



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 5 June 2012**

**10892/12**

---

---

**Interinstitutional File:  
2010/0197 (COD)**

---

---

**WTO 216  
FDI 17  
CODEC 1557**

**"I/A" ITEM NOTE**

---

from: General Secretariat of the Council  
to: Permanent Representatives Committee / Council

---

No. prev. doc.: 10908/11 WTO 228 FDI 15 CODEC 950  
No. Cion prop.: 11953/10 WTO 252 FDI 12

---

Subject: Proposal for a Regulation of the European Parliament and of the Council  
establishing transitional arrangements for bilateral investment agreements  
between Member States and third countries  
- *Political agreement*

---

1. On 8 July 2010 the Commission submitted to the Council the above-mentioned proposal.
2. The European Parliament adopted its position at first reading during the plenary session on 10 May 2011<sup>1</sup>, putting forward a number of amendments to the Commission proposal.

---

<sup>1</sup> Doc. 9726/11 CODEC 749 WTO 195 FDI 12 PE 206.

3. The proposed Regulation and the amendments adopted by the European Parliament at first reading have been discussed on a number of occasions by the Trade Policy Committee (both at Full Members' and Services and Investment experts' level), as well as by the Foreign Affairs Council (Trade) on 13 May 2011 and 16 March 2012.
4. In accordance with paragraphs 16-18 of the Joint Declaration on Practical Arrangements for the Codecision Procedure<sup>2</sup>, the Presidency, operating under the mandate from Coreper<sup>3</sup>, has been involved in informal contacts with the European Parliament, with a view to reaching an agreement between the institutions at the stage of the Council's first reading. Subsequently, such agreement has been reached at the informal trilogue meeting on 29 May 2012.
5. The Chairman of the European Parliament's INTA Committee, Mr Vital Moreira, indicated in his letter of 31 May 2012 to the Chairman of Coreper-II that, should the Council transmit formally to the Parliament its position in the form as it stands in the annex to his letter, he would recommend to the plenary to accept the Council's position without amendments, subject to the legal-linguistic verification, at Parliament's second reading.
6. It is therefore suggested that the Permanent Representatives Committee submit the draft text of the Regulation concerned and the joint declaration, as set out in the Annexes 1 and 2 to this note, to the Council for political agreement.

---

<sup>2</sup> OJ C 145, 30.6.2007, p.5.

<sup>3</sup> Doc. 10908/11 WTO 228 FDI 15 CODEC 950.

**Outcome of the informal trilogue negotiations on the proposal for a  
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,

Whereas:

- (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.
- (2a) This Regulation does not prejudice the allocation of competences between the Union and its Member States in accordance with the Treaty.
- (3) At the time of the entry into force of the Treaty of Lisbon, Member States of the Union 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 have 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 investment policy, require appropriate management. That relationship will develop further as the Union exercises its competence.
- (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 should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection.

- (6) This Regulation addresses the status under the law of the Union of bilateral investment agreements of the Member States signed before the entry into force of the Lisbon Treaty. These agreements can be maintained in force, or enter into force, in accordance with this Regulation.
- (6a) This regulation also lays down the conditions under which Member States are empowered to conclude and / or maintain in force bilateral investment agreements signed between the entry into force of the Treaty of Lisbon and the entry into force of this Regulation.
- (7) Moreover, this Regulation lays down the conditions under which Member States are empowered to amend or conclude bilateral investment agreements with third countries after entry into force of the Regulation.
- (7a) Maintenance in force of investment agreements by Member States under this Regulation, or authorisations to open negotiations or conclude bilateral investment agreements with third countries, shall not prevent the negotiation or conclusion of future investment agreements by the Union.
- (8) Member States are required to take the necessary measures to eliminate incompatibilities, where they exist, with the law of the Union contained in bilateral investment agreements concluded between them and third countries. The implementation of this regulation is without prejudice to the application of Article 258 of the Treaty with respect to failures of Member States to fulfil obligations under the law of the Union.

