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The International Comparative Legal Guide to:

International Arbitration 2013

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A practical cross-border insight into international arbitration work

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Preface:

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General Chapters:

1	**New Seats – New Challenges** – Kate Davies & Valeriya Kirsey, Wilmer Cutler Pickering Hale and Dorr LLP	1
2	**The Use of Section 1782 Applications in aid of International Arbitration** – Marc S. Palay & Katherine von der Weid, Sidley Austin LLP	12
3	**Mandatory Arbitration and Consumer Class Actions in Canada and the United States** – Lawrence Thacker, Lenczner Slaght	18
4	**The New EU Policy on Foreign Direct Investment** – Karel Daele, Mishcon de Reya	24

Asia Pacific:

5	**Overview**	Dr. Colin Ong Legal Services: Dr. Colin Ong	31
6	**Australia**	Ashurst Australia: Georgia Quick & Peter Ward	42
7	**Brunei**	Dr. Colin Ong Legal Services: Dr. Colin Ong	53
8	**China**	Boss & Young, Attorneys at Law: Dr. Xu Guojian	62
9	**Hong Kong**	Clayton Utz in association with Haley & Co: Glenn Haley & Patrick Daley	73
10	**India**	Kachwaha and Partners: Sumeet Kachwaha & Dharmendra Rautray	85
11	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Sahat A.M. Siahaan & Ulyarta Naibaho	94
12	**Japan**	Anderson Mori & Tomotsune: Aoi Inoue	104
13	**Singapore**	Baker & McKenzie.Wong & Leow: Gerald Kuppusamy & Jennifer Fong	112
14	**Taiwan**	Lee and Li, Attorneys-at-Law: Angela Y. Lin & Jeffrey Li	120
15	**Vietnam**	Tilleke & Gibbins: Michael K. Lee & Doan Ngoc Tran	128

Central and Eastern Europe:

16	**Overview**	Clifford Chance CIS Limited: Timur Aitkulov & Julia Popelysheva	136
17	**Albania**	Shuke Law: Enyal Shuke & Mariola Saliu	138
18	**Bulgaria**	Georgiev, Todorov and Co.: Alexander Katzarsky & Georgi Georgiev	146
19	**Cyprus**	George Z. Georgiou & Associates LLC: George Z. Georgiou & Socrates Eliades	156
20	**Czech Republic**	Johnson Šťastný Kramařík, advokátní kancelář, s.r.o.: Roman Kramařík & Karolína Černá	163
21	**Estonia**	Aivar Pilv Law Office: Pirkka-Marja Põldvere & Ilmar-Erik Aavakivi	170
22	**Hungary**	Lendvai Partners: András Lendvai & Gergely Horváth	178
23	**Lithuania**	Motieka & Audzevičius: Ramūnas Audzevičius & Rimantas Daujotas	186
24	**Poland**	Sołtysiński Kawecki & Szlęzak: Dr. Marcin Olechowski & Sławomir Uss	194
25	**Romania**	Chiuariu & Associates Attorneys at Law: Dr. Tudor Chiuariu & Roxana Giurea	202
26	**Russia**	Clifford Chance CIS Limited: Timur Aitkulov & Julia Popelysheva	212
27	**Turkey**	Akinci Law Office: Ziya Akinci	224
28	**Ukraine**	Vasil Kisil & Partners: Oleksiy Filatov & Pavlo Byelousov	232

Western Europe:

29	**Overview**	Gleiss Lutz: Stefan Rützel & Stephan Wilske	241
30	**Austria**	Weber & Co.: Stefan Weber & Ewald Oberhammer	246
31	**Belgium**	Linklaters LLP: Joost Verlinden	254
32	**England & Wales**	Wilmer Cutler Pickering Hale and Dorr LLP: Wendy Miles & Kate Davies	263
33	**France**	Lazareff Le Bars: Benoit Le Bars & William Kirtley	281
34	**Germany**	DLA Piper: Dr. Frank Roth & Dr. Daniel H. Sharma	290

Continued Overleaf

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Western Europe, cont.:

35	**Ireland**	Matheson: Nicola Dunleavy & Gearóid Carey	299
36	**Italy**	Nunziante Magrone Studio Legale Associato: Prof. Dr. Gabriele Crespi Reghizzi	308
37	**Liechtenstein**	Batliner Gasser: Dr. Johannes Gasser & MMag. Benedikt König	317
38	**Luxembourg**	Loyens & Loeff: Véronique Hoffeld	325
39	**Netherlands**	Van Doorne N.V.: Jasper Leedekerken & Bas van Zelst	333
40	**Portugal**	Abreu Advogados – Sociedade de Advogados, RL.: José Maria Corrêa de Sampaio & Nuno Pimentel Gomes	341
41	**Sweden**	Advokatfirman Vinge: Krister Azelius & Lina Bergqvist	353
42	**Switzerland**	Homburger: Felix Dasser & Balz Gross	360

