



EUROPEAN COMMISSION  
Directorate-General for Trade

The Director-General

Brussels

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

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**Subject: Your application for access to documents – Ref. GestDem No 2018/4448**

Dear Mr Verbeek,

I refer to your application of 1 August 2018 in which you make a request for access to documents in accordance with Regulation (EC) No 1049/2001<sup>1</sup> (hereinafter ‘Regulation 1049/2001’), registered on 20 August 2018 under the above mentioned reference number.

Please accept our apologies for the delay in answering your request, which is mainly due to the high number of requests for access to documents being processed at the same time by the Directorate-General for Trade (hereinafter ‘DG TRADE’).

#### **1. SCOPE OF YOUR REQUEST**

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

- "1) *a list of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, academics, public consultancies and think tanks in which the Multilateral Investment Court (MIC) was discussed (between January 2017 and today);*

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<sup>1</sup> 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.

- 2) *minutes and other reports of these meetings;*
- 3) *all correspondence (including emails, letters, faxes) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including trade unions, civil society groups, as well as representatives of individual companies, industry associations, law firms, academics, public consultancies as well as think tanks regarding the Multilateral Investment Court (MIC) (between January 2017 and today);*
- 4) *all correspondence (including emails, letters, faxes) and documents (including briefings, memo's, non-papers) shared between DG Trade officials and/or the Commissioner and the Cabinet in which the Multilateral Investment Court (MIC) was discussed (between January 2017 and today)."*

My services originally identified over 51 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 24 documents you identified as a priority, as per the correspondence of 13 and 19 September 2018. 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.

Please note that two of those 24 documents were found on closer scrutiny to be outside the scope of your request, as they were dated prior to 1 January 2017<sup>2</sup>. Considering that your request focused on documents dated later than 1 January 2017, we have instead assessed two other documents which fall under the scope of your original request.

We enclose for ease of reference a list of the 24 relevant main documents in Annex I. Eight of these documents include annexes, which amounts to a total of 45 documents. For each of them, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001**

In accordance with settled case law,<sup>3</sup> 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

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<sup>2</sup> The right date of document 47 in the list sent to you on 13 September 2018 is 22 December 2016.

<sup>3</sup> 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.

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*".<sup>4</sup> In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,<sup>5</sup> "*the exceptions to that right [...] must be interpreted and applied strictly*".<sup>6</sup>

Having examined the requested documents under the applicable legal framework, **full access is granted to:** annex 1 to document 2; annex 2 to document 3; annexes 3, 7 and 8 to document 6; annex 2 to document 16; annex 1 to document 19; and annex 1 to document 21.

In addition, **partial access is granted to** documents 1 to 5, 7 to 19, 21, 23, 24 and annex 1 to document 3 as well as annexes 2, 4, 5 and 6 to document 6.

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 45/2001 (hereinafter, 'Regulation 45/2001').<sup>7</sup>

In documents 1, 2, 16, 17, 18, 19 and 21, additional information to 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. In documents 16, 17, 18, 19 and 21, this information has been also protected pursuant to Article 4(3) first subparagraph of Regulation 1049/2001 concerning the protection of the institution's decision-making process.

In documents 3, 4, 9, 13 and 24, other information than personal data has been protected pursuant to Article 4(2) first indent of Regulation 1049/2001 concerning the commercial interests of a natural or legal person.

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

I regret to inform you that **access is not granted** to a number of documents and annexes. The exception in Article 4(1)(a) third indent of Regulation 1049/2001 concerning the

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<sup>4</sup> *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.

<sup>5</sup> Regulation (EC) No 1049/2001, recital (4).

<sup>6</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

<sup>7</sup> 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.

protection of the public interest as regards international relations applies with regards to the decision not to disclose documents 6, 20 and 22, as well as annex 1 to document 6, annex 1 to document 16, annex 1 to document 17, annexes 1 and 2 to document 18, annex 2 to document 19 and annexes 2 and 3 to document 21.

Documents 6, 20, 22, annex 1 to document 16, annex 1 to document 17, annex 1 to document 18, annex 2 to document 19 and annexes 2 and 3 to document 21 are also protected from disclosure under the exception set out in Article 4(3) first subparagraph concerning the protection of the institution's decision-making process.

In addition, some personal data in documents 6, 20 and 22, as well as in annex 1 to document 6, annex 1 to document 16, annex 1 to document 17 and annex 1 to document 18 is protected Article 4(1)(b) of Regulation 1049/2001.

The reasons justifying the application of each of the exceptions are set out below in sections 2.1, 2.2, 2.3 and 2.4. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure and section 4 considered whether partial access could be granted to the 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"*.<sup>8</sup> 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"*.<sup>9</sup>

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"*.<sup>10</sup> Moreover, *"the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and*

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<sup>8</sup> Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36.

