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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**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**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Introduction

The Treaty of Lisbon has brought foreign direct investment within the scope of the Union's common commercial policy and, consequently, of the Union's exclusive competence. A central feature of international agreements on foreign direct investment (normally referred to as investment protection agreements) is the possibility for an investor to bring a claim against a state where the state is alleged to have acted inconsistently with the investment protection agreement (hereinafter referred to as "investor-state dispute settlement"). When such litigation takes place, the state concerned will incur costs (fees for the administration of the dispute, for the payment of arbitrators, for the payment of lawyers) and may, if it loses, be required to pay compensation.

The Union is already party to one agreement with the possibility for investor-state dispute settlement (the Energy Charter Treaty¹) and the Union will seek to negotiate such provisions in a number of agreements currently under negotiation or to be negotiated in the future. It is thus necessary to consider how to manage the financial consequences of such disputes. This Regulation seeks to establish the framework for managing such consequences.

The central organising principle of this Regulation is that financial responsibility flowing from investor-state dispute settlement cases should be attributed to the actor which has afforded the treatment in dispute. This means that where the treatment concerned is afforded by the Union institutions then financial responsibility should rest with the Union institutions. Where the treatment concerned is afforded by a Member State of the European Union, then financial responsibility should rest with that Member State. It is only where the actions of the Member State are required by the law of the Union that financial responsibility should lie with the Union. Establishing this central principle also entails that consideration needs to be given to the issue of whether, and under what circumstances, the Union or the Member State which has afforded the treatment in dispute should act as respondent, how to structure co-operation between the Commission and the Member State in specific cases, how to deal with the possibility for settlements and finally, the mechanisms necessary to ensure that any apportionment can be made effective.

These additional elements also need to take into account the three other principles underlying this Regulation. The first is that the overall operation of the allocation must ultimately be budget neutral as regards the Union with the result that the Union only bears those costs which are triggered by acts of Union institutions. Second, the functioning of the mechanism must be such that a third country investor is not disadvantaged by the need to manage the financial responsibility within the Union. In other words, in the event that there is a disagreement between the Union and the Member State, the third country investor would be paid any award, and then the internal allocation within the Union would be addressed. Third, the mechanism must respect the fundamental principles governing the Union's external action as established by the Treaties and the case law of the Court of Justice of the European Union, in particular that of unity of external representation and of sincere co-operation.

¹ OJ L 380, 31.12.1994, p. 1.

It is to be noted that the Commission foresaw the need for this Regulation in its Communication "Towards a comprehensive European international investment policy"².

The proposed Regulation has been explicitly requested by the European Parliament in its resolution on the future EU International Investment Policy (para. 35 of Resolution A7-0070/2011 adopted on 22 April 2011). Furthermore, the Council requested the Commission to study the matter in its Conclusions on a Comprehensive International Investment Policy (25 October 2010). Subsequent discussions in the Council, notably in relation to the adoption of the relevant negotiating directives for certain agreements currently subject to negotiation, have confirmed the strong interest of the Council in this initiative.

1.2. The Union's competence to conclude investment protection agreements and the Union's international responsibility under those agreements

The Commission takes the view that the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both foreign direct investment and portfolio investment.³ Article 207 of the Treaty on the Functioning of the European Union ("TFEU") provides the exclusive competence for foreign direct investment. The Union's competence for portfolio investment stems, in the Commission's view, from Article 63 TFEU. That article provides that the movement of capital between Member States of the Union and third countries is to be free of restrictions. Article 3(2) TFEU provides for the exclusive competence of the Union whenever rules included in an international agreement "may affect common rules or alter their scope". In the Commission's view, the Union must have exclusive competence also over matters of portfolio investment since the rules being envisaged, which would apply indistinctly to portfolio investment, may affect the common rules on capital movement set down in Article 63 of the Treaty.

Furthermore, the Commission takes the view that the Union's competence covers all the standards provided for in investment protection texts, including expropriation. First, the European Court of Justice has consistently held that the Union's competence for the common commercial policy includes obligations applying post entry (i.e. after a good has been imported or a service supplier has established) even where Member States retain the possibility to adopt internal rules⁴. Thus, it is well-established that the Union's competence in the field of trade in goods is not limited to border measures, such as tariffs or import quotas, but covers also post-importation matters, such as the granting of national treatment and most

² COM(2010)343 final, page 10.

³ *Ibid*, page 8.

⁴ Opinion 1/94 of the European Court of Justice [1994] ECR I-5267 in particular paragraph 29 and paragraphs 32 and 33

"32) According to the Netherlands Government, the joint participation of the Community and the Member States in the WTO Agreement is justified, since the Member States have their own competence in relation to technical barriers to trade by reason of the optional nature of certain Community directives in that area, and because complete harmonization has not been achieved and is not envisaged in that field.

33) That argument cannot be accepted. The Agreement on Technical Barriers to Trade, the provisions of which are designed merely to ensure that technical regulations and standards and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade (see the preamble and Articles 2.2 and 5.1.2 of the Agreement), falls within the ambit of the common commercial policy."

favoured nation treatment in respect of taxes and other internal laws and regulations⁵, or the abolition of unnecessary obstacles to trade arising from technical regulations and standards.⁶ Likewise, it is generally agreed⁷ that the Union's competence with regard to 'trade in services' is not confined to issues of market access, but includes also matters such as national treatment and most-favoured nation treatment in respect of internal laws and regulations, as well as certain obligations with regard to the administration and the content of domestic regulation. Following this logic, the Union's competence for foreign direct investment and capital movements must also cover the standards applying post-establishment, including national and most-favoured nation treatment, fair and equitable treatment and protection against expropriation without compensation.

