

## High Level Seminar on Opinion 1/17 of the European Court of Justice and the Reform of Investment Protection (06/09/2019)

- Ladies and gentlemen, it is a **pleasure** for me **to conclude** this successful seminar on Opinion 1/17 of the European Court of Justice and on the reform of investment protection.
- I would like to **thank** the President of the Court of Justice, Mr **Koen Lenaerts**, for his presence, as well as our moderator and **panellists** for their participation.
- Nearly three years ago, our country was at the heart of the debates around CETA, when Wallonia opposed the signing of this trade and investment agreement between the EU and Canada. The **compromise** that was then reached consisted, first, in adding a **Joint Interpretative Instrument** to the treaty to clarify certain provisions of the text, and, second, in requesting an **opinion** of the European **Court of Justice** on the compatibility with EU law of the reformed system of investment dispute settlement. Now it is **time to look at the way ahead** and to possible further reforms.
- The debates that took place at the time have shown that the **general public** has **legitimate concerns** about the way trade policy is conceived. Although information about CETA was not always perfectly accurate, it is **essential for policy-makers to address these concerns**. To this end, transparency, proactive and inclusive communication towards civil society, and dialogue between politicians are key.

- Many people understand that **openness to foreign trade and investment** is essential to ensure **growth and economic prosperity**. Certainly for a country like **Belgium**, whose GDP relies for 80% on international trade. Since the provisional entry into force of CETA, EU exports to Canada have increased significantly, to a greater extent from Belgium than from other Member States, and to a greater extent from Wallonia than from other Regions of Belgium.
- Moreover, recent international developments like Brexit or trade tensions between the US and China show that **unilateralism and protectionism** are **no appropriate solutions** to global challenges.
- However, our **citizens** don't want a trade policy that goes only about quotas or tariffs. **Legitimate expectations** have been expressed about the need for more transparency in trade negotiations, for a system of dispute settlement that is accessible to all, for the protection of the right of public authorities to regulate in the public interest, and so on.
- The European Union and its Member States are **well aware of these concerns**. But it is important to understand that **the EU has started to implement an ambitious reform agenda** in this field.
- The EU trade strategy consists in taking into account non-economic interests while shaping its "new generation" trade agreements. For instance, the EU now provides for **sustainable development chapters** in its FTAs, making clear that trade should not be fostered by lowering any of our social, human rights, or environmental standards. Trade policy is now even part of the EU toolbox in order to try to **export our high standards** abroad.

- On investment policy more precisely, the EU has **abandoned** the old **ISDS** approach, that has been followed for decennia by States in the past, in favour of a **systemic reform**. Under the **Investment Court System (ICS)**, investment disputes are to be dealt with by real tribunals, with judges appointed by public authorities only. An appeal system is provided for, in order to enhance consistency of the case-law. **Guarantees** of independence and impartiality are imposed on judges. The right of public authorities to regulate in the public interest is expressly preserved. And the EU commits itself to ensure the accessibility of the new system to small and medium-sized enterprises.
- All these elements have been **taken into account by** the European **Court of Justice**. In April this year, the Court gave its **opinion 1/17**. The Court referred to many provisions through which the EU tried to find the right balance between the promotion of foreign investment on the one hand, and the protection of legitimate public interests on the other hand. The Court was of the opinion that the new ICS system is compatible with EU law, but **under conditions**. It is **because of all these guarantees** concerning independence and impartiality of judges, accessibility for small investors, the right to regulate... that the new system was deemed **compatible with EU law**.
- This opinion gives a very positive signal. EU trade negotiators don't operate in a legal vacuum. The EU is indeed a **unique legal order with its own constitutional framework, based on the Rule of Law**. The EU can conclude international treaties and set up international tribunals with the competence to interpret and apply these treaties. But the autonomy of the EU legal order is to be preserved. The EU external action has to respect fundamental principles of EU law, such as human rights or the independence of the judiciary. At the end, the **Court of Justice** is there **to make sure that this constitutional order is preserved**.

- Beyond new generation trade agreements, the EU and Belgium also support a modernized approach on investment protection **at the multilateral level**. The Investment Court System is **already a significant step forward** compared to the older ISDS system, but our objective is to set up a **Multilateral Investment Court**, with one single court replacing all the tribunals set up in our bilateral agreements. In this regard, Belgium will continue to advocate in favour of accessibility to SME's and of alternative methods of dispute settlement, such as mediation. We will **bear in mind the reasoning of the Court** of Justice in Opinion 1/17, to make sure that this Multilateral Investment Court is **fully compatible with EU law**.
- At the UN, Belgium supports the work of **UNCITRAL**, the Commission on International Trade Law. We have been elected as member of UNCITRAL this year, for a term running until 2025. We are actively taking part to the ongoing work of this Commission, which has identified certain needs for reform in the ISDS system (reducing costs, ensuring coherence of the case-law, independence and impartiality of arbitrators,...) and now tries to look at adequate solutions.
- To **conclude**, let me thank you again for your participation. Investment policy is a fascinating field, where things are changing rapidly. We need to hear the concerns of the general public, and to address them, while remaining open to foreign trade and investment. The new approach followed by the EU with the support of Belgium tries to make progress in this direction. Beyond provisions in legal agreements, inclusive communication and political dialogue are more needed than ever. This is the purpose of an event such as the one that has been organized today. Thank you all again for your participation.