

## EU consultation process on the proposed reforms on the Multilateral Investment Court project

We share the view of the European Commission about the need to reform the traditional investor state dispute settlement system (ISDS system) incorporated in a multitude of BITs signed by EU Member countries. Therefore we welcome the possibility to comment on the proposed multilateral investment court system.

The existing system of ad hoc arbitration raises serious concerns of procedural fairness and consistency. It is also incompatible with the supremacy of European law and the prerogative of the Court of Justice of the EU (CJEU) to rule at last instance on the interpretation of European law if it is a prejudicial issue in the arbitral proceeding. Under this system arbitral awards are final and cannot be set aside, except for rare instances of severe procedural violations. If the International Centre for Settlement of Investment Disputes (ICSID) system is chosen by the Treaty or the Parties, then arbitral awards are enforceable without the consent of a local court. If issues of interpretation of European law arise, there is no possibility of obtaining a preliminary ruling by the European Court of Justice.

Following a consultation process organized with respect to the dispute settlement procedures envisaged in the Transatlantic Trade and Investment Partnership between the EU and the US, the Commission has tried to respond to the criticisms of many civil society organizations and a call from the European Parliament. It has developed an investment court system that has been incorporated into the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Trade and Investment Agreement with Vietnam. The new system replaces ad hoc arbitration with a permanent investment tribunal with appointed judges, transparency of proceeding, procedural rules to dissuade frivolous claims and an appeals mechanism.

Under the Lisbon Treaty foreign direct investment is now part of the exclusive competence of the EC concerning external commercial policy and this includes investment protection and settlement of investment disputes (see conclusions of the Advocate General of 21 December 2016 concerning the submission for advice of the EU-Singapore Treaty).

The EU is now engaged in the negotiation of bilateral trade and investment treaties with third countries including investment protection and dispute settlement provisions. The recently signed Comprehensive Economic and Trade Agreement with Canada (CETA) contains an Investment Court System which replaces ad hoc arbitration with a permanent investment court to be set up under the Treaty. The Investment Court System constitutes a distinct advantage vis-à-vis ad hoc arbitration providing for transparent procedure and consistency of interpretation through an inbuilt appeal mechanism. However, it runs afoul of the EU Charter of Fundamental Rights, an integral part of primary EU law as it provides more favorable treatment to foreign investors as compared to national enterprises in similar situations. In addition this system is incompatible with the supremacy of European law as the proposed court could decide on prejudicial issues of European law without referring the matter to the CJEU for a preliminary ruling. The compatibility issues will be raised by the Belgian Government in its oncoming submission of the CETA agreement to the CJEU for advice according to Art 218(11) of the TFUE (see Declaration

of Belgium on the occasion of the signature of CETA on 30 October 2016 as recorded in the Council Minutes).

Concerning the options put forward in the Commission's Inception Impact Assessment (Roadmap of 1/8/2016), our position is as follows:

- a) It is not advisable nor legally possible to establish a Multilateral Investment Court System as an overarching institution for both existing and future BITs or Trade and Investment Agreements because of incompatibility with both the EU Charter of Fundamental Rights and the supremacy of European law.
- b) On the other hand the existing situation concerning the large number of BITs concluded by EU members as well as the Energy Charter Treaty concluded by the EU and its Member States raises serious concerns about coherence of interpretation and procedural fairness. As it is virtually impossible to renegotiate or terminate these agreements, the introduction of an appeals mechanism into the ISDS process seems to be a feasible second best solution. This could be achieved by additional protocols or interpretative documents adopted by the Parties to the Treaties concerned. To remedy the inconvenience of ad hoc interpretation, the Appeals mechanism should be constituted as a permanent body with the obligation to refer issues of interpretation of European law to the CJEU for a preliminary ruling that would be binding on the Appeals Panel.
- c) Concerning the desirability of investor-state dispute settlement, a distinction needs to be made between agreements with countries that have advanced legal systems as well as highly developed judicial systems and others. For the former there is no need for a special system as disputes can be handled through the national court systems. As pointed out above these treaties do not require any special treatment in favor of foreign investors, which would discriminate against domestic enterprises and distort market competition.
- d) Even if these issues can be resolved the proposal of a Multilateral Investment Court is premature in the absence of agreed multilateral rules on the substance of investment protection. If the elaboration of such standards is envisaged they should include not only investor protection but also key elements of responsible business conduct as well as stronger safeguards for general interest regulation. In other words a rebalancing of international trade and investment treaties would be required.

The replies to the attached questionnaire should be understood in the light of these fundamental considerations.