

EN

EN

EN



EUROPEAN COMMISSION

Brussels, 7.7.2010
COM(2010)344 final

2010/0197 (COD)

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The Treaty on the Functioning of the European Union (hereafter: "the TFEU") establishes the European Union's exclusive competence on foreign direct investment, as part of the common commercial policy (Article 207(1) and Article 3(1)(e)). In accordance with Article 2(1) of the TFEU, only the Union may legislate and adopt legally binding acts in an area where exclusive competence is conferred upon the Union.

Prior to the entry into force of the TFEU, Member States concluded more than 1000 bilateral agreements relating to investment with third countries, which relate in part or in full to foreign direct investment. Such agreements include Bilateral Investment Treaties (BITs) which provide *inter alia* guarantees on the conditions of investment in Member States and in third countries, in the form of specific commitments that are binding under international law.

Although agreements remain binding on the Member States as a matter of public international law, in the light of the entry into force of the TFEU the existence of Member States' agreements relating to investment and the commitments undertaken therein should be addressed from the perspective of the EU's exclusive competence on foreign direct investment.

In the absence of an explicit transitional regime in the TFEU clarifying the status of Member States' agreements, the present proposal for a Council and Parliament Regulation will authorise the continued existence of all investment agreements currently in force between Member States and third countries. As such, this proposal provides for an explicit guarantee of legal certainty as regards the conditions under which investors operate.

This approach, which reflects an evolutionary handling of the entry into force of the TFEU, much like the introduction of the common commercial policy in the 1960s,¹ allows for the gradual formulation and elaboration of an EU investment policy, which is to serve all investors and investments equally.

In recognition of the fact that Member States may be required or may find it necessary to amend or modify investment agreements, in particular to bring them in compliance with Treaty obligations, this proposal also establishes a framework and conditions to empower Member States to enter into negotiations with a third country with a view to modifying an existing bilateral agreement relating to investment. This framework is equally available to allow Member States to negotiate and conclude, under certain conditions set out by this proposal, a new bilateral agreement with third countries relating to investment. Given that the Union is exclusively competent for foreign direct investment, and that an EU investment policy will be gradually developed, the procedure established by this proposal must be regarded as an exceptional transitional measure.

¹ Council Decision of 9 October 1961 on the standardisation of the duration of trade agreements with third countries and Council Decision of 16 December 1969 on the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements.

This Regulation only addresses the transitional aspects of the management of the new EU competence on investment. The objectives, criteria and content of the new EU investment policy, to be developed on the basis of the newly-gained exclusive competence on foreign direct investment, is not addressed by this Regulation and is addressed in a separate Communication from the Commission to the European Parliament and the Council, adopted simultaneously with this proposal for a Regulation.

2. POLICY OPTIONS AND CONSULTATIONS WITH INTERESTED PARTIES

Taking into account the particular nature of the subject, the Commission evaluated a number of options to achieve the objective described above, although without carrying out a formal impact assessment. A meeting with experts from the Member States was held in Brussels on 25 January 2010 to discuss the status of bilateral agreements concluded between Member States and third countries relating to investment.

The extent to which investment agreements of Member States are incompatible with EU law can be the subject of discussions. The Commission is of the view that *any* legal uncertainty on the status and validity of these agreements, which could be detrimental for the activities of EU investments and investors abroad or foreign investments and investors in Member States, is to be avoided. Indeed, such uncertainty goes against the core rationale of investment protection, i.e. to provide legal certainty on the behaviour of host countries. In view of the situation that has arisen since the entry into force of the TFEU, swift and decisive action is therefore to be preferred over inaction or a delayed re-action.

Soft-law instruments, such as a declaration or statement by the Commission services or by the College on the status and validity of bilateral investment agreements, would not establish the legal certainty that is required to guarantee the agreements concerned. This is why a legal instrument is the preferred option.

This proposal maintains the status quo and offers a transitory solution by authorising the continued existence of bilateral agreements relating to investment concluded between Member States and third countries. The main impact of this proposal is to avoid a very negative result, i.e. the potential erosion of rights and benefits available to investors and investments under international investment agreements. In this respect, the impact of inaction is considered to be much higher than the impact of this action, which is neutral given that it preserves the status quo.

The authorisation provided in this proposal neither prejudices the contours of a future EU investment policy, nor allows the agreements covered to undermine the exercise of Union competence. In this respect, the authorisation granted pursuant to this proposal may be withdrawn, in accordance with the procedures specified therein. This procedure also takes account of the obligation of Member States to eliminate any incompatibilities with the TFEU that may exist in their existing agreements, as identified by the Court of Justice of the European Union.

3. LEGAL ELEMENTS OF THE PROPOSAL

The objective of this proposal is to authorise the continuation in force of international agreements relating to investment concluded between Member States and third countries and

to establish conditions and a procedural framework for the negotiation and conclusion by Member States of such agreements.

Chapter I sets out the subject matter and scope of the Regulation. Article 1 provides that the Regulation covers agreements between Member States and third countries relating to investment.

Chapter II provides for authorisation for existing bilateral agreements that Member States have concluded with third countries to remain in force.

