



EUROPEAN PARLIAMENT

2009 - 2014

Plenary sitting

A7-0148/2011

14.4.2011

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REPORT

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 (COM(2010)0344 – C7-0172/2010 – 2010/0197(COD))

Committee on International Trade

Rapporteur: Carl Schlyter

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**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
(COM(2010)0344 – C7-0172/2010 – 2010/0197(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2010)0344),
 - having regard to Article 294(2) and Article 207(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0172/2010),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on International Trade and the opinion of the Committee on Economic and Monetary Affairs (A7-0148/2011),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

POSITION OF THE EUROPEAN PARLIAMENT

AT FIRST READING*

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

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

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 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. ***The Commission shall 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 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.¹
- (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 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*²,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

Scope

Article 1

¹ OJ L 145, 31.5.2001, p. 43.

² *OJ L 55, 28.2.2011, p. 13.*

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

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 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 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 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, in accordance with 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(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 Brussels, [...]

For the European Parliament
The President

For the Council
The President

EXPLANATORY STATEMENT

Your rapporteur welcomes the implementation of Art 207(1) of the TFEU, providing for the exclusive competence of the EU on foreign direct investment, as part of the common commercial policy, which is the scope of the proposed Regulation. In a world of globalized transfers of goods and capital, and as a logical consequence of the common commercial policy of the Union, also the investment policy of Member States should be coordinated and decided on the level of the Union. This means that the present system embodied by a myriad of overlapping and sometimes conflicting Bilateral Investment Treaties (BITs) of the Member States has to be replaced - in a reasonable time span - by a new frame of modern EU investment treaties consistent with horizontal EU policy goals.

Given the risky and long-range nature of foreign direct investment, it must be regarded as an important task of the Regulation to provide for a high degree of legal certainty during the transition period. In this regard, your rapporteur strongly supports the co-existence approach of the Commission's Draft Regulation. It is indeed essential that by way of an authorization process the existing BITs of the Member States remain in place and that, under clear conditions, Member States are allowed to renegotiate existing BITs, finalize pending ones, and enter into negotiations for new ones. It is equally essential, under the condition of a period of co-existence, that the authorization of existing or newly negotiated BITs of Member States does not impede the emergence of a EU-wide investment policy and EU international investment treaties with certain third countries and generally. It should therefore be supported that the Regulation provides the faculty for the Commission to withhold an authorization, to request Member States to renegotiate or terminate a BIT, and to have the Commission's approval for newly negotiated BITs.

Legal certainty remains, however, a relative term as long as the transition of the investment protection regime is not completed, and given validity terms of existing BITs of Member States under international public law. Your rapporteur is intended to clarify legal certainty under the conditions of a necessary time span of transition, through two sets of amendments:

1) Introducing a timeline for the transition

Parliament should insist that the Regulation sets a timeline for the transition. Without a timeline, the Regulation would allow the emergence of parallel, potentially incompatible investment regimes, thus adding to legal uncertainty. While a sufficiently long transition is surely needed, an open-ended duality in the EU investment policy should be unacceptable for Parliament, given that Article 207(1) of the TFEU clearly states that investment policy is the competence of the Union. In this sense, an extended period of not implementing the Treaty could equally be challenged, again adding to legal uncertainty.

The review provisions in Art. 5 and 12 of the draft regulation - no later than 5 years after the entering into force of the Regulation the Commission will assess the need for a continued application of the possibility of Member States to re-negotiate BITs or enter into new ones - are not satisfactory. Parliament should make clear that it regards the co-existence of BITs with the emergence of EU international investment treaties as an exception, justified temporarily only for the reason of providing continued legal certainty.

2) Clarifying the conditions for withholding authorization

The draft Regulation suggests a distinction between three categories of reasons to withhold an authorization for a BIT.

Particularly, the distinction between "conflict with the law of the Union" (point a) and "overlap, in part or in full, with an agreement in force with that third country and this specific overlap is not addressed in the latter agreement" (point b) unnecessarily adds to uncertainty. It suggests that a future EU agreement with a third country could not address the overlap or allow for parallel regimes, which should not be accepted as a matter of principle. Moreover, the distinction is redundant since EU agreements in force with third countries are part of the law of the Union, and any BIT notified under Article 2 is automatically authorised under Article 3 and therefore not incompatible with the allocation of competences.

Your rapporteur suggests to move these two categories together in a clear reference to conflicts with the EU law.

On the other hand, the draft Regulation fails to make clear under the third category of reasons to withhold an authorization for a BIT (point c) what it is that may "constitute an obstacle to the development and the implementation of the Union's policies relating to investment". Since it refers to a policy in the making, also this adds to uncertainty.

Your rapporteur suggests referring to the developing body of mandates for investment negotiations with third countries to the Commission and the basic coherence principles in the Lisbon Treaty under Art. 3(5) and 6(1) of the TEU and Title II of Part I of the TFEU.