It should further be noted that Article 345 TFEU provides only that the Treaties shall not affect the system of property ownership prevailing in the Member States. Treaties providing for investment protection do not affect the system of property ownership – rather they require that expropriation be subject to certain conditions, including, inter alia, the payment of compensation. Hence, the specific rule in Article 345 is not such as to imply that the Union does not have competence for the rules on expropriation included in agreements providing for investment protection. Finally, it is also established that the competence to establish and administer dispute settlement provisions runs together with the underlying competence for the subject matter of the rules.⁸

It follows, therefore, that where the agreement is one which is concluded by the Union only, then it is only the Union which may be sued by an investor. This would be the case even if the treatment accorded which is challenged in investor-state dispute settlement is treatment accorded not by the Union but by a Member State. Should it be the case that both the European Union and the Member States are parties to an agreement and it needs to be decided who is responsible as a matter of international law for any particular action, the Commission takes the view that this has to be decided not by the author of the act, but on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty. In this perspective, it is immaterial that a Member State has competence under the rules on the internal market allowing it to legislate in its domestic sphere.

This logic has been confirmed in the Court of Justice's case-law. For instance, in Opinion 1/91 the Court held (emphasis added):

The expression 'Contracting Parties' is defined in Article 2(c) of the agreement. As far as the Community and its Member States are concerned, it covers the Community and the Member States, or the Community, or the Member States, depending on the case. Which of the three possibilities is to be chosen is to be deduced in each case

⁵ Cf. Article I:1 and Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Opinion 1/94, para. 34.

⁶ Cf. Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT) and Opinion 1/94, paragraphs. 31-33.

⁷ In its Opinion 1/2008 the ECJ rejected Spain's contention that the Community's competence with regard to trade in services pursuant to Article 133 EC was limited to services supplied according to mode 2 (i.e. cross-border services). According to the ECJ, following the Treaty of Nice, Article 133 EC also covered the other three modes of supply provided in the GATS, including the supply of services through the establishment of a 'commercial presence' (mode 3). See Opinion 1/2008, paragraphs. 120-123. Furthermore, there is no indication in Opinion 1/2008 that, as regards the sectors where the EC was exclusively competent, such competence did not extend to the national treatment commitments.

⁸ Opinion 1/91 of the European Court of Justice [1991] ECR I-060709

from the relevant provisions of the agreement and from the respective competences of the Community and the Member States as they follow from the EEC Treaty and the ECSC Treaty.⁹

In the international context, the International Law Commission has recognised the possibility that special rules may apply between an international organisation and its members. In elaborating its draft articles on the Responsibility of International Organisations, the International Law Commission provides that its rules on responsibility may not be applicable, or may be modified, in specific circumstances.¹⁰

While, for the reasons set out above, the Union bears, in principle, international responsibility for the breach of any provision within the Union's competence, it is possible, as a matter of Union law, to provide for the allocation of financial responsibility between the Union and the Member States. As discussed below in section 1.3, the Commission considers that it would be appropriate that each Member State bears financial responsibility for its own acts, unless such acts are required by Union law.

Similarly, while for the reasons mentioned above, the Union should, in principle, act as respondent in any dispute concerning an alleged violation of a provision of an international agreement falling within the Union's exclusive competence, even if such violation arises from a Member State's action, it may be possible, as provided expressly in Article 2(1) TFEU, to empower a Member State to act as respondent in appropriate circumstances given the potential for significant demands (even temporary) on the Union budget and on Union resources were the Union to act as respondent in all cases. This implies that rather than set up the mechanisms in a manner reflecting a strict application of the rules on competence, it is more appropriate to put forward pragmatic solutions which ensure legal certainty for the investor and provide all the necessary mechanisms to allow for the smooth conduct of arbitration and, eventually, the appropriate allocation of financial responsibility. As explained in section 1.4 below, the Commission is of the view that Member States should be permitted to act as respondents in order to defend its own actions, except under certain circumstances where the Union interest requires otherwise. This has to be done while ensuring, at the same time, respect for the principle of unity of external representation

1.3. Allocation of Financial Responsibility

As set out above, investor-to-State dispute settlement will give rise to costs for the parties concerned, both in terms of fees and in terms of the payment of final award. It is important to separate the issue of the conduct and management of an investor-to-State arbitration claim from the issue of the allocation of financial responsibility. This is necessary in order to ensure the fair allocation of costs, so that the EU budget – and consequently the budgets of Member States not concerned with the claim in question – are not burdened with costs relating to treatment afforded by one Member State. Therefore, regardless of whether the Union or a Member State acts as respondent to a claim, the financial responsibility for any costs should follow the origin of the treatment of which the investor complained. Therefore, should the treatment attacked by an investor exclusively originate in a Member State, the Member State in question should be liable for the costs flowing from the dispute settlement. Similarly, where the treatment of which an investor complained originates in the institutions of the

⁹ Opinion 1/91, paragraph 33

¹⁰ See Article 64 Document A/CN.4/L.778 of 30 May 2011 and the Report of the International Law Commission, Sixty First Session (A/64/10) p. 173-175.

Union (including where the measure in question was adopted by a Member State as required by Union law), financial responsibility should be borne by the Union. Equally, the decision on whether to settle a dispute settlement claim and the responsibility for the payment of a settlement award should normally follow the origin of the treatment.

However, while the allocation of financial responsibility between the Union and a Member State may give rise to complex considerations, the investor bringing the claim should not be adversely affected by any disagreement between the Union and the Member State. Therefore, provision should be made to ensure that any final award or settlement award is paid to the investor promptly, regardless of the decisions on the allocation of financial responsibility. In addition, and in order to avoid unnecessary drawings on the Union budget, there should be provisions for periodic payments to be made into the Union budget to cover arbitration costs, as well as for the prompt reimbursement of the Union budget by the Member State concerned.

1.4. The roles of the Union and of the Member States in relation to the conduct of disputes

This proposal distinguishes three different situations, as regards the distribution of roles between the Union and the Member States in relation to the conduct of disputes under agreements to which the Union is a party.

In the first situation, the Union would act as respondent where the treatment alleged to be inconsistent with the agreement is treatment afforded by one or several Union institutions. The Union would accept full financial responsibility in such cases.

