

Subject: EP INTA Technical briefing on Multilateral Investment Court on 19 October 2016.

Detail:

- The link between rights and obligations of investors in the treaties that include provisions on the Multilateral Investment Court (MIC).
- The convenience of finding a common approach with other countries that are envisaging alternatives to the ISDS system (e.g. South Africa, Brazil, and India).
- The feasibility and future steps of the MIC project.

[*] (Commission,) presented the MIC project:

- described in detail the background of the MIC (2010 Communication, Concept Paper, Trade for All Communication) and its state of play (EU-internally: publication of the Inception Impact Assessment, launch of stakeholder consultation and meeting, leading eventually to a request of negotiating mandate from the Council; EU-externally: building support on multilateral reform in G20, OECD, and Nairobi sessions, negotiating the transition from the bilateral system to the MIC with third countries).
- informed that formal negotiations are expected to start in 2018, after authorization of the Council.
- also informed on the reactions received so far from Member States

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[**] have shown interest, [**] is in general in favour of multilateralizing both substantive and ISDS rules, whereas [**] has shown less interest.

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- clarified that it is important to distinguish between substantive rules on investment protection and mechanisms of resolving investment disputes: the MIC would apply irrespective of what the substantive rules are in the underlying treaties.

[*] (Commission) answered to the Chair's question on obligations and rights of investors by explaining that at the current stage there is not enough interest in developing substantive rules at a multilateral level, notwithstanding isolated instances of reform of standards of investment protection undertaken by the EU itself and by Brazil and India in their respective model BIT. Nevertheless, the MIC can provide consistency in the interpretation of substantive provisions. He explained that the main obligation for investors incorporated in investment treaties is to respect the domestic laws of the host State.

[*] (Advisor S&D) asked:

- About the complexities of amending the Energy Charter Treaty (ECT) and intra-EU BITs, in order to be aligned with the MIC reform. On this point, **the Commission** replied first that the EC is not envisaging amending the ECT clauses directly, because the treaties between Parties who will sign up to the MIC would be indirectly amended. Second, on urging infringement proceedings against Member States for the termination of their BITs, he explained that the Commission has proceeded but clarity will likely be provided in the preliminary ruling of the CJEU on a reference from the German federal Court of Justice on the legality of these agreements (*Achmea* case).
- If the credibility of the EU is being undermined. **The Commission** replied that the EU credibility falls victim of the issue of mixity in the area of investment (for instance, if one Member State does not like the transparency policy of UNCITRAL and is thereby blocking the UNCITRAL Convention, it risks to undermine the whole process at EU level).

[*] enquired about the negotiating strategy of the EC. **The Commission** answered that the intention is to move from the bilateral to the multilateral level, not by building separate blocks but by opening the project to all interested third countries.

[*] expressed his concern that moving from the bilateral to the multilateral level is a very ambitious move and asked whether we could think of a "critical mass to move". In reply to this question and to [*] who wondered on the degree of confidence in the success of the project, **the Commission** reacted by saying that there is a reasonable degree of confidence and that as soon as the EC will start working with certain actors, there will be a multiplying effect in attracting more States. In this regard, the technical meetings held at UNCTAD and the OECD were a first step of a gradual process to start exploring expressions of interest.

[*] asked for clarifications as per:

- The comparison between the MIC and the Multilateral Agreement on Investment project (MAI, launched by the OECD in 1995), which ultimately collapsed. **The Commission** explained that while the MAI was an agreement encompassing both substantive and procedural rules on investment, the proposed MIC will only deal with dispute settlement and enforcement mechanisms.
- The link between the MIC and international agreements signed under the umbrella of the UN (*inter alia*, ILO Conventions, the UN Guiding Principles on Business and Human Rights). **The Commission** emphasised that internationally agreed instruments in the fields of environment and labour are incorporated in the Trade and Sustainable Development (TSD) Chapter of the agreements on trade and investments that the EC negotiates, which provides for clear commitments to ratify and implement these instruments. On a follow-up question from [∗] he also clarified that the MIC would interpret the TSD rules in the case of the EU, but essentially investment protection rules.

[∗] asked whether it would be advisable to request an opinion of the CJEU on the matter of compatibility of the MIC with the EU Treaties. In his response, **the Commission** referred to the EP INTA Committee meeting on 13th October 2016 and to the EPLS opinion on this topic and added that differently from the Accession Agreement to the ECHR (where the Commission considered it appropriate to request an Opinion of the CJEU), in this case the Commission is confident that the rules on the investment court system and the MIC are compatible with the Treaties.

Lastly, on the issue of the MIC's physical location raised by **Bernd Lange**, **the Commission** explained that all discussions on location, administration, and financing are still ongoing, although it is already clear that the MIC (similarly to the International Criminal Court) will have to be designed to adapt in time in relation to membership or geographical representation of judges.