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The EU Parliament proposes a regulation for financial responsibility for EU-linked investor-state dispute settlement

Laurence Burger (Perréard de Boccard) · Sunday, April 27th, 2014

On 16 April 2014, the Parliament of the European Union has published legislative resolution No P7_TA-PROV (2014) 0419 on the proposal for a regulation of the European Parliament and of the Council establishing framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party (COM(2012)0335-C7_0155/2012-2012/0163(COD)).

This proposed regulation aims at clarifying the division of competence for financial responsibility between the Union and Member States when the Union or a Member State is sued by a non EU-investor in the context of investor-state dispute settlement proceedings. Following the entry into force of the Lisbon Treaty, foreign direct investment is included in the EU common commercial policy.

Of particular importance is the Parliament's acknowledgement of the current uncertainty relating to the inclusion of investor-state dispute settlement mechanisms in Treaties negotiated by the EU. The Parliament states in its introduction that "agreements providing for investment protection **may** include an investor-to-state dispute resolution mechanism [...]". In this context, it should be reminded that the negotiations of the EU – US TTIP (Transatlantic Trade and Investment Partnership) have been suspended to allow for consultation of the EU public and that Germany has expressed its opposition to the inclusion of investor-state dispute resolution mechanisms in the TTIP.

At the outset, the Parliament sets forth two principles:

- (1) international responsibility for treatment subject to dispute settlement follows the division of competence between the European Union and Member States so that the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence;
- (2) the level of protection provided by union agreements is the same as that afforded by Union law or by the general principles common to the laws of the Member States afforded to investors from within the Union, but is not higher.

The repartition of competence between the Union and Member States follows from the fact that the Union, as an entity having legal personality, will be expected as a matter of international law to pay any adverse award and bear the costs of the dispute, whether the dispute arises out of the treatment of the investor by the Union or by the Member State. Consequently, the Parliament

considers that “it would as a consequence be inequitable if awards and the costs of arbitration were to be paid from the budget of the European Union [...] where the treatment was afforded by a Member State, unless the treatment in question is required by the law of the Union”.

Based on this principle, financial responsibility is allocated as follows:

- (a) if the treatment concerned is afforded by an institution, body or agency of the Union, the Union itself bears financial responsibility;
- (b) if the treatment is afforded by a Member State, then this Member State shall bear financial responsibility unless such treatment is required by the law of the Union, for example by transposing a directive adopted by the Union;
- (c) if the treatment is afforded by a Member State as well as by the law of the Union, both the Member State and the Union shall bear financial responsibility for the specific treatment afforded by either of them.

In cases where the Union will bear financial responsibility, it will act as respondent. In cases where the Member State will bear financial responsibility, the Member State will act as respondent, unless the Member State prefers that the Union acts as respondent for example by reason of its higher technical expertise. Moreover, the Union will act as respondent in cases involving treatment afforded by a Member State where:

- (i) the dispute also involves treatment afforded by the Union and the law of the Union requires the treatment afforded by the Member State;
- and
- (ii) similar treatment is challenged in a related claim against the Union in the WTO for which a panel has been established and the claim concerns the same specific legal issues so that it is necessary to ensure a consistent argumentation in the WTO case.

The remaining of the regulation concerns the conduct of the proceedings to best protect the financial interests of the Member States and the EU, and the drafting of a procedure for making settlements.

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