

CIVIL SOCIETY MEETING

## TRADE AND INVESTMENT

**Date:** 25 May 2010

**Time:** 10:30 – 12:30

**Location:** Centre Albert Borschette, Room 0B, Rue Froissart 36, 1040 Brussels

### **Key-note Speakers**

Mr Jean François Brakeland, Head of Unit, Services and Investment, DG Trade

Mr Colin Brown, Legal Aspects of Trade Policy Unit, DG Trade

Ms Selma Blank, Services and Investment Unit, DG Trade

Ms Marta Busz, Services and Investment Unit, DG Trade

### **Moderator**

Mr Ulrich Weigl, Acting Head of Unit, Sustainable Development and SPS Issues, DG Trade

### **Panel Presentations**

**Ulrich Weigl** introduced the Commission participants and presented the agenda of the meeting.

**Jean François Brakeland** debriefed on the state of play of the preparatory work conducted by the Commission in order to implement the EU exclusive competence on FDI, as conferred by the Lisbon Treaty. He started his presentation with an overview of the scope of the draft Regulation establishing transitional arrangements for Bilateral Investment Treaties (BITs) between Member States and third countries, focusing on its main features such as authorisation to maintain BITs in force and to amend or conclude new BITs.

Subsequently, he presented Commission thinking on how it intends to use the EU competence on investment in the future, referring to the draft Communication which would lay down foundations for the orientation of EU investment policy, as well as its future operationalisation in negotiating directives specific for each negotiating partner. He shared general intentions with respect to the EU investment policy coverage, standards of protection, dispute settlement mechanism, as well as a selection of potential partners for negotiating investment protection, but at the same time highlighted the need for a wider debate that should involve all stakeholders including the European Parliament and the Council.

### **Discussion Highlights / Questions and Replies**

**European Services Forum** requested clarification on the scope of the competence on investment, including whether the shift in competence might be questioned, and how new Member States BITs will be covered.

**Both ENDS** questioned the *raison d'être* of grandfathering on the grounds that nobody knows what the implications would be, especially for potential disputes.

**The Coalition of Flemish North-South Movement** questioned the rationale of re-delegation of power to negotiate investment agreements back to Member States, claiming that Foreign Direct Investment being part of the Common Commercial Policy should be considered in a broader context of EU foreign policy, and thus could not be limited to investment protection objectives. It called upon the Commission to stop Member States continuing their BITs negotiations. It also raised concerns related to the conflict between Member States' demands for more investment protection at the cost of limited policy space and referred to the social and labour rights chapter of EU trade agreements, which should be equally applicable to protection provisions of EU investment agreements.

**M-Lex** raised the issue of investor-to-state dispute settlement, enquiring about the availability of ICSID as an arbitration forum and the coverage of portfolio investment by the new EU competence.

**APRODEV** asked about the selection criteria for the choice of negotiating partners and called for a best development case scenario, suggesting that sole consideration of economic criteria may lead to a new colonialism.

Several participants asked about the review clauses of already concluded agreements, including the Cariforum EPA and EU-Korea FTA that would allow for negotiating investment protection.

**Oxfam** showed its preference for Corporate Social Responsibility provisions and asked about the status of extraterritorial obligations in investment agreements. **Oxfam** went on to mention the ongoing work of DG AGRI on land-grabbing that could be reflected in EU investment agreements.

Responding to these comments and questions, the **Commission (J.F. Brakeland and C. Brown)** explained the justification for the empowerment mechanism offered by the draft Regulation, in particular its relevance for curing BITs' incompatibilities with EU rules on capital movement, and gave assurances that the exercise of re-delegated power to negotiate BITs would be conditional and closely followed by the Commission as an observer.

As for ongoing negotiations, it referred to Member States' legitimate expectations relating to grandfathering and empowerment as a justification for the continuation of BITs' negotiations with third countries after entry into force of the Lisbon Treaty, although a legal risk was involved.

With respect to portfolio investment, the **Commission** explained the rationale for all-encompassing definition of investment as the economically justifiable option, even if portfolio investment was not explicitly mentioned as a part of the EU Common Commercial Policy. Referring to optimal standards of protection, the **Commission** emphasised the need to compromise the EU's divergent interests in order to find the acceptable balance, and finally to confront it with our partner's interests.

On the choice of negotiating partners, the **Commission** suggested that it would depend not solely on the EU interest, but also on our partners' willingness to engage. It would have implications on the form of any prospective investment agreement, being a part of a wider trade agreement or stand-alone BIT-like agreement. There is no one-size-fits-all solution.

Referring to the scope of commitments deriving from the existing BITs, the **Commission** explained that the draft Regulation would set a mechanism for notification of all existing BITs, as well as all disputes launched on their basis.

On arbitration, the **Commission** admitted that there were a number of issues that could be improved, including transparency of procedure but also clarity of provisions, although it excluded the European Court of Justice as an option for international arbitration.

With respect to ICSID, the **Commission** referred to the EU's prior experience in accession to international organisations gathering states, such as GATT and the World Customs Organisation. A reference to other fora and instruments was also made.

Referring to CSR standards, the **Commission** stressed that these standards were of a voluntary nature and should remain as such.

On land grabbing, the **Commission** briefed on the ongoing work coordinated by the FAO, World Bank and UNCTAD on international principles related to investment in the agricultural sector, which is intended to address such problems as land grabbing.

In closing the meeting, **Mr Weigl** invited all participants to submit their comments on new trade policy (which also includes a reference to investment policy) in the forthcoming open consultation process, as well as to participate in the forthcoming meeting with Commissioner Karel de Gucht, scheduled for 23 June.