[*= redactions under Art. 4.1(b)]
[** = redactions under Art. 4.1(a) third indent and 4.3 first subparagraph]
[*** = redactions under Art. 4.1(a) third indent only]

EUROPEAN COMMISSION
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 Informal TPC SI - Discussions with Member States on the establishment of a Multilateral Investment Court (Amsterdam 19 May 2016)

Participants: Unit F2: [*], Unit B2: [*]

Summary

First discussions with Member States at technical level on the proposed establishment of a Multilateral Investment Court were overall positive, with many delegates agreeing that a multilateral court would further improve the overall legitimacy of the ISDS system and would be a far more cost effective solution for the EU than multiple ICS in bilateral FTAs.

Many Member States also supported the suggestion by the Commission to apply an opt-in approach similar to that used for the UNCITRAL Convention i.e. to allow countries to bring their existing investment agreements with ISDS provisions under the court's ambit on the basis of a positive or negative list. A number of Member States also expressly agreed that the court should from the beginning be constituted of both a First Instance and an Appeal tribunal. [**] indicating the need for Council conclusions, although they engaged in a detailed discussion of some of the specific points.

The main bulk of MS questions/comments centred on the operational challenges of such a Multilateral Court in particular the need for a cost/benefit analysis, how to ensure a fair cost allocation for members of the court, the potential need for MS to reopen negotiations with third countries in order to allow existing MS BITs to be subject to the Court's jurisdiction, the importance of securing a critical mass of countries for the establishment of the court, the challenge of securing increased consistency in ISDS awards in the absence of one set of multilateral substantive investment rules, how to ensure enforceability of awards under the proposed court and whether the court should also deal with state-to-state dispute settlement.

Delegates asked the Commission to provide a more detailed paper on the operational elements of the Court. Many enquired on the reactions that the Commission had received from third countries on the idea of the multilateral court. On whether the court should be stand-alone or integrated into an existing international organisation, [**]

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COM reaction: on providing a more detailed paper on the multilateral court, we explained that the process around the establishment of the Court should ideally be bottom up, based on a number of key principles agreed with interested third countries (similar to those of other international courts and those underlying the Investment Court System).

On the issue of a cost benefit analysis, we explained that we would be conducting an impact assessment where we would look in to the issue of financing. We also provided an overview of which third countries had so far at different levels expressed an interest in the concept [***] but underlined that there was a balance to be struck in terms of the minimum threshold/critical mass necessary to start negotiations and the efficiency of the negotiating process.

On the limits of achieving full consistency, we acknowledged that this would not be reachable until a single set of substantive investment provisions was in place, but stressed the value of consistency across groups of agreements containing the same or similar provisions.

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It was agreed that more technical meetings would take place in the margins of TPC SI in the coming months to discuss the concept in more detail, also to allow MS time to get comments on the concept from other national ministries.

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In terms of next steps, we explained we are also looking at the possibility of exploring the issue of the court at the World Investment Forum held in parallel with the UNCTAD ministerial in Nairobi this coming July.

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Detail:

COM [*] introduced the discussion paper provided to the delegates (annex 1). The idea of the multilateral investment court first appeared in the Commission's Concept Paper of May 2015. The proposal is also part of the Trade for all communication and features in Juncker's State of the Union address.

In terms of procedural steps for the discussions, an impact assessment is currently in the making. The process for that will continue throughout 2016 and 2017. The present exchange with MS on the multilateral court initiative is only the first of a series of exchanges. If the idea concretizes, we would ask for negotiating directives from Council.

So far, interest from third countries expressed at different levels, but no detailed discussion have taken place. Discussions with Member States would need to happen before engaging with third countries.

Comments by Member States

[**] the idea of a multilateral court is not new. It has often been discussed in conjunction with multilateral investment rules. [**] agrees on COM's premise: multiple ICS is unsustainable. Multiple ICS plus traditional ISDS will lead to higher fragmentation. We also need to look at the issue of the critical mass of third countries supporting the idea. We may have more on this after COM's impact assessment is ready - do we have a coalition of the willing? Small number is not sufficient – e.g. WTO sets a threshold as to amount of trade covered for plurilaterals - eg 90% of global FDI as pre-condition. [**] Maybe in a year's time there will be more maturity also on this issue. The cost side is very important- if no multilateral rules and you use the opt in system from the Mauritius Convention - how do you then divide the costs between members? One option would be user fees. But would it not also depend on the number of of agreements submitted to the court? [**] is it then fair that we all pay for this court? Repartition of costs is also a very relevant issue for developing countries.

[**] welcome the idea as it will increase legitimacy and consistency. Also in favour of using the same opt-in approach as for the Mauritius Convention (UNCITRAL Transparency Convention). But the latter has shown how long this can take. Need critical mass: OECD countries –must cover developed, developing and transition countries. Which third countries have so far indicated support? Enforceability is essential point: such a Court would need to have the same guarantees of enforcement as the ICSID Convention. Proliferation of international institutions is not ideal -why not include such a Court in the WTO, especially given that investment could be a post-Nairobi issue. Also need special treatment for least developed countries.

