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Directorate-General for Trade

Directorate F - WTO, Legal Affairs and Trade in Goods
Dispute Settlement and Legal Aspects of Trade Policy

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Subject: Report of the Stakeholder meeting on a multilateral reform of investment dispute resolution and the possible establishment of a multilateral investment court

1) Background update

COM provided a general background update. Debate on the new approach to ISDS started in 2015 and COM addressed it through two main elements, first one, bilateral investment court system (ICS) that includes a standing body to settle first instance disputes and a permanent appeal. It contains strict rules on ethical requirements, strict Code of Conduct and prohibition of double hatting. This mechanism is already included in CETA, Viet Nam FTA and other recent agreements with negotiating partners. Second one is multilateral investment court (MIC), which has the same permanent nature as the bilateral ICS and could be applied to a large number of BITs. Eventually MIC would replace bilateral ICSs. This policy was already endorsed by the Council and European Parliament; CETA provides for further work on the MIC.

2) EU internal developments

In terms of the EU internal developments COM prepared Impact Assessment (IA) on the basis of the public consultations and internal analysis. IA was adopted together with the draft recommendation to authorise negotiations on 13 September 2017. All documents are publicly available. In the COM's view it is desirable to have an all-inclusive, transparent process on the development of the MIC, which will be open to international organisations and observers. MIC should cover all EU and MS agreements, and should have first instance tribunal, independent adjudicators and appeal mechanism (with possibility to appeal matters of law and fact). Additionally, questions on contributions by developing and least developed countries, access to the tribunal for SMEs and effective enforcement mechanisms should also be covered. Recommendation and draft negotiating directives are at the moment in front of the Council and are expected to be adopted in the next months. The matter is also being discussed in the European Parliament and other EU bodies, such as European Economic and Social Committee.

3) External developments

COM has held bilateral discussions on the MIC with third countries and in more plurilateral fora, including in UNCTAD, OECD and UNCITRAL, which in July 2017 gave a broad mandate to its WG III to examine the multilateral reform of ISDS. EU and MS support discussions within UNCITRAL, as it provides for a high level of openness, inclusiveness and transparency. First, it is a body of the UN General Assembly and all

UN members and observers can take part in discussions; second, international organisations such as UNCTAD, OECD, ICSID, PCA, etc. can also be involved; third, the process allows observers - both bodies that do not fit into UN system (such as EU) and observers from civil society (with accreditation by the UNCITRAL Secretariat). In addition, UNCITRAL process is highly transparent (reports and audio recordings available online). Further information can be found on the dedicated website of the WG III.

UNCITRAL mandate covers three steps, to: 1) identify and consider concerns regarding ISDS; 2) consider whether reform is desirable in the light of any identified concerns; 3) develop any relevant solutions to be recommended to the UNCITRAL Commission.

WG III normally holds 2 yearly meetings and reports yearly to the UNCITRAL Commission. The first of these meetings will take place in Vienna in November 2017 and the second one in New York in April 2018. WG III will report back to the Commission in July 2018. It is expected that a large number of countries will be present at the first meeting which will focus on the first step of the mandate.

EU and MS will also be present and will argue that concerns are systemic and require fundamental reform. COM is preparing an EU paper, which will be published soon. COM also intends to hold similar stakeholder meetings before each round of the WG.

COM opened floor for questions and answered as follows.

1) Belgian trade union:

- *There are two processes on reform ongoing – EU internal one and UNCITRAL one, how will they be interconnected?*

At the moment they are not connected, UNCITRAL process is at conceptual level and for EU to negotiate any agreement, negotiating directives are required. If the conclusion of the WG III is to start working on establishment of the MIC, these negotiating directives will enable EU to get involved in negotiations immediately. Ideally, processes will come together in the future.

- *Existing BITs include different interpretations of main investment concepts. Would it not be necessary to streamline interpretation of these principles?*

There are many BITs from old to modern ones, but they all involve large degree of similarity on four key obligations: national treatment, most favoured nation treatment, fair and equitable treatment, and expropriation. Although interpretation under one agreement will not be binding under other agreements, it will serve as a model, and will lead to better understanding and consistency over time.

