Subject: Your application for access to documents – Ref. GestDem No 2018/6646

Dear Ms Verheecke,

I refer to your application of 11 December 2018 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/20011 (hereinafter ‘Regulation 1049/2001’), registered on 11 December 2018 under the above mentioned reference number and to your correspondence with my service dated 20 March 2019.

Please accept our apologies for the delay in answering to your request.

1. **SCOPE OF YOUR REQUEST**

You would like to receive access to documents that contain the following information:

1) a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies, industry associations, law firms, academics, public consultancies and think tanks in which UNCITRAL negotiations were discussed (between August and December 2018);

2) minutes and other reports of these meetings;

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3) all correspondence (including emails, letters, faxes) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of individual companies, industry associations, law firms, academics, public consultancies and think tanks regarding UNCITRAL negotiations (between August and December 2018);

4) all correspondence (including emails, letters, faxes) and documents (including briefings, memo’s, non-papers) shared between Commission officials and between Commission officials and the Council in which UNCITRAL negotiations were discussed (between August and December 2018).

My services originally identified 43 documents falling within the scope of your request, some of which include annexes. In view of the significantly long list of documents covered by your original request, the scope was narrowed down to the 22 documents you have chosen, as per the correspondence of 20 March 2019 (one of the document chosen by you appeared to be out of scope). This was done in accordance with Article 6(3) of Regulation 1049/2001, which provides that in the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution. We are grateful for your cooperation in this regard.

We enclose for ease of reference a list of the 22 chosen documents in Annex I. Eight of these documents include annexes, which amounts to a total of 36 documents. For each of them, the list provides a description and indicates whether parts or full documents are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed.²

We would like to draw your attention to the dedicated DG TRADE website on the multilateral investment court initiative, which contains additional information that may be of interest, in particular links to video recording of meetings.³ Similarly, the UNCITRAL Working Group III website provides all the Working Group documents,⁴ as well as the audio recordings of all the Working Group meetings.⁵ We would also like to draw your attention to a presentation on the subject of this request, which was given at Columbia University on 13 November 2018.⁶ The full video of the presentation is available online.⁷

² Other documents registered under the Ares numbers indicated in Annex I that fully fall outside the scope of this request are not included in Annex I and, hence, are not accessible.

³ The dedicated website can be consulted at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

⁴ See https://uncitral.un.org/en/working_groups/3/investor-state.

⁵ See http://www.uncitral.org/uncitral/audio/meetings.jsp.


⁷ See https://echo360.org/media/6ecc0ad1-b027-49f7-a1c9-a2168dce3185/public.
2. **ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

In accordance with settled case law, 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 a multi-step approach. 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 poses a "reasonably foreseeable and not purely hypothetical" risk of undermining the protection of the interest covered by the exception. Third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4(2) and 4(3) of Regulation 1049/2001, the institution is required "to ascertain whether there is any overriding public interest justifying disclosure". In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents, "the exceptions to that right [...] must be interpreted and applied strictly".

Having examined the requested documents under the applicable legal framework, **full access** is granted to three documents: **annex 2 to document 3; annex to document 13 and annex 1 to document 15**. In addition, one document is available online: document 17.

**Full access** is also granted to: **annex 1 to document 8** however the parts of this document that fall outside the scope of this request have been redacted accordingly.

In addition, **partial access** is granted to **29 documents**: documents 1, 2, 3 and annex 1 to document 3, 4, annex 1 and 2 to document 5 and annexes 1 and 2 to document 6, 7, 8 and annex 2 to document 8, 9, 10 and annexes 1 and 2 to document 10, 11, 12 and annex to document 12, 13, 14 and annex 1 to document 14, 15 and annex 2 to document 15, document 16, as well as documents 18 to 22.

In particular, personal data have been redacted from all documents that are partially released, pursuant to Article 4(1)(b) of Regulation 1049/2001 concerning the protection of the privacy and protection of the individual and in accordance with Regulation (EC) No 2018/1725 (hereinafter, ‘Regulation 2018/1725’).