Latin America:

43	**Overview**	Akerman Senterfitt: Luis M. O'Naghten	369
44	**Brazil**	Vieira, Rezende, Barbosa e Guerreiro Advogados: Mauro Vinicius Sbrissa Tortorelli & Claudia Fabiana Correa Lisboa	378
45	**Colombia**	Cárdenas & Cárdenas Abogados Ltda.: Alberto Zuleta-Londoño & Silvia Patiño-Rodríguez	384
46	**Dominican Republic**	Medina & Rizek Abogados: Fabiola Medina Garnes & Jose Alfredo Rizek	391
47	**Mexico**	Von Wobeser y Sierra, S.C.: Victor M. Ruiz	399

Middle East / Africa:

48	**Overview – MENA**	Baker & McKenzie.Habib Al Mulla: Gordon Blanke & Soraya Corm-Bakhos	409
49	**Overview – Sub-Saharan Africa**	Werksmans: Des Williams	413
50	**OHADA**	Geni & Kebe: Mouhamed Kebe & Hassane Kone	416
51	**Angola**	Miranda Correia Amendoeira & Associados RL: Agostinho Pereira de Miranda & Cláudia Leonardo	423
52	**Equatorial Guinea**	Miranda Correia Amendoeira & Associados RL: Agostinho Pereira de Miranda & Cláudia Leonardo	431
53	**Kuwait**	Dentons & Co: Stuart Cavet & Aisha Al Nesef	439
54	**Morocco**	Hajji & Associés – Avocats: Amin Hajji	448
55	**Mozambique**	Ferreira Rocha Advogados in Partnership with Abreu Advogados: Rodrigo Ferreira Rocha	454
56	**Nigeria**	PUNUKA Attorneys & Solicitors: Anthony Idigbe & Omone Tiku	462
57	**South Africa**	Werksmans: Des Williams	477
58	**UAE**	Baker & McKenzie.Habib Al Mulla: Gordon Blanke & Soraya Corm-Bakhos	488

North America:

59	**Overview**	Baker Botts L.L.P.: Michael S. Goldberg & Ryan E. Bull	498
60	**Bermuda**	Sedgwick Chudleigh: Mark Chudleigh & Nick Miles	505
61	**BVI**	Kobre & Kim LLP: Tim Prudhoe & Timothy P. de Swardt	514
62	**Canada**	Borden Ladner Gervais LLP: Daniel Urbas & Robert J.C. Deane	525
63	**Cayman Islands**	Kobre & Kim LLP: James Corbett QC & Alison Maxwell	534
64	**USA**	K&L Gates LLP: Peter J. Kalis & Roberta D. Anderson	545

The New EU Policy on Foreign Direct Investment

Mishcon de Reya

Karel Daele

1. Introduction

The entry into force of the Treaty of Lisbon on 1 December 2009 has brought foreign direct investment (FDI) under the EU Common Commercial Policy and, therefore, within exclusive EU competence. This has prompted the EU to develop a comprehensive policy dealing with both investments made by European investors in third countries, so-called outbound investments, and investments made by non-EU investors into the EU, the inbound investments.

The EU's new policy is composed of three distinct, but interrelated, parts. The first part deals with the status of investment agreements that were signed by Member States in the days that FDI was still a national competence. The second part deals with the EU-wide investment agreements that the European Commission will negotiate and conclude with third countries under its new FDI competence. The third and final part establishes the responsibilities and liabilities as between the EU and the Member States arising out of disputes under EU investment agreements.

2. The Survival of Member States' Investment Agreements Under Regulation (EU) No. 1219/2012

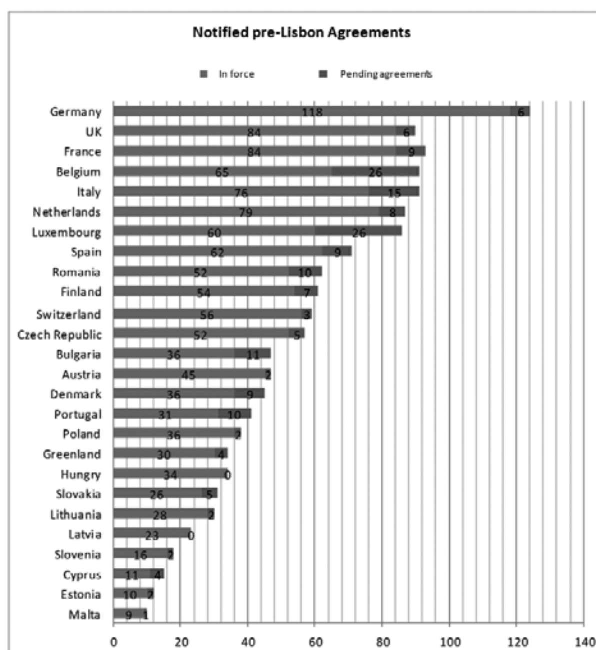
Before the Lisbon Treaty, FDI was a national competence and over the years the Member States have used this competence by signing hundreds of investment agreements with third countries. The Lisbon Treaty is, however, silent on the transition from Member States' to EU-wide investment agreements. *Regulation (EU) No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* fills this void.[1] The Regulation distinguishes between three categories of agreements, based on their date of signing.