Article 2 requires Member States to notify to the Commission of all agreements that they wish to maintain under the terms and conditions of the Regulation. Agreements which have been concluded but not entered into force would equally fall under Article 2.

Article 3 authorises the maintenance in force of all existing agreements between Member States and third countries relating to investment that have been notified by Member States, starting upon the entry into force of this Regulation. This authorisation is without prejudice to the obligations of Member States under the law of the Union.²

Article 4 provides for the annual publication of all notified agreements in the Official Journal, to ensure that the exact scope of the legal coverage provided by the Regulation is known by all stakeholders.

Article 5 provides for the review of agreements which have been notified. The review will identify quantitative and qualitative aspects of the agreements in place, as well as the possible obstacles the agreements could present to the implementation of the common commercial policy. In particular, the Commission will assess whether the agreements or provisions thereof conflict with the law of the Union, undermine negotiations or agreements relating to investment between the Union and third countries, or undermine the Union's policies relating to investment, including in particular the common commercial policy. No later than five years after the entry into force of this Regulation, the Commission will present a report based on the review of the agreements and any possible recommendations to discontinue the application of the provisions of Chapter II or to modify these provisions.

Article 6 details the possible withdrawal of the authorisation granted under this Chapter. A withdrawal of authorisation may be necessary for one or more agreements with a given third country when these agreements conflict with the law of the Union. Secondly, authorisation could be withdrawn where an agreement overlaps, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement. For example, reference is made to a scenario where the Union concludes a free trade agreement with a third country with provisions concerning investment and six Member States have an agreement in place with similar provisions concerning investment. If the agreement concluded by the EU with the third country does not provide for the replacement of the six agreements of the Member States with the third country, then Article 6 would be

² For recent case law, see judgments *C-205/06 and C-249/06* of 3 March 2009 and judgement *C-118/07* of 19 November 2009, in which the Court of Justice of the European Union found that specific provisions of Bilateral Investment Treaties concluded by Austria, Sweden and Finland were incompatible with the EC Treaty and that the Member States concerned had not taken the appropriate steps to eliminate those incompatibilities. The same or similar clauses exist in other BITs concluded either before or after accession to the Union. In its judgements, the Court has called upon the Commission to engage in the role of facilitator on these matters.

applicable. The Commission has set out in a Communication adopted in parallel with this proposal its views on the international investment policy that it intends to pursue, including the countries with which it contemplates, in an initial phase, to negotiate agreements concerning investment. Finally, the authorisation of one or more agreements could be withdrawn where an agreement undermines the Union's policies relating to investment, including in particular the common commercial policy (e.g. where the existence of agreements undermines the willingness of a third country to negotiate with the Union), or where the Council has not taken 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. Article 6 provides for consultation between the Commission and Member State(s) concerned through which the concerns giving rise to a possible withdrawal of authorisation are to be addressed.

Chapter III provides for the modification of existing agreements and the conclusion of new agreements. The procedural framework proposed is inspired by the empowerment mechanism set by *Regulation No 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non- contractual obligations* and *Regulation No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations*.³

Article 7 provides for the general framework under which Member States may conclude or modify bilateral agreements relating to investment.

Article 8 requires the notification to the Commission of a Member States' intent to modify an existing or to conclude a new bilateral agreement with a third country. Member States are requested to provide all relevant documentation relating to the re-negotiation or negotiation of an agreement, which can be made available to other Member States and the European Parliament subject to the requirements of confidentiality.

Article 9 details the substantive grounds on the basis of which the Commission would not authorise the opening of formal negotiations by Member States, which include notably the ground that a Member State initiative could undermine the objectives of EU negotiations or EU policy. The Commission may require a Member State to include in a negotiation appropriate clauses, for example with respect to (a) the termination of the agreement in the event of the conclusion of a subsequent agreement between the Union, or the Union and its Member States, on the one hand, with the same third country on the other hand (see for example the denunciation or replacement clauses set forth in Regulation 662/2009, Article 5), (b) transfer provisions or (c) most-favored nation treatment with a view to ensuring equal treatment of all EU investors in the relevant third country.

Article 10 requires that Member States keep the Commission informed of (re-)negotiations that have been authorised. In addition, the Commission may request to participate as an observer in the negotiations concerning investment between the Member State and the third country, to ensure full transparency and consistency with the Union's investment policy.

³ OJ L 200/52 of 31 July 2009, p. 25 and p. 46.

Article 11 deals with the end of the negotiating process and provides for the procedure and conditions under which Member States can be authorised to sign and conclude an agreement. Further to the notification of the agreement, which is to be submitted to the Commission before it is signed, the Commission assesses whether the agreement does not undermine imminent or ongoing EU investment negotiations or conflict with the obligations of EU law, including those under Part Three, Chapter 4 of Title V of the TFEU.

Article 12 provides for the review of authorisations that would be made pursuant to Chapter III of this Regulation. By reviewing the quantitative and qualitative aspects of the negotiations and agreements authorised, the Commission will assess the appropriateness of continuing the application of the provisions of Chapter III. The report and any possible recommendation to discontinue the application of the provisions of this Chapter or to modify these provisions will be presented no later than five years after the entry into force of the Regulation.