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8 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.
9 *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.
13 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.
In document 2, annex 1 to document 5, documents 6-7, annex 2 to document 8, documents 9-11, annex to document 12, as well as in document 15, 20, and 22, other information than personal data has been redacted pursuant to Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations.

Please note that information that does not relate to the UNCITRAL negotiations has been marked as falling outside the scope of your request.

I regret to inform you that **access is not granted** to **two** documents. The exception in Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations applies with regards to the decision not to disclose annexes 2 and 3 to document 14.

The reasons justifying the application of each of the exceptions are set out below in sections 2.1 and 2.2. Section 3 considers whether partial access could be granted to the two documents withheld.

### 2.1 Protection of the public interest as regards 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*". In this context, the Court of Justice of the EU 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*".

The General Court found 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*". Moreover, "*the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the

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negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union”.17

The European Commission and the EU Member States have started to elaborate negotiating positions and strategies to be implemented in the context of ongoing discussions and upcoming negotiations in Working Group III of UNCITRAL (United Nations Commission on International Trade Law), tasked with the mandate of exploring a possible multilateral reform of ISDS (Investor-State Dispute Settlement). Negotiations for the establishment of a multilateral solution, possibly a permanent investment court, can be expected to formally start when the Working Group starts to discuss possible solutions to the problems of ISDS under step 3 of its mandate.18 On 20 March 2018, the Council adopted the negotiating directives authorising the Commission to negotiate, on behalf of the EU, a multilateral investment court.19 Considering the abovementioned EU case-law on the sensitivity of EU positions in ongoing negotiating processes and the need to keep certain aspects thereof confidential, it is considered that a number of documents that fall within the scope of your request cannot be disclosed or can be disclosed only partially.

Some passages have been redacted in a number of documents that include information relevant for the protection of public interests as regards international relations. Please note that both the EU and the Member States sit and intervene separately at the meetings of the Working Group. Disclosure of the redacted passages of such documents would seriously hamper the mutual trust relationship built with the concerned third countries at the technical level which is key to move forward in this project.

In particular, some words and sentences in documents 10 and 11 have been redacted insofar as they contain information relating to positions of third countries and the UNCITRAL Secretariat in relation to the multilateral investment court initiative. These documents embody reports of meetings with third countries, the UNCITRAL Secretariat and other stakeholders. Releasing that information would pose a significant risk to the good relations between the EU and the concerned third countries and the UNCITRAL Secretariat.

Partial access on grounds of the same exception is granted to documents 6, 7, and 8, which are briefings prepared for meetings with representatives of third countries in relation to the UNCITRAL discussions on a possible multilateral reform of ISDS. The

17 Id., paragraph 125.
18 According to the mandate given by the UNCITRAL Commission, the Working Group must proceed to: first, identify and consider concerns regarding ISDS; second, consider whether reform was desirable in light of any identified concerns; and third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.
redacted sentences and paragraphs in documents 6, 7, and 8 contain sensitive information on the third countries’ positions, the reading of discussions at UNCITRAL Working Group III and the EU’s strategy as the process goes forward. Releasing this information would seriously compromise not only the EU’s position in the UNCITRAL process but also the EU and its Member States’ mutual trust relationship with third countries, and therefore their international relations.

Similar considerations apply to document 2, which contains a report of meetings held with officials of a third country on the multilateral investment court initiative. Disclosure of the redacted words would jeopardise the very good working relations of the EU with the country concerned.

Partial access on grounds of the same exception is also granted to documents 9, 12, 15, 20 and 22, which contain information on the EU’s and Member States' positions relevant for the UNCITRAL discussions. Disclosure of the redacted passages of such documents would undermine and weaken the position of the EU at this stage of the process. In order to ensure the best possible outcome in the public interest, the EU needs to retain a certain margin of manoeuvre to shape and adjust its tactics, options and positions in function of how the discussions evolve.