2.1 Pre-Lisbon agreements

a. Valid and binding until replaced by EU agreements

Investment agreements signed by Member States before 1 December 2009 fall under the replacement regime. Under this regime, Member States were required to notify the EU of those agreements that they wish to maintain in force or permit to enter into force upon the completion of the ratification process. Agreements so notified would be listed and remain in force for as long as they are replaced by EU-wide investment agreements.[2] The list of notified agreements was published recently.[3]

In total, the Member States have notified 1,401 agreements, of which 1,213 have entered into force and 188 have not.[4] The list establishes a significant uneven distribution of agreements among the Member States, basically along the lines of their membership of the EU. The six Member States that founded the EU in 1958 have all notified over eighty agreements, with Germany topping the table with 124. Most of the Member States who joined in 2004, on the other hand, have notified less than thirty agreements, with Malta closing the table with only ten. The Member States who joined the EU in the 70's, 80's and 90's appear predominantly in the middle of the table, with the exception of Ireland that has not signed any investment agreement at all. Obviously, this patchwork of agreements creates an uneven playing field for European outbound investors. For example, a German company, with 124 agreements, will be much better protected to invest internationally than its Maltese counterpart with only ten agreements. It is precisely to offer the same protection to all EU outbound investors, irrespective of the Member State in which they are based, that the EU will enter into EU-wide investment agreements.



In terms of country coverage, the notified agreements create relationships with 150 third countries. 47% of these countries have signed agreements with less than a quarter of the Member States, 24% with between one quarter to half of the Member States and

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15% with between half and three quarters of the Member States. Finally, 13% of the third countries have agreements with more than three quarters of the EU.[5]

b. Assessment 'light'

The replacement regime is, however, not completely unconditional. The European Commission may assess notified agreements to evaluate whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion of an EU-wide agreement.[6] If a Member State's agreement does constitute such an obstacle, the Commission and the Member State concerned will engage in a ninety-day consultation period to identify the appropriate actions to resolve the matter and in a subsequent sixty-day period the Commission may instruct the Member State what measure it has to take.[7] This may be the termination or renegotiation of the agreement. If a Member State fails to act accordingly, the European Commission may bring infringement proceedings before the European Court of Justice. The Commission has no powers, however, to terminate or modify itself the Member State's investment agreement.

As this assessment is strictly limited to the identification of serious obstacles to the conclusion of an EU-wide agreement, only agreements with those third countries with whom the EU is eager to sign an EU agreement will be assessed under this heading. At the time of writing this chapter, the EU expressed an interest in only a limited number of countries, including Canada, China, Egypt, India, Jordan, Morocco, Russia, Singapore, Tunisia and the US. Together, these countries account for 176 notified Member State agreements.[8] These are the agreements that will be subjected to the assessment 'light'. The other 1,225 agreements will remain unaffected.

c. Amendments

To amend a notified pre-Lisbon agreement, a Member State requires a double authorisation from the European Commission.

First of all, a Member State requires an authorisation to open formal negotiations with the third country. To obtain this authorisation, a Member State must notify the Commission at least five months before the start of the negotiations of the provisions to be amended and the objectives of the amendments.[9] The Commission will authorise the negotiations unless it concludes that their opening would either: (1) be in conflict with EU law; (2) be superfluous because the Commission is about to start its own negotiations of an EU agreement; (3) be inconsistent with the EU's principles and objectives for external action; or (4) constitute a serious obstacle to the negotiation or conclusion of an EU agreement.[10] The Commission's authorisation may also be conditional in that it may require a Member State to include or remove particular provisions from the negotiations to ensure consistency with the EU's investment policy or compatibility with EU law.

When the negotiations are concluded and before actually signing the modified agreement, a Member State requires a second authorisation. Upon notification, the European Commission will assess the amended agreement using the same criteria as for the authorisation of the opening of the negotiations. Where the Commission finds that the amended agreement fulfils the requirements, it shall authorise the Member State to sign and conclude it.

d. Agreements that have not been notified

Comparing the list of investment agreements that have been notified to the European Commission with the database of investment agreements of the UNCTAD reveals that not all Member States have notified all of their agreements. Seventeen Member States have omitted one or more agreements. In total, thirty-one Member States' investment agreements have not been notified. Notably, ten agreements with Serbia, two with Russia and two with Zimbabwe have not been notified.

