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Trying to change the rules for responding to arbitration unilaterally: The proposed new framework for investor-state dispute settlement for the EU

by
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The Lisbon Treaty endowed the European Union (EU) with the exclusive competence to conclude agreements on foreign direct investment (FDI). Given the economic power and relevance of the Union in the FDI field, a new hallmark could thunder through the world of investment arbitration as we know it. The latest example of this kind is the proposal for a regulation highlighting the Union's desire to establish solutions explicitly tailored to its needs -- solutions not necessarily compatible with the mechanisms international investors are used to under modern bilateral investment treaties (BITs).

It would be a major achievement if foreign businesses investing in the EU could, for the first time, bring claims against the Union on the basis of BITs alleging that protection obligations have been breached. However, since negotiations are still underway, their likely outcome is hard to predict; therefore, whether the results will eventually fit into the established system or substantially depart from it remains speculative. Still, comments can be made on the perspectives embodied in the new regulation proposal and red flags can be raised.

It seems foreseeable that future EU BITs will -- for reasons of political balance -- probably be concluded as mixed agreements, to which both the Union and its members are parties. This will not create a problem if the treatment about which an investor complains comes directly from the Union and its institutions -- then the Union will act as respondent in a corresponding arbitration proceeding. But in reality, such cases will occur rather infrequently, just as most internal actions under Union law are carried out by national authorities and must therefore be challenged in domestic courts. Similarly, where the treatment in question flows from the institutions of a member State, it is supposed to act as respondent, although it is remarkable that, in this case, the Commission could give directions on particular issues.[1] Nevertheless, this is also a point that does not directly affect foreign investors.

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[1] COM (2012) 335 final, art. 9, para. 2.

Much more interesting to foreign investors is a provision that allows the Commission (under specified, but far-reaching circumstances) unilaterally to determine the status of respondents by taking cases away from member States even if a breach of obligations by their institutions is alleged.[2]

If the Commission can basically take over investment cases as it sees fit, potential claimants are put into an awkward position. It is unheard of that, in a case with more than one possible respondent, one of them is able to determine respondent status and therefore procedural responsibility in a legally binding manner. This could easily create inappropriate procedural relations at the expense of member States, which lose the ability to decide if and how they want to defend their own actions. What is more troubling from the viewpoint of potential claimants, though, is that they could thereby face a different respondent than the one they have chosen.

How the proposed regulation seeks to solve this problem suggests some disrespect for the procedural rules under which a potential arbitral tribunal may operate. It is questionable whether the procedural regimes of the respective arbitral institutions will allow respondent status to be determined without permission by the institution or the tribunal. The proposed regulation here attempts to prejudice arbitral proceedings before they even commence.

Two related problems are:

- Possible delays caused by disputes between the Union and member States with regard to respondent status. For, if a member State does not concur with the Commission taking over a case, it might challenge that decision before the Court of Justice. What will then happen to the arbitration proceedings while the Court of Justice deliberates? Will they be stalled or conducted against both possible respondents until it is finally determined who shall respond? This uncertainty seems quite unbearable for a claimant.

- Possible different determinations on jurisdiction. The EU is not a party to the most widespread regime of investor-State dispute settlement, the International Centre for Settlement of Investment Disputes (ICSID). This is troublesome since the Commission's draft text on investor-State dispute settlement for EU agreements seems to restrict the employable arbitration systems to ICSID and UNCITRAL. Other renowned institutions (e. g., International Chamber of Commerce, Stockholm Chamber of Commerce) have so far been left out.

Consequently, either arbitral clauses in mixed agreements would be restricted to regimes under which the Union and member States are parties, or claimants could not only face respondents they did not envisage at the beginning, but also a different arbitral regime. This runs afoul of established principles of international arbitration.

It would therefore be advisable if the competent EU organs altered the regulation in question so as to determine the issue of respondent status by the outside appearance of responsibility for a taken measure. Then, an investor could simply initiate a claim against the party that has taken the measure alleged to have breached a protection standard. In most cases, this will be a member State -- which means that ICSID could be used regularly. Moreover, parallel claims against the EU and a member State would be avoided.

[2] Ibid., art. 8, para. 2.

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