

# “Towards an Investment Court System for the EU : Current Proposals and Possible implications for IP Enforcement”



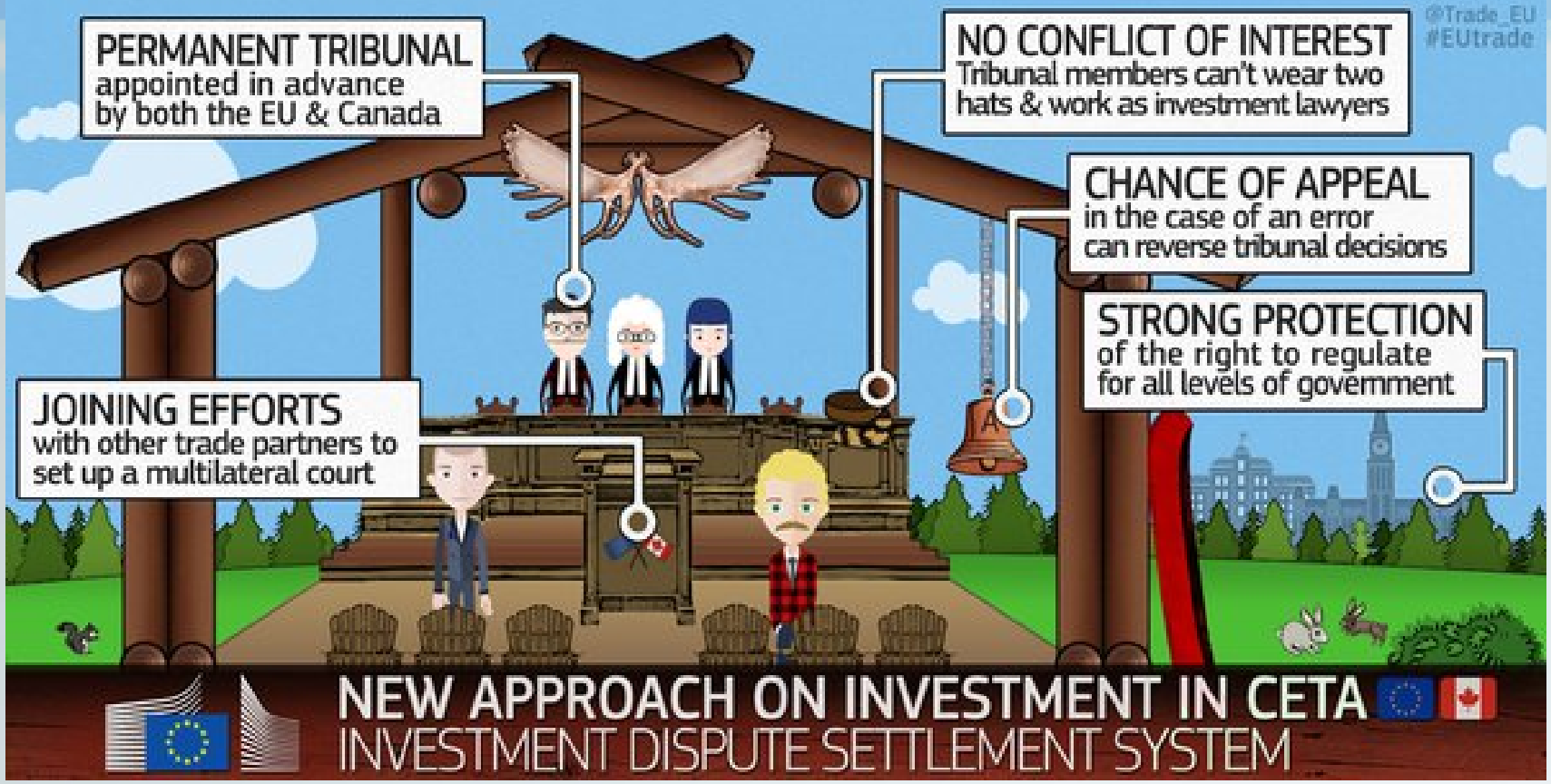
[https://twitter.com/eu\\_ttip\\_team/status/644110990242639873](https://twitter.com/eu_ttip_team/status/644110990242639873)

