



# International Arbitration

## New European Regulation Clarifies the Status of Extra-European Bilateral Investment Treaties

On December 12, 2012, the European Union issued Regulation (EU) No. 1219/2012 (the Regulation) establishing transitional arrangements for bilateral investment treaties (BITs) between Member States and third countries.<sup>1</sup> The Regulation, which entered into force on January 9, 2013, provides investors with some clarity regarding the status of BITs entered into by EU Member States and non-EU States (extra-EU BITs) following the Lisbon Treaty.

The Lisbon Treaty, which entered into force on December 1, 2009, expanded the EU's exclusive competence over the common commercial policy of the European Union to include foreign direct investment (FDI) and investment treaties with non-EU States.<sup>2</sup> As a result, the Lisbon Treaty created some uncertainty as to the status of the 1,200 plus extra-EU BITs, along with the ability of Member States to enter into BITs subsequent to the entry into force of the Lisbon Treaty.

### The Regulation Has Provided Some Clarity to These Issues

First, it confirms that extra-EU BITs signed before December 1, 2009, or before a Member-State's accession to the EU may, subject to review by the European Commission (the Commission), remain in force until replaced by an investment agreement between the European Union and the third State in question.

Second, it creates a regime whereby extra-EU BITs signed between December 1, 2009, and January 9, 2013, may be maintained or enter into force subject to certain conditions.

Third, it establishes a framework whereby Member States may negotiate or enter into new extra-EU BITs in the future.

The Regulation does not address the status of investment agreements between EU Member States (intra-EU BITs), which has resulted in complex legal issues and conflicting decisions of investment arbitral tribunals.<sup>3</sup> Neither does it address the fact that the European Union is not a signatory to the International Centre for Settlement of Investment Disputes (ICSID) Convention, which provides the forum and arbitration rules under which most BIT disputes are determined.

### BITs With Third Countries Signed Before December 1, 2009, or Before Accession to the EU

- The Regulation required Member States to notify the Commission of all extra-EU BITs that they wished to maintain in force by February 8, 2013, or within 30 days of their accession to the EU.<sup>4</sup> While the deadline for current Member States to avail themselves of the Regulation has passed, new Member States may still be able to do so by making the required notification to the Commission within 30 days after acceding to the EU;
- Subject to review by the Commission, the Regulation confirms that the BITs notified thereunder may remain in force until the EU concludes replacement BITs with the respective third countries;<sup>5</sup>
- If, upon its review, the Commission considers that an existing BIT constitutes a serious obstacle to the negotiation or conclusion by the EU of a replacement BIT, the Commission will enter into consultations with the Member State concerned to resolve the matter;<sup>6</sup>
- Within three months of February 8, 2013, or by May 8, 2013, the Commission will publish a list of the BITs notified to it pursuant to the Regulation, and will publish an updated list of such BITs every twelve months afterwards.<sup>7</sup> As of the date of this publication, the Commission has not yet published the list.

## BITs With Third Countries Signed Between December 1, 2009, and January 9, 2013

- Where a Member State has signed an extra-EU BIT after the date of entry into force of the Lisbon Treaty, the Regulation required that Member State to notify the Commission of any such BITs that it wished to maintain in force or enter into force by February 8, 2013;<sup>8</sup>
- The Commission will authorize the maintenance in force or entry into force of such BITs unless it determines that their provisions conflict with EU law or policies, or that it would constitute a serious obstacle to the negotiation by the EU of an investment agreement with the same third country<sup>9</sup> (the EU is currently planning to conclude BITs with Canada, India, and Singapore);<sup>10</sup>
- Failing authorization by the Commission, Member States must refrain from taking further steps towards the conclusion of such BITs and must “withdraw or reverse” the steps already taken.<sup>11</sup>

## BITs With Third Countries Signed or Amended after January 9, 2013

- Subject to authorization by the Commission, Member States can enter into negotiations to sign new BITs with third countries or to amend existing agreements after January 9, 2013;<sup>12</sup>
- Member States intending to negotiate or amend such BITs must notify the Commission and provide details of the provisions to be negotiated at least five months in advance;<sup>13</sup>
- The Commission will assess whether the negotiations are consistent with EU law and policies, and ensure that the negotiations are not superfluous, *i.e.*, that the Commission has not already initiated negotiations. In accordance with its findings, the Commission may require a Member State to include or remove provisions from the draft BIT to ensure compatibility with EU law or investment policy;<sup>14</sup>
- Once authorized by the Commission, the Member State may open negotiations for the new or revised BIT; however, the Commission must be kept apprised of their progress and may request to participate in the discussions between the Member State and the third country;<sup>15</sup>
- Member States must transmit a copy of the negotiated BIT to the Commission. If it determines that the BIT is consistent with EU laws and policies, and that negotiating an agreement with the same third country is not already in progress, the Commission will authorize the Member State to enter into the agreement.<sup>16</sup>

## Implications for Dispute Resolution Procedures

With respect to BITs falling within the scope of the Regulation,

- Member States must inform the Commission of any request for dispute resolution, including requests for arbitration, brought under such BIT;<sup>17</sup>
- Member States must seek the agreement of the Commission before they activate any dispute settlement mechanisms against a third country under a BIT, and must activate such mechanisms when requested by the Commission;<sup>18</sup>
- When a dispute resolution procedure has been activated, either by or against a Member State, the Member State and the Commission must cooperate in the conduct of the proceedings, which may include the participation of the Commission in the proceedings.<sup>19</sup>

## Observations

The Regulation provides timely clarity as to the status of extra-EU BITs. It sets forth a pragmatic approach to reconciling the EU's exclusive competence over the common commercial policy of the EU with the current regime, taking into account the experience of Member States in negotiating international investment agreements.

