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**AMENDMENT 001-001**

by the Committee on International Trade

**Report**

**Carl Schlyter**

**A7-0148/2011**

Transitional arrangements for bilateral investment agreements between Member States and third countries

Proposal for a regulation (COM(2010)0344 – C7-0172/2010 – 2010/0197(COD))

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**AMENDMENTS BY PARLIAMENT\***

to the Commission proposal for a

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REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing transitional arrangements for bilateral investment agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure<sup>1</sup>,

Whereas:

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\* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

<sup>1</sup> Position of the European Parliament of 10 May 2011.

- (1) Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1) (e) of the Treaty on the Functioning of the European Union (hereinafter "the Treaty"), the Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so only if empowered by the Union, in accordance with Article 2(1) of the Treaty.
- (2) In addition, Part Three, Chapter 4 of Title IV of the Treaty lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States.
- (3) At the time of the entry into force of the Treaty of Lisbon, Member States maintained a significant number of bilateral agreements with third countries relating to investment. The Treaty does not contain any explicit transitional provisions for such agreements which now come under exclusive Union competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Part Three, Chapter 4 of Title IV of the Treaty.
- (4) Although bilateral agreements remain binding on the Member States under public international law and will be progressively replaced by future agreements of the Union relating to the same subject matter, the conditions for their continuing existence and their relationship with the Union's policies relating to investment, including in particular the common commercial policy, require appropriate management. That relationship will develop further as the Union exercises its competence *in the common investment policy with the main goal of creating the best possible investment protection system for all Member States' investors equally and equal investing conditions on third country markets. As the new investment policy will be developed in view of the transitional validity of bilateral investment agreements concluded by Member States, it should acknowledge the rights of investors whose investments fall into the scope of those agreements and should ensure their legal certainty.*
- (5) In the interest of EU investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral agreements that specify and guarantee the conditions of investment *remain binding on the parties under public international law and* should be maintained in force *whereas the Commission should take the necessary steps towards a progressive replacement of all existing agreements on investment with new agreements that should provide for the best possible level of protection.*
- (6) This Regulation lays down the conditions under which Member States should be authorised to maintain in force or to permit to enter into force international agreements relating to investment.
- (7) This Regulation lays down the conditions under which Member States are empowered to *maintain*, amend or conclude international agreements relating to investment.

- (8) As the authorisation to maintain, amend or conclude agreements covered by this Regulation is granted in an area of exclusive Union competence, it must be regarded as **a transitional** measure. The authorisation is without prejudice to the application of Article 258 of the Treaty with respect to failures of Member States to fulfil obligations under the Treaties other than those concerning incompatibilities arising from the allocation of competences between the Union and its Member States.

- (10) The Commission should **■** withdraw the authorisation **of an agreement with a third country**, if an **investment** agreement **of the Union with the same third country negotiated by the Commission has already been ratified. The Commission may withdraw the authorisation of an agreement if it** conflicts with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States **on foreign direct investment, or if it constitutes a serious obstacle to the conclusion of future agreements with that third country** relating to investment **■**. Finally, should the Council not take a decision on the authorisation to open negotiations concerning investment within one year of the submission of a recommendation by the Commission pursuant to Article 218(3) of the Treaty, the possibility would exist to withdraw the authorisation.

- (12) No later than **ten** years after the entry into force of this Regulation, the Commission should present to the European Parliament and the Council a report on the application of **■** this Regulation. **■** Unless replaced by an agreement of the Union concerning investment, or otherwise terminated, bilateral agreements concluded by Member States with third countries remain binding on the parties under public international law.
- (13) Agreements authorised under this Regulation or authorisations to open negotiations **■** to conclude a new bilateral agreement with a third country should not in any case be allowed to constitute **a serious** obstacle to the **conclusion of future Union agreements with that third country** relating to investment **■**.
- (14) The European Parliament, the Council and the Commission should ensure that any information identified as confidential is treated in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.<sup>1</sup>
- (15) Agreements between Member States relating to investment **are** not covered by this Regulation.
- (16) It is necessary to provide certain arrangements to ensure that agreements maintained pursuant to this Regulation remain operational, including as regards dispute settlement, while at the same time respecting the Union's exclusive competence.
- (17) **In order to ensure uniform conditions** for the implementation of this Regulation, **implementing powers should be conferred on the Commission. Those powers** should

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

be *exercised* in accordance with *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*<sup>1</sup>,

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

Scope

Article 1

Subject matter and scope

This Regulation establishes the terms, conditions and the procedure under which Member States are authorised to maintain in force, amend or conclude bilateral agreements with third countries relating to investment.