***Dr. Kamalinne Pinitpuvadol***

Executive Director

International Institute for Trade and Development (ITD), Thailand





**A MULTILATERAL INVESTMENT COURT :**  
a permanent Investment Court System  
a permanent institution for resolving investment disputes



# Outline

- The current system of Investor to State Dispute Settlement (ISDS)
- The need for a multilateral reform of ISDS
- The establishment of a multilateral investment court in the EU
- The possible consequences of submitting IP disputes to a multilateral investment court



# The current system of Investor to State Dispute Settlement (ISDS)

- Provisions on investor-state dispute settlement (ISDS) have been a core component of international investment agreements (IIAs) for decades.
- The current ad hoc system of investor to state dispute settlement (ISDS) is currently included in around 3,320 investment treaties (by end-February 2018) in force today – of which EU member states have 1400.



# UNCTAD : ISDS Navigator Update: 850+ Known Cases by Year-End

## ISDS Navigator UPDATE

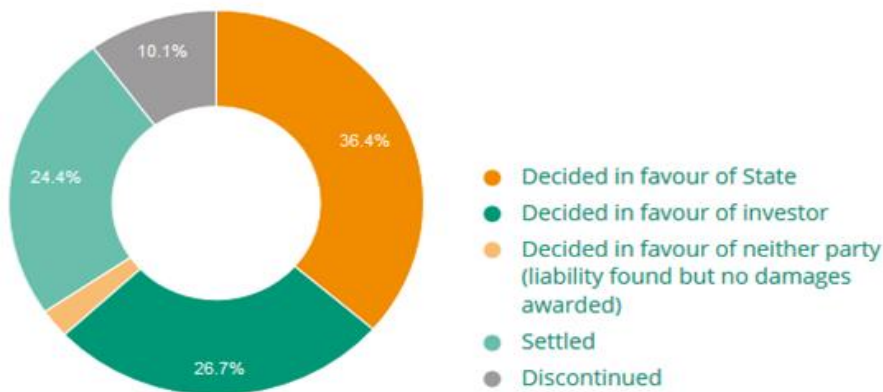
65

ISDS cases  
in 2017

TOTAL  
855

known ISDS  
cases

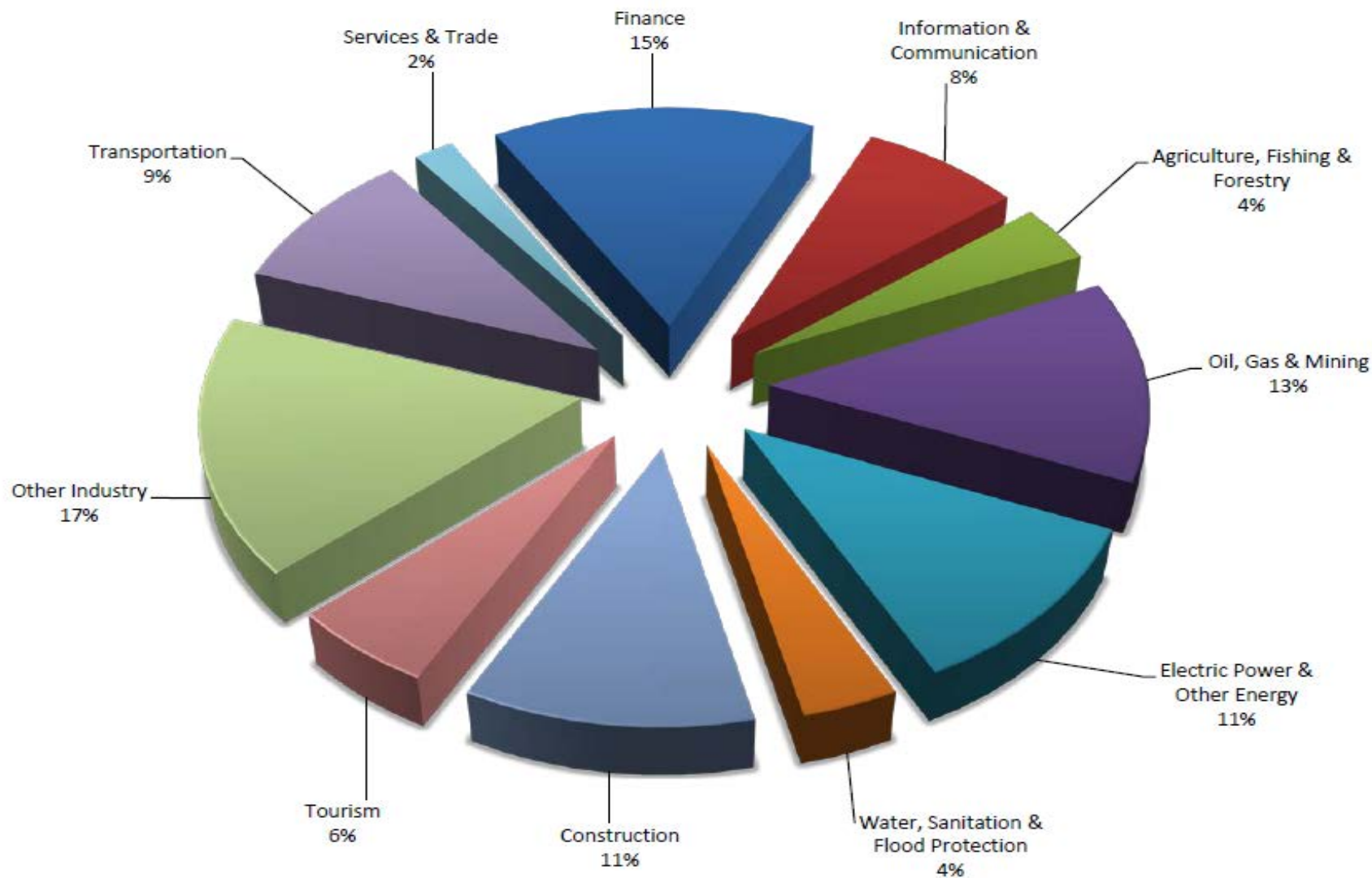
### Concluded original arbitration proceedings



