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### MEETING REPORT

#### **Subject: High Level Event on the Reform of Investment Protection – report of morning session**

On 22 November 2018, the Belgian Ministry of Foreign Affairs organised a high-level meeting on the reform of investment protection. The morning session started with introductory remarks by Didier Reynders (Deputy Prime Minister and Minister of Foreign Affairs of Belgium), Cecilia Malmström (EU Commissioner for Trade), Meg Kinnear (Secretary-General of ICSID) and Anna Joubin-Bret (Director of UNCITRAL). These were followed by two panel sessions, respectively, on:

- Session 1: the “Rationale for ISDS Reform” (Speakers: [Art. 4.1(b)] at UNCTAD; [Art. 4.1(b)] of ETUC; [Art. 4.1(b)] at Université Catholique de Louvain, Belgium); and,
- Session 2: “Perspectives for a Multilateral Investment Court (MIC)” (Speakers: [Art. 4.1(b)] of the School of International Arbitration at Queen Mary University of London, England; [Art. 4.1(b)] at the Investment Division of the OECD; [Art. 4.1(b)] at Hanotiau & van den Berg; [Art. 4.1(b)] at ENGIE).

The event was attended by a diverse group of participants, including representatives of third countries, EU institutions, law firms, civil society and academics.

#### Introductory session

In his speech, Minister Reynders mentioned that Belgium was planning on issuing, together with Luxembourg, a new model text for its bilateral investment treaties (BITs). The dispute settlement provisions in the BITs would be replaced once the Multilateral Investment Court (MIC) becomes operational.

Commissioner Malmström highlighted the achievements of the EU with respect to the bilateral and multilateral reform of ISDS, emphasising also the progress of the UNCITRAL discussions.

Ms Kinnear described the ongoing efforts at ICSID to modernise the ICSID procedural rules, including with regard to consolidation of cases, disclosure of third party funding, transparency of decisions and orders, cost procedures, expedited arbitration for SMEs. She also highlighted the ongoing cooperation efforts with UNCITRAL with a view to ensure consistency and common objectives.

Ms Joubin-Bret emphasised the inclusiveness and transparency of the UNCITRAL Working Group III discussions, and of UNCITRAL being the most appropriate forum for discussions given its large membership, its drive on transparency (e.g. UNCITRAL Transparency Rules) and consensus-based working method. She described the concerns identified in the Working Group discussions and stated that the next step is for Member States to define solutions.

During the Q&A session, a member from a Belgian NGO intervened to express critical views about the need for a system of investors protection, pointing to the absence of a comparable mechanism for individuals.

#### Panel – Session 1

[Art. 4.1(b)] (UNCTAD) pointed to the need for reforming the ISDS system, including on substantive provisions in BITs. The fact that there were more BITs terminated than concluded in 2017 suggests that countries are considering leaving the system. He pointed also to the need to hear and address the concerns of various stakeholders.

[Art. 4.1(b)] (ETUC) argued for the need for reform of the substantive rules. In her view, the balance of the discussions should be more in favour of investors' obligations than investors' rights, and pointed to the need for multinational companies to take responsibility on respecting the rights of individuals through their supply chains.

[Art. 4.1(b)] (Catholic University of Leuven) noted that while it is not yet known whether the reform will be incremental or systemic, the system seems to be shifting from private to public adjudication. He pointed to the need for a higher narrative that justifies investors' protection as an objective to pursue in the interest of the public good.

During the Q&A session, an academic from the Catholic University of Leuven expressed the view that the narrative should reinforce the need for an international mechanism. He also pointed out to the fact that certain BITs (e.g. Nigeria) do contain obligations for investors, and that a main focus of ICSID is economic development. He also stressed that there have been arbitration awards recognising public objectives over investors' rights (e.g. Philip Morris v. Uruguay). The latter however have been largely underplayed by NGOs.

A representative from the Economic and Social Committee criticised as exaggerated the concerns expressed regarding the investors' protection mechanism. He noted that such protection is limited to unfair and discriminatory treatment and expropriation, and that it cannot result in a change of the law, but only in compensation.

#### Panel – session 2

[Art. 4.1(b)] (Hanotiau & van den Berg law firm) supported the view that an appellate body – rather than a systemic reform through a multilateral court – would resolve most of the concerns identified so far in relation to the current ISDS mechanism.

[Art. 4.1(b)] expressed concerns about the ongoing reform. In his view, the issue of consistency is largely exaggerated given that different outcomes often originate from different substantive provisions in the BITs. He noted that replacing the current system with a public court would come with higher costs and an increased risk of politicization.

[Art. 4.1(b)] (ENGIE) highlighted the advantages and benefits of the current ISDS system. He expressed concerns about the binding interpretation mechanism, and doubted whether States will be able to ensure an independent adjudication system. He also questioned whether the reformed system will be able to foster investment.

[Art. 4.1(b)] (OECD) stressed the need for a dialogue between States and various stakeholders.

During the Q&A session, several participants intervened. A representative from a Dutch NGO stated that the reform should be comprehensive and also address investors obligations. He emphasised that a reform based only on investors' rights could risk fostering populism.

Another participant stressed the need to focus efforts on changing the substantive rules, and pointed to the need for the multilateral court to include judges from different nationalities.

A representative of ETUC noted that the idea of abolishing ISDS should also be on the table for discussion as a possible option.

A private practitioner questioned about whether the multilateral reform can really deliver, given the current crisis of the multilateral system and failed attempts for a multilateral agreement (e.g. WTO crisis, Multilateral Investment Agreement in OECD).

[Art. 4.1(a)] criticised the views expressed by [Art. 4.1(b)] and [Art. 4.1(b)] pointing to the fact that 90 States have agreed in UNCITRAL that there exist concerns with the current system.

In reply to interventions from the NGOs and ETUC, [Art. 4.1(b)] stated that while recognising that there are legitimate concerns with the current system, he could not understand how deconstructing investors' rights could help to construct the rights of individuals.

Ms Joubin-Bret noted that the current momentum for reform is strong and that while changes may not happen so fast, the process is moving in the right direction.

Mr Lange (President of INTA, European Parliament) made concluding remarks closing the morning session. He stressed that there is evidence of significant less investment without investment protection and that investment is needed to support employment and prosperity. He stressed that the EU has gone a long way with reforming the system. He recognised the need for a balance between investors' rights and obligations. He pointed to the need for reform of many of the existing BITs as well as of the Energy Charter Treaty.

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