

	<p><b>BRIEFING</b></p> <p><i>Origin: DG TRADE</i></p>	<ul style="list-style-type: none"> <li>○ Subject: Press points and defensives on Investment Protection and UNCITRAL press debrief with Minister Reynders</li> <li>○ Conference: High Level event on the Reform of Investment Protection</li> <li>○ Date: 22 November 2018 at 10.30 am</li> <li>○ Place: Brussels</li> </ul>	<p>Ret. Area 2018/102398 - 20/03/2019</p>
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## SCENE SETTER

The “High Level Event on the Reform of Investment Protection” on 22 November 2018 is organised by the Belgian Ministry of Foreign Affairs. Out of scope

Commissioner Malmström will set the stage of the discussions by giving a keynote speech focused on the ongoing multilateral reform process of the existing ISDS system at UNCITRAL and the EU proposal of establishing a Multilateral Investment Court. Following this, there will be two panels: Panel session 1 concerns the rationale for ISDS reform, while the Panel session 2 will focus on the Multilateral Investment Court proposal.

The speaking points for the press debrief with Minister Reynders underline (a) the important reforms by the EU in its investment protection policy, both on the investment protection standards and on the enforcement mechanism. (b) the leadership shown by the EU in the efforts to secure multilateral reform of the ISDS regime, notably the EU’s involvement in the UNCITRAL process. Out of scope


The defensives concern hotly debated issues on the Multilateral Investment Court, namely: (1) the scope of the Court, (2) investors’ obligations, (3) the impact of the awaited Opinion 1/17 of the Court of Justice of the EU on the legality of the Investment Court System under CETA, (4) the impact of the new NAFTA deal (USMCA), and (5) the role played by the academic and practitioners groups within the UNCITRAL discussions.

## SPEAKING POINTS/ KEY MESSAGES

Thank you to Minister Reynders and the Belgian Foreign Ministry for organising this event.

I am proud that the EU kick-started the first multilateral discussions on reform of the ISDS system. I pushed for this to happen and I am delighted that the United Nations has stepped up to the challenge.

I am very pleased to see that the discussions at UNCITRAL are progressing well. At the last meeting in Vienna three weeks ago, more than 90 countries and 400 delegates took part in the discussions.

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It is a significant achievement that it was agreed by consensus that reform of ISDS is desirable.

Now we have to work on reform. Discussions on ISDS reform have to be multilateral.

That discussion needs to be open and inclusive. I have added my voice to that conversation by setting out the EU's views..


In our view only a permanent Multilateral Court can address all the concerns of the current system.

I have explained why that is the case in my speech. The problems with the existing system are such that only structural reform can address them.

We have sought to change the existing system in our bilateral agreements with Canada, Singapore, Viet Nam and Mexico by including the Investment Court System.

These agreements are crucial stepping stones towards multilateral reform of the investment system.

OUT OF SCOPE

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## OUT OF SCOPE

### DEFENSIVES


#### 1. Scope of the Multilateral Investment Court

##### *What would be the scope of a Convention creating a Multilateral Investment Court?*

The Multilateral Investment Court initiative has as aim a reformed, more transparent and more legitimate dispute settlement mechanism to modernise the international investment regime.

The EU idea is that a Convention establishing the Court should concentrate on an area where we think multilateral agreement on reform is reasonably feasible and where multilateral action seems very appropriate, i.e. dispute settlement and not the substantive rules of investment protection. The UNCITRAL discussions show that there is political momentum to reform the existing dispute settlement rules.

What has proven problematic in the past is the *ad hoc* nature of ISDS arbitration, often non-transparent, with arbitrators appointed directly by the disputing parties on a case-by-case basis, often failing to provide sufficient guarantees of judicial independence and impartiality. In addition, the lack of appeal means that the current system often fails to provide sufficient

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predictability and legal correctness of decisions. These concerns ultimately threaten the overall legitimacy of the system.

This explains why the EU reform ideas, focussed on systemic reform by the creation of a Multilateral Investment Court, would address the most fundamental concerns in the current international investment regime.

## 2. Investors' obligations

### *Would the Multilateral Investment Court also be able to hear claims by States, affected individuals or communities against investors, such as for human rights violations?*

This will depend on what is foreseen in the underlying investment treaties under which cases will be submitted to the court. If such treaties allow for this possibility, the multilateral court should also be able to hear cases against investors. Existing investment tribunals are also already able to consider the broader context surrounding an investment, notably when such issues are invoked by the defendant State in the form of counterclaims.

EU investment protection agreements promote investment in a manner mindful of high levels of environmental and labour standards and relevant internationally-recognised standards and agreements adhered to by the parties; as well as sustainable development principles in more general. The adherence of companies to such standards and responsible business conduct is ensured through the consistency of the parties' domestic law with internationally recognised standards.


Moreover, EU investment protection agreements only provide protection for investments that have been made in accordance with the domestic legislation. Companies are therefore legally bound by all the obligations contained in the domestic legislation of the host State, including environmental or labour protection or respect of human rights.

Mindful of increasing calls for action on and the importance of investors' obligations, in particular with regard to the respect of human rights, the EU is currently reflecting on further options and challenges in this regard, in the light of the discussions taking place in the multilateral, bilateral and academic fora.

