EU Proposal: who will investors face off against in future investment treaty claims?

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With the entry into force of the Lisbon Treaty on 1 December 2009, control of foreign direct investment became an exclusive area of EU competence, or such is the view of the European Commission, a view which is not shared by all EU member States. Since that time, the Commission has embarked upon what it calls "the creation of a comprehensive EU investment policy which will allow the EU to negotiate investment protection agreements at the European level". So far, however, the developing policy generates as many questions as it does answers.

As part of the policy-making endeavour – and in light of the EU's current efforts at the negotiation of foreign trade agreements with trading partners such as Canada, India and Singapore – the Commission recently announced its vision for the financial responsibility of costs within the EU for investor-state dispute settlement under such agreements. This vision provides as its central principle that financial responsibility to investors, flowing from these foreign trade agreements, should be attributed to the actor which has afforded the treatment in dispute, except in circumstances where the relevant treatment is that of a member state and the treatment was effectively required by the law of the EU. In the latter case then the financial responsibility should shift back to the EU.

In its proposal the Commission also sets out a roadmap for which entity will defend

such claims. Essentially the Commission contends that where the measure at issue is an EU measure – that is, where the relevant treatment has been afforded by any of the EU institutions, bodies or agencies (see Article 4) – the EU itself will defend any action. In turn, the Commission suggests that where the relevant measure at issue is a member state measure, in circumstances where the measure was not required by EU law, that member state will defend any action (unless it prefers the EU to do so, notwithstanding the member state's financial responsibility).

In short the draft Regulation sets the following procedure for situations in which the relevant treatment is, fully or partially, treatment afforded by the member state (see section 2). Once the Commission receives either a request for consultation or notice of an investor's intention to initiate arbitration proceedings, it shall notify the member state concerned. Immediately after receipt of a notice of arbitration, the Commission and the relevant member state shall enter into consultations on the management of the case. Within 30 days of receiving an arbitration notice, the relevant member state needs to confirm to the Commission in writing that it intends to act as respondent. Failing this – or in circumstances where the Commission, also within these 30 days, makes a decision based on circumstances set out in Article 8(2) – the EU shall act as respondent.

What is immediately apparent is that the Commission – of course, in line with its view on the application of the Lisbon Treaty – earmarks a very wide scope for its involvement in cases where the member state will defend investor claims. This includes, for instance, compulsory member state consultation with the Commission on the terms of any potential settlements where, in the view of the Commission, a settlement would be in the interests of the EU.

What is yet to be seen is how the mechanics of such arrangements would be managed such as to avoid that procedural complications unnecessarily hinder the progress of investor-state proceedings themselves. For instance questions may well arise as to which entity is the correct legal respondent to a given action. Note in this respect the sentence included at the beginning of Article 8(1) which seems to suggest that there may be circumstances in which a member state would not be able to act as a respondent. In Patricia Nacimiento's post from 2010, she considered the question of how the EU might manage its liability under investor-state agreements and particularly considered the options from the perspective of the EU concluding such agreements together with its member states as co-signatories. So far it is not entirely clear whether the EU intends to sign the

abovementioned foreign trade agreements in conjunction with member states, although the Commission appears to indicate in the Explanatory Memorandum to the proposed Regulation that the proposed Regulation would only apply in circumstances where it alone is a signatory to the relevant foreign trade agreement (see 1.2)).

In light of the above, it will be interesting to see how the terms of the investor-state provisions, in the foreign trade agreements currently being negotiated by the EU, will be framed and whether there will be any attempt to tailor them more specifically to take into account the approach suggested in the proposed Regulation with respect to the defence of claims. They may, for instance, include something like the wording in the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty: *"The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party".* In any event, the absence of suitable arrangements, in circumstances where the EU is the only signatory, would surely give rise to uncertainty concerning the ability of a member state to formally defend an investor claim in the manner envisaged by the proposed Regulation.

It will also be interesting to see how the question of confidentiality of the arbitral proceedings will be handled where the relevant arbitration law/rules prescribe such. The proposed Regulation sets wide-ranging reporting/consultation requirements for member states with the Commission – see, for instance, paragraph 14 of the recitals.

The proposed Regulation will now be discussed by the Council of Ministers and the European Parliament.