In the context of the developing new EU investment policy, the Rapporteur further suggests to add an obligation to Member States in the case of the re-negotiation of existing BITs or the negotiation of new BITs to provide for a dispute settlement mechanism ensuring that the Commission is allowed to participate in the proceedings at least as an *amicus curiae* and that confidentiality requirements are lifted so as to allow the Commission to intervene in this quality. This should be seen as an indispensable element of the new EU investment policy and the transition towards it.

In reference to the practices established under the North American Free Trade Agreement (NAFTA), it is widely acknowledged that the lack of transparency in the dispute settlement mechanisms established in most of the existing BITs of the Member States of the Union would constitute as such an incompatibility with Union law. This is, hence, a dimension Member States need to take into account in their negotiations of new BITs. In this regard, your rapporteur suggests to include a reference to 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.

1.3.2011

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

for the Committee on International Trade

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

(COM(2010)0344 – C7-0172/2010 – 2010/0197(COD))

Rapporteur: David Casa

AMENDMENTS

The Committee on Economic and Monetary Affairs calls on the Committee on International Trade, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a regulation Rectial 2 a (new)

Text proposed by the Commission

Amendment

(2a) In its Communication of 7 July 2010 entitled 'Towards a comprehensive European international investment policy' (COM(2010)0343), the Commission "explores how the Union may develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth".

Amendment 2

Proposal for a regulation

Recital 3

Text proposed by the Commission

(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.

Amendment

(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 ***foreign direct*** 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.

Amendment 3

Proposal for a regulation

Recital 4

Text proposed by the Commission

(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.

Amendment

(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 ***foreign direct*** investment, including in particular the common commercial policy, require appropriate management. That relationship will develop further as the Union exercises its competence.

Amendment 4

Proposal for a regulation

Recital 5

Text proposed by the Commission

(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*.

Amendment

(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 *foreign direct* investment *remain binding under public international law without prejudice to the right of the Commission to replace progressively existing direct foreign investment agreements with new agreements offering equal or better conditions to Member States*.

Amendment 5

Proposal for a regulation

Recital 6

Text proposed by the Commission

(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.

Amendment

(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 *foreign direct* investment.

Amendment 6

Proposal for a regulation

Recital 7

Text proposed by the Commission

(7) This Regulation lays down the conditions under which Member States are empowered to amend or conclude international agreements relating to investment.

Amendment

(7) This Regulation lays down the conditions under which Member States are empowered to amend or conclude international agreements relating to *foreign direct* investment.

Amendment 7

Proposal for a regulation

Recital 8

Text proposed by the Commission

(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.

Amendment

(8) As the authorisation to maintain, amend or conclude ***foreign direct investment*** 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.

Amendment 8

Proposal for a regulation

Recital 9 a (new)

Text proposed by the Commission

Amendment

(9a) Member States should ensure that bilateral investment treaties are fully compatible with the Union principle of policy coherence for development.

Justification

The Commission is very clear in the explanatory memorandum of its proposal. Given that the EU is exclusively competent for Foreign Direct Investment, the procedure established by the proposal must be regarded as an exceptional transitional measure. Member States are entitled to renegotiate the notified Bilateral Investment Treaties if they fulfil the obligations set out in the Draft Regulation. Member States should make sure that Bilateral Investment Treaties between them and developing countries are fully compatible with the EU principle of policy coherence for development.

Amendment 9

Proposal for a regulation

Recital 10

Text proposed by the Commission

(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.

Amendment

(10) The Commission should be able to withdraw the authorisation if **a foreign direct investment** agreement conflicts with the law of the Union, **including respect for the protection of human rights and social and environmental legislation**, *save where* the incompatibilities *arise* from the allocation of competence between the Union and its Member States. **Such authorisations should be withdrawn only following a request by the Commission for the Member State to renegotiate the foreign direct investment agreement with which the Member State has failed to comply.** *It should also be possible to withdraw* **the** authorisation if **a foreign direct investment** agreement of the Union in force with a third country contains investment provisions **that are equivalent in substance** to those of a Member State **foreign direct investment** 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.

Amendment 10

Proposal for a regulation Recital 11

Text proposed by the Commission

(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.

Amendment

(11) The authorisation to amend or conclude ***foreign direct investment*** agreements provided for by this Regulation notably allows Member States to address any incompatibilities between their international agreements relating to ***foreign direct*** 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.

Amendment 11

Proposal for a regulation Recital 12

Text proposed by the Commission

(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 investment, or otherwise terminated, bilateral agreements concluded by Member States with third countries remain binding on the parties under public international law.

Amendment

(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 ***foreign direct*** investment, or otherwise terminated, bilateral ***foreign direct investment*** agreements concluded by Member States with third countries remain binding on the parties under public international law. ***An***

indicative timeline should be set that contemplates when the transition from the existing bilateral investment treaties of Member States to Union international investment treaties might be completed.

