Association française des entreprises privées / French Association of Large Companies

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Multilateral Investment Court Project
JOINT AFEP & CERCLE DE L'INDUSTRIE POSITION PAPER

This paper was prepared in the context of the public consultation from the European Commission aiming 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.

Context

- In the context of the TTIP negotiations, the **Investor-State Dispute Settlement sytem (ISDS),** which is part of most member states' investment agreements with third countries, has been widely criticised. In 2014, the European Commission organised a public consultation to gather views on whether and how to improve this system.

- Taking into account the consultation's results, the Commission proposed in 2015 to replace the existing ISDS system by an institutionalised investment dispute resolution system (the **Investment Court System – ICS**) in TTIP and other future bilateral EU trade and investment agreements. This new Investment Court System would include both a **Tribunal of First Instance and an Appeal Tribunal** with permanent judges appointed by the EU and its trade and/or investment partners. Such a system has already been included in the EU agreements with Canada and Vietnam.

- In its October 2015 Communication "*Trade for all – Toward a more responsible trade and investment policy*", the Commission went a step further and proposed to engage discussions with third countries to build consensus for a permanent **Multilateral Investment Court (MIC)**. The Court would take the form of the above-mentioned ICS deployed at multilateral level.

- On the basis on the present consultation, the Commission intends to issue an impact assessment study to support a request to the EU Council for a negotiation mandate to negotiate with third countries the creation of this Multilateral Investment Court (MIC).

Our general assessment of the Commission's proposal to create a Multilateral Investment Court

1. The Commission proposes to apply a unique set of rules to resolve any investor/State dispute, including under the member states' investment agreements**. However, the current ISDS system delivers satisfactory results. It is certainly not perfect but it provides investors with the guarantee that their investment protection claims can be pursued through a dispute settlement framework based on the rule of law.** It is worth reminding that the ISDS system cannot prevent States from regulating. When it rules that a State has violated its obligations towards a foreign investor under a bilateral or multilateral investment agreement, it can only require the State to pay compensation to the concerned investor.

Moreover, statistics show that ISDS cases are very often won by States[1] (in 2016, only 30% of the cases settled under the ICSID system were won by investors).

2. **The ISDS system could certainly be improved.** In this regard, the reinforcement of its legitimacy and transparency is already a step in the right direction, with the clarification of legal concepts such as "fair and equal treatment" and "in/direct expropriation" and the reinforcement of the States' rights to regulate, as exemplified in the ISDS system included in the CETA. But **its efficiency should also be strengthened,** especially by shortening the duration of the proceedings, which can be extremely long.

3. **In a context of growing state protectionism and as companies and value chains are increasingly globalised, changes to the ISDS procedure should only aim to preserve or improve its efficiency and to keep a high level of investor protection**. The companies' number one priority when dealing with investment dispute resolution is to rely on an efficient ISDS system that provides legal certainty and guarantees that legitimate claims in the field of investment protection can be pursued.

4. **Therefore, companies are concerned** by the Commission's proposal to replace the existing reliable ISDS system by a Multilateral Investment Court. The MIC project raises numerous **questions about its functioning and effectiveness and might impact negatively the global investment climate**. Companies consider that the Commission's priority as regards ISDS should be to **protect European investors towards third countries' violations of their obligations under bilateral investment agreements concluded with the EU.**

5. **Companies consider that the Commission should also engage in protecting European investors from unfair treatment by third countries in the area of taxation**, a growing and worrying trend at global stage, which does not fall under the perimeter of ISDS system, and should be pursued via available judicial tools such as the WTO panels.

Our technical comments

1. First and foremost, the number of third countries that will be part of this initiative is paramount. **If too few States decide to work on this project, it would only create another ISDS system in addition to the others and therefore add complexity**. Besides, the legitimacy and the relevance of the proposed Multilateral Investment Court will be put into question if the EU's major trade partners (USA and main OECD countries), and emerging countries (China, India…), decide not to join this initiative.

2. Setting up an Appeal mechanism to rule on facts is not relevant as it would create legal uncertainty for States and investors. **The most important for the procedure is to provide legal certainty in the shortest possible time**.

3. **Concerning the selection of judges, the priority must be to have a sufficiently large panel with highly qualified judges who present guarantees of impartiality and independence.** Ensuring impartiality would mean that the ability to appoint the adjudicators of a case should

[1] According to the *ICSID Caseload – Statistics (Issue 2017-1)*, in 2016, 29,1% of the awards upheld claims in part or in full

be shared by both parties to any dispute: States and investors, and those members **of the Justice Department of a State** should be prevented from being adjudicators.

4. Guaranteeing independence and competence would lead to **reject the option of full-time adjudicators,** because judges must be selected on the basis of their high qualifications in the particular context of a given case (**random allocation of cases must be cast out** for the same reason). Besides, permanent judges would not necessarily result in an increased predictability of rulings and a more consistent case law, as each case varies from another depending on the facts and legal contents of investment agreements. A pragmatic and practicable solution would be to appoint **semi-permanent judges, as for WTO panels. Professional lawyers and academics should not be banned** from being adjudicators because this would deprive this Court of valuable competences. Their independence can perfectly be ensured via rules ensuring independence and impartiality.

5. **Increasing the transparency of ISDS proceedings is indeed desirable**. As an example, the Court's rulings could be made public. But transparency should not be ensured to the detriment of the independence and serenity of proceedings. **In this regard, full documentation disclosure requirements would put in jeopardy trade secrets**. That is why transparency rules should be inspired from those applied by the Commission to merger cases of European dimension.

6. As regards the costs of the ICS, companies point out that **permanent adjudicators and court expenses would not necessarily be cheaper** than with the current ISDS system. In any case, reduced EU expenditure will depend on the willingness of third countries to adopt the Commission's proposal, which is not granted.

7. Finally, as regards the enforcement of this Multilateral Investment Court's decisions, the Commission should take inspiration from the **mechanism implemented by the International Centre for Settlement of Investment Disputes (ICSID), which works well.** It would ensure coherence with ISDS rules that are widely used at global stage, and would provide more legal certainty.

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About AFEP

Since 1982, Afep is the association which brings together large companies operating in France. The Association is based in Paris and Brussels. Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority. Afep has 118 members. More than 8.5 million people are employed by Afep companies and their annual combined turnover amounts to €2,600 billion.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility.

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About Cercle de l'Industrie

Based in Paris and Brussels, Cercle de l'Industrie brings together the CEOs of 37 of the largest French industrial companies – state-owned as well as private – along with key political decision-makers close to the right and the left aisles of the French parliament.

Its goal is twofold: to reflect on how industry should tackle challenges in terms of economic growth, sustainable development or technological progress, and to participate in the debates shaping national and European public policies that impact on industry.

Member companies of the Cercle de l'Industrie have a turnover of 757 billion euros and employ 2.5 million people throughout the world.

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