2) German Chambers of Industry and Commerce (DIHK):

- *Current system allows for appointment of arbitrators with expertise in specific sectors; will this also be fulfilled under the MIC?*

COM analysis shows that largely, if not exclusively, generalists are appointed as arbitrators – mostly public international lawyers and if needed, experts from particular sectors are hired. This informs COM preference of generalist adjudicators under the MIC allowed to appoint experts if needed.

- *Why not establishing only appeal mechanism on top of the existing system?*

In COM experience this is less favourable, as great deal of detail happens at the first instance, if the long term objective is to ensure consistency and predictability, it is necessary to address this at the first instance.

- *Appeals should be restricted to legal errors; otherwise there will be too many appeals.*

It is important to allow appeal of the matters of facts to ensure correctness; this is not a part of the current system.

- *How will it be ensured that decisions are effectively enforceable?*

There are different ways to ensure it, one would be Convention itself, another option also utilisation of existing rules (NY and ICSID Convention). This will need to be discussed.

- *How will procedures be cheaper and accessible for SMEs?*

Accessibility and costs aspect for SMEs are very important questions, it is premature to discuss concrete plan, but it is envisaged that costs would be partially saved on appointment of arbitrators.

3) Swedish trade union:

- *It was mentioned that a great deal of detail happens at the first instance, why could domestic courts not be entrusted with this task? Why is the exhaustion of domestic remedies required under the ECtHR but not ISDS?*

It is important to keep in mind that investment disputes require application of international agreements. In many countries these types of agreements cannot be pleaded in front of domestic courts. ECJ is such example; rules of WTO or FTAs typically cannot be applied. This is different in terms of the HR, which is why access to the ECtHR requires exhaustion of domestic remedies. In investment there is already the cross-border movement, and relationship between the states is not the same when you have cross-border element. EU position on this matter is that where possible, investment disputes should be resolved by domestic courts, but that MIC mechanism is something that remains available.

4) European Services Forum (ESF):

- *The idea behind the MIC is that it would be assigned to all EU and MS investment agreements; would these agreements need to be modified and what would happen if the other party would not agree?*

The idea is to put in place an opt-in system. When countries sign Convention, MIC would automatically become applicable for investment disputes between these countries (same mechanism in Mauritius Convention and BEPS Convention).

- *The appointment of judges by the states presents a risk of politisation of cases – sitting judges should not be from the same country as party to the dispute.*

Composition of panels will require transparency, there are different ways of doing it and nationality exclusion is a good option, but this question remains for later discussion.

- *Existing cases already commonly require appointment of experts; this would also be part of the MIC, who would cover this part of costs?*

This is another question for later discussion. Comparatively, under the WTO system the experts are paid by parties when a party appoints them and by the WTO as organisation when the appointment is done by the court.

5) German consumer organisation:

- *In the Recommendation third parties intervention is mentioned, could COM elaborate on that?*

In terms of third parties intervention two elements are mostly referred to, which are already included in EU treaties. First one is *amicus curiae* that would help with potential legal questions; and second one is entities and individuals (organisations, industrial facility, local residents, creditors, etc.) that are more directly affected by the dispute.

- *Independence of judges is very important; would the court be the only employer of the judges?*

It is envisaged that under the MIC judges would be full time employees, who would not engage in any other activity. This is also a common model under existing courts (ECJ).

6) Russian mission to the EU:

- *Some countries, including the US and Russia are of opinion that establishment of any additional court system at this moment is counterproductive; it is possible that UNCITRAL Commission conclusion would be not to start negotiations.*

COM is of opinion that it is too early to make any conclusions. Nevertheless, the decision in July was close to being unanimous to have a discussion. It is possible that not all countries will support the project, which was also the case for the transparency discussions, and still UNCITRAL held negotiations, came to an Agreement and several of those countries later signed it.

7) Transitiegroep Stropwaffel (NL):

- *What are envisaged instruments of consent for the MIC procedures?*

Main instrument of consent would be investment treaties with standards we are familiar with. Investment contracts and investment laws are under current system possible in ICSID procedures and will need to be looked into for the purposes of the MIC.

- *Would third parties other than parties to the dispute also be able to appeal decisions?*

Third parties are not envisaged to have the right to appeal, but they would be able to submit their opinions.

