independent and impartial judiciary. (https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf)

6 https://www.eesc.europa.eu/en/agenda/our-events/events/public-hearing-framework-eesc-own-initiative-opinion-position-eesc-specific-key-issues-ttip-negotiations

7 OJ C 487, 28.12.2016

8 See "The position of the EESC on specific key issues of the Transatlantic Trade and Investment Partnership (TTIP) negotiations (OJ C 487, 28.12.2016, p.30).

9 See EESC Own-initiative Opinion on Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries (OJ C 332, 8.10.2015). The opinion contains an appendix which makes reference to a possible multilateral instrument for the settlement of disputes between investors and states.

2.14 The EESC raised several concerns that relate more specifically to ISDS in its opinion on "Investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries"[10]. These included: conflict of interest and bias of arbitrators; frivolous claims; the nature of the arbitration industry; the resort to ISDS without seeking other means of redress; the unnecessary use of ISDS between countries with developed judicial systems; the potential incompatibility of ISDS with EU law; and opacity of proceedings.

Multilateral level

2.15 At the same time, discussions on a reform of the ISDS are also taking place at multilateral level. On 10 July 2017, following a formal request from many of its members, including the European Union Member States[11], the United Nations Commission on International Trade Law (UNCITRAL) decided to establish a government-led Working Group III, authorised with a mandate to (1) identify and consider concerns regarding ISDS; (2) consider whether reform was desirable in light of any identified concerns; and (3) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission[12].

2.16 From a broader perspective, the United Nations Conference on Trade and Development (UNCTAD) also contributes to the current debate on reforming the ISDS, offering an analysis of the current IIAs regime and recommendations for the modernisation of the IIAs. These include promoting joint interpretations of treaty provisions, amending or replacing outdated treaties, referencing global standards, engaging multilaterally, and terminating or withdrawing from old treaties[13].

2.17 According to UNCTAD statistics, highlighted at the EESC public hearing in February 2018, 107 investment agreements containing ISDS have been terminated and not replaced in recent years. Last year more investment agreements were terminated than concluded[14]. The EESC notes that some countries have started to reconsider their approach to ISDS.

2.18 Besides reforming ISDS, the EESC would like to stress that various policy instruments may also contribute to ensuring a viable environment for investments, including:

- strengthening the domestic judiciary;
- providing insurance to investors, such as through the Multilateral Investment Guarantee Agency of the World Bank;
- dispute prevention;
- more conciliatory forms of dispute settlement, such as mediation;

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10 OJ C 332, 8.10.2015

11 The EU is not a state and therefore no member, but has enhanced observer status within UNCITRAL.

12 http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CN.9/WG.III/WP.142&Lang=E

13 http://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf

14 UNCTAD IIA Issues Note, "Recent Developments in the International Investment Regime" (May 2018), available at http://investmentpolicyhub.unctad.org/Publications/Details/1186.

– investment promotion; and
– State-to-state Dispute Settlement.

2.19 Lastly, the EESC takes note of the United Nations Human Rights Council resolution 26/9 of 26 June 2014, through which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"[15]. This so-called UN binding treaty, currently under discussion by the Members of the UN, intends to codify international human rights obligations for the activities of transnational corporations. The EESC observes potential effects in the context of trade and investment treaties in the future.

Commission mandate

2.20 On 13 September 2017, the European Commission published its recommendation for a "Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes"[16]. The mandate, as amended by the Member States, was adopted in Council on 20 March 2018[17].

2.21 The adopted negotiating directives seek to establish a permanent court with independent judges able to deliver persistent, predictable and consistent decisions on disputes over investment between investors and states, based on bilateral or multilateral agreements, when both (or at least two) parties to these agreements have agreed to place them under the jurisdiction of the court. An appeal Tribunal is also foreseen. Overall, the court must function in a cost-effective, transparent and efficient manner, including on the appointment of judges. The court must also allow for third party interventions (including for example interested environmental or labour organisations).

3. General comments

3.1 The EESC welcomes the European Commission's efforts towards a multilateral reform of investor to state dispute settlement. The EESC also acknowledges the broader dynamic on ISDS reform, the multilateral efforts under UNCITRAL as well as different national efforts.

