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Subject: Meeting with BusinessEurope on the Multilateral Investment Court Project – 5 December 2016

SUMMARY

Meeting with BusinessEurope (BE) as Commission (COM) continues work on the Multilateral Investment Court (MIC) project. The meeting was to update BE members on key features and progress on the MIC. BE and its members asked questions on both procedural and substantive aspects of the project. COM stressed that continuous consultations with stakeholders on the project will be held in the future, in which representatives from business will be given the opportunity to actively participate and present their views.

In the first part of the discussion, **COM** (Art. 4.1(b)) informed the participants on the state of play of COM's negotiating agenda with regard to investment protection, including the ICS, as well as on the CETA signing process and its relationship with EU and MS competences in investment agreements. Further clarity on this issue is expected with the Opinion 2/15 of the Court of Justice of the EU, which is likely to be delivered in Spring/Summer 2017.

In the second part of the meeting, **COM** (Art. 4.1(b)) updated BE and its members on the latest developments of the MIC project: Internally, on the progress of the Impact Assessment process with the launch of the public consultation and stakeholder conference; Externally, on the UNCTAD World Investment Forum and the OECD Investment Treaty Dialogue meetings with third countries (co-hosted with Canada for building support on the multilateral reform), on the upcoming Geneva expert meeting and on possible next exploratory discussions on MIC at this stage.

In answering participants' questions, **COM** (Art. 4.1(b)) **and** (Art. 4.1(b)) clarified that:

- Compared to the 2014 public consultation on the EU investment policy in TTIP, the public consultation on the MIC project will be focused exclusively on investment dispute settlement.
- The driving force behind ICS and MIC is to ensure complete and effective enforceability of awards and to remove the legitimacy concerns of the current ISDS system.
- The ICS model may provide for some interesting ideas for the discussions on the establishment of the MIC. Nevertheless, not necessarily all features of the ICS will be replicated in the MIC.

- Certain complex and technical issues related to the functioning of the MIC (such as remedies) might be regulated in the underlying investment agreements, rather than in the MIC convention itself. However, reflection on such matters is ongoing.
- COM does not intend to lower the substantive investment standards of protection as a way to address the opposition toward ICS and the MIC that may arise in the European Parliament and in national parliaments. The substantive and procedural aspects of the EU investment policy are different.
- The right to regulate in EU's agreements is a reaffirmation of a well-established principle under international law.
- The multilateral system would apply to disputes under an agreement between two countries when both countries have ratified the convention establishing the multilateral Court and both countries have agreed that the investment agreement between them should be subject to the multilateral dispute settlement system. It is intended that also Member States' BITs will fall within this scope of application. Nonetheless, the Commission will not be able to force Member States to subject their BITs to the multilateral system, this choice depending also on the other Party to the BIT.
- It would be optimal to structure the MIC in a first and an appeal instance. Nevertheless, it is still an open question whether to design an appeal-only mechanism.
- COM is still exploring what would be the most suitable negotiating forum and process.
- The actions that COM needs to carry out before the ratification of CETA by Member States centre around two main areas: the review of the ethical requirements for judges and the related code of conduct and the operation of the appeal mechanism.

In sum, participants' concerns related to the following issues:

- Whether the new dispute settlement mechanism will lower the level of protection for investors, given that the rules of the underlying agreements are not the same.
- The way in which the right to regulate will be interpreted and applied by the Court.
- The type of remedies that the MIC will be able to award, i.e. whether the Court will award only compensation or whether a change in the host State's legislation will also be a possibility.
- The political support needed for the project to be realised.
- The relation with existing rules and systems governing ISDS.
- The structure of MIC and its function as an appeal court.
- The strength of the enforcement mechanism provided therein.
- Participants stressed their feeling of uncertainty about how the new system will function and emphasised that investors are willing to use schemes that they know and trust.

In the end of the meeting, participants' took note of the next stakeholders' meeting to be held as part of the public consultations in early 2017, possibly in the last week of January.