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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the application of Regulation (EU) No 1219/2012 establishing transitional
arrangements for bilateral investment agreements between Member States and third
countries**

1. Introduction

Following the entry into force of the Lisbon Treaty on 1 December 2009, the Union acquired exclusive competence on foreign direct investment. Prior to that date, Member States had negotiated and concluded a significant number of bilateral investment agreements covering provisions on investment protection for foreign direct investment with third countries over several decades. While these agreements continued to be valid under public international law, it was considered desirable to clarify their relationship with Union law and policy and to provide legal certainty. It was considered appropriate to maintain in force such agreements until they be progressively replaced by investment agreements of the Union. There was also a need for laying down the relevant procedures and conditions under which Member States would be empowered to conclude new or amend existing agreements with third countries.

Against this background, the European Parliament and the Council adopted Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries¹. The Regulation entered into force on 9 January 2013.

As foreseen by Article 15 of the Regulation, this Commission report to the European Parliament and the Council provides a description of the Regulation and its implementation during the period 9 January 2013 to 31 December 2019. In accordance with Article 15, the report also presents an overview of the notifications received from the Member States and of the authorisations granted by the Commission. Pursuant to Article 15(2), the report also addresses the question of whether there is a need for a continued application of the authorisation mechanism set out in Chapter III of the Regulation.

In line with its commitment to ensure a high level of transparency of the EU trade and investment policy, the Commission announced on 18 February 2020 its intention to henceforth publish all Commission Implementing Decisions on authorisations granted to Member States for bilateral investment agreements. The Decisions are published on the website of DG Trade. Previously, the European Parliament and the Council had already been kept regularly informed through reporting by the Commission about the authorisations granted to the Member States.

2. Description of the Regulation

“Grandfathered” agreements

The Regulation clarifies the legal status of the bilateral investment agreements signed by Member States *before* the entry into force of the Lisbon Treaty, or before their date of accession to the EU, by setting out a mechanism (see Chapter II, Articles 2 to 6) for Member States to notify all agreements, which they wished to maintain in force (or permit to enter into force). This process is also referred to as “grandfathering”. The Regulation refers to the process of progressive replacement of bilateral investment agreements by Union-level agreements and further stipulates that bilateral agreements can be maintained in force until an agreement between the Union and the same third country enters into force.

¹ OJ L 351, 20.12.2012, p. 40.

Conditions for authorising negotiation, signature and conclusion of new agreements

Articles 7 to 11 lay down the procedure and conditions under which Member States may be authorised to enter into negotiations with a third country to amend an existing bilateral investment treaty or conclude a new one, and to sign and conclude such agreement. Article 12 sets out arrangements for authorising Member States to conclude or maintain in force bilateral investment agreements which had been signed *after* the entry into force of the Lisbon Treaty and *before* the entry into force of the Regulation (i.e. between 1 December 2009 and 9 January 2013).

An authorisation cannot be granted if an EU-level investment negotiation is already ongoing with the same third country or if the Commission has submitted (or has decided to submit) a recommendation to open such a negotiation. Other conditions for the Commission to grant an authorisation to a Member State to open negotiations with a third country are: the agreement is compatible with Union law and the allocation of competences between the Union and the Member States; the agreement is consistent with the Union's principles and objectives for external action and the agreement does not constitute a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union.

The Commission grants its authorisation decisions in accordance with the advisory procedure. Commission Implementing Decisions are needed for both the opening of the negotiations (Article 9 procedure) and signature and conclusions of the bilateral investment agreements (Article 11 procedure) by the Member States.

Conduct of Member States under the bilateral investment treaties

Article 13 of the Regulation sets out cooperation arrangements between the Commission and the Member States in relation to the operation of the bilateral investment treaties, including with regard to their dispute settlement mechanisms. Member States are required to inform and cooperate with the Commission in case they receive a request for consultation or a notice of claim from an investor or a third country under a bilateral investment treaty covered by the Regulation, or if Member States intend to activate dispute settlement proceedings against a third country.

3. Implementation of the Regulation

3.1 “Grandfathered” pre-Lisbon agreements

Following the entry into force of the Regulation, Member States notified 1,360 pre-Lisbon bilateral investment agreements, which they wished to maintain or permit to enter into force. The list of the grandfathered bilateral investment agreements was published in the *Official Journal* on 8 May 2013.² This list is kept updated through regular publications³.

This list shows that Member States had been concluding bilateral investment agreements over several decades. It is also apparent from the list that the number of agreements concluded by

² OJ C 131. It should be noted that the published list did not yet take into account the accession of Croatia to the EU (which took effect on 1 July 2013). The above-mentioned figure of 1,360 grandfathered bilateral investment agreements, however, is based on all Article 2 notifications received from Member States (including Croatia's notifications tabled after its accession).