3.2 The EESC considers it vital that the EU remains open to all options for reform of ISDS, especially in light of several other approaches and ideas that have surfaced regarding ISDS reform. Proposals developed by other countries and organisations should be considered and assessed in particular by UNCITRAL Working Group III.

15 http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx

16 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:493:FIN

17 http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf

3.3 In this context, the EESC takes note that the Commission's public consultation on "Options on a multilateral reform of investment dispute resolution" was primarily focusing on technical questions surrounding the establishment of a permanent MIC. The EESC would like to underline the wide range of opinions among stakeholders as to whether the Commission's evaluation took into account alternative opinions.

3.4 Although the process of negotiations on establishing a MIC has not been launched yet and it is expected to be a long and complex process, the EESC welcomes the European Commission's increased commitment towards transparency, in particular the publication of the draft negotiating mandate. The EESC commends the Council for publishing the final mandate approved by Member States. This is an important step in ensuring that discussions and potential negotiations take place in a transparent, accountable and inclusive way.

3.5 Holding discussions under the auspices of UNCITRAL is, in terms of transparency in particular, a step in the right direction, as it allows non-governmental organisations to monitor and even participate in the discussions. Nevertheless, the EESC notes that not all relevant stakeholders have been granted access to the proceedings yet and that more organisations – representing business, trade unions and other public interest organisations – should be invited by UNCITRAL in the context of Working Group III. The decision-making process should be fully transparent and based on consensus.

3.6 The EESC considers it vital that the working group will welcome the input of all stakeholders in an effort to increase inclusiveness and that the stakeholder selection process should be further improved and balanced. In this context, we call for the European Commission to ensure the more active involvement of the EESC.

3.7 The establishment of a MIC is a long-term project that requires the engagement of a critical mass of states willing to become Parties to the court. Therefore, the EU should undertake all diplomatic efforts that are necessary to convince third countries to engage in those negotiations. The EESC considers it particularly important that this project is also carried out and supported by developing countries.

3.8 Any future MIC would aim to streamline the dispute settlement procedure in cases launched between investors and states under a wide range of existing international investment agreements. Despite a certain level of similarity between substantive investment protection clauses included in Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with Chapters on Investment Protection, full harmonisation of the system is difficult to achieve.

3.9 This would require a broader reform. Although not implemented yet, and under examination by the European Court of Justice (ECJ), the ICS, as provided in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[18], and the EU-Singapore[19], EU-Vietnam and EU-Mexico Free Trade Agreements, with more to follow in the future[20], could provide experience and contribute to the development of rules for a MIC.

3.10 The objective of the European Commission's recommendation is to establish a new system of dispute resolution between investors and states. The EESC recognises that a number of concerns expressed by civil society could be addressed by the new system. Nevertheless, a number of fundamental issues remain open and require further clarification.

Fundamental questions

3.11 Recognising that the multilateral reform process of ISDS is still in its initial stages, a number of fundamental questions are raised by stakeholders in the context of establishing a MIC. These are concentrated around the aspects of scope – whether the reform shall cover substantive or procedural elements of investment protection, or both; accessibility – whether it will only be possible for investors to launch claims under a MIC or third parties as well; and the exhaustion of local remedies – whether available local remedies shall be exhausted first, before an investor is able to launch a case under a future MIC. This opinion looks at these questions.

3.12 Looking at these questions, the EESC wishes to point out, that a possible setting up of a MIC should take into account both the principle of subsidiarity and article 1 of the TEU, which provides that "decisions are taken as openly as possible and as closely as possible to the citizen"[21].

3.13 The EESC takes note of concerns that the MIC might result in the expansion of the system of ISDS without properly addressing existing concerns on the ICS first, including its compatibility with EU law. The EESC shares the view that an international investment court should under no circumstances become a general substitute for domestic dispute settlement in countries with adequate judicial systems.