## CHAPTER II

Authorisation to maintain agreements in force

Article 2

Notification to the Commission

Within thirty days from the entry into force of this Regulation, the Member States shall notify the Commission of all bilateral agreements with third countries relating to investment concluded *and/or signed* before the entry into force of this Regulation that they either wish to maintain in force or permit to enter into force under this Chapter. The notification shall include a copy of those bilateral agreements. *Member States shall also notify the Commission of future changes to the status of these agreements.*

Article 3

Authorisation to maintain agreements in force

Notwithstanding the Union's competences relating to investment and without prejudice to other obligations of Member States under the law of the Union, Member States are authorised in accordance with Article 2(1) of the Treaty to maintain in force bilateral agreements relating to investment that have been notified in accordance with Article 2 of this Regulation.

Article 4

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<sup>1</sup> *OJ L 55, 28.2.2011, p. 13.*

## Publication

1. Every twelve months the Commission shall publish in the Official Journal of the European Union a list of the agreements notified pursuant to Article 2 or Article 11(7).
2. The first publication of the list of agreements referred to in paragraph 1 shall take place no later than three months after the deadline for notifications pursuant to Article 2.

## Article 5

### Review

1. The Commission *may* review the agreements notified pursuant to Article 2 by assessing whether the agreements:
  - (a) conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States *on foreign direct investment*, or
  - (c) constitute *a serious* obstacle to the *conclusion of future Union agreements with third countries* relating to investment .
3. No later than *ten* years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the *state of play of the review of existing bilateral investment agreements with third countries*.

## Article 6

### Withdrawal of authorisation

1. *The authorisation provided for in Article 3 shall be withdrawn where the Union has already ratified an agreement with the same third country relating to investment negotiated by the Commission.*

The authorisation provided for in Article 3 may be withdrawn where:

- (a) an agreement conflicts with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States *on foreign direct investment*, or
- (c) an agreement constitutes *a serious* obstacle to the *conclusion of future Union agreements with that third country* relating to investment , or

- (d) the Council has not taken a decision on the authorisation to open negotiations on an agreement which overlaps, in part or in full, with an agreement notified under Article 2, within one year of the submission of a recommendation by the Commission pursuant to Article 218(3) of the Treaty.
2. When the Commission considers that there are grounds to withdraw the authorisation provided for in Article 3, it shall deliver a reasoned opinion to the Member State concerned **■**. Consultations shall take place between the Commission and the Member State concerned. *Those consultations may include the possibility for Member States to renegotiate the agreement with the third country within an agreed period of time.*
  3. Where the consultations referred to in paragraph 2 fail to resolve the matter *within the given period of time*, the Commission *may* withdraw the authorisation for the agreement concerned *or, where appropriate, make a recommendation to the Council to authorise the negotiation of an agreement of the Union relating to investment in accordance with Article 207(3) of the Treaty*. The Commission shall take a decision on the withdrawal of the authorisation in accordance with the procedure referred to in Article 15(2). It shall include a requirement that the Member State takes appropriate action, and where necessary terminate the relevant agreement.
  4. Where an authorisation is withdrawn, the Commission shall remove the agreement from the list referred to in Article 4.

### CHAPTER III

#### Authorisation to amend or conclude agreements

##### Article 7

#### Authorisation to amend or conclude agreements

Subject to the conditions laid down in Articles 8 to 12, a Member State shall be authorised to enter into negotiations to amend an existing *bilateral investment agreement with a third country* or to conclude a new agreement relating to investment with a third country.

##### Article 8

#### Notification to the Commission

1. Where a Member State intends to enter into negotiations in order to amend an existing *bilateral investment agreement with a third country* or to conclude a new agreement with a third country relating to investment, it shall notify the Commission of its intentions in writing.
2. The notification shall include relevant documentation and an indication of the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information. In the case of amendments to an existing agreement, the notification shall indicate the provisions that are to be renegotiated.

3. The Commission shall make the notification and, on request, the accompanying documentation, available to other Member States subject to the requirements of confidentiality laid down in Article 14.
- 3a. ***Where a Member State intends to conclude a new agreement with a third country relating to investment, the Commission shall consult the other Member States within thirty days to determine whether there would be added value in having an agreement of the Union.***
4. The notification referred to in paragraph 1 shall be transmitted at least **three** calendar months before formal negotiations are to commence with the third country concerned.
5. Where the information transmitted by the Member State is not sufficient for the purposes of authorising the opening of formal negotiations in accordance with Article 9, the Commission may request additional information.

## Article 9

### Authorisation to open formal negotiations

1. The Commission shall authorise the opening of formal negotiations unless it concludes that the opening of negotiations would:
  - (a) be in conflict with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States ***on foreign direct investment***, or
  - (b) undermine the objectives of negotiations underway **■** between the Union and the third country concerned, or

***(ba) not be in line with policies of the Union relating to investments, or***

  - (c) constitute ***a serious*** obstacle to the ***conclusion of future Union agreements with that third country*** relating to investment **■**.
2. As part of the authorisation referred to in paragraph 1, the Commission may require the Member State to include in such negotiation any appropriate clauses.
3. Decisions on the authorisation referred to in paragraph 1 shall be taken in accordance with the procedure referred to in Article 15(2). The Commission shall take its decision within 90 days of receipt of the notification referred to in Article 8. Where additional information is needed to take a decision, the 90 days shall run from the date of receipt of the additional information.
- 3a. ***If a simple majority of Member States indicate their interest, pursuant to Article 8(3a), in concluding an investment agreement of the Union with the third country concerned, the Commission may withhold authorisation and instead propose a***