Agreements into force that have not been notified (19)			
Austria-S. Arabia	BelgoLux-Indonesia	BelgoLux-Serbia	Cyprus-Serbia
Denmark-Kuwait	Finland-Croatia	Finland-Serbia	France-Serbia
Germany-Serbia	Germany-Trinidad & Tobago	Hungary-Serbia	Italy-Bolivia
Poland-Serbia	Poland-Singapore	Romania-Serbia	Slovakia-Norway
Slovakia-Serbia	Slovakia-Switzerland	Slovakia-USA	

Pending agreements that have not been notified (13)			
Austria-Cambodia	Austria-Zimbabwe	Cyprus-Russia	Czech Rep.-Zimbabwe
France-Chad	Hungary-Chile	Hungary-Tunisia	Italy-Ghana
Italy-South Korea	Netherlands-Serbia	Poland-Russia	Portugal-Eq. Guinea
UK-Dominican Rep.			

Today's status of these omitted agreements is problematic. From an international law point of view, they remain valid and binding as long as they have not been properly terminated by a contracting party. However, under EU law, these agreements can no longer be given any legal effect within the EU on the ground of their incompatibility with the Lisbon Treaty and its rules of competence. To avoid infringement procedures being brought by the European Commission and in light of their obligation of loyal co-operation, the Member States will have to formally terminate the agreements that they have not notified, so as to bring their international obligations in line with EU law.

2.2 In-between agreements

Investment agreements signed between 1 December 2009 and 9 January 2013, i.e. the date of entry into force of Regulation No. 1219/2012, fall under the authorisation regime. Under this regime, Member States had to notify the European Commission by 8 February of all the agreements that they wish to maintain in force or permit to enter into force. Within 180 days of the receipt of the notification, the Commission must assess these agreements on the basis of the same criteria for the opening of negotiations of pre-Lisbon agreements. When the requirements are met, the Commission will authorise the agreement and the latter will remain in force or be permitted to enter into force until it is replaced by an EU investment agreement.[11] Where the Commission does not authorise the agreement, it will state its reasons therefor and the Member State must subsequently terminate the agreement or refrain from taking further steps towards the conclusion thereof.

The European Commission has yet to publish a list of the in-between agreements that the Member States have notified. However, based on UNCTAD's database of investment agreements, it is possible to draw up a list of those agreements that have most likely been notified under this regime. It is limited to thirty agreements, involving thirteen Member States. The remaining fourteen Member States have not signed any agreements since the entry into force of the Lisbon Treaty.

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In-between agreements in force (10)			
Cyprus-Jordan	Czech Rep.-Azerbaijan	Czech Rep.-Serbia	Estonia-Moldova
Latvia-India	Lithuania-India	Lithuania-Macedonia	Malta-Montenegro
Slovakia-Canada	Slovakia-Vietnam		

Pending in-between agreements (20)			
Austria-Kazakhstan	Austria-Tajikistan	Cyprus-Albania	Czech Rep.-Montenegro
Czech Rep.-Sri Lanka	Estonia-Azerbaijan	Estonia-Jordan	Germany-Congo Rep.
Germany-Iraq	Germany-Pakistan	Malta-Albania	Malta-Serbia
Portugal-Congo Rep.	Portugal-DRC	Portugal-Senegal	Portugal-U.A.E.
Slovakia-Kenya	Slovenia-India	Spain-Mozambique	UK-Colombia

2.3 Future agreements

Despite the fact that, in the future, the EU will conclude EU-wide investment agreements on behalf of the twenty-seven Member States, the possibility remains for individual Member States to sign new agreements with third countries. This possibility is logical as the European Commission will not be interested, nor will it have the human and financial resources, to negotiate an EU investment agreement with each and every country. Where a third country is not a priority partner for the EU, an individual Member State may fill the gap.

The regime applying to future Member States' agreements is identical to the one that applies to the negotiations of amendments of pre-Lisbon agreements as set out above. In a nutshell, the Member State will require the authorisation to open the negotiations and, once these have been concluded, the authorisation to sign the new agreement. A new Member State agreement will be in force until it is replaced by an EU investment agreement, if any.[12]

2.4 Additional powers of the European Commission

a. Participating in negotiations of Member States' agreements

Whenever Member States negotiate amendments of existing agreements, both pre- and post-Lisbon, or negotiate new agreements, they must inform the European Commission of the progress and results of the negotiations. On the basis of this information, the Commission may request to participate in those negotiations.[13] Whereas the Member State is most likely to honour such a request, the third country involved may refuse such participation. It is unclear whether, in such scenario, the Member State can continue the negotiations without the Commission's participation or is required, based on its loyal co-operation duty under EU law, to abort the negotiations.

b. Instructing Member States to take a particular position

Without undue delay, Member States must inform the Commission of any meetings that are scheduled with third countries in relation to any of their investment agreements. The Commission must be provided with an agenda and all relevant information permitting an understanding of the topics to be discussed at those meetings. Where an issue to be discussed might affect the implementation of the EU's common commercial or investment policy, the Commission may instruct the Member State to take a particular position.[14]

c. Participating in dispute settlement proceedings

When a Member State is involved in dispute settlement proceedings arising under one of its investment agreements, be it as claimant or, more likely, as respondent, it has to involve the European Commission.[15] When a Member State wishes to bring an action against a third country, it must seek the Commission's prior agreement. When an action is being brought against a Member State, it must immediately inform the Commission of the request for dispute settlement. Thereupon, the Member State and the Commission must cooperate fully and take all necessary measures to ensure an effective defence. Where appropriate, this may include the participation of the Commission in the arbitration proceedings.