The Regulation anticipates a growing role of the EU in negotiating BITs on behalf of the EU as a whole, and indicates that EU BITs will gradually replace Member State BITs. It also provides for the Commission's participation in future BIT disputes, although it is unclear if the Regulation anticipates that the Commission will be actively involved in all future investment treaty disputes involving Member States or how this will take place in practice.

Considerable uncertainties regarding the EU's role in the investment treaty sphere remain. In particular, the Regulation does not address the status of intra-EU BITs, which has been the subject of several recent

arbitrations. As regards extra-EU BITs, as the EU negotiates BITs with third countries, further complications will arise, for example, the possibility of parallel arbitrations under a EU BIT and a BIT concluded by a Member State; the EU's status vis-à-vis the ICSID Convention; and the EU's responsibility for the conduct of Member States (and their instrumentalities) under public international law.

The status of extra-EU BITs that are covered by the Regulation but have run afoul of its provisions also remains uncertain. For example, where a Member State has failed to notify the Commission of an existing BIT by the February 8, 2013, deadline, or where it fails to comply with the Regulation's notification or authorization provisions regarding future BITs, the question will arise if this has any effect on the relevant BIT under public international law. To avoid such further legal uncertainty, Member States would be well advised to ensure compliance with the Regulation, and investors should review whether any extra-EU BITs on which they rely have been duly notified and, to the extent necessary, authorized by the Commission.

## Key Takeaways From the Regulation

- BITs which were in place at the time the Lisbon Treaty entered into force will remain in force if certain conditions are met. As a result, **investors can continue to rely on the substantive protections and dispute resolution mechanisms of existing extra-EU BITs.**
- To maintain or enter into force BITs predating the Lisbon Treaty, or BITs which were signed between the entry into force of the Lisbon Treaty and the Regulation, Member States **were required to notify the Commission of such BITs by February 8, 2013**, (or within 30 days of accession, where applicable). Publication of the list of BITs so notified is expected no later than May 8, 2013.
- Investors who rely on such BITs should **review whether the treaties have been duly notified** and, if necessary, authorized by the Commission.
- The **EU will have a growing role in Member States' investment treaties**, as it has acquired authority to review current and prospective BITs, to negotiate EU-wide BITs, and to participate in investment treaty disputes.
- **Some uncertainty remains with respect to intra-EU BITs, the respective roles and responsibilities of the EU and its Member States in investment treaty disputes, and the EU's status vis-à-vis other key international dispute resolution instruments**, such as the ICSID Convention.

**Endnotes**

- <sup>1</sup> Regulation (EU) No. 1219/2012, OJ L 351/40, 20.12.2012 (hereinafter, "Regulation").
- <sup>2</sup> Treaty on the Functioning of the European Union, Arts. 3(1)(e) and 207(1) and 2(1); Regulation, *supra* note 1, at Recitals, ¶ 4.
- <sup>3</sup> See *Eastern Sugar B.V. v. The Czech Republic*, SCC No. 008/2004, UNCITRAL (Partial Award of March 27, 2007) (holding that a BIT entered into by the Czech Republic prior to its accession to the EU did not automatically terminate upon accession, and that the arbitral tribunal was not bound by the opinion of the European Commission, which considered the BIT superseded by EU law); *Slovak Republic's accession to the EU (Eureko B.V. v. The Slovak Republic, PCA Case No. 2008-13, UNCITRAL (Award on Jurisdiction, Arbitrability and Suspension of October 26, 2010)* (holding that a BIT entered into by Slovakia prior to its accession to the EU was not terminated by accession). The arbitral tribunal's decision in the *Eureko* case was subsequently upheld up the Frankfurt Higher Regional Court in its Decision of May 10, 2012. But see *AES Summit Generation Limited and AES-Tisza ErömU Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22 (Award of September 23, 2010) (holding that Hungary did not breach the Energy Charter Treaty by placing a cap on the price of electricity delivered to a state-owned entity due to pressure by the Commission to eliminate state aid); *Electrabel S.A. v. the Republic of Hungary*, ICSID Case No. ARB/07/19 (Decision on Jurisdiction, Applicable Law and Liability of November 30, 2012) (holding that Hungary did not breach the Energy Charter Treaty by terminating a power purchase agreement which was incompatible with EU law).
- <sup>4</sup> Regulation, Art. 2.
- <sup>5</sup> *Id.* at Arts. 3 and 5.
- <sup>6</sup> *Id.* at Arts. 5 and 6(2)-(3).
- <sup>7</sup> *Id.* at Art. 4.
- <sup>8</sup> *Id.* at Art. 12(1).
- <sup>9</sup> *Id.* at Art. 12(2)-(3).
- <sup>10</sup> Commission proposes improved rules to enforce EU rights under international trade agreements. European Commission Press Release dated December 12, 2012, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=856>.
- <sup>11</sup> *Id.* at Art. 12(5).
- <sup>12</sup> *Id.* at Art. 7.
- <sup>13</sup> *Id.* at Art. 8.
- <sup>14</sup> *Id.* at Art. 9(1)-(2).
- <sup>15</sup> *Id.* at Art. 10.
- <sup>16</sup> *Id.* at Art. 11(1), 11(4).
- <sup>17</sup> *Id.* at Art. 13(b).
- <sup>18</sup> *Id.* at Art. 13(c).
- <sup>19</sup> *Id.* at Art. 13(b)-(c).

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