*negotiating mandate to the Council in accordance with Article 207(3) of the Treaty. The Commission shall keep the European Parliament immediately and fully informed at all the stages of the procedure.*

*When making its decision the Commission shall take into consideration the geographical priorities of the Union's investment strategy and the capacity of the Commission to negotiate a new agreement of the Union with the third country concerned.*

## Article 10

### Participation of the Commission in negotiations

The Commission shall be kept informed of the progress and results throughout the different stages of negotiations and may request to participate in the negotiations between the Member State and the third country concerning investment. *The Commission may participate as an observer in the negotiations between the Member State and the third country as far as the exclusive competence of the Union is concerned.*

## Article 11

### Authorisation to sign and conclude an agreement

1. Before signing an agreement, the Member State concerned shall notify the Commission of the outcome of negotiations and shall transmit the text of the agreement to the Commission.
2. The notification duty provided for in paragraph 1 shall include agreements which were negotiated prior to the entry into force of this Regulation but not concluded and therefore not subject to the notification duty provided for in Article 2.
3. Upon notification the Commission shall make an assessment as to whether the negotiated agreement does not *conflict with the requirements under Article 9 paragraphs (1) and (2), which have been communicated to the Member State by the Commission.*
4. Where the Commission finds that the negotiations have resulted in an agreement which does not fulfil the requirements referred to in paragraph 3, the Member State shall not be authorised to sign and conclude the agreement.
5. Where the Commission finds that the negotiations have resulted in an agreement which fulfils the requirements referred to in paragraph 3, the Member State shall be authorised to sign and conclude the agreement.
6. Decisions pursuant to paragraphs 4 and 5 shall be taken in accordance with the procedure referred to in Article 15(2). The Commission shall take the decision within **60 days** of receipt of the notifications referred to in paragraphs 1 and 2. Where additional



information is needed to take the decision, the **60 days** shall run from the date of receipt of the additional information.

7. Where an authorisation has been granted in accordance with paragraph 5, the Member State concerned shall notify the Commission of the conclusion and entry into force of the agreement.
- 7a. ***Where the Commission decides to negotiate a bilateral investment agreement or a foreign direct investment agreement with a third country, it shall duly notify all Member States about its intention and the scope of the new agreement.***

## Article 12

### Review

1. No later than **ten** years after the entry into force of this Regulation, the Commission shall present to the European Parliament and the Council a report on the application of this Chapter which shall review the need for a continued application of ***this Regulation and any of its Chapters.***
2. The report referred to in paragraph 1 shall include an overview of authorisations requested and granted under this ***Regulation.***



## CHAPTER IV

### Final provisions

## Article 13

### Conduct of Member States with regard to agreements with a third country

1. For all agreements falling within the scope of this Regulation, the Member State concerned shall inform the Commission without undue delay of all meetings which take place under the provisions of the agreement. The Commission shall be provided with the agenda and all relevant information permitting an understanding of the topics to be discussed. The Commission may request further information from the Member State concerned. Where an issue to be discussed might affect the implementation of the Union's policies relating to investment, including in particular the common commercial policy, the Commission can require the Member State concerned to take a particular position.
2. For all agreements falling within the scope of this Regulation, the Member State concerned shall inform the Commission without undue delay of any representations made to it that a particular measure is inconsistent with the agreement. The Member State shall also immediately inform the Commission of any request for dispute settlement lodged under the auspices of the agreement as soon as the Member State

becomes aware of the request. The Member State and the Commission shall fully cooperate and take all necessary measures to ensure an effective defence which may include, where appropriate, that the Commission participates in the procedure.

3. For all agreements falling within the scope of this Regulation, the Member State concerned shall seek the agreement of the Commission before activating any relevant mechanisms for dispute settlement ***against a third country*** included in the agreement and shall, where requested by the Commission, activate such mechanisms. Such mechanisms shall include consultations with the other party to the agreement and dispute settlement where provided for in the agreement. The Member State and the Commission shall fully cooperate in the conduct of procedures within the relevant mechanisms, which may include, where appropriate, that the Commission participates in the relevant procedures.

#### Article 14

##### Confidentiality

In notifying the Commission of negotiations and their outcome in accordance with Articles 8 and 11, Member States may indicate whether any of the information provided is to be considered confidential and whether it can be shared with other Member States.

#### Article 15

##### Committee

1. The Commission shall be assisted by the Advisory Committee for the Management of Transitional Arrangements on International Investment Agreements. ***That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.***
2. Where reference is made to this paragraph, ***Article 4 of Regulation (EU) No 182/2011*** shall apply.

#### Article 16

##### Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at [...]

For the European Parliament  
The President

For the Council  
The President