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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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Trade Policy Committee (Services and Investment)	
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NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES & INVESTMENT)

SUBJECT: *Trade Policy Committee (Services & Investment) of 12 October 2016, agenda Item I.3: OECD Investment Committee (Paris 17-21 October 2016)*

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OBJECTIVE: *For information.*

REMARKS:

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Delegations will find attached a non-paper setting out issues for discussion with regard to the proposal to work towards the creation of a multilateral investment court. The substance of the non-paper is identical to the non-paper circulated on 14 July 2016 (m.d. 55/16) with the addition of a few sample questions for discussion. The Commission intends to use this non-paper as a basis for the discussions of the OECD hosted inter-governmental investment treaty dialogue of Monday 17 October 2016 (Room CC2, 9:30 – 12:30).

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Reforming investment dispute settlement: Considerations on the way towards a multilateral investment dispute settlement mechanism

The last years have seen a growing debate worldwide on the perceived limitations of the current ad hoc Investor-State Dispute Settlement mechanism in terms of its legitimacy, neutrality, lack of transparency, inconsistency, and costs.

The idea of working towards the creation of a multilateral investment dispute settlement mechanism has emerged. This idea has generated significant interest. In order to move forward, several key objectives and principles that would underpin a multilateral investment dispute settlement mechanism need to be identified for further discussion and analysis. In that context, guidance could be taken from the core characteristics common to highly respected and successful multilateral institutions such as the WTO Dispute Settlement System and the International Court of Justice.

Considerations:

1. **Permanency:** A degree of permanency of a future multilateral dispute settlement mechanism is required in order to reinforce the consistency of decisions and the legitimacy of the mechanism.
2. **Institutional aspects:** A new multilateral mechanism would either be independent from existing institutions or be built into or docked onto existing structures.
3. **Procedural aspects:** It may be possible to rely on existing procedural dispute settlement rules or to agree on new procedural rules. The mechanism should be designed to ensure enforceability of decisions in a way comparable to arbitral awards under current investment treaties.
4. **Membership and openness:** The initiative must remain open to all interested countries both during the negotiation process, as well as once the mechanism is established.
5. **Flexibility:** Flexibility must be ensured with regard to both the scope and coverage of the mechanism and potentially expanding membership.
6. **Neutrality:** The neutrality of adjudicators needs to be beyond doubt, such as through open and transparent appointment processes, stability of status and remuneration, ethical standards, and effectively addressing potential conflicts of interests.
7. **Competence and credibility:** Stringent qualification criteria should apply to ensure the highest possible degree of expertise, competence and credibility of adjudicators.
8. **Transparency and inclusiveness:** Transparency, openness, and participation of third parties in the adjudication process should be at least comparable to other international judicial institutions, taking into account recent developments in investment dispute settlement practice.

9. **Legal correctness and consistency:** Legal certainty, predictability, and coherence in the interpretation of investment agreements need to be ensured through in-built appeal or review mechanisms.
10. **Costs:** The costs should be equitably allocated among its members, taking into account the potential number of disputes and different economic situation and level of development of individual members.
11. **Development status:** consideration should be given to steps to ensure account is taken of the capacity to participate of developing and least developed countries, including exploration of the idea of an advisory centre for investment agreements.

Sample questions for discussion:

- Does your government have a particular vision on the form of such a mechanism? What are your government's views on the benefits or disadvantages of creating an independent institution as compared to building onto existing structures in the field of investor-state dispute settlement?
- In your view, what would be the most promising approach for ensuring the enforceability of the decisions of a multilateral investment dispute settlement mechanism?
- Does your government have experiences with multilateral conventions or institutions allowing flexibility for full or partial adherence to their mechanisms or with respect to expanding their membership?
- What are your government's or organization's experiences with regard to the allocation of costs among members of multilateral conventions or institutions in the field of international economic relations?
- Does your government or organisation have experience in advising or assisting developing or least developed countries in the field of international economic law and/or dispute settlement?
- Does your government or organisation have experience with review, set aside or annulment of arbitral awards in the field of Investor-State Dispute Settlement? What lessons can be drawn from the functioning of the existing mechanisms in this field?
- What lessons can be drawn from other existing international dispute settlement mechanisms as regards the neutrality and independence of adjudicators?
- What are your government's or organization's experiences with existing rules governing the transparency of investment dispute settlement proceedings?