³ The most recent list of bilateral investment agreements was published on 13 June 2019 (OJ C 198). It takes also into account new agreements concluded since 2013 as well as agreements that have expired, been terminated or not been renewed since 2013. The current figure stands at 1,286 agreements.

each Member State varies considerably: Member States in 2013 with the largest number of concluded agreements were Germany (123), Italy (113), France (93), UK (93), the Netherlands (86), Belgium and Luxembourg (81), and Spain (63).

Similarly, the geographical distribution of agreements is diverse and no overall pattern can be discerned. Several Member States are major capital exporters and therefore concluded bilateral investment agreements with third countries in several parts of the world since the 1960s. Member States in Central and Eastern Europe concluded bilateral investment agreements during the period of political and economic transition in the 1980s and 1990s, in particular with OECD countries (e.g. Australia, Canada, Norway, Switzerland and the US). Many Member States have also concluded bilateral investment agreements with various countries of the former Soviet Union (including Kazakhstan, Russia and Ukraine) and with the countries of the Western Balkans. Almost all Member States have entered into bilateral investment agreements with China and Korea. A substantial number of agreements was also concluded with Southern Mediterranean countries (e.g. Algeria, Egypt, Morocco, Tunisia), Turkey, several Latin American countries (e.g. Argentina, Chile, Paraguay and Peru) and some Gulf States (Iran, Kuwait, Qatar, United Arab Emirates and Saudi Arabia) as well as with various Asian (India, Indonesia) and African countries (such as Angola, Nigeria and South Africa).

For reasons of transparency and in accordance with Article 4 of Chapter II of the Regulation, the Commission annually publishes an updated and consolidated list⁴ of all bilateral investment agreements that have been signed and concluded by the Member States.

3.2 *Notified requests and authorisations granted*

Requests for authorisation to open formal negotiations (Article 9)

During the period 2013 to 2019, the Commission:

- received a total of 304 requests to authorise the opening of formal negotiations on new bilateral investment agreements or amendments to existing agreements;
- granted 241 authorisations, of which 164 were for new agreements and 77 for amendments to existing agreements;
- rejected six requests on the grounds that they concerned agreements with third countries already covered by EU-level investment negotiations;
- 22 notifications were withdrawn by the Member States during the authorisation procedure.

As of 31 December 2019:

- 27 authorisation procedures were pending as Member States had been requested by the Commission to provide additional information on the agreements for which they sought an authorisation;

⁴ During the reporting period, the respective annual lists were published on 5 June 2014 (OJ C 169), 24 April 2015 (OJ C 135), 27 April 2016 (OJ C 149), 11 May 2017 (OJ C 147) and 27 April 2018 (OJ C 149).

- the decision-making process was ongoing in relation to eight requests for authorisation.

Requests for authorisation to conclude a new agreement or amendment (Article 11)

During the period 2013 to 2019:

- a total of 76 requests to authorise the signing and conclusion of a newly negotiated agreement or an amendment to an existing agreement was notified by the Member States;
- the Commission granted a total of 48 authorisations under Article 11, of which 24 authorisations were for new agreements and 24 for amendments. Three requests were withdrawn by Member States during the authorisation procedure.

As of 31 December 2019, 25 authorisation procedures were pending as Member States had been requested by the Commission to provide additional information on the agreements for which they sought an authorisation.

Requests for authorisation of agreements signed between the entry into force of the Lisbon Treaty and the entry into force of the Regulation (Article 12)

- Member States notified 62 requests for authorisation of agreements signed between 1 December 2009 and 9 January 2013 as stipulated in Article 12.
- The Commission granted 33 authorisations under Article 12 of which 16 were for new agreements and 17 for protocols amending existing agreements.

As of 31 December 2019, the remaining 29 authorisation procedures were pending as Member States had been requested to provide additional information.

Evolution of authorisations granted

The table below shows the evolution of authorisations granted under Articles 9, 11 and 12 over the reporting period 2013-2019:

| Authorisations <u>granted</u> under Articles 9, 11 and 12 (2013 – 2019) | | | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------|
| | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
| Article 9 - <u>Authorisations to negotiate:</u> | | | | | | | | |
| New BIAs ⁵ | 44 | 49 | 1 | 8 | 49 | 2 | 11 | 164 |
| Amendments | 28 | 13 | - | 5 | 23 | - | 8 | 77 |
| Total | 72 | 62 | 1 | 13 | 72 | 2 | 19 | 241 |

⁵ BIAs corresponds to “Bilateral Investment Agreements”.

