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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Recommendation for a Council Decision

authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes

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Executive Summary Sheet

Impact assessment on the Recommendation for an authorisation to open negotiations for a Convention establishing a multilateral court for the settlement of investment disputes

A. Need for action

Why? What is the problem being addressed?

In recent years, the inclusion of investor-state dispute settlement (ISDS) in trade and investment agreements has become subject to increased public scrutiny and questioning. Lack of or limited legitimacy, consistency and transparency as well as the absence of a possibility of review have been identified as problems stemming from ad hoc ISDS which is based on the principles of arbitration. To address these limitations, the EU's approach since 2015 has been to institutionalise the system for the resolution of investment disputes in EU trade and investment agreements through the inclusion of the Investment Court System (ICS). However, due to its bilateral nature, the ICS cannot fully address all the aforementioned problems. Moreover, the more ICSs are included in EU agreements, the more complex the management will be for the Commission and more costly it will be for the EU budget, which will bear part of the operating costs of the ICS.

What is this initiative expected to achieve?

The initiative aims at setting up a framework for investment dispute resolution that is permanent, independent and legitimate; predictable in delivering consistent case-law; allowing for an appeal of decisions; cost-effective; transparent and efficient. It seeks to align the EU's policy in investment dispute resolution with the EU's global approach in other areas of international governance and international dispute settlement favouring multilateral solutions.

What is the value added of action at the EU level?

A multilateral reform of investment dispute settlement could not be carried out at the Member State level inasmuch as it would fail to cover all existing investment treaties, leaving out those concluded by the EU. Member States do not have competence for all the matters that would be dealt with in this initiative, which are either of the exclusive or shared competence of the EU.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

Option 1 (baseline scenario) means that the EU would continue to negotiate ICSs in its bilateral investment agreements while ISDS would continue to exist insofar as the treaties that utilise it have not been phased out.
Option 2 envisages that the EU and the Member States renegotiate Member States' bilateral investment treaties and the Energy Charter Treaty (ECT) to align the dispute settlement provisions therein with the ICS.
Under Option 3, the arbitration rules governing ISDS would be reformed to be in line with the principles of ICS.
Option 4 envisages the creation of a permanent multilateral appeal instance.
Option 5 foresees the creation of a permanent multilateral investment court. According to its preferred features, the court would include a First Instance and an Appeal composed by a number of adjudicators to be determined by the workload. They would be appointed for a fixed period of time and would meet high qualification and ethical requirements. They would be appointed by an independent body and hear cases allocated on a random basis. Resort to the Appeal Tribunal would be possible in cases of manifest errors in the appreciation of facts, in addition to procedural errors and substantial errors of law. The court would rely on a secretariat and states would be able to become Contracting Parties as per an opt-in system. Possible assistance to SMEs and developing countries should be considered. Costs should be allocated according to Contracting Parties' level of development and the possibility to charge user fees should not be excluded.
Option 6 implies the negotiation of multilateral substantive rules on investment protection as a wider framework for the negotiation of multilateral dispute settlement provisions.
Option 7 foresees improving ISDS in bilateral EU investment agreements and in the ECT.
Under Option 8, ISDS would be phased out and disputes between foreign investors and host states would be decided by the domestic courts of the host state.

Who supports which option?

The non-profit sector broadly supports the principles that underpin the option to establish a permanent multilateral investment court, notably permanency, independence and detachment of adjudicators from the disputing parties. Business groups see the potential of this option but are concerned that the new regime for the

appointment of adjudicators may lead to a loss of valuable expertise and that the possibility to appeal may prolong proceedings. Academia and legal practitioners are generally in favour of reforming the current system so that it is in line with the principles of domestic and international judicial systems.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

The establishment of a multilateral investment dispute settlement mechanism featuring the preferred sub-options would bring added legitimacy to investment dispute resolution by detaching adjudicators from the disputing parties and safeguarding their independence. Proceedings would be streamlined thereby saving costs to investors and states. The permanency of the court would contribute to greater predictability of case-law which would also contribute to faster decisions and may indeed avoid disputes in the first place. The appeal instance would contribute to legal correctness and promote consistency.

The multilateral investment court would address at the global level issues raised by ISDS that are only addressed by the ICS at the bilateral level. It would promote strong multilateral cooperation and good global governance, inasmuch as the court would aim to secure inclusiveness of all interested countries and ensure that countries' level of development not be an obstacle to an effective use of the court. It would simplify EU policy-making since it would progressively replace bilateral ICSs that will have been included in EU agreements and ISDS mechanisms included in investment treaties of Member States.

What are the costs of the preferred option (if any, otherwise main ones)?

The annual budgetary impacts of the multilateral investment court with its preferred features are estimated to be around EUR 5.4 million for the EU and Member States. This estimate would cover the remuneration of 14 permanent adjudicators (9 at First Instance and 5 at Appeal) and 42 members of staff (3 members of staff per adjudicator) which is assumed to be a reasonable number from which to start. These assumptions are based on other international courts and tribunals and a repartition key of the total costs among 45 Contracting Parties (including the EU, its 28 Member States and 16 third countries) taking into account their level of development (following the IMF quota system). The actual costs will depend on the number of adjudicators, size of the secretariat and number of Contracting Parties (inter alia) which cannot be precisely established at this stage. Moreover, these parameters are likely to evolve over time, leading to variations in the costs.

Since the multilateral court initiative only addresses procedural (i.e. dispute settlement) rules and not substantive rules (included in underlying investment agreements), and therefore it will not grant additional grounds to bring cases, financial implications related to the payment of damages are considered irrelevant.

How will businesses, SMEs and micro-enterprises be affected?

The preferred option will ensure investors' access to a legitimate, independent and effective dispute settlement system regardless of their size and/or turnover. Proceedings under the court are expected to be shorter and therefore less costly for investors, considering that no time will have to be spent on appointing adjudicators and that arguments will be more focused thanks to the enhanced predictability and consistency of interpretation of substantive investment provisions. SMEs may benefit from additional assistance to take account of their lower turnover.

Will there be significant impacts on national budgets and administrations?

Based on the assumptions explained above, it is estimated that the court would cost around EUR 2.7 million to EU Member States' budgets annually. This will be less than what the baseline scenario costs to EU and Member State budgets (estimated at around EUR 9 million).

Will there be other significant impacts?

The multilateral investment court would alleviate the administrative burden by centralising all disputes under a single set of procedural rules. As the multilateral investment court initiative only addresses procedural rules and not substantive rules, no relevant environmental or social impacts are expected to result from it. Minor social impacts are anticipated regarding the professional opportunities of the arbitrator/judge community in becoming adjudicators under the court. The same applies to the professional opportunities of potential staff of the court's secretariat.

D. Follow up

When will the policy be reviewed?

The Commission will carry out regular annual monitoring once the multilateral court is operational. It will also regularly audit the use of the EU's financial contributions to the costs of the court. An evaluation of the functioning of the multilateral investment court will be undertaken when it has been in force for a sufficient period of time allowing availability of meaningful data.