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Commentary

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Introduction

In January 2007, the Ukrainian Government reestablished the Commission for Promotion of Pretrial Settlement of Disputes Between Investors and Executive Bodies (the "Commission"),[1] a continuously functioning consulting body that, upon both parties' consent, will consider applications and promptly make recommendations to the Government on resolving controversies and/or amending regulations.

The Commission is chaired by the First Vice Prime Minister, who appoints the rest of its members from the pool of executive officials responsible for implementing investment policy. Organizational support to the Commission is provided by the State Agency of Ukraine for Investments and Innovations, an executive body with broad powers in these spheres (the "Supporting Agency"). The Commission's activity takes the form of meetings, where it makes decisions by voting. The Commission can hear executive officials' reports on pending disputes as well as invite independent experts to opine on those disputes. It can also, in accordance with procedures set by law, request and obtain relevant documents and information from "executive bodies, local authorities, enterprises, institutions and organizations of all forms of ownership." The establishment of the Commission is obviously a part of the current wider effort by Ukrainian authorities to attract foreign investment into the country.[2]

The Commission's predecessor, which was in place from April 2004 until December 2005, was abolished because of a lack of interest from investors and "the absence of an effective mechanism of commission's work in general and, specifically, of its cooperation with regional commissions."[3] The Government introduces the following innovations, apparently in response to investment community's earlier criticisms: The mention of regional-level commissions has been deleted from the regulations; thus the need to involve this extra link of bureaucracy has been dispensed with. And whereas the old commission's power was limited to disputes "with respect to which there [was] a threat of legal claims in Ukrainian courts," no such limitation is present in the new regulations; thereby the new Commission can resolve disputes — including disputes that may be subject to international arbitration[4] — at a very early stage.

General Observations

The Commission is a forum where investors can communicate their concerns to high-level government officials at early stages of disputes. The Commission can resolve controversies through the formal mechanisms available to it and can influence decision making of state agencies at the origin of disputes. The latter's mid-level officials may justify the terms of achieved settlements to their superiors and the general public by reference to Commission's recommendations.[5]

Furthermore, the Commission may improve the investment climate by initiating regulatory changes in response to investors' complaints. This may generally address the sometimes-expressed concern that investment dispute settlements have less of a corrective influence on the host country than investment treaty awards.[6]

The Commission should probably be considered an extension of the government rather than a neutral body; and it is not, if it matters, a part of the judiciary. Consequently, some investors may expect the Commission ultimately to act in Ukraine's interests when requesting information or documents under its broad powers, whether from state agencies or investors. A possibility that their vulnerabilities may migrate into other processes or stages of dispute resolution may discourage investors.[7]

It should also be noted that the new regulations are silent on confidentiality. According to Professor Coe, in an investment dispute the investor "may fear disclosure of trade secrets, or to litigation-prone shareholders" and the state agency "may be concerned about the revelation of secrets bearing on national security, or the negative publicity generated by the investor's allegations."[8] If the new Commission addresses these confidentiality concerns, then the number of disputes referred to the Commission may well increase.

Furthermore, at least three state agencies will be involved in the Commission-assisted dispute resolution: the Commission itself, the Supporting Agency, and the body at the origin of the dispute. As Barton Legum explained,[9] multiplicity of decision makers on the state's side could impede reaching an amicable settlement. Such factors as the slow flow of information about the dispute and the general complexity of interaction between state bodies may well obstruct the Commission's work and make settlements unlikely (and this will happen *before* initiation of investment treaty arbitration rather than *after*, as was generally the case in the Mr. Legum's example). The communist heritage of inefficient state bureaucracy may be an additional aggravating factor.

Another observation is that the Commission's activity, being limited to investors' disputes with executive bodies, probably does not extend to cases of alleged denial of justice in Ukrainian courts, such as the recently settled case of *Western NIS Enterprise Fund v. Ukraine*.[10]

As to the possibility of a parallel mediation, the Commission's activity is likely to be compatible with such a process. Moreover, the new regulation allows the Commission to 'involve . . . specialists as independent experts for consultations.'

The Commission's authority probably does extend to the cooling off period, i.e. the period after the notice of investment treaty claim, but before the request for arbitration.[11] Furthermore, the submission of a dispute to the Commission is unlikely to constitute a notice letter or a request for arbitration because the Commission does not formally represent the Government.[12]

Sometimes there may be no investment treaty claim on the horizon at all, for such reasons as lack of facts to establish a *prima facie* case or the high costs of investment treaty arbitration. Will state agencies, including the Commission, in such cases be less prone to meet the investors' concerns?[13] The Commission's success will of course much depend on the existence among its members of a genuine willingness to address needs of foreign investors.