3.14 Several stakeholders have expressed significant concerns about reforming the procedure before assessing the substantive law to be applied by a future MIC and empowering an institutionalised multilateral body to interpret these norms. Equally, there are concerns that this could possibly

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18 https://www.eesc.europa.eu/en/agenda/our-events/events/multilateral-investment-court-hearing

19 In Opinion 2/15 of 16 May 2017, the Court of Justice of the European Union provided clarity on the nature of the EU-Singapore Free Trade Agreement, declaring which parts of the agreement are of exclusive EU competence and which are of so-called "mixed competence", requiring ratification by national parliaments. (https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf).

20 For instance, the EU-Chile Free Trade Agreement (currently in the process of update), the EU-Japan Economic Partnership Agreement (which was concluded in 2017, and does not contain a Chapter on Investment Protection but it was agreed by the Parties that the issue will be further discussed and addressed in the future), as well as the future free trade agreements with Australia and New Zealand.

21 Moreover, this rule is also part of international human rights treaties, including the European Convention on Human Rights (ECHR).

create a new legal power base in itself. Other stakeholders agree with the views of the European Commission that substantive law is defined in the underlying agreements.

4. Scope of the proposed reform between substantive protection clauses and dispute settlement procedure

4.1 The EESC notes that the scope of the proposed multilateral reform has been limited to the procedural aspects of the settlement of disputes between investors and states.

4.2 Although the EESC believes that a more holistic approach, covering both concerns about substantive and procedural aspects of investment protection, would be preferable, it recognises the complexity of such an approach and the need to gather political support at multilateral level.

4.3 Looking at the discussions conducted under the auspices of UNCITRAL, a number of challenges have been identified by Working Group III. These include the question of whether it is possible to move towards a procedural reform of the investor-state dispute settlement before a substantive one. UNCITRAL considers this to be a difficult but not impossible task. In this context, Working Group III will look into issues that may be related to procedure but, at the same time, may be significantly affecting the legitimacy and consistency of the system as a whole, such as: a code of conduct for adjudicators, third-party funding and parallel proceedings.

4.4 Substantive investment protection is normally granted though a number of principles, including: national treatment, most-favoured-nation treatment (MFN), fair and equitable treatment and guarantee of transfer of capital. However, limitations apply in the claims that foreign investors can bring to dispute settlement. For instance, claims cannot be based solely on the grounds of loss of profit or on a mere change of national legislation.

4.5 States take different measures to address expressed concerns. These range from more holistic approaches, such as developing new models of agreements that aim to reform both the substantive as well as the procedural elements of investment protection, to more targeted approaches that focus either on the reform of the substantive or the procedural component of investment protection. The EESC notes that the EU has already started to promote a more holistic approach, at least at bilateral level, through the ICS.

4.6 The objective expressed by the Commission is that, once established, a MIC should become the standard model for investment-related dispute resolution in all future agreements of the EU, while it should also ultimately replace the procedural mechanisms in existing EU and Member States' investment agreements.

4.7 In this context, if it goes ahead, the establishment of a MIC should reform the existing ISDS system in a manner that, on one hand ensures effective protection of foreign direct investments and, on the other hand, fully addresses the concerns raised by stakeholders. We would like to note that, in this regard, considerable progress has been achieved, especially in the context of the most recent modern free trade agreements negotiated by the EU.

5. The public interest

5.1 The EESC considers it vital that the MIC should not in any way affect the ability of the EU and the Member States to fulfil their obligations under international environmental, human rights and labour agreements as well as on the protection of consumers.

5.2 First and foremost, the agreement establishing the MIC should contain a hierarchy clause that ensures that in the event of any inconsistency between an international investment agreement and any international environmental, social or human rights agreement binding on one Party to a dispute, the obligations under the international environmental, social, or human rights agreement shall prevail, in order to avoid precedence being given to investors' agreements[22]. This clause is particularly important to ensure that Parties to the MIC have the necessary freedom to reach the goals under the Paris agreement which requires a significant regulatory change to achieve a successful energy transition.

