International agreements: framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals

2012/0163(COD) - 21/06/2012 - Legislative proposal

PURPOSE: to establish a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the

European Union is party.

PROPOSED ACT: Regulation of the European Parliament and of the Council.

BACKGROUND: with the entry into force of the Lisbon Treaty, the **Union has acquired exclusive competence for the conclusion of international agreements on investment protection**. The Union is already party to one agreement with the possibility for investor-state dispute settlement (the Energy Charter Treaty1) and the Union will seek to negotiate such provisions in a number of agreements currently under negotiation or to be negotiated in the future.

Agreements providing for investment protection typically include an **investor-to-state dispute settlement mechanism**, which allows an investor from a third country to bring a claim against a state in which it has made an investment. Investor-to-state dispute settlement can result in awards for monetary compensation. Furthermore, significant costs for administering the arbitration as well as costs relating to the defence of a case will inevitably be incurred in any such case.

In accordance with the case-law of the **Court of Justice of the European Union**, international responsibility for treatment subject to dispute settlement should follow the division of competence between the European Union and Member States.

It is to be noted that the Commission foresaw the need for this Regulation in its Communication "Towards a comprehensive European international investment policy". The proposed Regulation has been explicitly requested by the European Parliament in its resolution on the future EU International Investment Policy adopted on 22 March 2011). Furthermore, the Council requested the Commission to study the matter in its Conclusions on a Comprehensive International Investment Policy (25 October 2010).

IMPACT ASSESSMENT: this proposal has not been subject to an impact assessment.

LEGAL BASIS: **Article 207(2) of the TFEU** which establishes the exclusive competence of the Union for a common commercial policy, including for foreign direct investment.

CONTENT: the central organising principle of this Regulation is that **financial responsibility flowing from investor-state dispute settlement cases should be attributed to the actor which has afforded the treatment in dispute**.

Allocation of Financial Responsibility: investor-to-State dispute settlement will give rise to costs for the parties concerned, both in terms of fees and in terms of the payment of final award. Regardless of whether the Union or a Member State acts as respondent to a claim, the financial responsibility for any costs should follow the origin of the treatment of which the investor complained. Therefore :

-

- should the treatment attacked by an investor exclusively originate **in a Member State**, the Member State in question should be liable for the costs flowing from the dispute settlement;
- where the treatment of which an investor complained originates **in the institutions of the Union** (including where the measure in question was adopted by a Member State as required by Union law), financial responsibility should be borne by the Union.

Equally, the decision on whether to settle a **dispute settlement claim** and the responsibility for the payment of a settlement award should normally follow the origin of the treatment.

Distribution of roles in relation to the conduct of disputes: the proposal distinguishes three different situations, as regards the distribution of roles between the Union and the Member States in relation to the conduct of disputes under agreements to which the Union is a party.

- **In the first situation**, the Union would act as respondent where the treatment alleged to be inconsistent with the agreement is treatment afforded by one or several Union institutions. The Union would accept full financial responsibility in such cases.
- **In the second**, the Member State would act as respondent where the treatment in question is afforded by the Member State.The Member State would accept full financial responsibility is such cases. In this situation, the Member State would need to keep the Commission informed of developments in the case, and permit the Commission to give direction on particular issues.
- **In the third situation**, the Union would act as respondent in respect of treatment afforded by a Member State. This would occur where the Member State has opted not to act as respondent. It would also occur where the Commission decides that issues of Union law are involved such that the Union may be financially responsible, in whole or in part. It would also apply where the Commission takes the view that a Union position is required in order to ensure unity of external representation.

It is evident for the Commission that, where the Union acts as respondent concerning treatment afforded by a Member State, it will be necessary to ensure a **high degree of cooperation** with the Member State concerned. This will involve close co-operation in the preparation of the defence, from the beginning to the end of the procedure.

Recognition and enforcement of awards against the Union: it is also necessary to set down rules to deal with the situation in which the EU is held liable. Since the European Union is or will be a party to such agreements, the European Union will be under an international obligation to accept any award made against it. The European Union would honour such obligation.

Given investor-state dispute settlement is based on arbitration, in most countries, including the Member States of the European Union, **the recognition and enforcement of investment awards is based on the relevant legislation governing arbitration**.

The rules which apply to the recognition and enforcement of investment awards are those set down in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) when the arbitration in question is pursuant to the rules of the ICSID Convention and otherwise, those elaborated in the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and national laws on arbitration shall apply.

BUDGETARY IMPLICATIONS: at the time this proposal is made, the Union is only party to one agreement with investor-state dispute settlement, even if a number of other agreements are currently under negotiation. Hence, it is impossible to be specific as to the likely budgetary consequences in the preparation of a Regulation of this nature, intended to have a horizontal effect.

Financial Statements shall be prepared for all future agreements to be concluded pursuant to Article 218 of the Treaty which would fall under the scope of this Regulation.

All such payments and recoveries would be made through the budget line 20 02 01 - External trade relations, including access to the markets of third countries.

The necessary provisions for this have been taken up in the Commission's proposal for the 2013 budget by specifying that the following expenditure shall be allowed:

- arbitration costs, legal expertise and fees incurred by the Union as party to disputes arising from the implementation of international agreements concluded under Article 207 of the Treaty on Functioning of the European Union;
- payment of final award or award settlements paid to an investor in the context of such international agreements.