- In [2017](#), investors brought at least 65 ISDS arbitrations pursuant to international investment agreements (IIAs).
- As of 31 December 2017, the total number of known arbitrations against host countries based on IIAs has reached [855](#).



# Distribution of New ICSID Cases Registered in 2017, by Economic Sector



## The ICSID Caseload – Statistics (Issue 2018-1)



# The current ISDS system is problematic!

- a perceived deficit of legitimacy and transparency
- contradictions between arbitral awards
- difficulties in correcting erroneous arbitral decisions
- questions about the independence and impartiality of arbitrators
- the costs and time of arbitral procedures

UNCTAD : REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT: IN SEARCH OF A ROADMAP, IIAs Issue Note, NO 2, June 2013



# The need for a multilateral reform of ISDS



## UNCTAD has defined five options for reforming the ISDS system

ISDS is a system of *application* of the law; improvements to the ISDS system should go hand in hand with progressive development of substantive int'l investment law

Tailoring the existing system through individual IIAs



Source: UNCTAD, WIR 2014.

## 5 main reform paths :

- Promoting alternative dispute resolution
- Tailoring the existing system through individual IIAs;
- Limiting investor access to ISDS;
- Introducing an appeals facility;
- Creating a standing international investment court.



# Reform of ISDS is an integral part of UNCTAD's Roadmap for IIA Reform

**Table IV.3.**

**Objectives and areas for IIA reform**

Reform objectives	Reform areas
<b>1. Safeguarding the right to regulate</b>	<p>Circumscribed (clearly defined) IIA standards of protection</p> <ul style="list-style-type: none"> <li>• Fair and equitable treatment</li> <li>• Indirect expropriation</li> <li>• MFN</li> </ul> <p>“Safety valves”; e.g. exceptions for</p> <ul style="list-style-type: none"> <li>• Public policies</li> <li>• National security</li> <li>• Balance-of-payments crises</li> </ul>
<b>2. Reforming investment dispute settlement</b>	<p>Clauses that</p> <ul style="list-style-type: none"> <li>• Fix the existing ISDS mechanism by improving transparency, limiting investors' access, enhancing the contracting parties' control and introducing local litigation requirements</li> <li>• Add new elements to the existing ISDS mechanism (e.g. building in effective alternative methods of dispute resolution, introducing an appeals facility)</li> <li>• Replace the existing ISDS mechanism (e.g. by creating a standing international investment court, reliance on State-State dispute settlement and/or reliance on domestic dispute resolution)</li> </ul>
<b>3. Promoting and facilitating investment</b>	<p>Clauses that</p> <ul style="list-style-type: none"> <li>• Strengthen promotion measures (inward and outward)</li> <li>• Target promotion measures to sustainable development</li> <li>• Foster cooperation in this regard</li> </ul>
<b>4. Ensuring responsible investment</b>	<p>Clauses that</p> <ul style="list-style-type: none"> <li>• Prevent the lowering of environmental or social standards</li> <li>• Ensure compliance with domestic laws</li> <li>• Strengthen corporate social responsibility (CSR) and foster cooperation in this regard</li> </ul>
<b>5. Enhancing systemic consistency</b>	<p>Clauses and mechanisms that manage interaction between</p> <ul style="list-style-type: none"> <li>• IIAs and other bodies of international law</li> <li>• IIAs and domestic investment and other policies</li> <li>• Different IIAs within a country's network</li> </ul>

Source: UNCTAD.

## Overview of phase 2 IIA reform options



Source: ©UNCTAD.



# The establishment of a permanent court in the EU to decide investment disputes

- The "Investment Court System", with a First Instance and an Appeal Tribunal with judges appointed by the agreement partners
- Both the Comprehensive Economic Trade Agreement (CETA) signed with Canada and the trade agreement concluded between the EU and Vietnam contain a reference to the establishment of a multilateral investment court.