5.3 Procedural safeguards against claims that target domestic public interest legislation are needed to guarantee a Party's right to regulate in the public interest, as they see fit, over the protection of the investor. The EESC is of the opinion that this could only be sufficiently achieved by the inclusion of a public interest carve-out. However, this must be accompanied by appropriate guarantees that it will not be abused for protectionist reasons. In this context, the right to regulate in the area of social protection needs to explicitly mention collective agreements, including tripartite and/or generalised (erga omnes) agreements, in order to exclude them from being made subject to interpretation as breach of an investor's legitimate expectation[23].

5.4 The EESC notes that Article 8.18 (3) CETA already ensures that an investor may not submit a claim if the investment has been made through fraudulent misrepresentation, concealment, corruption, and conduct amounting to an abuse of process. A possible future agreement establishing the MIC should ensure that this clause is extended to applicable law in terms of fraud, human rights abuses, or violations of (international) environmental, social, or consumer law.

5.5 Stringent criteria to prevent frivolous claims and ensure the early dismissal of non-meritorious cases should be also incorporated into the rules of procedure of the MIC. The existence of preliminary expedited procedures to dismiss frivolous claims is important, as it will address one of the criticisms against the current system, ensuring that it will not be misused in the future. In addition, such an expedited procedure for claims without legal merit will contribute to the reduction of costs of the functioning of the court.

5.6 The EESC notes that one area of concern raised during its public hearing was the possibility of third party funding of disputes. Third party funding may not serve the original aims of

22 For a critical analysis of past ISDS tribunal cases see Andreas Kulick, Global Public Interest in International Investment Law (Cambridge University Press 2012), 225-306.

23 OJ C 487, 28.12.2016

investment agreements and may result in perverse incentives. The EESC therefore recommends investigating the impact and need for third party funding and its regulation under the MIC[24].

6. Third party rights and counterclaims

6.1 The EESC considers permitting amicus curiae submissions[25], which are currently already possible under a significant number of ISDS proceedings, a welcome first step in order to ensure a balanced and fair system. However, the EESC sees it essential to ensure that the convention setting up the MIC not only permits amicus curiae submissions as to their admissibility, but also ensures that the judges are required to take them into due consideration in their deliberations.

6.2 The EESC therefore welcomes the inclusion in the mandate for the MIC of the possibility of third party interventions. However, the EESC recommends investigating the role of third parties beyond the current UNCITRAL rules in order to ensure a balanced and fair system and effective rights for affected third parties that can be local residents, workers, unions, environmental groups, or consumers.

6.3 The EESC welcomes the Commission's efforts in the context of the Investment Court Proposal in TTIP for the possibility of third party interventions and the clarification in the mandate that such interventions shall be open to all stakeholders that have a legal interest in a case. The EESC requests the Commission to ensure that standing criteria under the MIC shall not be unnecessarily constraining and shall allow fair access to proceedings fully in line with and in the spirit of the EU's obligations under the Aarhus Convention.

6.4 Some stakeholders support the view that the MIC should also be able to hear claims raised by third parties as well as counter-claims by states against investors as in line with existing developments under the old ISDS system. This issue raises a number of legal and practical questions that need to be carefully examined. For instance, this possibility depends on the applicable law, in other words the substantive provisions included in the agreements placed under the jurisdiction of the court.

6.5 The EESC requests the Commission to ensure that the MIC at the very least does not close the door for claims by affected third parties against foreign investors. To this extent, a convention establishing the MIC could contain provisions that would allow for such claims when Parties to an international agreement have agreed to the jurisdiction of the MIC for such disputes.

7. Relationship with domestic courts

7.1 The EESC considers that the MIC may under no circumstance negatively affect the EU's judicial system and the autonomy of EU law. The EESC recalls that in Opinion REX/411 it held

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24 http://ccsi.columbia.edu/work/projects/third-party-funding-in-investor-state-dispute-settlement/

25 Amicus curiae: literally, friend of the court. A person with a strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. For more information: https://legal-dictionary.thefreedictionary.com/amicus+curiae.

that there are considerable EU treaty-related and constitutional law concerns regarding the relationship between ISDS and the EU legal order. It therefore felt it was "absolutely vital for compliance of ISDS with EU law to be checked by the ECJ in a formal procedure for requesting an opinion, before the competent institutions reach a decision and before the provisional entry into force of any IIAs, negotiated by the EC".

