

**To:** [\*] (TRADE); [\*] (TRADE); PETRICCIONE Mauro Raffaele (TRADE); [\*] (TRADE); GARCIA BERCERO Ignacio (TRADE); REDONNET Denis (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); [\*] (TRADE); NYMAN Jon (CAB-MALMSTROM); EICHHORN Nele (CAB-MALMSTROM)

**Cc:** [\*] (TRADE); [\*] (TRADE); [\*] Luisa (TRADE); [\*] (TRADE)

**Subject:** Subject: Meeting with BusinessEurope on the Multilateral Investment Court Project - 14 November 2016

**Summary – initial meeting with Business Europe as Commission continues work on the Impact Assessment on the MIC. The meeting was to update BE on progress on the MIC, and in particular on the next steps of the impact assessment. BE raised known concerns on appointment of judges and asked questions on relationship between ICS in EU FTAS, BITs and the multilateral court.**

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**COM agreed to return to discuss the matters more thoroughly with BE committee (possibly to be scheduled week of 5 December)**

In a meeting with **Luisa Santos (BusinessEurope, TTIP Advisory Group)**, COM [\*] [\*] presented the state of play of the Multilateral Investment Court (hereinafter “MIC” or “Court”) project:

- EU-internally: publication of the Inception Impact Assessment (IIA) and launch of stakeholder consultations and meetings.
- EU-externally: building support on multilateral reform in G20, OECD, Nairobi sessions, and in the forthcoming Geneva meeting on 13<sup>th</sup> and 14<sup>th</sup> December 2016.

In their answers to Luisa Santos’ questions, COM explained that:

- The Investment Court System (ICS) 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.
- As soon as it will enter into force, the MIC is conceived to replace the ICS and all other dispute settlement mechanisms provided in BITs that will be subject to the jurisdiction of the Court.
- The multilateral system would apply to disputes under an agreement between countries A and B when both countries have ratified the convention establishing the multilateral system and both countries have agreed that the investment agreement between them should be subject to the multilateral dispute settlement system, either through a negative or positive list. Ideally, 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.

- The rules on parallel claims/relation to domestic remedies are likely to need to remain in the underlying agreement – that would be an issue to be discussed.
- Once the MIC will enter into force, the *de facto* case law of ad hoc investment arbitration tribunals will not be binding on the MIC. As in other areas of international law (e.g. in the WTO), in the MIC system there will be no rule of *stare decisis*. Nevertheless, if the reasoning developed in previous investment awards is persuasive, it is likely that the Court will take it into consideration and/or follow it.

In sum, the main concerns/arguments raised by **Luisa Santos** are that:

- The MIC might face problems in applying different investment treaties, whose substantive standards may differ significantly. Therefore, she expressed her view that substantive standards should also be harmonised soon.
- The MIC might replicate the ICS' rule that the prerogative of appointing the arbitrators is reserved only to one party, the State, and no longer to investors, as in the traditional ISDS system.
- As a result of the reform of substantive standards of protection in the latest investment chapters of EU FTAs, a competition between countries is created. For instance, after CETA, an EU investor in Canada has stricter rights and conditions than a foreign investor of a different nationality in the same Canadian market.

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Lastly, **COM** emphasised that a crucial turning point for the Commission's negotiations of FTAs and work on the MIC will be the CJEU Opinion 2/15 on the EU's competence to conclude an FTA with Singapore, which will define the scope of the EU external trade policy.

The meeting concluded with an agreement to have a meeting with the relevant BE committee in December 2016 before the release of the public consultation questionnaire which would also give a chance to discuss the broader direction of EU investment policy.

Prepared by [ \* ] , visa [ \* ]