- (11) The authorisation to amend or conclude agreements provided for by this Regulation notably allows Member States to address any incompatibilities between their international agreements relating to investment and the law of the Union, other than incompatibilities arising from the allocation of competences between the Union and its Member States, which are addressed in this Regulation.
- (12) No later than seven 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. This report should, inter alia, review the need for the continued application of Chapter III of this Regulation. Where the report recommends to discontinue the application of the provisions of Chapter III or where it would propose to modify these provisions, it may be accompanied if appropriate, by a legislative proposal.
- (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) Investment agreements between Member States should not be 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.

---

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

- (17) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011<sup>1</sup>.
- (18) Specifically, these powers should be conferred on the Commission given that the procedures set out in Articles 9, 11 and 14a empower Member States to act in areas of exclusive competence of the Union and decisions thereon must be taken at Union level.
- (19) The advisory procedure should be used for the adoption of authorisations pursuant to Articles 9, 11 and 14a, given that these authorisations are to be granted on the basis of clearly defined criteria established in the regulation.

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### Scope

#### Article 1

#### Subject matter and scope

1. Without prejudice to the division of competences established by the Treaty, this Regulation addresses the status of the bilateral investment agreements of the Member States under the law of the Union, and establishes the terms, conditions and the procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.

---

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

2. For the purpose of this Regulation the term "bilateral investment agreement" means any agreement with a third country that contains provisions on investment protection. This Regulation covers only those provisions of the bilateral investment agreements dealing with investment protection.

## CHAPTER II

### Maintenance in force of existing agreements

#### Article 2

##### Notification to the Commission

Within thirty days from the entry into force of this Regulation, or the date of their accession to the European Union, the Member States shall notify the Commission of all bilateral investment agreements with third countries signed before 1 December 2009 or the date of their accession, whichever is later, 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

##### Maintenance in force

Without prejudice to other obligations of the Member States under the law of the Union, agreements notified in accordance with Article 2 of this Regulation can be maintained in force, or enter into force, in accordance with the Treaty and this Regulation, until a bilateral investment agreement between the same third country and the Union enters into force.

Article 4  
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, Article 11(7) or Article 14a(6).
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  
Assessment

The Commission may assess the agreements notified pursuant to Article 2, by evaluating, whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union, in view of their progressive replacement.

Article 6  
Duty of cooperation

1. The Member States shall take any appropriate measures to ensure that the provisions contained in agreements notified pursuant to Article 2 of this Regulation do not constitute a serious obstacle to the negotiation or conclusion of future bilateral investment agreements with third countries by the Union, in view of their progressive replacement.

2. If the Commission establishes that one or more of the provisions contained in an agreement notified pursuant to Article 2 of this Regulation constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union, in view of their progressive replacement, the Commission and the Member State concerned shall enter into consultations expeditiously and cooperate with a view to identifying the appropriate actions to resolve this matter. The consultations shall take no longer than 90 days.
3. After the end of consultations, without prejudice to paragraph 1, the Commission may indicate within 60 days the appropriate measures to be taken by the Member State concerned in order to remove the obstacles as referred to in paragraph 2.

### 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 11, a Member State shall be authorised to enter into negotiations to amend an existing or to conclude a new bilateral investment agreement 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 or to conclude a new bilateral investment agreement with a third country, 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.
4. The notification referred to in paragraph 1 shall be transmitted at least five 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, or

- (b) be superfluous, because the Commission has submitted or decided to submit pursuant to Article 218(3) of the Treaty, a recommendation to open negotiations with the third country concerned, or
  - (c) be inconsistent with the Union's principles and objectives for external action as elaborated in accordance with the general provisions laid down in Chapter I of Title V of the Treaty on European Union, or
  - (d) constitute a serious obstacle to the negotiation or conclusion of future bilateral investment agreements with third countries by the Union.
2. As part of the authorisation referred to in paragraph 1, the Commission may require the Member State to include in or remove from such negotiation and prospective agreement any clauses necessary to ensure consistency with the Union's investment policy or compatibility with the law of the Union.
  3. Decisions on the authorisation referred to in paragraph 1 shall be taken in accordance with the advisory 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.
  4. The Commission shall inform the European Parliament and the Council about the decisions taken pursuant to paragraph 3.