In the second, the Member State would act as respondent where the treatment in question is afforded by the Member State. The Member State would accept full financial responsibility in such cases. In this situation, the Member State would need to keep the Commission informed of developments in the case, and permit the Commission to give direction on particular issues.¹¹

In the third situation, the Union would act as respondent in respect of treatment afforded by a Member State. This would occur where the Member State has opted not to act as respondent. It would also occur where the Commission decides that issues of Union law are involved such that the Union may be financially responsible, in whole or in part. It would also apply where the Commission takes the view that a Union position is required in order to ensure unity of external representation, because it is likely that similar claims may be raised in disputes against other Member States or because the disputes raises unsettled issues of law that are likely to recur in other disputes. The Union will be represented by the Commission in accordance with its role in external representation established by Article 17 of the Treaty on European Union.

It is evident for the Commission that, where the Union acts as respondent concerning treatment afforded by a Member State, it will be necessary to ensure a high degree of co-operation with the Member State concerned. This will involve close co-operation in the preparation of the defence, from the beginning to the end of the procedure. Thus, documents will need to be shared and representatives of the Member States should form part of the

¹¹ As provided in Article 13 of the Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2010/197 COD].

Union's delegation. However, legislating for a specific role for such representatives in the hearings or permitting the filing of individual briefs, would introduce too rigid a system and might lead to difficulties in ensuring the unity of external representation of the Union. For that reason, while the Commission is keen to ensure close and effective co-operation, this Regulation should not contain details of such elements and should only specify the principle of close co-operation between the Union and Member States.

A number of alternatives were examined by the Commission in informal consultations in preparation for this proposal. One such alternative was a mechanism whereby the Union and the Member State concerned would have acted as co-respondents. However, in the Commission's view, such mechanism is not well suited to investor-to-state dispute settlement. First, it does not adequately provide for a mechanism for the allocation of financial responsibility between the Member State concerned and the Union. A Member State paying any eventual award and then seeking to recover from the European Union by itself seeking to determine which elements are required by the law of the Union would be neither consistent nor effective as regards budgetary procedures, nor would it recognise the Commission's role in the implementation of Union law. Second, it could lead to inconsistencies in the defence of the claim, with each co-respondent presenting conflicting or diverging arguments. This would be inconsistent with the principle of unity of external representation as established by the Court of Justice of the European Union. Third, it could result in the tribunal having to make a pronouncement on the division of competences between the Union and Member States, in circumstances where the two co-respondents present divergent positions on this issue to the tribunal; a scenario where a third party gives an opinion on a purely internal EU matter is to be avoided. Finally, in a scenario where a case is successfully defended, and the respondent is awarded costs, it is unlikely that a tribunal would permit the Union and the Member State concerned both to recover costs. It is not acceptable that the potential costs which would be reimbursed to the Union be reduced in order to cover the costs incurred by a co-respondent Member State (or vice-versa). The result would be less than full restitution of the funds allocated by the Union and as a consequence the budget neutrality of the operation for the Union could not be ensured.

1.5. Recognition and enforcement of awards against the Union

It is also necessary to set down rules to deal with the situation in which the EU is held liable. Since the European Union is or will be a party to such agreements, the European Union will be under an international obligation to accept any award made against it. The European Union would honour such obligation.

Given investor-state dispute settlement is based on arbitration, in most countries, including the Member States of the European Union, the recognition and enforcement of investment awards is based on the relevant legislation governing arbitration. This is often in turn based either upon the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards or on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 (as amended in 2006).¹² The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") provides a specific forum for the settlement of investment disputes. It provides in Article 54(1):

¹² These instruments have many similarities.

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

The rules which apply to the recognition and enforcement of investment awards are those set down in the ICSID Convention when the arbitration in question is pursuant to the rules of the ICSID Convention and otherwise, those elaborated in the New York Convention and national laws on arbitration. To the Commission's knowledge, only the United Kingdom and Ireland provide, in domestic law, specific procedures on the management of awards rendered under the ICSID Convention.¹³

These rules would apply, as appropriate, to arbitration conducted pursuant to Union agreements. While there are no recorded cases of the Union or of its Member States refusing to respect an award, if an investor were to consider it necessary to seek recognition or enforcement of an award, it would need to seek such recognition or enforcement via the courts of the Member States. If enforcement is sought of an award made against the Union, Article 1 of Protocol (No. 7) on the Privileges and Immunities of the European Union would apply:

The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.

This means that the investor may need to go to the Court of Justice of the European Union if enforcement against Union assets is requested. The Commission considers that the Court of Justice would apply the standard approach on sovereign immunity to such situations, with the result that the situation within the Union would be comparable to the situation in other countries, including the Member States of the European Union, where the international principle of sovereign immunity would come into play.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

This proposal has not been subject to an impact assessment. This is because the regulation does not, in and of itself, include the provisions on investor-state dispute settlement which in turn may lead to the need to engage in arbitration or in liability to pay compensation. To the extent that it is possible to analyse the potential impacts of such provisions, this will be done in the impact assessment for the agreements in question. Section 4 below nevertheless gives some explanation on the likely budgetary effects.

The Commission held several meetings with Member State representatives and with the European Parliament in the preparation of this proposal. The views expressed in those meetings have been carefully taken into account in the attached proposal.

¹³ See, for the UK the Arbitration (International Investment Disputes) Act 1966 and for Ireland, the Arbitration Act, 1980, (Part IV).

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The proposal is based on Article 207(2) of the TFEU which establishes the exclusive competence of the Union for a common commercial policy, including for foreign direct investment.

3.2. Presentation of the proposal

The proposed Regulation establishes a framework for the allocation of the financial responsibility arising out of investor-to-state dispute settlement conducted pursuant to agreements to which the Union is a party.

3.2.1. Chapter I: General Provisions

This Chapter sets out the scope of the proposed Regulation and includes the definitions of the terms used. The proposed Regulation applies to dispute settlement initiated by an investor of a third country and conducted pursuant to an agreement to which the Union is a party. It does not apply to state-to-state dispute settlement concerning investment protection provisions, since these do not as such concern the possibility of financial compensation. A state wishing to seek compensation would need to be assigned the relevant claims from its investors.