| Authorisations <u>granted</u> under Articles 9, 11 and 12 (2013 – 2019) | | | | | | | | |
|--|-------------|-------------|-------------|-------------|-------------|-------------|-------------|--------------|
| | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | Total |
| Article 11 - Authorisations to <u>conclude</u>: | | | | | | | | |
| New BIAs | 8 | 5 | 1 | 3 | 3 | 2 | 2 | 24 |
| Amendments | 7 | 10 | 4 | - | - | 1 | 2 | 24 |
| Total | 15 | 15 | 5 | 3 | 3 | 3 | 4 | 48 |
| Article 12 - Authorisations: | | | | | | | | |
| For new BIAs | 15 | 1 | - | - | - | - | - | 16 |
| For Amendments | 17 | - | - | - | - | - | - | 17 |
| Total | 32 | 1 | - | - | - | - | - | 33 |
| Total number of Authorisations under Articles 9, 11 and 12 | | | | | | | | 322 |

As shown in the table, there was a high number of authorisation requests and authorisations granted - notably to launch new negotiations (Article 9) - during the first two years of implementation of the Regulation in 2013 and 2014. However, there were very few authorisations in 2015. This period coincided with EU policy discussions and developments on a reformed approach to investment policy. Most authorisation procedures were put on hold during that period. Requests for authorisations picked up again in the following years though with a significant drop again in 2018. The relatively high number of authorisations in 2017 and 2019 is partly due to some Member States requesting authorisations for opening multiple negotiations with different third countries.⁶

It is worth highlighting the relatively small number of 48 authorisations to sign and *conclude* investment agreements under Article 11 (broken down into 24 new agreements and 24 amendments to existing agreements) during the seven years of implementation of the Regulation. Thus, most of the negotiations that have been authorised under the Regulation have in fact not yet been concluded. The figures suggest that the negotiation and conclusion of investment negotiations are lengthy processes: so far 40 additional bilateral investment agreements have been signed under the Regulation (of which 16 under the specific procedure of Article 12).

Most of the requests for authorisation under the Regulation originated from the Czech Republic, Hungary, Italy, Lithuania, Malta, Portugal, Romania, Slovak Republic and Spain. As concerns the third country coverage of the 442 notifications received for new bilateral

⁶ Spain for 22 amendments and the Slovak Republic for 34 bilateral investment agreements in 2017, the Netherlands for 8 amendments and two bilateral investment agreements in 2019.

investment agreements under Articles 9, 11 and 12, the picture is mixed and no specific geographical trends can be extrapolated.⁷ The third countries with the highest number of notification requests from Member States include, *inter alia*, Iran, Kazakhstan, Nigeria, Saudi Arabia, Qatar and United Arab Emirates.

To ensure consistency between bilateral investment agreements and EU investment policy, the authorised bilateral investment agreements or amendments to existing agreements need to include the key elements and standards of the EU's reformed approach. In this context, it is important to note that during the seven-year period of implementation of the Regulation, the EU's investment protection policy has undergone substantial reform and developments. In 2015, following the debate on Transatlantic Trade and Investment Partnership (TTIP) the Commission presented its reformed standard for all subsequent EU investment protection negotiations.

Since then, the EU has undertaken initiatives both at the bilateral and multilateral level to reform the investor-to-State dispute settlement system. In its bilateral investment agreements with third countries, the EU has replaced traditional *ad hoc* arbitration between investors and States with a more permanent model of dispute settlement inspired by existing international courts, i.e. the Investment Court System ("ICS"). The ICS tribunals are composed of adjudicators appointed for a fixed term by the Parties to the agreement and subject to the highest standards of competence, independence and impartiality. ICS proceedings are also subject to high transparency requirements, including publication of the litigation documents and allowing the possibility of intervention by third parties.

It should be noted, however, that the Investment Court Systems established under EU agreements are intended to be transitional and to be replaced by a multilateral investment dispute settlement mechanism once such a mechanism enters into force. Indeed, the EU is currently pursuing at the multilateral level within the United Nations Commission for International Trade Law ("UNCITRAL")⁸, a project for the establishment of a Multilateral Investment Court which would apply to future and existing bilateral investment treaties, including in force between EU Member States and third countries.

For the time being, the EU's reformed approach on investment protection and investment dispute settlement is reflected as much as possible in the Commission's decisions authorising the conclusion of new bilateral investment agreements of Member States with third countries. In relation to the investment protection standards, it includes: the affirmation of the right to regulate; a clear circumscription of the fair and equitable treatment standard; a clear definition of direct and indirect expropriation; the prohibition of investment enhancement by lowering or relaxing domestic environmental or labour legislation or standards, or by failing to effectively enforce such legislation and standards; and a reference to human rights and sustainable development and promotion of internationally recognised standards of corporate social responsibility, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

As regards investment dispute settlement, it includes: a code of conduct for tribunal members; rules on transparency; commitments to make disputes subject to a future multilateral investment court; and provisions on the applicable law ensuring preservation of the autonomy

⁷ Looking at all authorisation requests received under Articles 9, 11 and 12, third countries have at most received five negotiation requests by Member States.