5. In the event that authorisation is not granted pursuant to paragraph 1 of this article, the Commission shall inform the Member State concerned and explain the reasons therefore.

## 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.

## 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. This article shall also apply to agreements which were negotiated prior to the entry into force of this Regulation, but are not subject to the notification duty provided for in Article 2, or in Article 14a.
3. Upon notification the Commission shall make an assessment as to whether the negotiated agreement conflicts with the requirements under Article 9(1) and (2).
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. Articles 3, 5 and 6 of this Regulation apply to such agreements, as if they had been notified under Article 2 of this Regulation.

6. Decisions pursuant to paragraph 5 shall be taken in accordance with the advisory procedure referred to in Article 15(2). The Commission shall take the decision within 90 days of receipt of the notifications referred to in paragraphs 1 and 2. Where additional information is needed to take the decision, the 90 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, and of future changes to the status of this agreement.
8. The Commission shall inform the European Parliament and the Council about the decisions taken pursuant to paragraph 5.
9. In the event that authorisation is not granted pursuant to paragraph 5 of this article, the Commission shall inform the Member State concerned and explain the reasons therefore.

## CHAPTER IV

### Final provisions

#### Article 12

##### Review

1. No later than seven 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 Regulation.

2. The report referred to in paragraph 1 shall include an overview of authorisations requested and granted under Chapter III as well as a review of the need for a continued application of Chapter III.
3. Where the report referred to in paragraphs 1 and 2 recommends to discontinue the application of Chapter III or to modify its provisions, it shall be accompanied by an appropriate legislative proposal.

### 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 state 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 14a Agreements signed by the Member States between 1 December 2009 and the entry into force of this Regulation

1. Where a Member State, between 1 December 2009 and the entry into force of this Regulation, has signed a bilateral investment agreement with a third country, the Member State concerned shall notify the Commission of such agreements which they wish to maintain in force or permit to enter into force, within thirty days from the entry into force of this Regulation. The notification shall include a copy of such agreements.
2. Upon notification the Commission shall make an assessment as to whether the agreement notified pursuant to paragraph 1 conflicts with the requirements under Article 9 paragraphs 1 and 2.

3. Where the Commission decides that the agreement notified pursuant to paragraph 1 fulfils the requirements referred to in paragraph 2, maintenance in force or entry into force of such agreement shall be authorised under the law of the Union.
4. The Commission shall take the decisions referred to in paragraph 3 within 180 days of receipt of the notification referred to in paragraph 1. Where additional information is needed to take the decision, the 180 days shall run from the date of receipt of the additional information. Decisions pursuant to paragraph 3 shall be taken in accordance with the advisory procedure referred to in Article 15(2).
5. Unless the agreement has been authorised under paragraph 3, the Member State shall not take any further steps towards conclusion of the agreement, and shall withdraw or reverse those steps which have been taken.
6. Where an authorisation has been granted in accordance with paragraphs 3 and 4, the Member State concerned shall notify the Commission of the entry into force of the agreement and of any future changes to the status of such agreement. Articles 3, 5 and 6 shall apply to such agreements as if they had been notified under Article 2 of this Regulation.
7. The Commission shall inform the European Parliament and the Council about the decisions taken pursuant to paragraph 4.
8. In the event that authorisation is not granted pursuant to paragraphs 3 and 4 of this article, the Commission shall inform the Member State concerned and explain the reasons therefore.

Article 15  
Committee

1. The Commission shall be assisted by the Committee for the Investment Agreements.
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 Brussels, [...]

For the European Parliament  
The President

For the Council  
The President

\* \* \*

**Declaration by the European Parliament, the Council and the Commission**

The fact that this Regulation, including recitals 17, 18 and 19 provide for the use of the procedures referred to in Regulation (EU) No 182/2011 does not constitute a precedent as to future regulations allowing the Union to empower the Member States under Article 2(1) TFEU to legislate and adopt legally binding acts in areas of Union exclusive competence. Furthermore, in this Regulation, the use of the advisory as opposed to the examination procedure shall not be considered as setting a precedent for future regulations establishing the framework for the common commercial policy.

---

---