The Commission may help resolve disputes before they become significant bones of contention between investors and state agencies. It is an example of a structure moving away from dispute *resolution* towards dispute *avoidance*.[14] The re-establishment of the Commission is at a minimum a step in the right direction.

Endnotes

1. *See* The Regulation on the Commission for Promotion of Pre-Trial Settlement of Disputes Between Investors and Executive Bodies Adopted by the Regulation of the Cabinet of Ministers of Ukraine of 16 January 2007 # 19 (Положення про комісію із сприяння досудовому врегулюванню спорів між інвесторами та органами виконавчої влади

затверджене постановою Кабінету Міністрів України від *16 січня 2007 р. No. 19*), available at: http://www.kmu.gov.ua/control/uk/publish/article?art_id=63184998&cat_id=103615 (accessed November 6, 2007). *See also* Markiyan Kliuchkovskyi & Olga Glukhovska, *New Commission Offers Pre-trial Resolution of Investment Disputes*, Int'l Law Off. Newsl. (March 1, 2007).

2. *See, e.g.,* Press Service of the President of Ukraine, *Ukraine is Ready for Active Cooperation with International Business — Viktor Yuschenko* (May 23, 2007), available at:http://www.president.gov.ua/news/data/1_15984.html (accessed November 6, 2007).

3. Ukrainian Government's commentary to the new regulations, available at:http://www.kmu.gov.ua/control/uk/publish/article?art_id=63184998&cat_id=103615 (accessed November 6, 2007). *See also* Kliuchkovskyi & Glukhovska, *supra* note 1.

4. References to "*pretrial* settlement of disputes" (досудове *врегулювання спорів*) in the new regulations are unlikely to limit the Commission's authority to resolution of disputes capable of being litigated in domestic courts.

5. *See* Noah Rubins, *Comment to Jack C. Coe Jr.'s Article on Conciliation*, 21-4 Measley's Int'l Arb. Rep. 21, 23 (2006) ("[G]overnment officials, particularly the mid-level bureaucrats who are typically charged with managing disputes with foreign investors, are subject to rather abstract pressures that tend to discourage settlement . . . [T]he government official himself will have to take responsibility for any concessions included in a settlement agreement. This pressure is increased where public opinion has turned against the foreign investor, and therefore any compromise viewed as a betrayal of national interests.").

6. Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes — A Preliminary Sketch*, 12 UC Davis J. of Int'l L. & Pol'y 7, 27-28 (2005) ("Settlements divert attention from the legal merits of the underlying controversy and may thereby shroud dubious levels of treaty compliance in ambiguity, producing less incentive for the states to institute corrective measures . . . [S]tates self regulate in light of the pronouncements of tribunals and any liability that might flow therefrom. Reasoned adjudications thus provide law-makers guidance and stimulation not found in mediated agreements, the very point of which might have been to avoid such corrective influences. It is therefore reasonable to question whether states might not find conciliation be too comfortable a blind, where bad habits might be perpetuated.").

7. *See ibid.*, p. 17.

8. *Ibid.*, p. 23.

9. *See* Barton Legum, The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's "Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch," 2006 — *21:4 Mealey's Arbitration Rep.*

10. *See* Sergei A. Voitovich, *Western NIS Enterprise Fund v. Ukraine: Certain Issues of Denial of Justice in the Discontinued Investment Arbitration*, Ukrainian J. of Bus. Law 26 (August 2006).

11. *Also see supra* note 4.

12. Kliuchkovskyi & Glukhovska, *supra* note 1.

13. The executive body may simply not consent to the Commission's involvement.

14. In the commercial context, see Martin Hunter, *International Commercial Dispute Resolution: the Challenge of the Twenty-First Century,* 16-4 Arb. Int'l. 379, 391 (2000) ("I foresee a new breed of lawyers becoming actively involved in preventing potential disputes getting 'out of hand' before they mature into intractable situations. I envisage *dispute avoidance groups* being set up around the world, both as independent entities (not necessarily comprised wholly of lawyers) and also as teams with major law firms and in-house legal departments in large corporations. The investment required to design appropriate structures for individual industries, and to create the resources to implement such schemes, would surely be far exceeded by the direct and indirect costs of the litigation that could be averted; and the role of the lawyer would be at a much earlier stage of the process."). ■

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