From an EU law perspective, the Commission's participation is understandable. However, dispute settlement proceedings are not governed by EU law. They are governed by the rules that the disputing parties have agreed upon or by the rules of the arbitral institution that the parties have selected, in most cases *in tempore non suspecto*. It may well be that these rules, for example in relation to the confidentiality of the proceedings, prevent a Member State from providing the Commission with all the arbitration documents and submissions. Likewise, these rules may not allow the European Commission to participate in the proceedings. For example, most Member States' investment agreements refer to the arbitration procedure of the International Centre for the Settlement of Investment Disputes (ICSID). ICSID arbitration proceedings are governed by the 1965 ICSID Convention. As the Convention's signature is only open to sovereign states, the EU, as a supranational organisation, cannot be a party. The Commission's sole possibility to get around this obstacle and to effectively participate in the proceedings is to obtain *amicus curiae* status. However, this status depends on the goodwill of the Tribunal and, to some extent, the investor's agreement.

3. EU-wide Investment Agreements with Third Countries

Under its newly acquired competence for FDI, the European Commission will negotiate and conclude EU-wide investment agreements with third countries. Gradually, these EU agreements will replace the investment agreements that the Member States have individually concluded with those countries. In a Communication to the Council of the EU and the European Parliament entitled *Towards a comprehensive European international investment policy*, the Commission has set out how these agreements are likely to look like, subject to the input and approval of the third country concerned.[16]

3.1 Form

The Commission has a preference for integrating investment agreements in broader trade agreements. It is currently negotiating such a mixed trade and investment agreement with, for example, Canada and the US.[17] If a particular third country is not interested in concluding a trade agreement with the EU or no agreement on the liberalisation of trade can be found, the EU is also willing to enter into a stand-alone investment agreement. The EU has just started the negotiation of such a stand-alone agreement with China.[18]

The Commission has no intention to develop a model investment agreement, rather it will draw up a check-list of key protections that need to be included in any investment agreement. In theory, these

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protections can then be tailored to the needs of the partner country. However, in practice, the European Commission has limited its negotiation margin considerably by committing to the best level of protection negotiated by any of the Member States in any existing Member State investment agreement and ensuring that no European investor will be worse off under an EU-wide investment agreement than under its previous Member State investment agreements. This commitment is understandable in so far as that the Member States, assembled in the EU Council, have to approve the start of any negotiations with a third country, but it may be less realistic when facing powerful countries at the other side of the negotiation table.

In principle, the EU will negotiate comprehensive, across-the-board, investment agreements covering all business sectors. However, if broad agreements would prove impossible or inadvisable, the EU may also consider entering into sectoral investment agreements.

3.2 Selecting partner countries

The EU will not enter into investment agreements with the world at large. Rather, it will identify priority countries on the basis of three parameters: (1) the magnitude of the actual investment flows; (2) the growth prospects of a particular market; and (3) the 'robustness' of the existing investor protection in the host country, i.e. the capacity and practice of the country in upholding the rule of law in a manner that provides a certain and sound environment for investors. Priority countries should be top performers in terms of both current investment and future market potential, but have poorer ratings in terms of effective investor protection. Countries that appear to fit this bill are China, Russia, India and Brazil. Countries such as Singapore, Canada and the US score high on the first two parameters, but they also offer high standards of investment protection.[19] Therefore, they could be slightly lower in the ranking of priority countries. Irrespective of these parameters, the European Commission has also indicated to be willing to negotiate agreements with partners that have expressed a wish to do so.

3.3 Content

The EU's main concern is providing maximum protection to EU investors, following the best available practices as developed by the Member States' investment agreements. With this in mind, any EU investment agreement is likely to include the following standards of protection: (1) fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures; (2) national treatment; (3) most-favoured nation treatment; (4) protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation; (5) full protection and security of investors and investments; (6) other effective protection provisions such as an 'umbrella clause'; (7) free transfer of funds of capital and payments by investors; and (8) an investor-state dispute settlement mechanism.

At the same time, the EU is concerned that these very same standards will be invoked by inbound investors and will conflict with other EU objectives, including policies on the protection of the environment, decent work, health and safety, cultural diversity, consumer protection, development policy and competition. The investment agreements that the EU will propose are therefore likely to include language according to which the EU and the Member States are allowed to adopt and enforce measures necessary to pursue public policy objectives.[20] However, in practice, such language will only be acceptable if it is reciprocal, in the sense that the third country will enjoy the same regulatory freedom. This, in turn, will reduce the level of protection for EU outbound investors and be at odds with the Commission's stated objective of ensuring the best deal for all EU investors.