3.2.2. Chapter II: Apportionment of financial responsibility

This Chapter sets out the basis on which the financial responsibility arising from a dispute settlement claim will be allocated to the Union, a Member State or both.

The main criterion for the allocation will be the origin of the treatment of which the investor has complained. If the treatment originates in a Union act, then the financial responsibility will be borne by the Union. If the treatment originates in an act of a Member State, then the financial responsibility will be borne by the Member State, unless the treatment was required by Union law. However, the Member State should bear financial responsibility for treatment required by Union law, in cases where such treatment was required in order to correct a pre-existing violation of Union law.

In cases where financial responsibility has been allocated to a Member State, the Commission may adopt a decision setting out the allocation.

Notwithstanding these apportionment criteria, if a Member State chooses to accept the financial responsibility arising from a claim to which the Union is respondent or acts as respondent to the claim or chooses to settle the claim, the financial responsibility will be borne by the Member State.

Should a Member State accept financial responsibility arising from a claim, the Member State and the Commission may agree the mechanism by which the arbitration costs and award will be paid. The Commission will inform the arbitration tribunal and the investor of the Member State's acceptance of financial responsibility.

3.2.3. *Chapter III: Conduct of disputes*

This Chapter sets out the principles relating to the conduct of disputes relating to treatment afforded either by the Union or by a Member State, whether fully or in part.

Section 1 of this Chapter provides that the Union shall act as respondent whenever the dispute concerns treatment afforded by the Union.

Section 2 deals with the situation where the dispute concerns, fully or partially, treatment afforded by a Member State. The Commission will notify the Member State concerned as soon as it becomes aware that consultations have been requested by an investor, in accordance with the provisions of an investment protection agreement. The Member State may participate in the consultations and it shall provide the Commission with all relevant information.

As soon as the Commission or a Member State receives a notice of arbitration from an investor in accordance with the provisions of an investment protection agreement, they will notify each other. The Member State may act as a respondent to the claim, unless the Commission decides that the Union should act as respondent or the Member State itself wants the Union to so act. The Commission may issue a decision that the Union shall act as respondent where:

- (a) it is likely that the Union will have to bear at least some of the financial responsibility of the claim;
- (b) the dispute also concerns treatment afforded by the Union
- (c) it is likely that similar claims will be brought against treatment afforded by other Member States; or
- (d) it is likely that the claim will raise unsettled issues of law.

Where the Union is acting as a respondent, the Member State concerned must provide all necessary assistance to the Commission and may form part of the Union delegation in the arbitration proceedings. The Commission will keep the Member State closely informed of all significant steps in the process, will work closely with the Member State and will consult with the Member State regularly.

Where the Member States is acting as respondent, it must provide all documents relating to the proceedings to the Commission and shall allow the Commission to form part of the Member State delegation in the arbitration proceedings. The Member State will keep the Commission closely informed of all significant steps in the process and may be required to adopt a particular position in its defence of the claim where there is a Union interest.

3.2.4. *Chapter IV: Settlements*

If the Commission considers that the interests of the Union would be best served by the settlement of a claim concerning treatment exclusively afforded by the Union, it may adopt a

decision to approve a settlement. This decision shall be adopted in accordance with the examination procedure created by Regulation (EU) 182/2011¹⁴.

If the Commission considers that the interests of the Union would be best served by the settlement of a claim concerning treatment afforded by a Member State or by both a Member State and the Union, the Commission will consult with the Member State concerned. If the Member State agrees to a settlement, it shall endeavour to agree with the Commission the necessary elements for the negotiation and implementation of the settlement. The Commission may decide to settle the dispute even if the Member State concerned does not consent, if the Commission considers that there is an overriding interest of the Union. The terms of the settlement will be agreed in accordance with the examination procedure.

Where a claim concerns treatment exclusively afforded by a Member State, the Member State may settle the dispute provided that:

- (a) the Member State accepts any financial responsibility arising from the settlement;
- (b) the settlement agreement is only enforceable against that Member State;
- (c) the terms of the settlement are compatible with Union law and;
- (d) there is no overriding Union interest.

The Member State shall consult with the Commission which will decide whether all of the conditions set out above are met within 90 days.

3.2.5. Chapter V: Payment of final awards and settlements

Where the Member State concerned has acted as respondent to a claim, it shall be responsible for the payment of final awards and settlements relating to that claim.

Where the Union has acted as respondent to a claim, it shall pay any final award to the investor in accordance with the rules laid down in the relevant agreement, unless a Member State has accepted financial responsibility for the dispute. In cases where a settlement has been agreed, the Commission will pay the settlement amount in accordance with the rules laid down in the settlement agreement.

Where the Commission considers that all or part of a final award or settlement amount should be paid by a Member State which has not accepted financial responsibility, it will consult with the Member State concerned. If the Commission and the Member State cannot reach agreement on the matter, the Commission will adopt a decision setting out the amount to be paid by that Member State. The Member State will compensate the Union budget, including interest, within three months from the date of the decision. If the Member State disagrees with the Commission's allocation of financial responsibility, it shall submit an objection. If the Commission does not agree with the Member State's objection, it shall adopt a decision asking the Member State to compensate the Union budget, including interest. The Member State may then have recourse to Article 263 of the Treaty on the Functioning of the European Union in order to seek annulment of the decision in question. The matter will thereafter be

¹⁴ 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 (OJ L 55, 28.2.2011, p. 13).

decided by the Court of Justice of the European Union in accordance with this Regulation. This procedure should not include any element for the control of the Commission's decision by the Member States. This is a decision which applies only to one Member State and in respect of which the Commission's application of the standards set down by the regulation should not be subject to a political control by the Member States. It is key for the proper functioning of the regulation that the criteria are strictly applied in an objective manner. Should the Member State concerned seek the annulment of the Commission's decision before the Court of Justice of the European Union then other Member States with an interest in the interpretation would be able to intervene in the proceedings before the Court of Justice.

Where the Union is acting as a respondent, arbitration costs shall be paid by the Union or the Member State in accordance with how the financial responsibility for the dispute is allocated. The Commission may adopt a decision requiring the Member State concerned with the claim to make financial contributions to the Union budget to cover any periodic payments of arbitration costs.