⁸ https://uncitral.un.org/en/working_groups/3/investor-state

of the EU legal order. In view of the pursued objective of replacing the Member States' bilateral investor-to-State dispute settlement provisions by a Multilateral Investment Court, and considering the potential resource implications of setting up distinct Investment Court Systems in all Member States' bilateral investment treaties, the Commission does not for the time being request EU Member States to set up ICSs in their bilateral investment treaties. Rather, the objective of establishing a multilateral investment court is pursued through the Member States' negotiating commitments with their treaty partners to use the multilateral investment court in the future.

Member States must also ensure that the new or revised bilateral investment agreements are compatible with EU law (Article 9(2)) and that none of the provisions prevents Member States from fulfilling their obligations resulting from their membership of the European Union.⁹ The Commission recommends the inclusion of a so-called "regional economic integration organisation" clause (REIO) to that end.

Under Article 13 of the Regulation, the Commission has the possibility to intervene in cases where Member States act as respondents. Among the disputes that have been notified by Member States under Article 13, the Commission has so far intervened or sought to intervene in three cases: one concerning state aid questions, one relating to the EU single resolution mechanism and another concerning the implementation by a Member State of the EU energy policy framework. Given the links of these cases to established EU policies, the objective of the Commission's interventions is to clarify the EU legal framework and procedures in connection with the facts of the disputes. In another case, the Commission authorised a Member State to activate dispute settlement proceedings against a third country, though the case was eventually not pursued by the Member State in question.

4. Review of the need for continued application of Chapter III of the Regulation

The overall objective of the Regulation to set out the necessary transitional arrangements for bilateral investment agreements by Member States until such time they be progressively replaced by Union-level investment agreements continues to be relevant.

Since the entry into force of the Regulation, the Union has concluded the negotiations of four agreements covering investment protection, i.e. with Canada, Mexico, Singapore and Vietnam. None of the investment protection provisions have entered into force yet¹⁰. Upon entry into force, these four agreements will replace a total of 57 investment agreements concluded by Member States. Investment negotiations at EU-level are currently also ongoing with a number of third countries such as China, Chile, Indonesia, Japan and Tunisia.¹¹

Given the Member States' demand for concluding new or amending existing investment agreements and considering that the replacement by EU investment agreements will take some time, there exists a need to continue operating the transitional arrangements set out under Regulation (EU) No 1219/2012. This is confirmed by the fact that during the reporting

⁹ BITs between Member States and the countries that are candidates for the accession to the EU are authorised under the condition that they will be immediately terminated in case of eventual accession. This is in light of the Achmea judgement (C-284/16).

¹⁰ CETA and the Singapore Investment Protection Agreement are still in the process of ratification by Member States. The European Parliament gave its consent to the EU-Vietnam Investment Protection Agreement on 12 February 2020 and the Agreement is still subject to ratification by Member States. The text of the modernised EU-Mexico Association Agreement is close to finalisation.

¹¹ For the full list, see: <https://trade.ec.europa.eu/doclib/html/118238.htm>

period, the Commission received a constant flow – albeit with some fluctuations – of requests from Member States for bilateral investment agreements. Some Member States submitted a considerable number of requests under Chapter III and the geographical diversity in the network of third countries suggests that bilateral investment agreements are seen to be a useful tool for Member States to pursue economic opportunities and particular interests and priorities in cases where there is limited interest of the Union.

Looking ahead, it is encouraging that several Member States¹² either have already reviewed or are in the process of reviewing their model texts of bilateral investment treaties with a view to replacing older bilateral investment agreements with new ones reflecting modernised standards in line with the EU's reformed investment policy. In this context, Chapter III of the Regulation not only provides the necessary tools to formally authorise such bilateral initiatives based on criteria that reflect the most recent EU investment policy standards, but also allows for mechanisms to ensure a policy dialogue between the Commission and Member States.

Importantly, Chapter III can be seen as an effective instrument for Member States to promote the EU's reformed investment policy approach and standards worldwide. Member States have the opportunity to act as advocates of the modernised EU standards in regions where there is no Union agreement. The Commission continues to encourage Member States to modernise their older agreements to ensure overall consistency with the EU approach. Given that Member States also include in their new or amended bilateral investment treaties provisions to ensure the application of a future multilateral dispute settlement mechanism to disputes under such agreements, these agreements and the Member States' active support for the multilateral investment court in UNCITRAL discussions, thus also constitute a useful vehicle to promote the application of such a new multilateral mechanism once it enters into force.

Against this backdrop, the Commission recommends continuing the application of Chapter III under the Regulation.

¹² For example, the Netherlands adopted a new model bilateral investment agreement text in 2019 as a basis for renegotiating their old agreements. Several other Member States are currently working on similar initiatives.