Similarly, some passages have been redacted in annexes 1 and 2 to document 5 under the exception relating to international relations. These documents were intended to give key DG TRADE colleagues a quick update on the UNCITRAL discussions.

Annexes 2 and 3 to document 14 constitute early drafts of the EU and Member States’ papers, which were submitted to UNCITRAL in their final versions in January 2019. These draft papers therefore contain delicate information on the EU and Member States' work-in-progress negotiating position and strategy, which would be seriously hampered in the event that they were released. It is therefore considered justified not to disclose annexes 2 and 3 to document 14 on grounds of protection of the public interest as regards international relations. These documents were elaborated for strictly internal purposes and cannot be shared without seriously hampering the EU's international relations. Disclosure of such documents, to the extent that they are not a final version, would hamper relations of the EU and its Member States with third countries, inasmuch as the documents may contain inaccuracies and discrepancies that could be flagged by UNCITRAL Members. It is therefore considered that the entirety of the documents is covered by the exception relating to the public interest as regards international relations in Article 4(1)(a) third indent of Regulation 1049/2001 and for this reason they are not released. The final version of the papers as submitted to UNCITRAL is available in English, French and Spanish on the DG TRADE website\textsuperscript{20} and in all UN languages.

(Arabic, Chinese, English, French Spanish and Russian) on the UNCITRAL Working Group III website.\footnote{See https://uncitral.un.org/en/working_groups/3/investor-state.}

### 2.2 Protection of privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that "\textit{[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}".


Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data "\textit{means any information relating to an identified or identifiable natural person [...]}". The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.\footnote{Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, Peter Novak v Data Protection Commissioner, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.}\footnote{Judgment of the General Court of 19 September 2018 in case T-39/17, Port de Brest v Commission, paragraphs 43-44, ECLI:EU:T:2018:560.} Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.\footnote{Judgment of 29 June 2010 in Case C-28/08 P, European Commission v The Bavarian Lager Co. Ltd, EU:C:2010:378, paragraph 59.}

In its judgment in Case C-28/08 P (\textit{Bavarian Lager})\footnote{Judgment of 29 June 2010 in Case C-28/08 P, European Commission v The Bavarian Lager Co. Ltd, EU:C:2010:378, paragraph 59.}, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable\footnote{Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.}.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "\textit{[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data}
subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests”. Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

All documents identified – except annex 2 to document 3, annexes 1 and 2, to document 5, annexes 1 and 2 to document 8, annex to document 13 and annex 1 to document 15– contain personal information, such as names, job titles, e-mail addresses or telephone numbers that is necessary to protect the concerned natural persons’ identity and privacy.

In line with the Commission's commitment to ensure transparency and accountability, the names of the senior management of the Commission (i.e. Members of the Cabinets and Director level and above) are disclosed.

3. **PARTIAL ACCESS**

Pursuant to Article 4(6) of Regulation 1049/2001 “[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released”.

Accordingly, the Commission has also considered whether partial access could be granted to annexes 2 and 3 to document 14. After a careful review, it has concluded that such annexes are entirely covered by the exception in Article 4(1)(a) third indent of Regulation 1049/2001 concerning the protection of the public interest as regards international relations, as described above. It is thus impossible to disclose any parts of these documents without undermining the protection of the interests identified in this reply. Such determination also takes account of the General Court finding that the Commission is entitled "to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant".  

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Regarding annexes 1 and 2 to document 10, you may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is

acknowledged, that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

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In case you would disagree with the assessment provided in this reply, you are entitled, in accordance with Article 7.2 of Regulation 1049/2001, 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, Document Management & Access to Documents (SG.C1)
BERL 7/076
1049 Bruxelles

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

Yours sincerely,

[Signature]

Jean-Luc DEMARTY

Encl.: Annex I: list of documents
       Disclosed documents