4. BUDGETARY IMPLICATIONS

It is by definition not possible to give precise information on the likely costs associated with investor-state dispute settlement. These depend on a wide array of factors including the volume of capital flows, the stability of the investment environment etc. The Union's exposure to such liability also depends, of course, on the number of such agreements to which it will eventually be a party. At the time this proposal is made, the Union is only party to one agreement with investor-state dispute settlement, even if a number of other agreements are currently under negotiation. Hence, it is impossible to be specific as to the likely budgetary consequences in the preparation of a Regulation of this nature, intended to have a horizontal effect. While the difficulty of making accurate estimates should not be discounted, a more accurate analysis is possible on a case-by-case basis in the impact assessments which will be prepared for specific agreements and the agreements should also be subject to ex post evaluation. Financial Statements shall be prepared for all future agreements to be concluded pursuant to Article 218 of the Treaty which would fall under the scope of this Regulation.

It is necessary to ensure that the requisite elements in the General Budget of the Union are in place in order to cover any potential costs arising from agreements with third countries including investor state dispute settlement as implemented in this Regulation. This has three elements. First, provision needs to be made for the payment of any expenses of the arbitral tribunal and any other related costs. Second, provision needs to be made for situations where the Union is required to pay compensation on final awards or settlement in respect of acts of its institutions. Third, in cases in which the Union acts as respondent, but where the Member State concerned is ultimately to be considered as financially responsible, it is necessary for the Union to make any necessary payments and then have these payments reimbursed by the Member State concerned. It is also necessary to provide for a mechanism where a Member State, which has accepted the financial responsibility on a case, makes periodic payments to the EU Budget in order to compensate the cost of arbitration. All such payments and recoveries would be made through the budget line 20 02 01 - External trade relations, including access to the markets of third countries. The necessary provisions for this have been

taken up in the Commission's proposal for the 2013 budget¹⁵ in the form of an addition to the budgetary comments of the afore-mentioned budget line referring to:

"Investor to state dispute settlement as established by international agreements

The following expenditure is to support:

- Arbitration costs, legal expertise and fees incurred by the Union as party to disputes arising from the implementation of international agreements concluded under Article 207 of the Treaty on Functioning of the European Union.
- Payment of final award or award settlements paid to an investor in the context of such international agreements."

¹⁵ Adopted by the Commission on 25 May 2012 (COM(2012)300).

Proposal for a

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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) With the entry into force of the Lisbon Treaty, the Union has acquired exclusive competence for the conclusion of international agreements on investment protection. The Union is already party to the Energy Charter Treaty¹ which provides for investment protection.
- (2) Agreements providing for investment protection typically include an investor-to-state dispute settlement mechanism, which allows an investor from a third country to bring a claim against a state in which it has made an investment. Investor-to-state dispute settlement can result in awards for monetary compensation. Furthermore, significant costs for administering the arbitration as well as costs relating to the defence of a case will inevitably be incurred in any such case.
- (3) In accordance with the case-law of the Court of Justice of the European Union², international responsibility for treatment subject to dispute settlement should follow the division of competence between the European Union and Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State.
- (4) Where the Union has international responsibility for the treatment afforded, it will be expected, as a matter of international law, to pay any adverse award and bear the costs

¹ OJ L 69, 9.3.1998, p. 1.

² Opinion 1/91 of the European Court of Justice [1991] ECR I-60709

of any dispute. However, an adverse award may potentially flow either from treatment afforded by the Union itself or from treatment afforded by a Member State. It would as a consequence be inequitable if awards and the costs of arbitration were to be paid from the Union budget where the treatment was afforded by a Member State. It is therefore necessary that financial responsibility be allocated, as a matter of Union law, and without prejudice to the international responsibility of the Union, between the Union and the Member State responsible for the treatment afforded on the basis of criteria established by this Regulation.

- (5) In its resolution on the future EU International Investment Policy³, the European Parliament has explicitly called for the creation of the mechanism provided for in this Regulation. Furthermore, the Council requested the Commission to study the matter in its Conclusions on a Comprehensive International Investment Policy of 25 October 2010.
- (6) Financial responsibility should be allocated to the entity responsible for the treatment found to be inconsistent with the relevant provisions of the agreement. This means that the Union should bear the financial responsibility where the treatment concerned is afforded by an institution, body or agency of the Union. The Member State concerned should bear the financial responsibility where the treatment concerned is afforded by a Member State. However, where the Member State acts in a manner required by the law of the Union, for example in transposing a directive adopted by the Union, the Union should bear financial responsibility in so far as the treatment concerned is required by Union law. The regulation also needs to foresee the possibility that an individual case could concern both treatment afforded by a Member State and treatment required by Union law. It will cover all actions taken by Member States and by the European Union.
- (7) The Union, represented by the Commission should always act as the respondent where a dispute concerns exclusively treatment afforded by the institutions, bodies or agencies of the Union, so that the Union bears the potential financial responsibility arising from the dispute in accordance with the above criteria.
- (8) On the other hand, where a Member State would bear the potential financial responsibility arising from a dispute, it is appropriate, as a matter of principle, to permit such Member State to act as respondent in order to defend the treatment which it has afforded to the investor. The arrangements set down in this Regulation provide for that. This has the significant advantage that the Union budget and Union resources would not be burdened, even temporarily, by either the costs of litigation or any eventual award made against the Member State concerned.
- (9) Member States may, nevertheless, prefer that the Union, represented by the Commission, act as a respondent in this type of disputes, for example for reasons of technical expertise. Member States should, therefore, have the possibility to decline to act as a respondent, without prejudice to their financial responsibility.
- (10) In certain circumstances, it is essential, in order to ensure that the interests of the Union can be appropriately safeguarded, that the Union itself act as a respondent in disputes involving treatment afforded by a Member State. This may be so in particular

³ Paragraph 35 of Resolution A7 0070/2011 of 22 April 2011.

where the dispute also involves treatment afforded by the Union, where it appears that the treatment afforded by a Member State is required by Union law, where it is likely that similar claims may be brought against other Member States or where the case involves unsettled issues of law, the resolution of which may have an impact on possible future cases against other Member States or the Union. Where a dispute concerns partially treatment afforded by the Union, or required by Union law, the Union should act as a respondent, unless the claims concerning such treatment are of minor importance, having regard to the potential financial responsibility involved and the legal issues raised, in relation to the claims concerning treatment afforded by the Member State.

