Open Doors for Small or Medium Sized Enterprises to Investor State Dispute Resolution?

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On 19 October 2018, the European Commission concluded three agreements with Singapore that will govern the relations between the two markets.[1] In particular, the EU-Singapore Investment Protection Agreement EUSIPA, a mixed agreement that needs to be ratified not only by the European Parliament but also by each Member State, provides for substantive protection standards as well as a dispute resolution between investors and their host States.

These agreements are part of a series of new generation FTAs that include provisions on investor State dispute resolution, which are currently discussed among governments, scholars and practitioners as part of the ISDR reform project. Apart from establishing the Investment Court System, the texts of the agreements include references to small or medium sized enterprises (SMEs) investing abroad. Said provisions attempt to improve the access to justice of SMEs and can also be found in the Comprehensive and Economic Trade Agreement (**CETA**) and the EU-Vietnam Free Trade Agreement (**EUVFTA**).

1 Small or Medium Sized Enterprises

What are SMEs and why is their access to the ICS of interest? This is because, according to the Commission, SMEs represent 99% of all businesses in the EU.[2] The Commission clearly defines this term. Pursuant to Article 2 of Commission Recommendation of 6 May 2003[3] two factors are taken into account: the staff headcount and either the turnover or the annual balance sheet total:

> Article 2 Staff headcount and financial ceilings determining enterprise categories
>
> 1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and

which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

According to a Eurobarometer survey (2015)[4] and the European Commission, about 50% of all European SMEs have been involved in international business outside the Internal Market over the last 3 years. Moreover, the Commission deems it "crucial for Europe's competitiveness, economic growth and innovation"[5] that SMEs increase their internationalisation. To this end, the Commission promotes a business-friendly environment. As already mentioned, provisions on investor State dispute resolution in the new generation FTAs are part of that strategy and supposed to contribute to said environment. Yet, investment arbitration can have downsides and can be disadvantageous for SMEs.

2 Perceived obstacles for SMEs

People working in the field of international dispute resolution know the common prejudices against investment arbitration. Investment arbitration is lengthy. Investment arbitration is costly. But what does reality look like? Is investment arbitration really lengthy? Is it really costly? The answer always depends on whom you ask as well as on the comparator you use. Especially with regard to SMEs, these questions become serious concerns. This is because an SME is not able to engage in a lengthy and costly dispute since their resources are much lower than those of big international corporations such as Philip Morris, Chevron or Société Générale.

What is the average duration of an investment dispute? Pursuant to an ICSID study reviewing 63 cases, which concluded with an award in the period 1 January 2015 to 30 June 2017, the average duration of investment arbitration proceedings is about 1.336 days, i.e. 3 years and 7 months.[6] This is a long time for a small or medium sized business.

As to costs, an Allen and Overy study revealed that average claimant costs amount to USD 6,019,000 and average tribunal costs to USD 933,000.[7] If an SME with an annual turnover not exceeding EUR 50 million would have to spend over 12% of their turnover to bring a claim against their host State, the result is evident. The business is highly unlikely to survive. Of course, the enterprise could have recourse to third party funding, which has its own advantages and disadvantages.[8]

3 The Commission's approach

The European Commission decided to attempt to address these concerns by including three provisions into their new Free Trade Agreements with Singapore, Canada and Vietnam that open the doors for SMEs to reduce time and costs.

3.1 Videoconferences

First, the agreements concluded with Singapore, Canada and Vietnam propose to the disputing parties to hold the consultations through videoconference or other means, where appropriate, such as in the case where the claimant is a small or medium-sized enterprise.[9] This is not a novelty as it is common practice to hold consultations, pre-hearing procedural meetings etc. through teleconference or videoconference. It is important to ensure that the technical aspects are dealt with before starting such a conference. Some authors see this as an argument for the requirement of an institution to administer the dispute.[10]

3.2 Sole Member Tribunals

Second, pursuant to the text of the agreements the SME may request for the case to be heard by a Sole Member of the Tribunal.[11] The Claimant shall make this request before the constitution of the division of the Tribunal (CETA) or should make the request at the same time as the filing of the claim (Vietnam & Singapore). However, there is no need for the dispute resolution body to accept this request. Neither must the Respondent accept this request. All three FTAs stipulate that the "respondent shall give sympathetic consideration" to the request. Yet, what happens if the respondent does not accept a Sole Member Tribunal?