[**] support idea of multilateral court. On organisational issues, [**] is not fixed. COM line is ok – it makes sense to have two instances in one (First Tribunal and Appeal Tribunal). [**] Premature to discuss grafting onto existing organisation, but

as a first reaction, [**] Question is whether we really need new judges and new institutions. [**] For its establishment, using the same opt-in process as for Mauritius Convention is a good idea. Costs would be much lower than multiple ICS.

[**] It assumes that the political will is there to go ahead. [**] wants Council conclusions affirming this. [**] on need for critical mass of countries, especially if this is to serve cost efficiency argument – can COM explain which countries have expressed interest to become member? We are very interested to see the Impact Assessment. Interesting to have first discussion on First Instance and appeal tribunal in one. But what about the link to TPP where a vague reference to multilateral appeal instance is made? The proposal for remand may make the process more time consuming. On consistency of rulings, can we really achieve this with in a spaghetti bowl of Investment agreements? Intentions of the contracting parties must be reflected.

The relevance of Mauritius Convention as a model for opt-in is procedural, whereas the proposal in question is much broader in concept. [**] is against any renegotiations of existing treaties to place them under proposed multilateral court. Aligning enforceability with the New York Convention [on enforcement in domestic courts] is a better option as it would allow national courts to still review awards.

One of the key objectives for the court should be efficiency: If the initial number of countries is very small, then it is not evident at all that there would be efficiency/cost gains as compared to the current ICS. COM's discussion paper jumps too easily to the conclusion that a court would be more cost efficient. Have other intermediary solutions, based on what is already there, been examined? The ICS can be seen as virtual courts so why not examine using the ICS in a more efficient way – e.g. by having a network of ICS that could be shared across several agreements, supported by a secretariat for instance. It is important to have Council conclusions supporting this before we move forward into concrete steps as described in the paper.

[**] for the moment no position as to the necessity of having the court and would also want more time to consult internally. The foreseen IA will be very useful to help us assess cost-benefit relation. [**] thinks this is needed before having council decision. [**] would appreciate receiving more detailed scenarios on the different options. [**] preliminary thoughts: it is important with consistency but a lot will depend on how the court will be created and function. On enforceability: if there is no possibility to review by national courts, then we need to focus on "no parallel claims" and "res judicata". On the set up of the court, one can perhaps take inspiration from the ECJ or ICJ?

What about the issue of the competence of Court in terms of interpretation of EU law? PL and the EU are not ICSID members, so how would it work to dock it to ICSID? Also how would a new court impact on pending investment disputes? [**]. On bringing MS BITs under the multilateral court to: what about the ISDS that exists in MS agreements? Don't want to renegotiate those agreements. What about intra-EU BITs?

[**] the efforts towards the multilateral court have the potential to increase legitimacy- main objective. Howver three points here (1) Cost-benefit analysis very important. The design of such a court will necessary entail trade-offs (e.g. length of procedures, quality of outcome). This proposal needs systematic comparison with other institutions and presentation of those trades-offs. (2) Political feasibility: critical mass of countries needed. We know the US is against such international courts. (3) Consistency – there is no uniform body of law. So what do we achieve here? Potential tension between emerging case law and intentions of parties to the BITs. Can we really confine this reform process to procedure with no convergence in substance? Will we not be forced into substantive problems?

On MS BITs: in procedural terms ok, but is there an intended substantive convergence and how can we deal with all differences of BITs between them and with the EU approach?

[**] these are preliminary remarks only as we need time to consult internally especially ministry of justice. Positive about the idea- not sustainable to continue with bilateral courts in EU FTAs. [**] is negative on the creation of a new institution; would need to make a very strong case in this respect. On costs, [**] is less concerned than others about this as could be resolved through various ways e.g. a per case fee or a membership fee. It is up to COM to present a workable solution – should in any event be clarified in a cost benefit/ analysis. On the stated importance of critical mass, there is a balance to be struck between that and the efficiency in designing the court. The issue of enforceability is the key issue.

[**] the negotiation of multilateral rules will take time. We need a balance between critical mass and effective outcome. Only a single legal basis to interpret will provide consistency, but there will be the BITs, which will be difficult to interpret in the same way. Need an IA and deeper discussions before we engage in the next operational steps.

[**] legitimacy is very important but we need more reflection on this. Consistency of BITs with this system but we recognize that a mechanism that allows jurisdiction of MIC will allow for coherence. Mauritius Convention is ok as a model for opt in. On costs we would need to know how the calculations are made. On appeal side: will there be a special regime for SMEs? Should we limit appeal only to legal issues not factual erorrs?
Important to ensure the enforcement and the recognition of decisions under the court. Also, how many members will this court have?

[**] support further discussion on the MIC. We need to see the IA. Is the proposal compliant with EU law? And should the court be making requests to ECJ? What about the question of governing law? How many third countries support this idea? On the existing arbitration institutions: is it proper to use them given that they are all based on arbitral rules? On rules of procedure would the proposed court replace ISDS provisions in existing BITs or offer choice to investors between the two [ISDS and court]?