3.4 Investor-state dispute settlement

To ensure their enforceability, EU investment agreements are likely to contain an investor-state dispute settlement mechanism permitting the investor to take investment claims against the host state directly to binding international arbitration. In a confidential text of the European Commission to the Trade Policy Committee of the EU Council of 5 June 2012, the Commission has set out the following key elements of this mechanism.

a. Consultations

Any arbitration would have to be preceded by consultations between the investor and the host state. Such consultations would have to be initiated at a latest within three years of the investor becoming aware of the treatment on which the investment claims are based. If the claims cannot be settled within four months of the investor's request for consultation, the latter may issue a notice of intent to submit a claim to arbitration.[21] If the dispute is not settled within another three months, the investor may file a request for arbitration.

b. Selecting arbitration rules

Unless the investor and the host state agree otherwise, the arbitration must be initiated at the latest within eighteen months of submitting the request for consultation. The investor may choose to submit its claims to arbitration under (1) the Rules of the ICSID Convention, (2) ICSID's Additional Facility, (3) UNCITRAL, or (4) any other arbitration rules proposed by it. The host state will be deemed to have accepted the 'other rules' proposed by the investor unless it objects within twenty days. In that case, the investor will have to choose from one of the three aforementioned rules.

c. The Tribunal

In principle, the Tribunal will consist of three members, with each party appointing one arbitrator at will and the third, who shall be the chairperson, to be appointed by agreement of the parties.[22] However, the investor may also propose that a sole arbitrator should hear the case. The host state should give sympathetic consideration to such a request, especially where the investor is a small or medium-sized company or the damages claimed are relatively small. The arbitrators will have to comply with a detailed Code of Conduct, imposing strict obligations in terms of disclosure, impartiality and independence.

d. Arbitral proceedings

The draft text prohibits class action claims by an indeterminate number of unidentified claimants. It leaves room, however, for other, more identified collective claims. The possibility of conducting parallel proceedings during the arbitration, for example before national courts or other international courts, will be restricted. To avoid conflicting awards, a special Committee constituted by representatives of the EU and the partner country will have authority to adopt decisions interpreting provisions of the investment agreement. Such decisions will be binding on arbitral tribunals. The text also provides for a mechanism to dispose on an expedited basis of claims that are manifestly without legal merit. The investor may request the consolidation before one Tribunal of claims that have a question of law or fact in common, even if the claims are made against different Member States. Transparency of the proceedings is an important element in the draft text. A large number of documents, such as the request for arbitration, submissions, witness statements, expert reports and awards will be public. Also, hearings will be public, unless otherwise decided by

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the arbitral tribunal after consultation with the parties. The text further contains detailed provisions on the right of third parties to intervene in the proceedings as *amicus curiae*.

e. The Award

Where the EU or a state is found in breach of the investment agreement, the Tribunal may order the following remedies: (1) the payment of monetary damages and interest; (2) the restitution of any property illegally taken; and (3) the repeal of the illegal measure. States are, however, entitled to pay compensation *in lieu* of restitution or repeal. In principle, the costs of the proceedings will follow the event and be paid by the unsuccessful party. This is in line with the practice in commercial arbitration but a departure from the traditional approach in investment arbitration according to which each party bears its own costs. Awards will be binding and not be subject to any appeal or review except those provided for in the EU investment agreement or the applicable arbitration rules. Finally, awards imposing pecuniary obligations on the EU or a state will be enforceable within the territory of that state as if it were a final judgment of its own court.

4. Defending Inbound Investment Claims Under EU Investment Agreements

As indicated above, the EU investment agreements will almost certainly allow for investors to bring dispute settlement proceedings where they believe that their investment rights have been breached. This will work in both directions, meaning that EU - outbound - investors will be able to bring investment claims against third countries and non-EU - inbound - investors may bring investment claims against the EU and/or individual Member States. To clarify how the EU and the Member States will deal with such inbound investment claims, the European Commission is proposing a *Regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*.[23] At the time of finalising this chapter, also the European Parliament has approved the draft Regulation, subject to a number of minor amendments.[24]

4.1 Financial responsibility

The main principle, set out in Article 3(1) of the draft Regulation, is that the financial responsibility of the EU and the Member States follows the origin of the treatment that the investor is complaining of. This means that where an investor alleges that its rights have been breached by treatment afforded by one or more of the institutions of the EU, for example a Regulation adopted by the European Parliament and the Council, the EU will be liable for the costs of the proceedings and the payment of the final award. Conversely, where an investor complains about a Member State measure, the Member State will bear the financial responsibility flowing from the dispute.

