Investor-to State Dispute Settlement Mechanism (EU Regulation)

On 28 August, the European Union took an important step towards creating a comprehensive EU investment policy, with the publication of a Regulation setting out a new set of rules to manage disputes under the EU's investment agreements with its trading partners. The rules – set out in the Regulation on financial responsibility under future investor-to-state disputes – are a necessary component of a common EU investment policy.

'This Regulation,' said EU Trade Commissioner Karel De Gucht 'represents another building block in our efforts to develop a transparent, accountable and balanced investor-to state dispute settlement mechanism as part of EU trade and investment policy. '

The rules set up the EU's internal framework for managing future investor-state disputes. They define who is best placed to defend the EU's and Member States' interests in the event of any challenge under investor-to-state dispute (ISDS) in EU trade agreements and the Energy Charter Treaty. The rules also establish the principles for allocating any eventual costs or compensation. Member States will defend any challenges to their own measures and the EU will defend measures taken at EU level. In all cases, there will be close cooperation and transparency within the EU and the EU institutions.

EU investment policy

Under the Treaty of Lisbon, investment became part of the EU Common Commercial Policy – an exclusive competence of the EU. As a consequence, the European Commission now also negotiates the investment component of trade agreements on behalf of the European Union.

The possibility of dispute settlement between an investor and a state is the enforcement mechanism typically used in agreements containing investment protection. There are currently 3000 bilateral investment treaties in force globally, more than 1400 of which are concluded by EU Member States. The vast majority of them include ISDS, as a necessary enforcement mechanism for those investing in third countries. EU investors are the most frequent users of ISDS worldwide.

The EU is negotiating investment protection and ISDS in a number of agreements, and is already party to the Energy Charter Treaty which provides for investment protection and ISDS. As part of its investment policy, the EU aims to implement extensive improvements to the already existing investor-to-state dispute settlement mechanisms by requiring increased transparency, accountability and predictability. In its agreements, the EU is including firm transparency obligations, so that all documents and hearings are public, provisions against the abuse of the system and provisions ensuring the independence and impartiality of arbitrators. The Regulation published today will help to ensure transparency in investor-to-state disputes that arise under future EU agreements, by foreseeing close consultations and information-sharing between the Commission, Member States and the European Parliament.

Where EU-level agreements including investment protection are concluded, they will replace the Member States' Bilateral Investment Treaties with the same non-EU countries.

When will the new rules be used?

Although the Regulation will enter into force on 17th September, the rules will only be applied once actual investor-state disputes under EU agreements with an ISDS mechanism arise.

Source: European Commission Press release.

Note: for a further reading on the topic, based on the draft of the Regulation, Jan Kleinheisterkamp, 'Financial Responsibility in the European International Investment Policy', (2014) 63-2 International and Comparative Law Quarterly 449-476 (summary here).