- The EU includes similar references in all of its negotiations involving investment



# The proposal for an investment court system includes:

- setting up a permanent tribunal for each EU trade agreement, together with the corresponding trade partner
- nominating a pool of highly qualified judges, then randomly assigning them for each case
- avoiding any of conflict of interest by preventing nominated arbitrators from also working as investment lawyers who act as representative of parties one day, and as arbitrator the next.
- the right to appeal against verdicts and the possibility to reverse the court's decisions
- making all documents available online, and webstreaming hearings for all to see



# Developments of the establishment of a permanent court in the EU

- The issue of reforming the current system of Investor-to-State Dispute Settlement (ISDS) was already subject to a wide-ranging **public consultation** at EU level in 2014, in the context of the development of the EU's policy on investment protection and investment dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP) agreement.
- The establishment of a multilateral investment court is an integral part of the **EU's trade and investment strategy**, "Trade for all - Towards a more responsible trade and investment policy", presented in 2015.



# Developments of the establishment of a permanent court in the EU

## Adoption of Recommendation

On 13 September 2017, the EC issued, based on Article 218(3) of the Treaty on the Functioning of the European Union (“TFEU”), a Recommendation for a Council Decision authorising the opening of negotiations for a convention establishing a multilateral court for the settlement of investment disputes (the “Recommendation”). **Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes dated 13 September 2017, COM (2017) 493 final.**





## Key features: Investor to State Dispute Settlement (ISDS) vs Multilateral investment court

	At present – ISDS		In the future – multilateral investment court
<b>Ad hoc</b>	Tribunals are only set up on a case by case basis	<b>Permanent</b>	The court would be a permanent international institution
<b>Risks of Partiality</b>	The disputing parties nominate arbitrators, who could have potential conflicts of interest	<b>Independent</b>	States who are members would appoint permanent, fully qualified judges, free of any conflicts of interest or interest in the outcome of cases
<b>Unpredictable</b>	Tribunals often interpret investment protection standards differently, since they are only appointed to hear a particular case	<b>Predictable</b>	By sitting permanently and deciding cases over time, judges would deliver consistent decisions
<b>One-stop shop</b>	Parties have very limited grounds on which to appeal against ISDS decisions – essentially if the tribunal has not followed its rules properly (violation of due process)	<b>Comprehensive</b>	The court would allow either party to appeal against a decision
<b>Inefficient</b>	ISDS (but also the EU's current approach of including ICS in bilateral EU trade agreements) duplicates the same framework for each deal. It is costly and doesn't cover the large number of treaties	<b>Cost-effective</b>	The court would allow for economies of scale, as it could cover disputes arising under the bilateral investment agreements which all members of the multilateral investment court have in place
<b>Opaque</b>	There is currently limited published information about: <ul style="list-style-type: none"> <li>• the existence of investment disputes</li> <li>• the procedure of the dispute</li> <li>• the substantive aspects of the case</li> <li>• the results of the disputes</li> </ul>	<b>Transparent</b>	The court would: <ul style="list-style-type: none"> <li>• publish online details of all aspects of its work, including its decisions</li> <li>• open all hearings to the public</li> <li>• Allow third parties (NGOs, trade unions, consumer groups, business associations) to make submissions</li> </ul>