<sup>9</sup> Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

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

*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 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".*<sup>11</sup>

The European Commission has 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.<sup>12</sup> On 20 March 2018, the Council adopted the negotiating directives authorising the Commission to negotiate, on behalf of the EU, a multilateral investment court.<sup>13</sup> 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. In particular, some sentences in documents 1 and 2 have been redacted insofar as they contain information relating to positions of third countries in relation to the multilateral investment court initiative that, where disclosed, risks affecting international relations between the EU and such countries. These documents embody minutes and reports of meetings with a range of stakeholders representing a number of interests. Releasing that information would pose a significant risk to the good relations between the EU and the concerned third countries.

Partial access on grounds of the same exception is granted to documents 16, 17, 18 and 19, which relate to specific meetings of UNCITRAL Working Group III discussing a possible multilateral reform of ISDS. Documents 18 and 19 concern the first meeting of the Working Group (meeting report and meeting preparation note) while documents 16 and 17 embody the report and preparation note of the second meeting of the Working Group. The redacted paragraphs in documents 16, 17, 18 and 19 contain sensitive information on the reading of discussions at UNCITRAL Working Group III and the

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<sup>11</sup> *Id.*, paragraph 125.

<sup>12</sup> 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.

<sup>13</sup> See <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

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. Please note that both the EU and Member States sit and intervene separately at the meetings of the Working Group.

The sensitivity of the information in these documents justifies that entire pages have to be redacted. In document 16, pages 2 to 4 are entirely redacted under Article 4(1)(a) of Regulation 1049/2001 while page 6 is redacted in order to protect the privacy and integrity of the individual under Article 4(1)(b) of Regulation 1049/2001. Page 5 is covered under both exceptions. Similar considerations apply to documents 17 (pages 3 and 4 redacted under Article 4(1)(a) and page 4 also under Article 4(1)(b)); document 18 (pages 2 and 3 redacted under Article 4(1)(a) and pages 3 and 4 under Article 4.1(b)); and document 19 (pages 2 and 3 completely redacted pursuant to Article 4(1)(a) and page 3 also under Article 4(1)(b)).

The substantial amount of information covered under Article 4(1)(a) and therefore not susceptible of disclosure warrants that some documents not be disclosed at all, inasmuch as the information that the applicant would have access to would be meaningless. This is the case of document 6, which contains the report of a seminar held with officials of certain countries on the multilateral investment court initiative. The report includes sensitive information on the EU's and those countries' positions and views which cannot be disclosed without jeopardising the good working relations of the EU with the countries concerned. It is therefore considered that the entirety of the document 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 it is not released. The same considerations apply to annex 1 to document 6, which contains the list of participants to the seminar.

Similar considerations apply to annexes 1 to document 16 and 18 respectively, which contain a report of third countries' positions as per discussions in UNCITRAL Working Group III. Although recordings of discussions are entirely available in the website of UNCITRAL Working Group III,<sup>14</sup> the documents at hand incorporate the EU's particular reading of the interventions. These documents were elaborated for strictly internal purposes and cannot be shared without seriously hampering the EU's international relations with those countries. Conversely, annex 2 to document 16 is entirely disclosed, to the extent that it constitutes a public report put together by UNCITRAL Secretariat and validated by all members of Working Group III.<sup>15</sup> In turn, annex 2 to document 18 is a Secretariat report at its draft stage subject to validation of Working Group III. Disclosure of such document, to the extent that it is not a final version, would hamper relations of the EU with UNCITRAL Secretariat, inasmuch as the document may contain

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<sup>14</sup> See <http://www.uncitral.org/uncitral/audio/meetings.jsp>

<sup>15</sup> This document is also publicly available in the website of Working Group III – see [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)

inaccuracies that are meant to be flagged by UNCITRAL members prior to its release. For these reasons annex 2 to document 18 is withheld. The final report of the meeting as adopted by the Working Group is available on UNCITRAL Working Group III website<sup>16</sup>.

Annex 1 to document 17 constitutes an early draft EU non-paper that was put together to trigger specific discussions on a number of points. This paper therefore contains delicate information on the EU's negotiating position and strategy which would be seriously hampered in the event that it was released. It is therefore considered justified not to disclose annex 1 to document 17 on grounds of protection of the public interest as regards international relations.

Annex 2 to document 19 contains information on the EU's and Member States' positions relevant for the first meeting of the Working Group. The document was drafted to coordinate the position of the EU and its Member States, as they sit and intervene separately at the meetings of the Working Group. Disclosure of the document, even partially, 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.

