EUROPEAN COMMISSION PRESSES FOR PROGRESS ON MULTILATERAL INVESTMENT COURT

The European Commission (EC) has called for authorisation to negotiate a free-standing multilateral court (MIC) to resolve investor-State disputes arising under investment agreements. If the EC's vision gains traction, the way in which investor-State disputes are run will significantly change.

On 13 September 2017, the EC issued a recommendation for a council decision (the Recommendation)[1] authorising the start of negotiations for an MIC. An impact assessment in favour of the MIC and a positive decision from the EC's Regulatory Scrutiny Board accompany the Recommendation.[2]

THE MULTILATERAL INVESTMENT COURT

The EC has proposed that all investor-State disputes arising under European Union (EU) investment-related treaties be resolved through one stand-alone permanent investment court. The EC anticipates that the main features of the MIC will be:

- a first instance tribunal with an appeal tribunal for cases of manifest errors in the appreciation of facts, in addition to procedural errors and substantial errors of law, both permanent with a dedicated secretariat; and
- adjudication by judges: appointed by the EU and the respective investment treaty partner, for a fixed amount of time, each meeting a high level of qualification and ethical conduct, and allocated to cases on a random basis.

The MIC would work according to principles of transparency, namely the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014). Further, assistance may be available to small and medium-sized companies and developing countries, with costs potentially allocated according to their level of development.

If established, the EC expects that the MIC will:

- replace all investor-State dispute mechanisms in the EU's agreements relating to investment with non-EU countries;
- be open to any countries outside the EU who wish to join; and

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1 COM(2017) 493 final, 2017/0224(COD).
2 SWD (2017) 302 final, SWD (2017) 3030 final and Opinion of the Regulatory Scrutiny Board of the European Commission dated 24 July 2017.

- be capable of replacing existing bilateral agreements concluded by EU member States in their own capacities.[3]

To date, investor-State disputes have been resolved through international arbitration by tribunals set up on a one-off or "ad hoc" basis. The EC views its proposed centralised standing court with judge-led adjudication as a means of addressing criticisms levelled at the current system, relating, for example, to coherence and predictability of outcomes and the cost, fairness and transparency of the process.

THE EU'S BILATERAL INVESTMENT COURT SYSTEMS

The EU's determination to reform ISDS is clear. It has already negotiated an institutionalised court-type system for investor-State disputes (ICS) into certain bilateral free trade agreements containing investment protection provisions (FTAs).

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The EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the EU-Vietnam FTA both contain negotiated versions of the ICS. Neither treaty is fully in force yet. On 21 September 2017, those areas of CETA that fall within the EU's exclusive competence provisionally entered into force. The investment chapter deals with issues of foreign non-direct investment as well as foreign direct investment and as such falls outside the EU's exclusive competence, requiring approval by EU member States. The ICS provisions have proved contentious. The legality of the ICS provisions are under scrutiny by the Court of Justice of the EU following a referral by Belgium questioning the compatibility of the ICS with EU law.

The ICS in both FTAs reflect the core principles of permanency, appeal and random allocation of judges to cases that the MIC aims to incorporate. Both treaties also make provision for the ICS to be replaced by the MIC, if established.

OPTIONS FOR REFORM

The EC has been considering a form of MIC since May 2015, having conducted public consultations, as well as surveying the potential options for reform and evaluating their impacts.

The EC's impact assessment concluded that the MIC is the most cost-efficient reform available that will uphold investors' rights to access remedies for breaches of investment treaties and promote the efficient management of investor-State disputes to which the EU is party.

To achieve its goal of being a "one-stop-shop" for all disputes arising out of the EU's investment-related treaties, the EC intends for the MIC to be included in all future FTAs.

Though there is, broadly-speaking, agreement that some reform of ISDS is necessary, the views of governments, policy makers and other stakeholders differ as to what level and manner of reform is required:

- Some argue that the current "ad hoc" arbitration system could be improved.

[3] It remains to be seen whether the MIC might also determine disputes arising out investment treaties between EU member States since the legality of such "intra-EU" treaties is not settled. Despite the EC's long-held opinion that they are contrary to EU law, an Advocate-General to the Court of Justice of the EU recently determined that the application of an ISDS provision in an intra-EU treaty (concluded before one of the State parties had acceded to the EU) is not incompatible with EU law.

- Others argue that ISDS can be dispensed with altogether.
- Some (including businesses) have concerns about reforms that could lead to a loss of the decision-making expertise accrued through the current system and potential delays created by appellate processes.

Accordingly, it is uncertain what the EU's trade and investment partners will be willing to accept in relation to ISDS. For example, during the course of the now-stalled TTIP negotiations, the Obama Administration was not receptive to the EU's proposal for an ICS. The U.S. position on ISDS under the Trump Administration has not yet crystallized. For example, there is no clear proposal for ISDS currently on the table in the ongoing renegotiations of the North American FTA. On 6 July 2017, an agreement in principle was reached for an FTA between EU and Japan. As yet, it makes no provision for ISDS and the issue of investor protection under the treaty remains open.

THE FUTURE

With the EU's backing in due course, the EC is expected to push ICS and the MIC in all of the EU's FTAs. This includes any FTA negotiated between the UK and the EU. It remains to be seen what variety of ICS the EU will conclude with each of its trading partners on a bilateral basis going forward, or how far the EU will be able to promote the use of any MIC that is set up. Change, however, is on the horizon.

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