Amendment 12

Proposal for a regulation Recital 13

Text proposed by the Commission

(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.

Amendment

(13) Agreements *on foreign direct investment* 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 *foreign direct* investment, in particular common commercial policy.

Amendment 13

Proposal for a regulation Recital 15

Text proposed by the Commission

(15) Agreements between Member States relating to investment *should not be* covered by this Regulation.

Amendment

(15) Agreements between Member States relating to investment *are* not covered by this Regulation.

Amendment 14

Proposal for a regulation Article 1

Text proposed by the Commission

This Regulation establishes the terms, conditions and the procedure under which Member States are authorised to maintain

Amendment

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.

in force, amend or conclude bilateral agreements with third countries relating to **foreign direct investment ('FDI')**. **FDI includes any foreign investment which serves to establish lasting and direct links with an undertaking to which capital is made available in order to carry out an economic activity. Where FDI takes the form of a shareholding, those lasting and direct links are the ability of the shareholder to participate effectively in the management or control of the undertaking concerned. FDI does not include foreign investments where there is no intention to influence the management or control of an undertaking. Such investments which are often of a more short-term, and sometimes of a more speculative, nature, are commonly referred to as portfolio investments.**

Amendment 15

Proposal for a regulation Article 2

Text proposed by 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 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.

Amendment

Within *30* 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 **FDI** concluded before the entry into force of this Regulation that **will** either **remain** in force or **be permitted** to enter into force under this Chapter. The notification shall include a copy of those bilateral agreements.

Amendment 16

Proposal for a regulation Article 3

Text proposed by the Commission

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.

Amendment

Notwithstanding the Union's competences relating to **FDI** 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 **FDI** that have been notified in accordance with Article 2 of this Regulation.

Amendment 17

Proposal for a regulation Article 5 – paragraph 1 – point c

Text proposed by the Commission

(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.

Amendment

(c) constitute an obstacle to the development and the implementation of the Union's policies relating to **FDI**, including in particular the common commercial policy;

Amendment 18

Proposal for a regulation Article 5 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) are compatible with the Union principle of policy coherence for development.

Justification

The Commission is very clear in the explanatory memorandum of its proposal. Given that the EU is exclusively competent for Foreign Direct Investment, the procedure established by the proposal must be regarded as an exceptional transitional measure. Member States are

entitled to renegotiate the notified Bilateral Investment Treaties if they fulfil the obligations set out in the Draft Regulation. Member States should make sure that Bilateral Investment Treaties between them and developing countries are fully compatible with the EU principle of policy coherence for development.

Amendment 19

Proposal for a regulation

Article 5 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

On the basis of the review referred to in paragraph 1, the Commission shall notify the Member State of any reason that could constitute a cause for withdrawal of the authorisation provided for in Article 3.

Amendment 20

Proposal for a regulation

Article 5 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. On the basis of the review referred to in paragraph 1, the Commission shall issue a Communication identifying best practices. It shall also issue a model bilateral investment treaty that Member States may use, in part or in full, in order to facilitate the negotiation of such treaties.

Amendment 21

Proposal for a regulation

Article 6 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) an agreement is incompatible with the Union principle of policy coherence for development; or

Justification

The Commission is very clear in the explanatory memorandum of its proposal. Given that the EU is exclusively competent for Foreign Direct Investment, the procedure established by the proposal must be regarded as an exceptional transitional measure. Member States are entitled to renegotiate the notified Bilateral Investment Treaties if they fulfil the obligations set out in the Draft Regulation. Member States should make sure that Bilateral Investment Treaties between them and developing countries are fully compatible with the EU principle of policy coherence for development.

Amendment 22

Proposal for a regulation Article 6 – paragraph 3

Text proposed by the Commission

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.

Amendment

3. Where the consultations referred to in paragraph 2 fail to resolve the matter, the Commission shall withdraw the authorisation for the agreement concerned. ***Such a withdrawal of authorisation shall not occur until at least one year has elapsed from the date of delivery of the reasoned opinion referred to in paragraph 2.*** 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.

Amendment 23

Proposal for a regulation Article 7

Text proposed by the Commission

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.

Amendment

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 ***FDI*** with a third country.

Amendment 24

Proposal for a regulation Article 8 – paragraph 1

Text proposed by 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.

Amendment

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 **FDI**, it shall notify the Commission of its intentions in writing.

Amendment 25

Proposal for a regulation Article 8 – paragraph 4

Text proposed by the Commission

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.

Amendment

4. The notification referred to in paragraph 1 shall be transmitted at least **two** calendar months before formal negotiations are to commence with the third country concerned.

Amendment 26

Proposal for a regulation Article 9 – paragraph 1 – point c

Text proposed by the Commission

(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.