[**] generally supportive of the concept. But securing a critical mass is essential. What is the minimum threshold?

[**] in principle support the concept- [**]

[**] On MS BITs: interesting position; doubts as to substantive provisions in the BITs - very difficult to renegotiate. There is also the underlying issue of negotiation of substantive rules: Agenda for G20 and Post-Nairobi process. These things cannot be seen totally in isolation from the proposed court.

On the structure of the court - no firm position on having an Appeal Tribunal - COM arguments are convincing- would it be similar to the ICS set up? Will it fit to existing structures of enforceability? New York Convention? Very difficult to trade off «legitimacy» against efficiency in enforceability.

On scope, how do you distinguish between procedural and substantive rules? Would the scope extend to State to State? What kind of procedural rules will apply? Will it be possible to use the existing ones as in the ICS? We need a balance between a good number of countries and be able to move forward. On institutional setting -stand alone or grated onto existing organisation notably WTO- would claims brought by private claimant fit into WTO?

[**] raises a lot of questions about practicability, legitimacy and benefit? What is the relation with ICSID? relation with MS BITs?

[**] need to examine how the court would interact with national legal systems. In favour of settling disputes first before national courts - necessary to encourage recourse to national courts. We need to further elaborate question of MS BITs. Costs of court? Court needs to bring consistency in the interpretation of substantive standards.

[**] potential problems re implementation but also idea of system - enforcement problematic – substantive rules are different so how far will consistency be ensured? What third countries are interested?

[**] crucial question regarding consistency.

[**] MIC needed because a global phenomenon needs a global solution [**] is in favour of the proposal. But how do we get there? [**] [**] agrees that we can start campaigning on this but we need to keep several things in mind: on substantive rules, there is the July 2016 Ministers meeting in G20 under Chinese Presidency. As we know, for China investment is paramount. [**] What should this court look like – WTO, ICC, ICSID, PCA?

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<u>Response by COM</u>

We are at a stage where we do not have answers to all questions. Indeed we need to further define and elaborate on some issues. To respond to specific questions by Member States:

Critical mass vs efficiency: agree that it is clearly important to attract as many partners as possible, also for question of legitimacy and cost. But COM not sure we should try at this stage to define what is the critical mass: [**] There is the example of

UNICITRAL where we lost some substance in the transparency rules in order to get agreement of countries, which were clear they would not apply the rules. That is not necessarily the best approach.

Costs issue: the planned Impact Assessment will cover cost/benefit question. But costs would be comparable to e.g. International Tribunal of the Law of the Sea and other institutions. Regarding the repartition of costs, clearly something we will need to discuss. E.g. the costs of WTO are calculated in function of trade volume – a similar proxy could be found for investment. We also need to discuss the question raised by some of you on « user fees »: should we do this even if in other tribunals there is no such fee? The issue of developing countries is important, whether balancing on the basis of purchasing power. A centre for legal assistance for LDCs was again raised, to be seen…

Institutional set-up : this is something to discuss over time: [**]

3rd countries: we picked up different levels of support. General interest in reform, including at the OECD where a lot of talk about this. In terms of third country interest, [***] [***] At this stage these are technical level discussions.

Link with substantive rules: currently no religion. [**] But a permanent court will, like appeal courts in MS, look at different sets of rules. For now, our position is that substantive rules and dispute settlement should not be linked in terms of negotiation. Another question is the point of arrival: need to foresee the possibility that the agreement evolves over time and keep open the possibility of the MIC to potentially apply future multilateral rules.

Opt in: Mauritius Convention type approach is useful exactly to avoid renegotiations of existing BITs.

Primary function of court would be to resolve dispute - in doing so, a body of law would develop. We already see that investment arbitration tribunals cite previous cases. In some cases they follow and in others they do not. Interpretations would be useful and not necessarily binding. If judges apply VCLT on interpretation intentions would be looked into even if judges refer to other awards. We will always have slightly different substantive obligations unless we multilateralise the rules. Indeed this is a broader exercise than UNCITRAL. On the fork in the road, no u turn etc approach we would not regulate this in the court, but leave it for each agreement. The court would also not be used for intra- EU agreements.

Enforcement: [**]

SMEs: noted point - already cater for this - we can discuss what more we can precisely do. A lot to be discussed on qualifications and appointment of judges. ICJ qualifications.

Relation with SSDS : we need to work through that - [**]

On procedural rules that would apply: we don't have any preconceived ideas.

Compatibility with EU law: COM does not see any issue with the compatibility of the ICS and investment agreements with EU law, because the tribunals apply international law (the international treaties) not EU law. We need to see how we manage the question of the applicable law in the MIC system. That would be in line with opinions of ECJ. [**]

Next steps: we are also looking at the possibility of exploring the issue of the court at the World Investment Forum held in parallel with the UNCTAD ministerial in Nairobi this coming July.

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