- (11) It is necessary to provide for the possibility for the Union to act as respondent in such circumstances in order to ensure that the interests of the Union and hence of the collectivity of Member States can be taken into account. This is given expression in the principles of unity of external representation and the duty of co-operation, established in Article 4(3) of the Treaty on European Union and in the case-law of the Court of Justice of the European Union⁴ which apply irrespective of the underlying competence.
- (12) It is appropriate that the Commission decide, within the framework set down in this regulation, whether the Union should be the respondent or whether a Member State should act as respondent.
- (13) It is necessary to provide for some practical arrangements for the conduct of arbitration proceedings in disputes concerning treatment afforded by a Member State. Irrespective of whether the Union or the Member State acts as respondent in such disputes, those arrangements should aim at the best possible management of the dispute whilst ensuring compliance with the principles of unity of external representation and the duty of co-operation, established in Article 4(3) of the Treaty on European Union and in the case-law of the Court of Justice of the European Union⁵. Where the Union acts as respondent such arrangements should provide for very close co-operation including the prompt notification of any procedural steps, the provision of documents, frequent consultations and participation in the delegation to the proceedings.
- (14) Equally, when a Member State acts as respondent it is appropriate that it keep the Commission informed of developments in the case and that the Commission can, where appropriate, require that the Member State acting as respondent takes a specific position on matters having a Union interest.
- (15) A Member State may at any time accept that it would be financially responsible in the event that compensation is to be paid. In such a case the Member State and the Commission may enter into arrangements for the periodic payment of costs and for the payment of any compensation. Such acceptance does not imply that the Member State accepts that the claim under dispute is well founded. The Commission should be able to adopt a decision requiring the Member State to make provision for such costs. In the

⁴ Opinion 1/94 of the European Court of Justice [1994] ECR I-5267; Commission v. Council (FAO), [1996] ECR I-1469

⁵ Opinion 1/94 of the European Court of Justice [1994] ECR I-5267; Commission v. Council (FAO), [1996] ECR I-1469

event that the tribunal awards costs to the Union, the Commission should ensure that any advance payment of costs is immediately reimbursed to the Member State concerned.

- (16) In some cases, it may be appropriate to reach a settlement in order to avoid costly and unnecessary arbitration. It is necessary to lay down a procedure for making such settlements. Such a procedure should permit the Commission, acting in accordance with the examination procedure, to settle a case where this would be in the interests of the Union. Where the case concerns treatment afforded by a Member State, it is appropriate that there should be close co-operation and consultations between the Commission and the Member State concerned. The Member State should remain free to settle the case at all times, provided that it accepts full financial responsibility and that any such settlement is consistent with Union law and not against the interests of the Union.
- (17) Where an award has been rendered against the European Union, that award should be paid without delay. The Commission should make arrangements for the payment of such awards, unless a Member State has already accepted financial responsibility
- (18) The Commission should consult closely with the Member State concerned in order to reach agreement on the apportionment of financial responsibility. Where the Commission determines that a Member State is responsible, and the Member State does not accept that determination, the Commission should pay the award, but should address a decision to the Member State requesting it to provide the amounts concerned to the budget of the European Union, together with applicable interest. The interest payable should be that set down pursuant to [Article 71(4) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities as amended⁶]⁷. Article 263 of the Treaty is available in cases where a Member State considers that the decision falls short of the criteria set out in this Regulation.
- (19) The Union budget should provide coverage of the expenditure resulting from agreements concluded pursuant to Article 218 of the Treaty providing for investor-state dispute settlement. Where Member States have financial responsibility pursuant to this Regulation, the Union should be able to either accumulate the contributions of the Member State concerned first before implementing the relevant expenditure or implement the relevant expenditure first and be reimbursed by the Member States concerned after. Use of both of these mechanisms of budgetary treatment should be possible, depending on what is feasible, in particular in terms of timing. For both mechanisms, the contributions or reimbursements paid by the Member States should be treated as internal assigned revenue of the Union budget. The appropriations arising from this internal assigned revenue should not only cover the relevant expenditure but they should also be eligible for replenishment of other parts of the Union budget which provided the initial appropriations to implement the relevant expenditure under the second mechanism.

⁶ OJ L 248, 16.9.2002, p. 1.

⁷ References to be replaced by references to the Regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union (2010/395(COD)) once adopted.

- (20) In order to ensure uniform conditions for the implementation of this Regulation implementing powers should be conferred on the Commission.
- (21) The implementing powers relating to Articles 12(1), 13(4) and 14(3) 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 powers⁸.
- (22) The advisory procedure should be used for the adoption of decisions on settlement of disputes pursuant to 14(3) given that those decisions will have at most a merely temporary impact on the Union budget, since the Member State concerned will be required to assume any financial responsibility arising from the dispute, and because of the detailed criteria set down in the regulation for acceptability of such settlements,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General Provisions

Article 1

Scope

1. This Regulation applies to investor-to-state dispute settlement conducted pursuant to an agreement to which the Union is a party and initiated by a claimant of a third country.
2. For information purposes, the Commission shall publish in the *Official Journal of the European Union* and keep up to date, a list of the agreements falling within the scope of this Regulation.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (a) "agreement" means any international agreement to which the Union is a party and which provides for investor-to-state dispute settlement;
- (b) "costs arising from the arbitration" means the fees and costs of the arbitration tribunal and the costs of representation and expenses awarded to the claimant by the arbitration tribunal;

⁸ OJ L 55, 28.2.2011, p. 13.