7.2 In this context, the EESC would like to draw attention to two cases examined by the European Court of Justice, which were based on the former ISDS arbitration system and are relevant to the discussion. First, in its Opinion 2/15 of 16 May 2017 on the EU-Singapore FTA, the ECJ determined that the EU does not have exclusive competence on ISDS, finding that ISDS "removes disputes from the jurisdiction of the courts of the Member States". Second, in its judgement in case C-284/16, Slowakische Republik v Achmea BV on intra-EU investment agreements, the ECJ found that ISDS removes disputes from the jurisdiction of EU Member States courts and, as a result, also from the system of judicial remedies in the EU legal system.

7.3 The EESC commends the Belgian government for requesting an opinion pursuant to article 218 (11) TFEU on the compatibility of the Investment Court System in CETA with the EU Treaties as requested by the EESC in its Opinion on Specific key issues of the Transatlantic Trade and Investment Partnership (TTIP) negotiations[26]. The EESC expresses the hope that ECJ Opinion 1/17 will give the EU institutions the much-needed guidance on important questions of European constitutional law.

7.4 The EESC acknowledges that some stakeholders consider that the most effective way of preserving the powers of domestic courts is by limiting standing before the Multilateral Investment Court to states and international organisations such as the EU. State-to-state dispute settlement is also the default dispute settlement mechanism under public international law, has been used in several investment agreements already, and should therefore be preferred in relation to investment law. The EESC notes that other stakeholders consider that investor-to-state dispute settlement is a more effective option in the case of investment, in their view offering a neutral, depoliticised and cost-effective resolution of disputes. It has been the default system for the settlement of disputes on investment since its establishment decades ago.

7.5 The EESC notes that the question of the relationship between domestic courts and the Multilateral Investment Court is viewed differently by different stakeholders. While some consider that the Multilateral Investment Court should be considered a last resort, following the mandatory exhaustion of local remedies, others support that the "no U-turn approach" currently followed by the Commission also constitutes a good basis in the context of the Multilateral Investment Court.

7.6 Under the "no U-turn approach" an investor has the right to address the local tribunals or the ICS/MIC directly. However, once the case is concluded in either forum, an investor cannot re-open it using another forum. Some stakeholders believe that this approach responds successfully to concerns raised by the fact that investors have the possibility to seek relief in multiple fora,

26 OJ C 487, 28.12.2016

for the same alleged violation. They also note that several International Investment Agreements follow this approach[27]. According to an analysis provided by UNCTAD[28], "[the no U-turn clause] attempts to preclude a simultaneous international claim by an investor alleging breaches of the IIA, and domestic proceedings by the investor's subsidiary alleging breaches of a contract or domestic law".

7.7 The requirement to exhaust domestic remedies first, is a fundamental principle of customary international law and international human rights law. There are also several investment agreements concluded by EU Member States with third countries that expressly require applicants to exhaust domestic remedies[29]. The rationale of the rule is that it gives the state where the violation occurred an opportunity to redress it by its own means, within the framework of its domestic legal system and is applied whenever international and domestic proceedings are designed to obtain the same result[30]. The International Court of Justice found that this is so important that it cannot be construed as having been implicitly set aside through an international agreement[31]. For these reasons, some stakeholders consider it important that this rule would be made explicit in the agreement setting up the MIC.

7.8 Given the debate above, the EESC encourages the European Commission to further investigate the issue of the exhaustion of local remedies and how it could work in the context of the MIC.

8. Independence and legitimacy of the judges

8.1 Irrespective of its institutional structure (a stand-alone international organisation or tied to an existing institution) the independence of a MIC should be safeguarded. The appointment of judges on a permanent basis is considered a key factor in starting to build case law, thus improving predictability and moving away from the approach of the ISDS, which is often perceived as "ad hoc".

8.2 If MIC were to be go ahead, having permanent judges should be the ultimate objective. In the initial stages of the establishment of the court, it should be able to organise itself taking into account the number of cases that the court will be dealing with. This depends on the number of the initial Parties to the Convention establishing the court and the number of agreements they bring under the jurisdiction of the court.

