



Council of the  
European Union

Brussels, 20 March 2018  
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### **DECLASSIFICATION**

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Subject: Negotiating directives for a Convention establishing a multilateral court for  
the settlement of investment disputes

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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**NOTE**

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**From:** General Secretariat of the Council

**To:** Delegations

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**Subject:** Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes

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Delegations will find attached the draft negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes.

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**NEGOTIATING DIRECTIVES FOR A CONVENTION ESTABLISHING A  
MULTILATERAL COURT FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

Regarding the process of the negotiations:

1. The Union shall be represented by the Commission throughout the negotiations. In accordance with the principles of sincere cooperation and of unity of external representation as laid down in the Treaties, the Union and the Member States of the Union participating in the negotiations shall fully coordinate positions and act accordingly throughout the negotiations.
2. The Union shall strive to ensure that the process of the negotiation of the Convention allows all interested countries, with government-led delegations and international organisations to effectively participate in the negotiation and consensus building.
3. The Union shall strive to ensure that the negotiations are conducted in a transparent manner, including, where possible, through audio- and/or web-streaming, and that representatives of civil society organisations will have the opportunity to participate in the discussions as accredited observers.

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4. Negotiations, based on preliminary analysis and discussions, should be conducted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). In the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law shall exercise their voting rights in accordance with these directives and previously agreed EU positions.
5. These directives are without prejudice to the division of competences between the Union and the Member States as laid down in the Treaties.

Regarding the substance of the negotiations:

6. The Convention should allow the Union to bring agreements to which the Union is or will be a party to under the jurisdiction of the multilateral court. Consequently, the Union should be in a position to become a Party to the Convention and the provisions of the Convention should be drafted in a way which allows their effective use by the European Union.
7. The Convention should also allow the Member States of the Union and third countries to bring agreements to which they are or will be Parties to under the jurisdiction of the multilateral court.<sup>1</sup>

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<sup>1</sup> Without prejudice to the question of their validity or applicability under EU law, bilateral investment treaties concluded among Member States (i.e. intra-EU BITs), as well as the intra-EU application of the Energy Charter Treaty shall not fall within the scope of these directives.

8. The principal mechanism of the Convention should be that the jurisdiction of the multilateral court extends to a bilateral agreement when both Parties to the agreement have agreed to submit disputes arising under the agreement to the jurisdiction of the multilateral court. In the case of multilateral agreements, the Convention should allow two or more Parties to such an agreement to agree to submit disputes under the multilateral agreement to the jurisdiction of the multilateral court. It should be explored whether the Convention could also be utilised if only the respondent state is Party to the Convention.
9. The Convention should include appropriate procedural safeguards, including provisions against frivolous claims. It should also be explored whether the Convention should include amicable dispute resolution mechanisms and other procedural provisions on, inter alia, parallel claims or joint interpretations.
10. The multilateral court should be composed of a tribunal of first instance and an appeal tribunal. The appeal tribunal should have the competence to review decisions issued by the tribunal of first instance, on the grounds of errors of law or manifest errors in the appreciation of facts or, as appropriate, serious procedural shortcomings. The Convention should include provisions for the completion of the proceedings in light of the findings of the appeal tribunal, which should have the power, when appropriate, to send back cases to the tribunal of first instance ("remand").

11. The independence of the Court should be guaranteed. Members of the Court (both of the tribunal of first instance and of the appeal tribunal) should be subject to stringent requirements regarding their qualifications and impartiality. Strong rules on ethics and conflict of interests, including a code of conduct for the Members of the Court and challenge mechanisms shall be included in the Convention. The Members of the Court should receive a permanent remuneration. They should be appointed for a fixed, long and non-renewable period of time and enjoy security of tenure, as well as all necessary guarantees of impartiality and independence. Members should be appointed through an objective and transparent process. Different methods of appointment of the Members of the Court should be explored including, for example, the possibility that all Parties to the Convention are entitled to appoint a Member of the Court, or the possibility that Members of the Court are appointed through other methods inspired by existing international courts such as the International Court of Justice or the International Criminal Court, taking into account, inter alia, the expected size of the Court and the need to ensure effectiveness and cost-efficiency. Any such method shall ensure that the Members of the Court who are appointed are of a high quality with the necessary professional and ethical standing to fulfil their duties. Any method of appointment of the Members of the Court shall provide also for regional balance and gender representation in addition to ensuring the efficient and effective management of the Court. Moreover, Members should be appointed to hear a particular case by a transparent and objective method.

12. The Convention should include the necessary flexibilities to adapt to an evolving membership, as well as to possible evolutions in the nature of agreements that could be submitted to the jurisdiction of the court. The Convention should not exclude the possibility for the court to rely on the secretarial support of an existing international organisation, nor to be integrated into the structure of any such organisation at a later stage.
13. Proceedings before the multilateral court should be conducted in a transparent manner, including the possibility of submitting third party interventions, similar to or utilising the rules and standards provided for within the UNCITRAL Rules on Transparency for treaty-based investor-state arbitration.
14. Decisions of the multilateral court should benefit from an effective international enforcement regime.
15. One objective of the negotiations should be that the multilateral court operates in an effective way, both in terms of costs and length of procedures. The fixed costs of the court, including costs of remuneration of its members and costs of administrative and secretarial support, should in principle be borne by the Contracting Parties to the Convention establishing the multilateral court with a possible contribution from the disputing parties through Court fees, which should not be linked to the remuneration of the Members of the Court. The distribution of such costs among the Contracting Parties should be decided on an equitable basis which shall take into account various factors, including the Parties' level of economic development.

16. The Union should strive to ensure that support can be made available to ensure that developing and least developed countries can operate effectively in the investment dispute settlement regime. Such an initiative may form part of the process of establishing a multilateral investment court or may be conducted separately.
17. The Convention should include appropriate provisions aimed at ensuring the access of small and medium-sized enterprises and natural persons to the multilateral court by seeking, *inter alia*, to reduce costs.
18. The Convention establishing the multilateral court should be open for signature and accession by any interested country and regional economic integration organisation that is a party to an investment agreement. It should allow for an early entry into force as soon as a minimum number of ratification instruments have been deposited.

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