




EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

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

Brussels, 12 April 2018
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MEETING REPORT

Subject: BusinessEurope Seminar on the Multilateral Investment Court

Participants:

 (DG TRADE F2)

 (UNCITRAL)

 (ICSID) – through DVC

 (WTO)

BusinessEurope Secretariat and members

Report

On 13 March 2018, BusinessEurope organised a seminar with DG Trade in the BusinessEurope offices in Brussels to discuss the details of the Multilateral Investment Court (MIC) file. The meeting was structured around four presentations by DG TRADE as well as contributions from UNCITRAL, the World Bank (ICSID) and the WTO.

Session 1: Presentation of the European Commission's proposal for a Multilateral Investment Court

The meeting began with a presentation by DG TRADE on the background of the MIC initiative. DG TRADE gave background and presented the state of play of the work on the MIC. Internally within the EU, reference was made to the impact assessment and public consultation that were conducted, as well as to the recent COREPER approval of the Commission Recommendation for a Council decision authorising negotiations and negotiating directives. DG TRADE indicated that all EU Member States are supportive of this project, although discussions on topics such as the role of SMEs or the selection of adjudicators are ongoing. Externally, DG TRADE explained that UNCITRAL's Working Group III was given a mandate to lead a three-phase discussion on ISDS reform (i.e. (1) identifying concerns regarding ISDS, (2) assessing whether reform is desirable in light of the identified concerns and (3) designing relevant solutions). DG TRADE

stressed that UNCITRAL was chosen due to its transparent proceedings, experience in arbitration and investment and the possibility for stakeholders to participate in the process. In November 2017, the first meeting of Working Group III was attended by more than 60 countries and a large number of observers. At that meeting, most states were committed to discussing reform of ISDS with very few exceptions [Art. 4.1(a)]

During the Q&A, participants enquired about third countries' appetite for the MIC, including given the current [Art. 4.1(a)] seeming opposition to ISDS. DG TRADE clarified that the MIC is a medium to long term project [Art. 4.1(a)]

. Following other participants' comments, DG TRADE clarified that SMEs access to the Court could benefit from the possibility of having cases heard by a single adjudicator to keep costs down [Art. 4.1(a)]

On costs, DG TRADE stressed that the MIC would replace the ISDS mechanisms under existing BITs and that in current arbitrations a large percentage of the costs is connected to the selection of arbitrators which would be significantly reduced with a MIC.

Session 2: The Multilateral Investment Court as an institution

UNCITRAL presented the current workings of Working Group III, emphasising the importance of the three phase process and the process' openness to all UN members as well as observers, including the EU and stakeholders such as NGOs. She clarified that decisions in UNCITRAL are taken by consensus and that they further require to be adopted by each government. For this reason, it is fundamental to reach decisions that states are genuinely in favour of. Only two votes have taken place in the history of UNCITRAL, in 1979, when moving the headquarters from New York to Geneva was on the agenda, and more recently in 2017, when the chair of Working Group III had to be chosen. Meetings happen twice-yearly with a rotating location between New York and Vienna.

Discussions on how to ensure participation of stakeholders in the UNCITRAL process related to UNCITRAL accreditation system for stakeholders. UNCITRAL clarified the accreditation requirements (including technical requirements and the fact that the stakeholder in question must not already be represented by others). Time-wise, UNCITRAL explained that multilateral reform of ISDS is a complex issue and estimated that at least five or six years of discussions might be necessary.

DG TRADE then discussed the possible characteristics of the court, including certain features that still remain to be defined (e.g. whether a MIC would have to be docked into a previously existing institution or whether a new institution should be created). DG TRADE outlined the current considerations on which it is internally reflecting (e.g. while creating a new institution might be more desirable, there might be more appetite for docking it into an existing framework and, in that case, what framework to). The manner in which dispute settlement provisions in current BITs can be replaced by the MIC was also discussed. DG TRADE explained that it should be possible to create an opt-in mechanism through which countries can sign up to the MIC and list the BITs that they want the MIC to be applicable to. As soon as both parties to a BIT list it in their accession to the MIC instrument, the MIC would have jurisdiction over disputes under such BIT. Such mechanism could be similar to those implemented by the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) or by

the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS). On financing, DG TRADE referred to the importance of breaking the link between disputing parties and adjudicators hence adjudicators' salaries should be paid by contracting parties, with the expectation that their respective contributions would be weighed on the basis of a scale. User fees, while not ideal, could become part of the system.