The draft Regulation provides an exception to the basic rule of dividing financial responsibility in that the liability for Member State measures shifts from the Member State to the EU where the Member State concerned took the disputed measures in order to comply with EU law.[25] In practice, it may sometimes be difficult to determine whether a Member State measure is actually required by EU law. For example, a Member State may be required to transpose an EU Directive into national law but does so incorrectly or, when doing so, exceeds the standards set by the Directive.

4.2 Procedural issues

a. Respondent status

The general rule governing legal representation reflects the allocation of financial responsibility. In other words, where the investor complains about EU measures and the EU is therefore potentially liable, the EU will represent itself. Where the investor eyes Member State measures and a Member State may therefore be liable, it is the Member State concerned that will defend the claim and act as respondent.

However, in particular circumstances and without prejudice to the liability rules, the European Commission may decide that the EU will take the place of a Member State where it would otherwise be entitled to act as respondent. This may be the case where: (1) the Member State declines to act as respondent; (2) it is likely that the EU will bear at least part of the financial responsibility; (3) the dispute also involves EU measures; (4) it is likely that similar claims will be brought under the same investment agreement against other Member States and the European Commission is best placed to ensure a consistent defence; or (5) the dispute raises unsettled issues of law which may recur in other disputes under the same or other investment agreements.[26]

b. Conduct of the proceedings

Where the EU acts as respondent, the European Commission and the Member State concerned, if any, will work in close co-operation so as to ensure as effective defence as possible. This may include Member State representatives forming part of the EU delegation in the proceedings. This should ensure that also the Member State's interests are considered, in particular where the dispute involves a Member State measure. A Member State may, however, not act as a self-standing, co-respondent.

Where a Member State acts as respondent, it must provide the Commission with all proceeding documents and inform and consult with the Commission regularly.[27] It must also allow representatives of the Commission to form part of its legal representative team. A Member State may also be required by the Commission to adopt a particular position as regards any point of law raised by the dispute or any other element having an EU interest. The Commission may also instruct the Member State to appeal or seek annulment of an unfavourable award. The purpose of these significant powers on the part of the European Commission is to guarantee unity of the EU's external representation.

4.3 Settlements

Disputes in which the EU acts as respondent and which involve EU measures only, may be settled by the Commission without any consultations with the Member States. The same applies to disputes in which a Member State acts as respondent and which involve Member State measures only. These may be settled by the Member State concerned without any involvement of the Commission or other Member States. Settlements of disputes in which the EU acts as respondent and which involve Member State measures are slightly more complicated.[28] Where it is the Member State who wants to settle, it requires the approval of the European Commission. The latter will approve the settlement where: (1) the Member State accepts the financial responsibility arising from the settlement; (2) the settlement is only enforceable against the Member State; (3) the terms of the settlement are compatible with EU law; and (4) there is no overriding EU interest against a settlement. Where it is the European Commission who wants to settle, it will consult with the Member State. If the latter consents to settle, the EU and the Member State will agree on the terms of

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the settlement. If the Member State refuses, the Commission may nevertheless impose a settlement on the Member State where overriding interests of the EU so require.

4.4 Payment of foreign investors

The draft Regulation distinguishes between the external responsibility of the EU and the Member States to pay investors and the internal allocation of financial responsibility.

In general, a successful claimant will be paid by the entity who acted as respondent. Where the claim is defended by a Member State, it will be up to that Member State to pay the investor. This avoids the EU budget being unnecessarily burdened with costs resulting from the actions of individual Member States and 'innocent' Member States, through the EU budget, having to pay for other Member States' mistreatment of investors. Where the claim is defended by the EU, the EU will have to pay, unless a Member State has accepted financial responsibility for the dispute, in which case the investor will be paid by the Member State.[29]

Where the EU has paid the investor but it is of the opinion that the financial responsibility should fully or partially be borne by a Member State, i.e. in disputes in which the EU has acted as respondent in relation to Member State measures, the Commission shall first consult with the Member State and then determine the amount to be paid by the Member State.[30] Thereupon, the Member State shall compensate the EU budget accordingly. If a Member State disagrees with the Commission's determination, it may ultimately refer the matter to the European Court of Justice.

5. Conclusion

The EU Member States have notified 1,401 pre-Lisbon investment agreements, involving 150 third countries. Until they are replaced by EU-wide investment agreements, they remain in force, unless the European Commission determines that they constitute a serious obstacle to the conclusion of an EU investment agreement. In that case, the Member State agreement will either have to be terminated or modified or the Member State concerned risks infringement proceedings before the European Court of Justice. The Member States have also concluded about thirty post-Lisbon investment agreements. Although these agreements are subject to a closer review by the European Commission, they will generally also remain in force.

Under pressure from its 'stronger' Member States, the EU has thus clearly chosen for the *status quo*. Investors continue to benefit from the existing agreements, until an EU deal with a particular country is in place or unless the Member States themselves no longer wish to maintain a particular investment agreement in force. About thirty pre-Lisbon agreements have indeed not been notified by the Member States. These agreements will have to be formally terminated. In parallel with the EU negotiating EU-wide agreements, Member States are allowed to renegotiate existing investment agreements with non-priority countries and even conclude new agreements, be it that the European Commission will be carefully looking over their shoulders.

