Establishment of a Multilateral Investment Court (MIC)

Position of the Austrian Federal Economic Chamber (WKÖ)

Baseline situation

In 2014 the EU initiated a public consultation on the EU's approach to investment protection and investment dispute resolution in the Transatlantic Trade and Investment Partnership (TTIP) agreement. In this context, a number of stakeholders indicated that a reform of the investment dispute settlement system (ad hoc arbitration, ISDS) should be started at the multilateral instead of the bilateral level. The idea to establish a permanent Multilateral Investment Court was then discussed by the European Parliament and was also supported by the Member States. In its Concept Paper "Investment in TTIP and beyond – the path for reform"[1] in May 2015, the Commission stipulated that - in parallel with its bilateral efforts[2] - work should start towards the establishment of a multilateral system for the resolution of investment disputes.

On its way towards a more responsible trade and investment policy it is the objective of the European Commission to engage with partners and build consensus for a fully-fledged, permanent International Investment Court to develop an effective, coherent and consistent investment policy. A number of concrete proposals for multilateral reforms have come up in the last years. At the same time, many third countries and international organizations (UNCTAD, OECD, UNCITRAL, World Bank) have discussed the idea of a multilateral reform of the investment dispute settlement system.

[1] See http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153455.pdf
[2] A bilateral investment court, including an appellate body, has already been provided in the two trade agreements with Canada and Vietnam. Concerning Mexico, Myanmar, Japan, Tunisia and China negotiations are still ongoing.

Position of the Austrian Federal Economic Chamber

In principle, we are open to the idea of a multilateral solution regarding investment dispute resolution. For us, this constitutes a logical, practical and efficient further development in this field which could also lead to wider public acceptance and legitimacy of the system. In this respect, it is of particular importance for Austrian enterprises that legal certainty and clarity is preserved and quick and full access to efficient dispute resolution remains guaranteed.

Against this background, the WKÖ raises concerns with regards to the setting-up of a MIC. These are in line with our existing position on the bilateral investment dispute settlement.

Our main points of interest are:

Selection of judges and composition of tribunal

From a business perspective, it is essential that judges not only have legal expertise on international investment protection, but also an understanding for economic matters. Judges (likely to be appointed by the States) should not tend to rule in favour of the defendant State. Arbitrators have to be independent, impartial and free of bias and conflict of interest. A politicization of investment protection and dispute settlement is to be avoided by all means. Otherwise an essential protection instrument of international law would be undermined. In view of the above, it would be desirable to foresee, with regards to judges appointed by the State, a right to be heard for business on the one hand. At the same time, the plaintiff should continue to have a say regarding the selection of at least one judge (tribunal) responsible for the procedure.

The quality and qualification of the arbitrators is clearly in the interest of the Austrian Federal Chamber. In general, it seems promising to enhance and deepen the economic expertise of a possible MIC by including experts from certain associations or social partners' institutions in an advisory capacity (see the system of lay judges – participation of the people in jurisdiction – in Austrian law).

Appellate Body

Keeping in mind the need for an efficient conduct of procedure and for a quick decision, we would like to underline that we are still critical about the establishment of an appellate body as it bears the risk of increasing the duration of the process as well as the procedural costs.

Enforceability of judgments

The direct enforceability of judgments must also be possible under the new system (following the example of the enforceability in ICSID) and the need for a national exequatur procedure must be avoided. National courts should not be able to review arbitration awards, not even on the basis of *ordre public* considerations.

Legal costs

A key aspect of the potential establishment of a MIC should be the reduction of legal costs, especially for SMEs. These costs are currently very prohibitive and the access to an effective, independent dispute settlement is reserved to those parties that dispose of the necessary financial means. A solution to this problem would also contribute to improve the legitimacy of such a system.

With regards to legal costs, there are two different aspects:

1) Court fees

Court fees should be as low as possible in order to guarantee the widest possible access to justice for businesses. Special account needs to be taken of the particular needs of SMEs, whose financial resources are often limited. We strongly oppose the introduction of additional "user fees" that would be levied from businesses.

2) Attorney fees

The key cost factor related to investment disputes is the fees of the parties' representatives. In order to reduce these for the future, the envisaged mechanism of a counselling centre or legal aid office for developing countries should in general also be considered for SMEs. Such a mechanism could be installed on EU level and offer legal advice for Investment Disputes to European SMEs. This office would be financed in part from the EU budget and in part from fixed fees covered by the plaintiff companies. The amount of the fee should be proportional to the size of the individual company. To prevent abusive use, cases presented to the legal aid office would be initially examined upon their legal prospects of success and if success is obviously improbable, they should get immediately rejected. The legal aid office would exclusively be responsible for treaties concluded by the EU with third countries. Claims related to intra-EU BITs or BITs of Member States with third countries would not be encompassed.
Another way of lowering the attorney fees would be the establishment of standardized attorney fees which – analogous to the Austrian attorney fees – define fixed hourly rates for legal representation in investment disputes. Such fees could be agreed upon in the context of an international treaty and would be applied to disputes within the competence of the MIC.

Competence of the MIC for existing BITs and future treaties

It should be avoided to provoke a situation that forces contracting parties to adapt existing treaties in a way that would not only complement pre-existing substantive rules but also change their content. Therefore, existing protection standards must not be touched when establishing a MIC.

We take a positive stance on the increase of choice regarding existing institutions of arbitration (ICSID, ICC and UNCITRAL) upon request of the contracting parties. However, this should not lead to a situation where the possibility of seizing a single Multilateral Investment Court is the only option available. From a business perspective, the coexistence of various institutions is positive. This does not only provide a broader choice in case of a dispute but also creates incentives for further development through the competition of systems. From our point of view, the current reform efforts must contribute to the effective protection and promotion of worldwide foreign investments.

A matter of general criticism is the idea of broadening the MIC's competence to other treaties not related to investment protection. The Austrian Federal Economic Chamber argues that a MIC – also in the context of the quality of arbitration awards - should generally be an institution solely confined to investment disputes, especially as investment protection law is a highly specialized matter of international law.

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