Document 20 does not relate to any particular meeting but it embodies DG TRADE's considerations and proposals on future discussions at UNCITRAL Working Group III. The information contained therein builds on the expectations of third countries' positions based on informal preliminary discussions and is therefore extremely sensitive. Disclosure of such document 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 and for this reason cannot be disclosed on the basis of the same exception.

Document 21 constitutes the full report of the informal ministerial meeting held in Davos on 21 January 2017. It contains sensitive information on third countries' views on the multilateral investment court initiative. Such views, which were expressed freely in the context of a ministerial meeting, cannot be disclosed without seriously hampering the good relations of the EU with such countries. For the reasons highlighted above, access is granted to the parts of the report that are not covered by the exception on public interest as regards international relations. Annexes 1, 2 and 3 to document 21 constitute the EU's discussion paper, verbatim notes and list of participants to the ministerial meeting. Access is granted to the EU's discussion paper.<sup>17</sup> Conversely, the verbatim notes and the list of participants to the meeting are in their entirety covered by the exception relating to international relations and for this reason access thereto is denied. Both documents were

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<sup>16</sup> See [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)

<sup>17</sup> The discussion paper co-sponsored by the European Commission and the Government of Canada is publicly available at the EU's multilateral investment court dedicated website: [http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc\\_155264.pdf](http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf)

put together for internal purposes only and based on the reasons outlined above it is considered that their confidentiality must be preserved.

Similarly, document 22 which contains the flash report of the ministerial meeting is also covered by the exception relating to international relations. For the reasons explained above, this document which was intended to give key DG TRADE colleagues a quick update on the outcome of the meeting, must not be disclosed. The flash report is also partially covered by the exception related to the protection of privacy of individuals, as explained below. Coverage under both of these exceptions justifies that the document not be released.

## **2.2 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 applicable legislation in this field is Regulation 45/2001. In this respect, the Court of Justice of the EU has ruled that "*the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data*".<sup>18 19</sup>

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 of the EU has confirmed that "*there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*"<sup>20</sup> and that "*surnames and forenames may be regarded as personal data*"<sup>21</sup>, including names of the staff of the institutions.<sup>22</sup>

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*

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<sup>18</sup> Article 8(b) and 18 of said Regulation relate to the transfer of personal data to recipients other than the EU Institutions and the subject's right to object to the transfer of its data, respectively.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>22</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

*prejudiced*". The Court of Justice has clarified that "*it is for the person applying for access to establish the necessity of transferring that data*".<sup>23</sup>

All documents identified –except annex 1 to document 17, annex 1 and 2 to document 18, annex 2 to document 19, and annexes 2 and 3 to document 21, contain personal information such as names, e-mail addresses or telephone numbers that is necessary to protect the concerned natural persons' identity and privacy.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested without including these personal data.

For the documents partially disclosed, a disclaimer that, unless otherwise specified, redactions are made pursuant to this exception, has been included at the top left hand corner of each partially released document.

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.

Concerning documents 3 and 12, we would like to draw your attention to the dedicated website on the multilateral investment court initiative, which contains additional information which may be of its interest, in particular links to video recording of the meetings that are described in such documents.<sup>24</sup>

### **2.3 Protection of commercial interests**

Article 4(2) first indent of Regulation 1049/2001 provides that "*[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person [...] unless there is an overriding public interest in disclosure*".

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2) first indent,<sup>25</sup> it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.<sup>26</sup> Accordingly, it must be information that is "*known only to a limited number of persons*", "*whose disclosure is liable*

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<sup>23</sup> *Id.*, paragraph 107; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 77.

<sup>24</sup> The dedicated website can be consulted at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>. The links to both stakeholder meetings of April 2018 and November 2017 are available therein.

<sup>25</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>26</sup> See Article 339 of the Treaty on the Functioning of the European Union.

*to cause serious harm to the person who has provided it or to third parties" and for which "the interests liable to be harmed by disclosure must, objectively, be worthy of protection".<sup>27</sup>*

Some passages in documents 4, 9 and 24 have been redacted to protect the commercial information of some organisations. These documents constitute reports of meetings with stakeholders where sensitive information of a commercial nature was expressed in support of the views and arguments of these stakeholders. Disclosing such information could harm the competitive position of the stakeholders concerned and as such is considered to be covered by the exception on the protection of commercial interests. Accordingly, such pieces of information are redacted.

In addition, the redactions in document 3 concern the identity of the stakeholders that intervened in the stakeholder meeting on the multilateral investment court. As document 3 reflects the interpretation that DG TRADE has made of the questions or comments by the different stakeholders and might not fully represent their complete assessment, the identity of the stakeholders has been redacted<sup>28</sup>.

The redactions in document 13 correspond to discussions on the stakeholder's specific answers to the public consultation on a multilateral reform of ISDS.<sup>29</sup> Where stakeholders consented, replies were made publicly available. However, the concerned stakeholder is not among those that specifically allowed the Commission to publish the replies with its name. It is therefore considered appropriate not to disclose the specific answers of this stakeholder in order to protect its commercial interests.

## **2.4 Protection of the institution's decision-making process**

Article 4(3) first subparagraph of Regulation 1049/2001 provides that *"[a]ccess to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure"*.

The jurisprudence of the EU Courts has also recognised that *"the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process"*<sup>30</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>31</sup> so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court put it, the result of such self-censorship *"would be that the Commission could no longer benefit from*

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<sup>27</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

<sup>28</sup> To watch the full meeting, see: <https://webcast.ec.europa.eu/stakeholder-meeting-on-a-multilateral-investment-court>

<sup>29</sup> See [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=233](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233)

<sup>30</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

<sup>31</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

*the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]"<sup>32</sup>.*

As explained above, the European Commission has 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, tasked with the mandate of exploring a possible multilateral reform of ISDS (Investor-State Dispute Settlement).

The decision-making process for a possible multilateral reform of ISDS is therefore at a very early stage.

Documents 6, 16, 17, 18, 19, 20, 21, 22, annex 1 to document 16, annex 1 to document 17, annex 1 to document 18, annex 2 to document 19 and annexes 2 and 3 to document 21 were drafted in relation to meetings with other trading partners at different international fora (ASEM, UNCITRAL, World Economic Forum) and contain information drafted for internal use in order to explore or to consider different options for the ongoing discussions, in a subject-matter where a decision has not yet been taken. Those options are subject to changes after discussions with the negotiating partners, but also with EU Member States, external stakeholders or civil society.

Disclosing the withheld documents and redacted passages would seriously undermine the decision-making process of the institution in this specific case, as it would reduce the free exchange of views between different services of the Commission or with our negotiating partners by exposing internal views and considerations to undue pressure and unfounded conclusions both from external stakeholders and from our negotiating partners, at a time when such free exchanges of views are particularly important given the early stage of discussions. Protecting the confidentiality of internal views and opinions allows for the Commission staff involved to speak freely and frankly in a manner that is vital for the process to move forward in a manner that EU interests are effectively advanced. Reducing this degree of confidentiality would give rise to a risk of self-censorship, which would in turn undermine the quality of the ongoing decision-making process. Those withheld documents and redacted passages must therefore remain protected pursuant to Article 4(3) first subparagraph of Regulation 1049/2001.

### **3. OVERRIDING PUBLIC INTEREST**

The exceptions laid down in article 4(2) first indent and 4(3) first subparagraph of Regulation 1049/2001 apply unless there is an overriding public interest in the disclosure of the documents. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure. The Court of Justice of the EU has acknowledged that it is for the institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution "*is acting in its*

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<sup>32</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

*legislative capacity*"<sup>33</sup> as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.<sup>34</sup>

The pieces of information withheld under Article 4(2) first indent are all justified by the notion of commercial interest. The Commission has not been able to identify a public interest capable of overriding the relevant commercial interests of the relevant stakeholders. Therefore, documents 3, 4, 9, 13 and 24 are disclosed except for the relevant parts covered under the exception.

As regards the documents protected under Article 4(3) first subparagraph, we have concluded that on balance, preserving the Commission's decision-making prevails over transparency in this specific case. In particular, disclosure at this stage would undermine the possibility of achieving the best possible outcome in the public interest. Disclosing the withheld documents would expose the EU to have to justify preliminary positions which eventually evolved in the decision-making process.

#### **4. 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 document 6 and annex 1 thereto, annex 1 to document 16, annex 1 to document 17, annexes 1 and 2 to document 18, annex 2 to document 19, document 20, annexes 2 and 3 to document 21 and document 22. After a careful review, it has concluded that such documents and annexes are entirely covered by the exceptions described above and 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*".<sup>35</sup>

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Regarding annex 1 to document 2, annex 2 to document 3, annexes 3 and 7 to document 6, annex 1 to document 19 and annex 1 to document 21, 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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<sup>33</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

<sup>34</sup> *Id.*, paragraph 67.

<sup>35</sup> Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.

Regarding annex 8 to document 6 and annex 2 to document 16, please note that these documents were received by the Commission from UNCITRAL. They are disclosed for information only and cannot be re-used without the agreement of the originator. They do not reflect the position of the Commission and cannot be quoted as such.

Regarding annex 4, 5 and 6 to document 6, please note that these documents were received by the Commission from third-parties. They are disclosed for information only and cannot be re-used without the agreement of the originator. They do not reflect the position of the Commission and cannot be quoted as such.

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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 5/282  
1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Jean-Luc DEMARTY

Encl.: Annex 1 (list of documents) and (partially) released documents.