Future investment agreements with important trading partners will no longer be concluded by individual Member States. By concluding them on an EU-wide level and, where possible, integrating them in a broader trade agreement, the EU wants to level the playing field for European companies, based on the best level of protection negotiated by any of the Member States in any existing investment agreement. For investors based in 'strong' Member States, nothing much will change provided the EU can deliver on its promise that no EU investor will be worse off under an EU-wide investment agreement. Investors based in 'weaker' Member States, on the other hand, will substantially benefit from this new policy, both in terms of the level of protection and the geographical scope thereof. Investor-state arbitration will remain the preferred dispute settlement mechanism, be it in a slightly modernised version, including provisions on consolidation, transparency, third party rights, code of conduct for arbitrators and uniform interpretation.

As far as companies investing in the EU are concerned, the draft Regulation on the financial responsibility of the EU and the Member States offers them legal certainty in the sense that financial awards will be paid out promptly, irrespective of any disagreements between the Europe Commission and a Member State as to who is ultimately liable. On the other hand, whereas an investor may prefer to sue and have an award paid by the EU, rather than face a Member State with a bad track record in terms of the payment and enforcement of awards, the Regulation does not allow the investor to choose its opponent. It is up to the European Commission and, to a lesser extent, the Member States, to decide who will defend the claims and ultimately pay the final award. The investor has no say in this. From the EU's point of view, the draft Regulation avoids the EU budget being burdened by measures unilaterally taken by individual Member States. It also allows the Commission to defend a claim instead of a Member State or impose a settlement where it is of the view that there is an overriding EU interest. Finally, from a Member State's point of view, it may find itself excluded from defending its case while it will ultimately remain liable for paying an unfavourable award. On the other hand, the Regulation minimises the risk that an innocent Member State has to pay up for another Member State's mistreatment of investors.

Endnotes

1 EU Official Journal L351/40 of 20 December 2012.
2 Article 3 of the Regulation.
3 EU Official Journal C131/2 of 8 May 2013.
4 As per 8 February 2013.
5 This group includes countries such as China, India, Russia, South Korea and a number of North African countries.
6 Article 5 of the Regulation.
7 Article 6 of the Regulation.
8 Of which 166 have entered into force and ten have not.
9 Article 8 of the Regulation.
10 Article 9 of the Regulation.
11 Article 12(3) of the Regulation.
12 Article 11(4) of the Regulation.
13 Article 10 of the Regulation.
14 Article 13(a) of the Regulation.
15 Up to 14 June 2013, the Member States have been involved in forty-two ICSID proceedings. However, not all of these proceedings were based on an investment agreement with a third country. Some of these proceedings were based on an investment contract with the investor or domestic investment legislation.
16 COM(2010)343 final of 7 July 2010, available at <http://trade.ec.europa.eu>.
17 EU Commission MEMO/13/282 of 25 March 2013.
18 EU Commission Press Release of 23 May 2013.
19 Study *The EU approach to international investment policy after the Lisbon Treaty*, Directorate-General for External Policies of the Union, October 2010, 28-29.
20 For example, Annex B.10(3) of the China-Canada BIT of 8

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September 2012 provides that 'except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation'.

21 Within forty days of receiving the notice of intent, the EU will have to indicate whether, where the dispute concerns treatment afforded by a Member State, the EU or the Member State concerned will act as the respondent in the arbitration.

22 The Secretary-General of ICSID will act as appointing authority in case a party fails to make an appointment or the parties fail to agree on the chairperson. In selecting and appointing an arbitrator, the Secretary-General will be limited to a roster of eligible arbitrators.

23 COM(2012) 335 final of 21 June 2012, available at <http://trade.ec.europa.eu>. To read more on the background of the draft Regulation, see J. Kleinheisterkamp, 'Managing financial responsibility for investor claims under EU investment agreements', available at <http://ssrn.com/abstract=2222580>; C. Tietje, E. Sipiorski & G. Töpfer, 'Responsibility in Investor-State Arbitration in the EU', 10(2) TDM 2013.

24 Report of the European Parliament, A7-0124/2013 of 26 March 2013, available at <http://www.europarl.europa.eu>.

25 Pursuant to Article 3(2) of the Draft Regulation the liability remains however with the Member State where the latter is required to act pursuant to EU law in order to remedy the inconsistency with EU law of a prior act, unless the adoption of such prior act was required by EU law.

26 Article 8(2) of the Draft Regulation.

27 The disclosure of information and sharing of proceeding documents may, however, interfere with confidentiality provisions in the procedural rules applicable to the dispute settlement proceedings.

28 Articles 13 and 14 of the Draft Regulation.

29 Article 16(1) of the Draft Regulation.

30 Article 17 of the Draft Regulation.

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