- ISDS reform is on the agendas of various international organizations, including UNCTAD, OECD, UNCITRAL, ICSID...
- UNCITRAL Commission entrusts Working Group III to further work on a multilateral reform of ISDS (July 2017)





*“The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberation,, while benefiting from the widest possible breadth of available expertise from stakeholders, would be government-led with high level input from all governments, consensus-based and be fully transparent”.*



- Identify and consider concerns regarding ISDS
- Consider whether reform is desirable in the light of any identified concerns
- If the Working Group concludes that reform is desirable, develop any relevant solutions to be recommended to the Commission

*[http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)*



# UNCITRAL way forward

UNCITRAL discussions need to count on the experiences and expertise of other organisations, e.g. UNCTAD, OECD, WTP, ICSID, PCA (Permanent Court of Arbitration)

- 27 November – 1 December 2017 (Vienna) First meeting of WG III. Focus on first point of the mandate - identifying and considering concerns regarding the ISDS.
- 23 – 27 April 2018 (New York) Second meeting of the WG. Continue discussions as per the mandate.
- July 2018 (New York) WG III will report back to UNCITRAL Commission on the state of discussions according to the mandate.



# What would a permanent multilateral investment court look like?

- The MIC could be modelled on the set up of most domestic and international courts/tribunals, which are composed of two instances : a first instance and an appeal instance
- The MIC could have permanent staff, a secretariat to support its daily work
- The MIC would need to be a legal entity under international law



# An option of the establishment of a permanent Multilateral Investment Court

- This builds further on the approach taken in the World Trade Organisation.
- In terms of scope, the Court would be designed to be competent to hear disputes brought under IIAs.
- The mechanism to achieve coverage of both existing and future agreements would be comparable to that permitting the application of the *UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration* to existing agreements.
- Under this mechanism, the Multilateral Investment Court would deal with disputes under an agreement between countries A and B when both countries have ratified *the agreement establishing the Multilateral Investment Court* and both countries have agreed that the bilateral investment agreement between them should be subject to the Multilateral Investment Court



# The possible consequences of submitting IP disputes to a multilateral investment court

- Intellectual property is recognized as an investment under IIAs (International Investment Agreements)
- If a country seizes and investment or passes new laws with make it worthless (State interference / Right to regulate) and pay insufficient compensation or non at all, the investors can use a multilateral investment court to bring a claim directly against that country, claiming a breach of expropriation provision or Fair and Equitable Treatment (FET) obligations in the IIAs and seeking compensation



# What will be IP cases under an investment court about ?

- As ISDS, IP cases will concern **state regulatory actions in the public interest/administrative acts** by the executive branches of governments affecting foreign investors
- The case of Philip Morris : Uruguay's introduction of plain packaging tobacco legislation
- The case of Eli Lilly : the Canadian patent office's revocation of Eli Lilly's Canadian patent (adoption of the "promise doctrine")



**For Information :** The International Institute  
for Trade and Development (ITD)  
8th Floor, Vidhayabhathana Bldg.,  
Chulalongkorn University,  
Chula Soi 12, Phayathai Rd.,  
Bangkok 10330 Thailand  
Tel: +662 2161894 - 7  
Fax: +662 2161898 - 9  
Website: [www.itd.or.th](http://www.itd.or.th)      Email:  
[info@itd.or.th](mailto:info@itd.or.th)



[www.facebook.com/itd.th](http://www.facebook.com/itd.th)



[www.twitter.com/itdlive](http://www.twitter.com/itdlive)