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27 Many agreements concluded by the U.S. and Canada include no U-turn provisions. For instance, the Canada-Jordan BIT (2009) in Art.26 on conditions precedent to submission of a claim to arbitration.

28 UNCTAD series on Issues in International Investment Agreements II, Investor-State Dispute Settlement (UNCTAD, 2014): http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

29 See for instance Article 5 of the 1976 Germany–Israel BIT, Article 8 of the 1978 Egypt–Sweden BIT, Article 7 of the 1981 Romania–Sri Lanka BIT, Article 8 of the 2007 Albania–Lithuania BIT, Article XI of the 1992 Uruguay–Spain BIT, Article X of the 1991 Uruguay– Poland BIT.

30 Interhandel (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (Mar. 21). Available at http://www.icj-cij.org/docket/files/34/2299.pdf, at 27.

31 Elettronica Sicula S.p.A. (ELSI) (Italy v. U.S.), Judgment, 1989 I.C.J. Rep. 15, 28 I.L.M. 1109 (July 20), para. 50.

8.3 Although the method for the appointment of the judges is not provided in the Recommendations of the European Commission for a mandate, the EESC welcomes the commitments on setting clear and high-level criteria, including on the qualifications of candidates and the respect of a code of conduct, such as the Magna Carta of Judges[32], which shall guarantee no conflicts of interest and the independence of the judges. This is essential to ensure the rule of law and public trust.

8.4 With regard to the qualifications of judges, not only demonstrable expertise in the area of public international law should be required, but also in areas such as investment, consumer, environmental, human rights and labour law and dispute resolution. This is crucial in order to ensure that the judges will have the necessary experience to deal with the different types of cases, and are able to fully understand and properly assess the legal context, pertaining to different sectors and types of investments that will be brought under the jurisdiction of the court.

8.5 Furthermore, the EESC supports a procedure for the appointment of the judges that is transparent and follows criteria that will ensure the equitable representation of all the Parties to the Convention establishing the court. The selection process should be transparent and subject to the principles of public scrutiny.

8.6 Ensuring transparency, accessibility of information to the broader public as well as accessibility to stakeholders, for instance through accreditation, is another crucial element to improve the credibility and the legitimacy of the system. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") should provide a base level for the rules on transparency in a future MIC.

9. An effective system

9.1 A secretariat should be tasked with the effective administration of a MIC. Although it is not currently clear whether the court will be a newly founded organisation or tied to an existing international organisation, it shall be guaranteed that sufficient resources are allocated for the functioning of the secretariat.

9.2 It is suggested by the draft mandate that the administrative costs be covered by the Parties on an equitable basis, taking into account different criteria, including the level of economic development of the Parties, the number of agreements covered per Party and the volume of international investment flows or stocks of each Party.

9.3 With regard to the allocation of costs related to the adjudication of the cases (excluding the remuneration of judges which it is proposed should be fixed), the draft mandate is silent. The EESC requests clarification on this issue.

32 https://rm.coe.int/16807482c6

9.4 A substantial amount of FDI is conducted by small and medium-sized (SME) companies, which need to enjoy the same level of protection and access to dispute settlement, at reasonable conditions and costs.

9.5 The possibility of providing a conciliation mechanism that would aim at helping parties to solve a dispute in an amicable manner should be also considered.

9.6 All decisions of the MIC should be enforceable and made public.

10. **High-level of protection and potential transition period**

10.1 It is important to note that a key prerequisite for an agreement to be submitted under the jurisdiction of the court is that both parties to the agreement need to give their consent. This effectively means that none of the agreements signed either by the EU or the Member States of the EU will be automatically placed under the jurisdiction of the court, unless the third party agrees as well.

10.2 In this regard, during a potential transition period between the current ISDS system and the ICS, and until the establishment of a MIC, the agreed dispute settlement procedures shall continue to apply in order to guarantee high-level protection of investments, given its constitutionality and viability under EU law, pending the case submitted by Belgium to the Court of Justice of the EU[33].

Brussels, 12 December 2018

Luca JAHIER
The president of the European Economic and Social Committee

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33 See footnote 5.