- (c) "dispute" means a claim brought by a claimant against the Union pursuant to an agreement and on which an arbitration tribunal will rule;
- (d) "investor-to-state dispute settlement" means a mechanism provided for by an agreement by which a claimant may initiate claims against the Union;
- (e) "Member State" means one or more Member States of the European Union;
- (f) "Member State concerned" means the Member State which has afforded the treatment alleged to be inconsistent with the agreement;
- (g) "financial responsibility" means an obligation to pay a sum of money awarded by an arbitration tribunal or agreed as part of a settlement and including the costs arising from the arbitration;
- (h) "settlement" means any agreement between the Union or a Member State, or both, of the one part, and a claimant, of the other, whereby the claimant agrees not to pursue its claims in exchange for the payment of a sum of money, including where the settlement is recorded in an award of an arbitration tribunal;
- (i) "arbitration tribunal" means any person or body designated under an agreement to rule on an investor-to-state dispute;
- (j) "claimant" means any natural or legal person which may bring a claim to investor-to-state dispute settlement pursuant to an agreement or any natural or legal person to whom the claims of the claimant under the agreement have been lawfully assigned.

CHAPTER II

Apportionment of financial responsibility

Article 3

Apportionment criteria

1. Financial responsibility arising from a dispute under an agreement shall be apportioned according to the following criteria:
 - (a) the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union;
 - (b) the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State, except where such treatment was required by the law of the Union.

Notwithstanding point (b) of the first subparagraph, where the Member State concerned is required to act pursuant to the law of the Union in order to remedy the inconsistency with the law of the Union of a prior act, that Member State shall be financially responsible unless the adoption of such prior act was required by the law of the Union.

2. Where provided for in this Regulation, the Commission shall adopt a decision determining the financial responsibility of the Member State concerned in accordance with the criteria laid down in paragraph 1.
3. Notwithstanding paragraph 1, the Member State concerned shall bear the financial responsibility where:
 - (a) the Member State concerned has accepted potential financial responsibility pursuant to Article 11;
 - (b) the Member State concerned acts as respondent pursuant to Article 8 or,
 - (c) the Member State concerned enters into a settlement pursuant to Article 12.

CHAPTER III

Conduct of disputes

Section 1

Conduct of disputes concerning treatment afforded by the Union

Article 4

Treatment afforded by the Union

The Union shall act as respondent where the dispute concerns treatment afforded by the institutions, bodies or agencies of the Union.

Section 2

Conduct of disputes concerning treatment afforded by a Member State

Article 5

Treatment afforded by a Member State

The provisions of this Section shall apply in disputes concerning, fully or partially, treatment afforded by a Member State.

Article 6

Consultations

1. As soon as the Commission receives a request for consultations from a claimant in accordance with the provisions of an agreement, it shall notify the Member State concerned. A Member State which has been made aware of or has received a request for consultations shall immediately inform the Commission.

2. Representatives of the Member State concerned shall form part of the Union's delegation to the consultations.
3. The Member State concerned shall immediately provide the Commission with all information which may be relevant to the case.

Article 7

Initiation of Arbitration proceedings

As soon as the Commission receives notice by which a claimant states its intention to initiate arbitration proceedings, in accordance with the provisions of an agreement, it shall notify the Member State concerned.

A Member State which receives notice by which a claimant states its intention to initiate arbitration proceedings, shall immediately notify the Commission.

Article 8

Respondent status

1. Provided the agreement provides for the possibility, the Member State concerned shall act as respondent except where any of the following situations arise :
 - (a) the Commission has taken a decision pursuant to paragraph 2; or,
 - (b) the Member State has not confirmed to the Commission in writing that it intends to act as respondent within 30 days of receiving notice or notification referred to in Article 7.

If either of the situations referred to in (a) or (b) arise, the Union shall act as respondent.

2. The Commission may decide, within 30 days of receiving notice or notification referred to in Article 7, that the Union shall act as respondent where one or more of the following circumstances arise:
 - (a) it is likely that the Union would bear at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3;
 - (b) the dispute also concerns treatment afforded by the institutions, bodies or agencies of the Union;
 - (c) it is likely that similar claims will be brought under the same agreement against treatment afforded by other Member States and the Commission is best placed to ensure an effective and consistent defence; or,
 - (d) the dispute raises unsettled issues of law which may recur in other disputes under the same or other Union agreements concerning treatment afforded by the Union or other Member States.

3. The Commission and the Member State concerned shall immediately after receiving notice or notification referred to in Article 7 enter into consultations on the management of the case pursuant to this Article. The Commission and the Member State concerned shall ensure that any deadlines set down in the agreement are respected.
4. The Commission shall inform the other Member States and the European Parliament of any dispute in which this Article is applied and the manner in which it has been applied.

Article 9

Conduct of Arbitration proceedings by a Member State

1. In the event that a Member State acts as respondent, the Member State shall
 - a) provide the Commission with all documents relating to the proceeding;
 - b) inform the Commission of all significant procedural steps, and enter into consultations regularly and, in any event, when requested by the Commission; and,
 - c) permit representatives of the Commission, at its request, to form part of the delegation representing the Member State.
2. The Commission may, at any time, require the Member State concerned to take a particular position as regards any point of law raised by the dispute or any other element having a Union interest.
3. When an agreement, or the rules referred to therein, provide for the possibility of annulment, appeal or review of a point of law included in an arbitration award, the Commission may where it considers that the consistency or correctness of the interpretation of the agreement so warrant, require the Member State to lodge an application for such annulment, appeal or review. In such circumstances, representatives of the Commission shall form part of the delegation and may express the views of the Union as regards the point of law in question.

Article 10

Conduct of Arbitration proceedings by the Union

The following provisions shall apply throughout arbitration proceedings where the Union acts as a respondent pursuant to Article 8:

- (a) the Commission shall take all necessary measures to defend the treatment concerned;
- (b) the Member State concerned shall provide all necessary assistance to the Commission;

- (c) the Commission shall provide the Member State with all documents relating to the proceeding, so as to ensure as effective defence as possible; and,
- (d) the Commission and the Member State concerned shall prepare the defence in close co-operation with the representatives of the Member State concerned who shall be entitled to form part of the Union delegation in the proceedings.

