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

2012/0163(COD) - 16/04/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 535 votes to 119 with 9 abstentions, a legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.

The matter has been referred back to committee during the plenary session of 23 May 2013.

Parliament adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary were the result of a compromise between Parliament and Council. They amend the Commission's proposal as follows:

Dispute settlement mechanism: with the entry into force of the Lisbon Treaty, foreign direct investment was included in the list of matters falling under the common commercial policy.

Agreements providing for investment protection may 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.

Observance of limits of EU law: future Union agreements should:

- afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, but not a higher level of protection;

- Union agreements should ensure that the Union's legislative powers and right to regulate were respected and safeguarded.

Financial responsibility: the amended text stated that financial responsibility arising from a dispute under an agreement should be apportioned according to the following criteria:

- the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union;

- the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State;

- the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by the law of the Union.

The Commission should adopt a decision determining the financial responsibility of the Member State concerned in accordance with the criteria set out in the text and the European Parliament and the Council should be informed of such a decision.

Treatment afforded by the Union: where the Commission received a request for consultations from a claimant or a notice by which a claimant stated its intention to initiate arbitration proceedings in accordance with the provisions of an agreement, it should **immediately notify the European Parliament and the Council.**

Cooperation and consultations between the Commission and the Member State concerned: in accordance with the principle of sincere co-operation, the Commission and the Member State concerned will take all necessary steps to **defend and protect the interests of the Union and of the Member state concerned.**

The Commission and the Member State concerned should enter into consultations on the management of disputes pursuant to the Regulation, and **share with each other information** where relevant to the conduct of disputes.

Notice of intention to initiate arbitration proceedings: when a claimant stated its intention to initiate arbitration proceedings against the Union or a Member State the Commission shall inform the European Parliament and the Council within 15 working days of receiving the notice, of the name of the claimant, the provisions of the agreement alleged to have been breached, the economic sector involved, the treatment alleged to be in breach of the agreement and the amount of damages claimed.

Respondent status: the Commission may decide based on a full, balanced, factual analysis and legal reasoning provided to the Member States, that the Union shall act as respondent if:

- the Union would bear all or at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in the regulation; or

- the dispute also concerns treatment afforded by the institutions, bodies or agencies of the Union.

It was added that the Commission may decide that the Union shall act as respondent where similar treatment is **being challenged in a related claim against the Union in the WTO**, where a panel has been established and the claim concerns the same specific legal issue and where it is necessary to ensure a consistent argumentation in the WTO case.

When the Union acts as a respondent, the Commission shall consult the Member State concerned on any pleading or observation prior to the finalisation and submission thereof. Representatives of the Member State concerned shall, at their request and at the Member State's expense, form part of the Union's delegation in any hearing and the Commission shall take Member State's interest in due account.

Where the Union is respondent in a dispute which involves the financial liability of the Union and of a Member State, **the Commission may not settle the dispute without the agreement of the Member State concerned.** The latter may submit a full analysis of the impact of the proposed settlement on its financial interests. Where the Member State does not agree to settle the dispute, the Commission may nonetheless decide to settle provided that such settlement does not have any financial or budgetary implications for the Member State concerned

Where a Member State acts as a respondent, it should inform the Commission in a timely manner of all significant procedural steps, and upon request enter into consultations with the Commission with a view to taking into due consideration any point of law or any other element of Union interest raised by the dispute and identified by the Commission in a non-binding written analysis provided to the Member State concerned.

Settlements: settlement procedure should permit the Commission to settle a case involving the financial liability of the Union, where this would be in the interests of the Union. Where the case also concerns treatment afforded by a Member State, it is appropriate that the Union would only be able to settle a dispute if the settlement would not have any financial or budgetary implications for the Member State concerned.

Advance payment of arbitration costs: the Commission may adopt a decision requiring the Member State concerned to advance financial contributions to the Union budget in respect of foreseeable or incurred costs arising from the arbitration. Such a decision should be proportionate, taking into account the criteria set down in the text.

Settlement of disputes concerning treatment afforded in part by a Member State where the Member State wishes to settle: in such cases, if the Commission and Member State concerned agreed to settle the dispute, the Member State concerned should endeavour to enter into an arrangement with the Commission setting out the necessary elements for the negotiation and implementation of the settlement. **In the event that the Commission does not consent to settle the dispute,** it may decide, based on a full, balanced, factual analysis and legal reasoning provided to Member States **to refuse to settle.**

Report: the Commission's regular report should contain all relevant information including the listing of the claims made against the Union or the Member States, related proceedings, rulings and the financial impact on the Union budget. The Commission should annually submit to the European Parliament and to the Council a list of requests for consultations from claimants, claims and arbitration rulings.