



## EUROPEAN COMMISSION

Directorate-General for Trade

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

### Meeting report

#### Stakeholder meeting on the multilateral investment court

13 April 2018

COM started by providing an update on the state of play of this file. EU-internally, reference was made to the recent adoption and publication of the negotiating directives by the Council. Externally, COM recalled the ongoing discussion process at UNCITRAL. The inclusive and open character of UNCITRAL was emphasised. COM briefed stakeholders on the first meeting of UNCITRAL WG III and presented the expectations for the second meeting (April 2018). Reference was made to relevant working documents such as the note from the Secretariat and EU submission.

The recent judgement of the CJEU in the Achmea case was raised repeatedly by stakeholders ( [Art. 4.2] ) that referred to its impact on extra-EU BITs and on the MIC project. In this sense, some stakeholders also raised the Belgian request for an opinion on the ICS in CETA (Art. 4.2) COM explained that the Achmea judgment refers to the particular situation of intra-EU BITs and that the negotiating directives (fn. to para. 7) clarify that the MIC will not apply to intra-EU BITs. The main problematic aspect in Achmea was the possibility for the investment arbitral tribunal to interpret and apply EU law outside the control of the Court of Justice of the EU. COM clarified that a potential MIC will not rule on EU law but on compatibility of a given measure with an international investment agreement and that EU law will be at a maximum examined as a question of fact. It underlined that as an international actor the EU must be part of international courts and in this sense gave examples of international courts ruling on compliance with international obligations (e.g. the WTO panels and Appellate Body or potential international courts ruling on international environmental obligations). COM further clarified that, at this stage, it does not foresee any impact of the Achmea judgment on extra-EU treaties. COM also underlined that it is confident that Opinion 1/17 will not pose problems but that it will of course make any adjustments along the MIC process as needed.

On the relationship of the MIC with domestic remedies, some ( [Art. 4.2] ) indicated a preference for exhaustion of domestic remedies. COM clarified that it considers this approach inappropriate inter alia because of the more extended time it would require before cases be solved. COM also clarified that as a matter of principle many domestic legal systems do not incorporate principles of international law such as non-discrimination. COM explained that its no U-turn approach in fact encourages recourse to domestic remedies.

The need to select adjudicators in a transparent and fair manner and involving users was raised ([Art. 4.2]). COM explained the approach envisaged in the negotiating directives (at para. 11) and explained why the fact that adjudicators be appointed by states does not mean that they be pro-state, not least because of states' need to appoint individuals for the long term, internalising both their capital-importing and capital-exporting interests (change in paradigm). The view that adjudicators should have expertise in specific areas other than Public International Law was also expressed ([Art. 4.2]). COM explained that under its preferred approach of having public international lawyers as adjudicators of the MIC, most individuals currently serving as ISDS arbitrators would not be able to serve. It also referred to its current thinking that long and non-renewable mandates would favour independence of adjudicators ([Art. 4.2]).

COM also clarified that the negotiating directives (at para. 13) and UNCITRAL Rules on Transparency foresee that affected third parties be able to make submissions in the context of proceedings ([Art. 4.2]).

Some stakeholders referred to the need to address investors' obligations and how the EU is engaging in ongoing UN discussions for a legally binding instrument ([Art. 4.2]). COM clarified that the current ISDS reform is focused on procedure and cannot serve the purpose of renegotiating substantive obligations, in the realm of which investors obligations and related aspects such as the clean hands doctrine pertain. COM also recalled that it is the only major developed economy engaging in the UN discussions for a legally binding instrument and that an internal reflection process is also ongoing on the potential need to go beyond its current policy. In the same vein, some argued that the MIC will not change the fact that ISDS leads to regulatory chill and is a form of corporate abuse ([Art. 4.2]).

Clarifications were sought on the scope of appeal as foreseen in the directives, in particular regarding the possibility that an appeal instance extends proceedings and the scope of the term "manifest" as part of the appellate review for manifest errors of fact of the award at first instance ([Art. 4.2]). COM recalled that the permanency and stability of the WTO Appellate Body has given rise to very welcome consistency and coherence in the interpretation of certain principles.

Along the same lines, the idea was raised that states' obligations should be included in the MIC Convention with the aim to strengthen the rule of law (anti-corruption, judicial and administrative system, etc) so that less disputes are filed against states ([Art. 4.2]). COM indicated that DG JUST is working on these matters.

On the UNCITRAL process specifically, stakeholders asked about the position of third countries ([Art. 4.2]), the role of academic and practitioners groups ([Art. 4.2]) and the importance of consensus ([Art. 4.2]). COM explained that many countries see ISDS as problematic and are willing to multilaterally reform the system, and that discussions with third countries on the MIC are ongoing. COM clarified that it is not yet clear what role the academic and practitioners groups will play, but that it should be in support of UNCITRAL discussions. COM also explained that "consensus" means "support of large majority" of states at UNCITRAL and that the EU will seek to ensure that decisions will be taken on this basis. It was also asked whether the EU's idea of a MIC would not be diluted due to the multilateral process ([Art. 4.2]). COM emphasised that it has no intention to dilute the MIC project.

Attachments: Commission presentation, list of attendants.

C.c.: [redacted]  
[redacted]  
[redacted].