Chapter IV sets out certain requirements regarding the conduct of Member States with regard to agreements covered by this Regulation.

Article 13 requests Member States to provide information with respect to meetings which take place under the auspices of covered agreements. Furthermore, Member States are requested to inform the Commission of any request for dispute settlement lodged against themselves under the auspices of their agreements as soon as they become aware of such request and to co-operate with the Commission as regards the activation of dispute – which they would be allowed to lodge against another third country party to such agreement – or consultation mechanisms under an agreement.

Article 14 provides that Member States may indicate whether any of the information they provide in accordance with Articles 8 and 11 is to be considered confidential and whether it can be shared with other Member States.

Article 15 creates a new committee which shall assist the Commission in the management of the Regulation and stipulates the procedures under which this committee shall operate. This provision can be revised to bring it in line with the future regulation adopted pursuant to Article 291 TFEU on the control of the Commission's exercise of implementing powers.⁴ In the event that the present proposal is adopted before the regulation on the control of the Commission's exercise of implementing powers enters into force the Commission envisages that it will be automatically updated to refer to the regulation adopted pursuant to Article 291 by operation of that proposal.⁵

Article 16 provides that this Regulation enters into force 20 days following the day of its publication, which means that Chapter II applies to agreements in force before that date.

4. BUDGETARY IMPLICATION

The proposal has no implication for the EU Budget.

⁴ See Proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanism for control by Member States of the Commission's exercise of implementing powers, COM(2010) 83 final of 9 March 2010.

⁵ See Article 10 of the abovementioned Commission proposal.

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.
- (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 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.

- (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.
- (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 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 an exceptional 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.
- (9) Member States are required⁶ to take the necessary measures to eliminate incompatibilities, where they exist, with the law of the Union contained in Bilateral Investment Treaties concluded between them and third countries.
- (10) The Commission should be able to withdraw the authorisation if 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. The authorisation may also be withdrawn if an agreement of the Union in force with a third country contains investment provisions similar to those of a Member State agreement. In order to ensure that agreements of Member States do not undermine the development and implementation of the Union's policies relating to investment, including in particular of autonomous measures of common commercial policy, authorisation may be withdrawn. 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.
- (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 five 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 Chapters II and III of this Regulation. This report should, inter alia, review the need for the continued application of these chapters. Where the report recommends to discontinue the application of the provisions of these Chapters or where it would propose to modify these provisions, it should be accompanied by an appropriate legislative proposal. Unless replaced by an agreement of the Union concerning

⁶ For recent case law see judgments of the Court of Justice of the European Union in cases C-205/06, *Commission v. Austria*, C-249/06, *Commission v. Sweden*, and C-118/07, *Commission v. Finland*.

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 amend an existing or to conclude a new bilateral agreement with a third country should not in any case be allowed to constitute an obstacle to the implementation of the Union's policies relating to investment, in particular common commercial policy.
- (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.
- (15) Agreements between Member States relating to investment 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.
- (17) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁸,

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

⁷ OJ L 145, 31.5.2001, p. 43.

⁸ OJ L 184, 17.7.1999, p. 23.

concluded 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.

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

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 shall review the agreements notified pursuant to Article 2, including by assessing, in particular, 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, or
 - (b) overlap, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement, or
 - (c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy.
2. Consultation may take place between the Commission and the notifying Member State, either at the request of the Member State or on the initiative of the Commission, to facilitate the review referred to in paragraph 1.
3. No later than five 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 the continued application of this chapter, based on the review referred to in paragraph 1.

4. Where the report referred to in paragraph 3 recommends to discontinue the application of the provisions of this Chapter or to modify these provisions, it shall be accompanied by an appropriate legislative proposal.

Article 6

Withdrawal of authorisation

1. 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, or
 - (b) an agreement overlaps, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement, or
 - (c) an agreement constitutes an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy, 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 on the necessary steps to be taken to comply with the requirements referred to in paragraph 1. Consultations shall take place between the Commission and the Member State concerned.
3. Where the consultations referred to in paragraph 2 fail to resolve the matter, the Commission shall withdraw the authorisation for the agreement concerned. 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 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 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.
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) undermine the objectives of negotiations underway or imminent between the Union and the third country concerned, or
 - (c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy.
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.

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. 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:
 - (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, or
 - (b) undermine the objectives of negotiations underway or imminent between the Union and the third country concerned, or
 - (c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy, or
 - (d) conflict with the requirement of Article 9(2), where applicable.
4. Where the Commission finds that the negotiations have resulted in an agreement which does not fulfil the requirements referred to in paragraphs 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 paragraphs 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 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.

Article 12

Review

1. No later than five 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 the Chapter.
2. The report referred to in paragraph 1 shall include an overview of authorisations requested and granted under this Chapter.
3. Where the report referred to in paragraph 1 recommends to discontinue the application of this Chapter or to modify the provisions of this Chapter, it shall be accompanied by an appropriate legislative proposal.

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 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.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC 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