The purpose of these provisions is to grant access to the dispute resolution body to SMEs that would not be able to have recourse to investor State dispute resolution under the current system. Hence, the relevant provisions, even if not expressly providing for a right of the SME to request for a Sole Member ICS division, should be interpreted in a favourable manner. The meaning of this term remains unclear and is not further defined in the agreements. Whereas many agreements provide for the possibility of the parties to agree to a sole arbitrator tribunal, the new generation FTAs simply ask the respondent State to give sympathetic consideration to a request from an SME. However, the language of the provision is not binding upon the State.

3.3 Supplemental Rules on Fees

A third provision contained in EUSIPA and EUVFTA hints that the Contracting Parties did indeed take into account the financial resources of a claimant, which is a natural person or an SME.[12] To this end, the Committee, a body established by the treaties comprised of State representatives, may adopt supplemental rules on fees taking into account the financial resources of an SME claimant. The text does not contain an obligation for such rules to be adopted but shows that the Contracting Parties did not forget about SMEs. It remains to be seen if and how such rules will be implemented. It would be desirable to decide on a fixed fee that does not discourage the small or medium sized businesses from bringing a claim.

4 Impact of the provisions

Both the Sole Member provision, as well as the financial resources provision

attempt to improve SMEs’ access to justice. Sole Member tribunal costs will be lower and therefore the access to the dispute settlement mechanism is made easier for smaller businesses investing in Canada, Singapore, Vietnam or the EU. There is little public data on the costs of a sole member investment tribunal, yet, regular costs for a USD 5 million ICC dispute can amount to USD 87.000.[13] In comparison, as stated earlier, an Allen & Overy study revealed that average claimant costs amount to USD 6,019,000 and average tribunal costs to USD 933,000.[14] If the SME is able to avoid such high costs through a Sole Member tribunal, this is likely to have a positive impact on the situation of SMEs. Yet, the SME will still have to pay its counsel’s fees. It is not clear as to how the financial situation of SMEs will be taken into account, however, said provision evidences that the Commission is aware of the problem. The third provision on videoconferences constitutes a measure how costs can be reduced.

Furthermore, Sole Member tribunals are likely to render awards and decisions faster than tribunals of three.[15] Therefore, such tribunals would improve the access to justice of SMEs not only by reducing costs but also by speeding up the duration of the proceedings.

Unfortunately, the provisions do not provide for binding rules and it remains to be seen what actual difference they will make. Time will show if the above suffices to increase the accessibility of the Tribunal and contributes to the judicial protection of smaller businesses. If so, the latest FTAs concluded by the EU would constitute a new milestone for access to justice and rule of law considerations for SMEs.

[1] EU-Singapore Free Trade Agreement (**EUSFTA**), EU-Singapore Investment Protection Agreement (**EUSIPA**) EU-Singapore Framework Agreement on Partnership and Cooperation (**EUSFAPC**).

[2] http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en.

[3] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422).

[4] http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2090.

[5] http://ec.europa.eu/growth/smes/access-to-markets/internationalisation_en.

[6] https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf, page 898.

[7] http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx and

http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf.

[8] For a discussion see Jonas von Goeler , Third-Party Funding in International Arbitration and its Impact on Procedure, International Arbitration Law Library, Volume 35 (© Kluwer Law International; Kluwer Law International 2016).

[9] Article 3.3-7 EUSIPA, Article 8.19-3 CETA, Article 4.3 Chapter 8 Section 3 EUVFTA.

[10] Paul Eric Mason, ‘Visualizing a Settlement – Videoconferencing to Resolve International Commercial Disputes’, Revista Brasileira de Arbitragem, (© Comitê Brasileiro de Arbitragem CBAr & IOB; Comitê Brasileiro de Arbitragem CBAr & IOB 2006, Volume III Issue 11) pp. 91 – 98.

[11] Article 8.27(9) CETA, Article 8.23(5) CETA, Article 12.9 Chapter 8, Section 3 EUVFTA, Article 3.9(9) EUSIPA.

[12] Article 3.21-5. EUSIPA, Article 27.5 Chapter 8 Section 3 EUVFTA.

[13] https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/.

[14] http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx and http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf.

[15] Yu Jin Tay, Reflections on the Selection of Arbitrators in International Arbitration, in 17 International Arbitration: The Coming of a New Age?, ICCA Congress Series 112, 113 (Albert Jan van den Berg ed., 2013) and Michael Dunmore, ‘Increased Efficiency and Lower Cost in Arbitration: Sole Member Tribunals’, Indian Journal of Arbitration Law, (© Indian Journal of Arbitration Law; Centre for Advanced Research and Training in Arbitration Law, National Law University, Jodhpur 2015, Volume IV Issue 1) p. 31.