Article 11

Acceptance by the Member State concerned of potential financial responsibility where the Union is respondent

Where the Union acts as respondent pursuant to Article 8, the Member State concerned may, at any time, accept any potential financial responsibility arising from the arbitration. To this end the Member State concerned and the Commission may enter into arrangements dealing with, inter alia;

- (a) mechanisms for the periodic payment of costs arising from the arbitration;
- (b) mechanisms for the payment of any awards made against the Union.

CHAPTER IV

Settlements

Article 12

Settlement of disputes concerning treatment afforded by the Union

1. If the Commission considers that a settlement of a dispute concerning treatment exclusively afforded by the Union would be in the interests of the Union, it may adopt an implementing decision in accordance with the examination procedure referred to in Article 20(3) to approve the settlement.
2. Should a settlement potentially involve action other than the payment of a monetary sum, the relevant procedures for such action shall apply.

Article 13

Settlement of disputes concerning treatment afforded by a Member State

1. Where the Union is respondent in a dispute concerning treatment afforded, whether fully or in part, by a Member State, and the Commission considers that the settlement of the dispute would be in the interests of the Union, it shall first consult with the Member State concerned. The Member State may also initiate such consultations with the Commission.
2. If the Member State concerned consents to settle the dispute, it shall endeavour to enter into an arrangement with the Commission setting out the necessary elements for the negotiation and implementation of the settlement.

3. In the event that the Member State does not consent to settle the dispute, the Commission may settle the dispute where overriding interests of the Union so require.
4. The terms of the settlement agreed shall be approved in accordance with the examination procedure referred to in Article 20(3).

Article 14

Settlement by a Member State

1. Where the Union is respondent in a dispute concerning exclusively treatment afforded by a Member State, the Member State concerned may settle a dispute where:
 - (a) the Member State concerned accepts any financial responsibility arising from the settlement;
 - (b) any settlement arrangement is enforceable only against the Member State concerned;
 - (c) the terms of the settlement are compatible with the law of the Union; and,
 - (d) there is no overriding interest of the Union against the settlement.
2. The Commission and the Member State concerned may enter into consultations to evaluate a Member State's intention to settle a dispute.
3. The Member State concerned shall notify the Commission of the draft settlement arrangement. The Commission shall be deemed to have accepted the settlement arrangement unless it decides otherwise, in accordance with the advisory procedure referred to in Article 20(2) and within 90 days following the notification of the draft settlement by the Member State, on the grounds that the settlement does not meet all of the conditions set out in paragraph 1.

CHAPTER V

Payment of final awards and settlements

Article 15

Scope

The provisions of this chapter shall apply where the Union acts as respondent in a dispute.

Article 16

Procedure for the payment of awards or settlements

1. A claimant having obtained a final award pursuant to an agreement may present a request to the Commission for payment of that award. The Commission shall pay any such award within the relevant time periods set down in the agreement, except where the Member State concerned has accepted financial responsibility pursuant to Article 11 in which case the Member State shall pay the award.
2. Where a settlement approved by the Union pursuant to article 12 or 13 is not recorded in an award, a claimant may present a request to the Commission for payment of the settlement. The Commission shall pay any such settlement within any relevant time periods set down in the settlement agreement.

Article 17

Procedure where there is no agreement as to financial responsibility

1. Where the Union acts as respondent pursuant to Article 8, and the Commission considers that the award or settlement in question should be paid, in part or in full, by the Member State concerned on the basis of the criteria laid down in Article 3(1), the procedure set out in paragraphs 2 to 5 shall apply.
2. The Commission and the Member State concerned shall immediately enter into consultations to seek agreement on the financial responsibility of the Member State concerned, and the Union where applicable.
3. Within three months of receipt of the request for payment of the final award or settlement, the Commission shall adopt a decision addressed to the Member State concerned, determining the amount to be paid by that Member State.
4. Unless the Member State concerned objects to the Commission's determination within one month, the Member State concerned shall compensate the budget of the Union for the payment of the award or the settlement no later than three months after the Commission's decision. The Member State concerned shall be liable for any interest due at the rate applying to other monies owed to the budget of the Union.
5. If the Member State concerned objects, unless the Commission agrees with the Member State's objection, the Commission shall adopt a decision within three months of receipt of the Member State's objection, requiring the Member State concerned to reimburse the amount paid by the Commission, together with interest at the rate applying to other monies owed to the budget of the Union.

Article 18

Advance payment of arbitration costs

1. The Commission may adopt a decision requiring the Member State concerned to make financial contributions to the budget of the Union in respect of any costs arising from the arbitration where it considers that the Member State will be liable to pay any award pursuant to the criteria set down in Article 3.
2. To the extent that the costs arising from the arbitration are awarded to the Union by the arbitration tribunal, and the Member State concerned has made periodic payment of costs arising from the arbitration, the Commission shall ensure that they are transferred to the Member State which has paid them in advance.

Article 19

Payment by a Member State

A Member State's reimbursement or payment to the budget of the Union, for the payment of an award or a settlement or any costs, shall be considered as internal assigned revenue in the sense of [Article 18 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the General Budget of the European Communities⁹]. It may be used to cover expenditure resulting from agreements concluded pursuant to Article 218 of the Treaty providing for investor-state dispute settlement or to replenish appropriations initially provided to cover the payment of an award or a settlement or any costs.

CHAPTER VI

Final provisions

Article 20

1. The Commission shall be assisted by [the Committee for Investment Agreements established by Regulation [2010/197 COD]]. 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.
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

⁹ References to be replaced by references to the Regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union (2010/395(COD)) once adopted.

Article 21

Report and Review

1. The Commission shall submit a report on the operation of this Regulation to the European Parliament and the Council at regular intervals. The first report shall be submitted no later than three years after the entry into force of this Regulation. Subsequent reports shall be submitted every three years thereafter.
2. The Commission may also submit, together with the report referred to in paragraph 1 and based on the Commission's findings, a proposal to the European Parliament and the Council for the amendment of this Regulation.

Article 22

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