Addressing comments on the mixed nature of the Convention establishing the Court, DG TRADE explained that all Member States support the project. On costs, DG TRADE explained why ultimately the MIC would be cheaper than having multiple ICS operative under various trade agreements. Asked about the impact of the *Achmea* judgment on the MIC, DG TRADE commented that this case concerned intra-EU BITs and that its impact on the MIC initiative is therefore limited. DG TRADE recalled that it is confident about the outcome of the CJEU opinion on the CETA ICS requested by Belgium, expected for the first half of 2019.

Session 3: The functioning of the Multilateral Investment Court

DG TRADE outlined key aspects related to the functioning of the MIC including qualifications of adjudicators (which could be modelled on those of the ICJ or of other international tribunals) and appointment procedures of permanent adjudicators. DG TRADE dismissed concerns about pro-state bias since states will consider their offensive interests when appointing adjudicators. DG TRADE explained that, on enforcement of awards, the target would be to recreate a system that provides for enforceability through either ICSID or the New York Convention.

ICSID presented its role in ISDS and expressed its willingness to assist in the process of reform of multilateral investment dispute resolution. It stressed that the ICSID system is self-contained and that ICSID awards need not be enforced through the ICSID or the New York Convention. Domestic courts do not have a relevant role in the process. ICSID arbitration is also the major forum for the settlement of investment disputes, with about 60% of the about 700 ISDS cases being ICSID cases. ICSID stressed that a new MIC would have to expect to handle a similar workload.

Following questions from the audience, ICSID clarified that the recent increase in ICSID cases can be explained by several factors including an increase in FDI, an ever-growing number of BITs and increased awareness of investment arbitration.

Session 4: The Appeal Tribunal of the Multilateral Investment Court

DG TRADE then presented the main advantages of a permanent investment court over current ISDS, including increased predictability and consistency as well as quicker and cheaper proceedings thanks to the inclusion of an appeal mechanism. Under the current ISDS system an investor incurs the risk of seeing an award annulled by domestic courts, in which case it must re-activate proceedings from the beginning with the consequent loss of time and funds. Conversely, an appeal instance would allow for a second check of the award. The scope of the appeal would have to be relatively narrow and limited (i.e. errors of law, manifest errors of fact or severe procedural shortcomings) to ensure its proper functioning. It should be possible to develop a system of remand through which the appeal tribunal would send cases back to the tribunal of first instance.

[Art. 4.1(a)]

Desirability and feasibility of consistency were discussed, in light of the existing thousands of BITs. DG TRADE clarified that there are obvious limits to it and noted that many provisions across BITs, or even entire BITs, are substantially identical.

The WTO presented the mechanisms used by the WTO to ensure consistency and coherence, emphasising the clear differences between the WTO and international investment systems. The WTO highlighted the standing nature of the Appellate Body (where decision making happens collegially) as opposed to panels. It clarified that no consistency is absolute, but permanent bodies have the tendency to develop a certain tradition, since the same people who have dealt with an issue in the past are recurrently seized. Discussions revolved inter alia around how to avoid possible entrenchment of undesirable interpretations.

Comments

This full-day seminar was useful to clarify technical issues and allowed for detailed discussions on aspects of this file that are of particular interest to BusinessEurope and its members. The participation of speakers from other organisations provided for an interesting exchange of views and allowed timely discussions. Both for transparency reasons and from the viewpoint of DG TRADE's internal reflection and discussions it is desirable to continue to invest reasonable time and efforts explaining the initiative to EU stakeholders.

Art. 4.1(b)

Art. 4.1(b)

Attachment: DG TRADE presentation

Cc:

Art. 4.1(b)