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Directorate-General for Trade

The Director General

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***By registered letter with acknowledgment
of receipt***

Cecilia Olivet
Transnational Institute
De Wittenstraat 25
1052 AK Amsterdam
The Netherlands

Advance copy by email:
ask+request-2160-badfd480@asktheeu.org

**Subject: Your application for access to documents – Ref GestDem No
2015/3854**

Dear Ms Olivet,

I refer to your e-mail dated 20 July 2015 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),¹ registered on 22 July 2015 under the above mentioned reference number.

You request access to the following documents:

"a list of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of international arbitral institutions (such as but not only the International Chamber of Commerce, the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes) in which the EU's foreign investment policy, and in particular Investor-state dispute settlement (ISDS) was discussed (since July 2014)",

"minutes and other reports of these meetings", and

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

"all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of international arbitral institutions (such as but not only the International Chamber of Commerce, the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes) in which the EU's foreign investment policy, and in particular Investor-state dispute settlement (ISDS) was discussed (since July 2014)".

As you do not specify the end date for the requested documents, we consider that your application covers the period between 1st July 2014 and 20 July 2015, date of your application.

As a preliminary remark, I would like to apologise for the time it has taken to reply to your request. The Directorate-General for Trade is currently processing a large number of requests for access to documents while at the same time pursuing a busy trade agenda. Although we make our best effort to reply to applicants within the deadlines set out in Regulation 1049/2001, a delay in these circumstances has unfortunately been unavoidable.

Further to a review of our files, we have identified two documents falling within the scope of your request, namely:

- an internal e-mail dated 21 April 2015 containing the report of a meeting with ICSID (Ares(2015)5993775) ("**document 1**"); and,
- an internal e-mail dated 13 June 2015 containing *inter alia* the report of a meeting with the Stockholm Chamber of Commerce Arbitration Institute (Ares(2015)5993877) ("**document 2**").

1. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,² when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in subsequent steps. First, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception. Second, it must examine whether disclosure of the parts of the document in question pose a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the interest covered by the exception.³ In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,⁴ "*the exceptions to that right [...] must be interpreted and applied strictly*".⁵

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ See Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

Having carefully examined the documents identified above in light of the applicable legal framework, I am glad to inform you that they can be partially disclosed. Some parts of the documents have been redacted as their disclosure is prevented by the exception to the right of access laid down in Article 4.1(a) third indent of Regulation 1049/2001.

Names and e-mail addresses of individuals involved in the internal correspondence have also been redacted, pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001").⁶ Yet names of members of Cabinet and senior management of the Commission as from the Director level, have been disclosed. Moreover, parts of documents 1 and 2 have been removed as they fall outside the scope of your request.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 1.1 and 1.2.

1.1. Protection of international relations

Article 4.1(a) third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations."

According to settled case-law, "the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation".⁷ In the same vein, the Court of Justice has acknowledged that the institutions enjoy "a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest",⁸ and that "public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations".⁹

Furthermore, the General Court stated that "it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations" and "have a negative effect on the negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations".¹⁰ It added that "in the context of international negotiations, unilateral

⁶ Regulation (EC) No 45/2001 of the European Parliament and the of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

⁷ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

⁸ Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

⁹ *Id.*, paragraph 102.

¹⁰ Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations."¹¹

Finally, the General Court recently ruled that the exception under Article 4.1(a) third indent of Regulation 1049/2001 applies to information originating from international bodies and organisations to the extent that its disclosure may undermine the international relations of the EU.¹²

Documents 1 and 2 contain reports of meetings with ICSID and the Stockholm Chamber of Commerce. Certain redacted parts of documents 1 and 2 contain information, views, opinions and proposals originating from ICSID and the Stockholm Chamber of Commerce whose release would affect the mutual trust that governs the relations of the EU with these institutions. Other redacted parts contain information and internal opinions whose disclosure may undermine the position of the EU on the international level and its relationship with certain international actors, as well as weaken its negotiating position in the context of ongoing and future trade and investment agreements by revealing tactical elements, and elements necessary to prepare textual proposals, in the context of the EU foreign investment policy.

The public release of these passages would therefore undermine in a reasonably foreseeable and not hypothetical manner, the public interest as regards international relations.

1.2. Protection of privacy and integrity of the individual

Article 4.1(b) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

The Court of Justice has ruled that "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety".¹³

Article 2(a) of Regulation 45/2001 provides that "'personal data' shall mean any information relating to an identified or identifiable natural person [...]". The Court of Justice has confirmed that "there is no reason of principle to justify excluding activities of a

¹¹ *Id.*, paragraph 126.

¹² Judgment in *Jurašinovič v Council*, T-465/09, EU:T:2012:515.

¹³ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

*professional [...] nature from the notion of 'private life'*¹⁴ and that *"surnames and forenames may be regarded as personal data"*,¹⁵ including names of the staff of the institutions.¹⁶

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish *"the necessity of having the data transferred"* and additionally *"if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*.¹⁷

Documents 1 and 2 both contain generally names and e-mail addresses that allow the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Jean-Luc DEMARTY

¹⁴ Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁵ Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

¹⁶ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

¹⁷ *Id.*, paragraph 107. See also judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.