Amendment

deleted

Amendment 27

Proposal for a regulation
Article 9 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) be incompatible with the Union principle of policy coherence for development.

Justification

The Commission is very clear in the explanatory memorandum of its proposal. Given that the EU is exclusively competent for Foreign Direct Investment, the procedure established by the proposal must be regarded as an exceptional transitional measure. Member States are entitled to renegotiate the notified Bilateral Investment Treaties if they fulfil the obligations set out in the Draft Regulation. Member States should make sure that Bilateral Investment Treaties between them and developing countries are fully compatible with the EU principle of policy coherence for development.

Amendment 28

Proposal for a regulation
Article 9 – paragraph 3

Text proposed by the Commission

Amendment

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.

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 **35** days of receipt of the notification referred to in Article 8. Where additional information is needed to take a decision, the **35** days shall run from the date of receipt of the additional information.

Amendment 29

Proposal for a regulation
Article 10

Text proposed by the Commission

Amendment

The Commission shall be kept informed of the progress and results throughout the

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*.

different stages of negotiations and may request to participate in the negotiations between the Member State and the third country concerning *FDI*.

Amendment 30

Proposal for a regulation Article 11 – paragraph 3 – point c

Text proposed by the Commission

(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

Amendment

deleted

Amendment 31

Proposal for a regulation Article 13 – paragraph 2

Text proposed by the Commission

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.

Amendment

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 *the* necessary measures to ensure an effective defence. The Commission *shall participate* in the procedure.

Justification

The EU has an exclusive competence when it comes to Foreign Direct Investment (FDI). It is thus necessary that the Commission, concerning FDI, is not only standing in procedures against the EU, but also in procedures started against individual Member States. A parallel can be drawn with the dispute settlement strategy in the World Trade Organization, in which the EU is also standing in cases falling under its competence, but which are brought against individual Member States.

PROCEDURE

Title	Transitional arrangements for bilateral investment agreements between Member States and third countries	
References	COM(2010)0344 – C7-0172/2010 – 2010/0197(COD)	
Committee responsible	INTA	
Opinion by Date announced in plenary	ECON 7.9.2010	
Rapporteur Date appointed	David Casa 6.9.2010	
Discussed in committee	10.1.2011	10.2.2011
Date adopted	28.2.2011	
Result of final vote	+	29
	-	2
	0	2
Members present for the final vote	Burkhard Balz, Sharon Bowles, Udo Bullmann, Pascal Canfin, Nikolaos Chountis, George Sabin Cutaş, Leonardo Domenici, Derk Jan Eppink, Markus Ferber, Vicky Ford, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sylvie Goulard, Gunnar Hökmark, Wolf Klinz, Jürgen Klute, Rodi Kratsa-Tsagaropoulou, Philippe Lamberts, Werner Langen, Astrid Lulling, Hans-Peter Martin, Ivári Padar, Anni Podimata, Antolín Sánchez Presedo, Edward Scicluna, Theodor Dumitru Stolojan, Kay Swinburne, Corien Wortmann-Kool	
Substitute(s) present for the final vote	Thijs Berman, David Casa, Sari Essayah, Robert Goebbels, Carl Haglund, Olle Ludvigsson, Gay Mitchell, Gianluca Susta	

PROCEDURE

Title	Transitional arrangements for bilateral investment agreements between Member States and third countries			
References	COM(2010)0344 – C7-0172/2010 – 2010/0197(COD)			
Date submitted to Parliament	7.7.2010			
Committee responsible Date announced in plenary	INTA 7.9.2010			
Committee(s) asked for opinion(s) Date announced in plenary	ECON 7.9.2010			
Rapporteur(s) Date appointed	Carl Schlyter 17.3.2010			
Discussed in committee	30.8.2010	2.12.2010	25.1.2011	3.3.2011
Date adopted	13.4.2011			
Result of final vote	+: -: 0:	15 13 0		
Members present for the final vote	William (The Earl of) Dartmouth, Laima Liucija Andrikienė, Kader Arif, David Campbell Bannerman, Daniel Caspary, Marielle De Sarnez, Christofer Fjellner, Metin Kazak, Bernd Lange, David Martin, Emilio Menéndez del Valle, Vital Moreira, Paul Murphy, Godelieve Quisthoudt-Rowohl, Helmut Scholz, Peter Štátný, Robert Sturdy, Gianluca Susta, Keith Taylor, Iuliu Winkler, Pablo Zalba Bidegain, Paweł Zalewski			
Substitute(s) present for the final vote	Catherine Bearder, George Sabin Cutaș, Mário David, Elisabeth Köstinger, Jörg Leichtfried, Carl Schlyter			
Substitute(s) under Rule 187(2) present for the final vote	Sajjad Karim, Véronique Mathieu			
Date tabled	14.4.2011			