### *Detail*

As set out in the EU Action Plan on Human Rights and Democracy 2015 - 2019, the EU and its Member States are committed to making advances on business and human rights. The Council Conclusions on business and human rights of June 2016 (adopted in occasion of the fifth anniversary of the UN guiding principles on business and human rights, UNGPs) clearly show this. The Council also adopted Conclusions on Responsible Global Value Chains in May 2016.

We consistently call on all business enterprises, both transnational and domestic, to integrate human rights due diligence into their operations to better identify, prevent and mitigate human rights risks. The EU strongly supports the existing UN Guiding Principles. Their proper implementation is good for the EU and good for business. The EU Member States have committed internationally to developing and adopting National Action Plans (NAPs) to implement the Guiding Principles.

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We are participating in the UN intergovernmental Working Group on Business and Human Rights, chaired by Ecuador, within the UN Human Rights Council. It is too early to say how discussions in this forum will develop.

***What is the Commission's position on the letter against the UNCITRAL reform process and the Multilateral Investment Court initiative that was signed by a number of NGOs?***

The Commission shares many of the concerns expressed with regard to the traditional ISDS system, in particular regarding potential risks of misuses of the system and its lack of accountability and legitimacy. This is why the Commission has been pushing for a thorough reform process of the system of investment protection and dispute settlement, both at the bilateral and at the multilateral front.

But international rules for investment protection and dispute settlement remain important – by fostering investments they contribute to the creation of growth and jobs. What is important is that the rules and the procedural mechanism are reformed so as to safeguard the governments' legitimate right to regulate and to provide for accountable and public dispute settlement mechanisms.

The Multilateral Investment Court project is an important step in this direction because it allows to address the procedural side of the reform in one go. There are over 3.200 investment treaties in force worldwide that need to be reformed – if the Multilateral Investment Court project fails, the vast majority of those treaties will remain in force with their old-style arbitration clauses. It is not realistic to count on the denunciation of all (or even of a significant number) of such existing treaties by all countries in the world.

The EU is also fully supportive of ensuring the responsibility of corporations through existing instruments (such as e.g. the OECD guidelines for multinational enterprises) and is fully engaged in the on-going discussions within the UN system about possible additional legal instruments setting out obligations of transnational companies.

***How is the EU approaching the UN Working group on Business and Human rights (which is examining an idea to create a legal instrument requiring business to respect human rights)?***

As regards the legally binding instrument on Business and Human Rights, the EU has followed carefully the preparations of the Inter-Governmental Working Group in Geneva.

Since the start, we made our participation in the Working Group dependent on two principled conditions: 1) ensuring that the scope of the discussion is not limited to transnational corporations and 2) making sure that the implementation of the UNGPs is not undermined. This position was supported by a range of countries across different regions and by a number of civil society organisations.

The EU is engaging in the Working Group and participated in the last session of the Working Group held in October, while in parallel reflecting on the best ways to address the issues at stake.

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### 3. The Opinion 1/17 of the Court of Justice of the EU on the legality of the ICS under CETA

*What is the impact of the Belgian request of compatibility of the CETA Investment Court System with EU law (Opinion 1/17 of the Court of Justice of the EU)?*

There is no immediate consequence. The Commission is confident that the Court would confirm the compatibility of the Investment Court System (ICS) under CETA with EU law.

The Court will need to examine these matters over the course of the next months. The European Commission will take any findings of the Court into account as appropriate.

In relation to the Multilateral Investment Court, we are confident that the Opinion of the Court will be known sufficiently early in order to take this into account in any concrete negotiating steps on multilateral ISDS reform. In addition, our current thinking is that the core issue in Opinion 1/17, on the law applicable by the ICS, will not be dealt with in the Multilateral Investment Court, but left for the underlying treaties.

## OUT OF SCOPE

### 4. The new NAFTA deal (USMCA)

*What is the impact of the ISDS provisions in the new NAFTA deal (USMCA) on the Multilateral Investment Court project?*

We do not see any immediate impact of the USMCA ISDS provisions on the on the Multilateral Investment Court project.

Out of scope

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In the EU's view, a fragmented system of investment dispute resolution is not desirable and we look forward to continuing discussions on a possible multilateral reform of ISDS with all interested partners (including from North America) at UNCITRAL. During the last meeting of UNCITRAL Working Group III in Vienna (29 October to 2 November 2018), it was agreed by consensus that multilateral reform of ISDS is desirable. The EU will put forward its ideas on the establishment of a multilateral investment court.

## OUT OF SCOPE

### 5. Role of practitioners in the UNCITRAL discussions

*A practitioners group and an academic group have been established to assist the UNCITRAL Working Group. Is there a danger that the project will be hijacked by private interests through these groups?*


The UNCITRAL process is a government-led process. Governments set the agenda and make concrete policy decisions, while benefiting from the widest possible breadth of available expertise from all stakeholders. This has been consciously and explicitly built into the mandate of Working Group III.

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#### Contact person:

[Art.4.1(b)]

**DG TRADE F.2**

 [Art.4.1(b)]

**15/11/2018**