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

2012/0163(COD) - 23/07/2014 - Final act

PURPOSE: to protect foreign investment throughout the EU by establishing a framework for managing financial responsibility linked to investor-to-state dispute settlements established by international agreements to which the European Union is party.

LEGISLATIVE ACT: Regulation (EU) n° 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

CONTENT: with the entry into force of the Treaty of Lisbon foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with the Treaty on the Functioning of the European Union (TFEU), the Union has **exclusive competence** with respect to the common commercial policy and may be a party to international agreements covering provisions on foreign direct investment.

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. Investor-to-state dispute settlement can result in awards for monetary compensation.

This Regulation sets out the rules for **managing the financial consequences of investor-to-state disputes** , specifying how cooperation between the Commission and the member states should be structured in specific cases. It provides clarity as to whether the Union or the Member State concerned conducts the defence of a case and pays the final award or settlement amount where investor-to-state arbitration proceedings take place.

In its resolution of 6 April 2011 on the future European international investment policy, the European Parliament explicitly called for the creation of the mechanism provided for in the Regulation.

The main points of the Regulation are as follows:

Apportionment of financial responsibility: financial responsibility arising from a dispute under an agreement shall be apportioned in accordance with the following criteria:

- the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies, offices or agencies of the Union;
- the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State;
- by way of exception, the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by Union law.

Conduct of the procedure: the Union shall act as the respondent where the dispute concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.

Where the dispute concerns **treatment afforded by a Member State**, the Commission and the Member State concerned shall enter into consultations on the management of disputes and shall share with each other information where relevant to the conduct of disputes. The Commission shall **inform the European Parliament** and the Council of any requests for consultations.

The Member State concerned shall act as the respondent except under certain circumstances. In **exceptional circumstances**, the Commission may decide that the Union will act as respondent in disputes relating to treatment afforded by a Member State.

The Commission may decide that the Union is to act as the 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. The Commission shall ensure that the Union's defence protects the **financial interests** of the Member State concerned.

- **Where the Union acts as the respondent**, practical arrangements should provide for very close cooperation including the prompt notification of any significant procedural steps, the provision of relevant documents, frequent consultations and participation in the delegation to the proceedings.

- **Where a Member State acts as the respondent**, it must keep the Commission informed of developments in the case and in particular ensures timely information of any significant procedural steps, the provision of relevant documents, frequent consultations and participation in the delegation to the proceedings.

Settlements: the Regulation lays down a procedure permitting the Commission to settle a case involving the financial responsibility of the Union, where this would be in the interests of the Union. Where the case also concerns treatment afforded by a Member State, 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 costs arising from the arbitration: the Commission may adopt a decision requiring the Member State concerned to advance financial contributions to the budget of the Union in respect of foreseeable or incurred costs arising from the arbitration.

Report and review: the Commission shall submit a detailed report on the operation of this Regulation to the European Parliament and to the Council at regular intervals. That report shall contain all relevant information including the listing of the claims made against the Union or the Member States, related proceedings and rulings, and the financial impact on the budget of the Union. The first report shall be submitted by 18 September 2019. Subsequent reports shall be submitted every three years thereafter.

ENTRY INTO FORCE: 17.9.2014.