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Directorate-General for Trade

Directorate B - Services and Investment, Intellectual Property and
Public Procurement
Investment

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NOTE TO THE FILE

Subject: EU-China Investment Agreement: Report of the 12th Round of negotiations, Brussels 26-30 September 2016

Participants: EU team led by Rupert Schlegelmilch TRADE B
China team led by DG Li Chenggang, MOFCOM

The 12th round of the EU-China investment negotiations took place in Brussels from the 26th to the 30th September 2016.

The bilateral talks focused on following areas:

- definitions ("investment", "covered investment", "investor", "juridical person/enterprise", "national/natural person"),
- performance requirements
- fair and equitable treatment/minimum standard of treatment
- expropriation.

In addition, the negotiating teams discussed:

- domestic regulation,
- dispute settlement (State to State and Investor to State/Investment Court System),
- sustainable development and the EU text proposals on state owned enterprises (SOEs),
- procedural fairness in competition related procedures and standard setting.

The exchanges were constructive and allowed both sides to better understand their respective positions, as well as to explore **points of convergence**, still subject to confirmation at a later stage. In particular:

- On the **definition of "investment"** the negotiating teams exchanged views on the coverage of claims to money, loans or debt securities issued by an enterprise or a Party and discussed the value of including indicative examples to be covered under the different forms an investment may take. Reference could be made to 'enterprises' instead of 'juridical persons' and to 'natural persons' instead of 'nationals'. The precise wording of the definitions is still being discussed.

- On **performance requirements**, views were exchanged as to the scope of application of the provision (coverage beyond goods and of domestic investors) and the relation of the performance requirements disciplines with related TRIPS provisions.
- On **fair and equitable treatment**, discussions focused on the content of the treatment granted under the minimum standard of treatment in accordance with customary international law in comparison to that offered under fair and equitable treatment. Views were exchanged as to the situations that would qualify as unfair treatment under customary international law as well as on the way arbitral tribunals have so far interpreted the minimum standard of treatment under customary international law.
- On **expropriation**, the negotiating teams discussed the conditions of lawful expropriation with particular emphasis on due process and the modalities of compensation. Discussions also covered the interpretative guidance that should be given as to the definition of "indirect expropriation", the specific factors to be taken into account and the concept of proportionality.
- On **domestic regulation**, the parties discussed the relevance of qualification requirements in the context of an investment agreement as well as the relation between the domestic regulation disciplines and the discriminatory licensing and qualification requirements that should appear in the market access offers.
- On **state to state dispute settlement** exchanges were overall conceptual and focused on the approaches followed in international treaty practice with respect to trade and investment disputes, in particular concerning enforcement.
- On the **investment court system**, the negotiating teams discussed the possibility to reform the old-style system through means such as establishment of binding interpretations, an appeal mechanism or the selection procedures for the composition of panels.
- On **sustainable development** views were exchanged on the possible overarching principles to be included in the agreement and the way discussions should be planned for the months ahead.
- On **state-owned-enterprises and standard setting**, the EU provided clarifications with respect to the proposed disciplines.
- On **procedural fairness**, both sides discussed the overlaps between transparency disciplines relating to all administrative proceedings and those relating specifically to proceedings before competition authorities.

Next steps:

13th Round is scheduled tentatively for the week of 5 December 2016 in Beijing