- *How would cases when corrupted government makes a deal and later government wants to reverse it, be held?*

Rules on corruption already exist under current system and are also foreseen in the future system, based on underlying rules. Authorisation of investment by corrupted means, however, is often not entitled to protection under investment treaties.

8) Friends of the Earth:

- *What type of engagement is meant when the option of affected party to take part in the procedure is discussed – only counterclaims or wider?*

Third parties intervention would mainly cover the ability to bring the facts to the knowledge of the tribunal, which would be based on the underlined treaty itself.

- *What is the COM reaction on including binding obligations for investors?*

COM in general encourages binding obligations in EU agreements; they are also part of the OECD guidelines, however not yet for investors. It is also not an intention to raise this question under the UNCITRAL, as only procedural aspect is to be discussed. Additionally, this is more substantive matter that needs to be developed in underlined investment treaties.

- *IA states that there is overall broad support for establishment of the MIC, FoE is of opinion that this is inaccurately presented.*

There is a misunderstanding behind the objective of public consultations. Its objective was to identify different forms of multilateral reform of the investment system and see what form of reform would make most sense. That is why the analysis and questions were done in this specific way.

- *German association of judges released their suggestion for the German Government to not give mandate for negotiations of the MIC. Reason behind this opinion is that the new court would be allowed to write new law without the necessary democratic scrutiny.*

Association of German Judges might not understand what is meant to be done with the MIC. The new system would only work on the basis of decisions of authorities of governments that will ratify the agreement, and bring BITs under the MIC. BITs are ratified in a democratic way through parliaments, in particular German parliament ratified 130 these agreements.

9) CNCD – 11.11.11:

- *What is the timing for adoption of negotiating directives? If it is to be done very quickly it might be a missed opportunity to work on it within domestic parliaments. Would it also be possible to have a similar dialogue with EC and MS sitting around the same table?*

It is up to the MS how they want to incorporate their own internal procedures. Within the EP some MS are already consulting relevant bodies, and EP will only be able to conclude procedure when the work of these bodies is done. Directives are likely to be adopted by the summer 2018 but timing difficult to predict.

- *If substantial rules are not rewritten, where and how does the COM intends to address imbalances of the current system?*

COM does not agree with the statement that there are fundamental imbalances in existing treaties. It is of opinion that more consistent interpretation of existing rules needs to be provided. Investment regime does not take precedent over HR, environment, health, culture and other interests. Many of these issues are matters of domestic law and under the existing system nothing prevents governments for regulating these matters. Therefore efforts should be made to improve domestic systems. Discussion on the MIC is on investment system and substantive rules are not to be handled within this project.

10) UK trade union (GMB):

- *If MIC is established, how would investors be prevented from taking their claims elsewhere?*

From COM point of view, if an investor has a claim under MIC, the system would only allow it to resolve it under MIC – it would be the only path. This would also exclude notion of treaty shopping, as one single body will be better equipped to fight this issue.

11) EESC:

- *If the UNCITRAL discussion will be on procedural reform only and substantive elements will not be covered, where does reform of the substantive rules fit in?*

The time does not seem suitable for reform of substantive rules. Since a permanent body would interpret substantive rules, it would lead to better understanding and stable balance between states and investors.

12) Question from Twitter:

- *How is mistrust of foreign courts going to be addressed under MIC?*

It is difficult to foresee how controversial issues will be. A number of concerns with the existing system will be addressed with the reform, which will hopefully over time lead to a better functioning system.

13) China Chamber of commerce:

- *There is no unified practice among the EU MS in terms of enforcement. While ICSID enforcement rules seem to provide balance between investors and states, it seems that MIC would give more leverage back to states.*

Enforcement is important whatever the result, which is why an effective system for enforcement is needed. The matter is not harmonised on the EU level, it is underlined in international treaty obligations. Ultimately, the goal is to apply same effective enforcement rule to all cases.

14) German metal union:

- *Are there other elements to be taken into consideration, such as investment screening?*

There is no link between the MIC and investment screening, which is inevitably connected to access to the market that is not covered under the EU and MS investment treaties.

C.c.: