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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 493 final - Annex 1
Subject:	ANNEX to the Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes

Delegations will find attached document COM(2017) 493 final - Annex 1.

Encl.: COM(2017) 493 final - Annex 1



EUROPEAN
COMMISSION

Brussels, 13.9.2017
COM(2017) 493 final

ANNEX 1

ANNEX

to the

Recommendation for a Council Decision

**authorising the opening of negotiations for a Convention establishing a multilateral
court for the settlement of investment disputes**

{ SWD(2017) 302 final }
{ SWD(2017) 303 final }

ATTACHMENT

Regarding the process of the negotiations:

1. The Union shall strive to ensure that the process of the negotiation of the Convention allows all interested countries and international organisations to effectively participate in the negotiation and consensus building.
2. The Union shall be represented by the Commission throughout the negotiations. In accordance with the principles of sincere cooperation and of unity of external representation as laid down in the Treaties, the Union and the Member States of the Union participating in the negotiations shall fully coordinate and act accordingly throughout the negotiations.
3. Negotiations shall be conducted under the auspices of the United Nations Commission on International Trade law (UNCITRAL). In the event of a vote, the Member States which are Members of the United Nations Commission on International Trade law shall exercise their voting rights in accordance with these directives and previously agreed EU positions.
4. The Union shall strive to ensure that the negotiations are conducted in a transparent manner, including, where possible, through audio- and/or web-streaming, and that representatives of civil society organisations will have the opportunity to participate in the discussions as accredited observers.

Regarding the substance of the negotiations:

5. The Convention should allow the Union to submit disputes arising under agreements to which the Union is or will be a party to the jurisdiction of the multilateral court. Consequently, the Union should be in a position to become a Party to the Convention and the provisions of the Convention should be drafted in a way which allows their effective use by the European Union.
6. The Convention should also allow the Member States of the Union and third countries to submit disputes arising under agreements to which they are or will be Parties to the jurisdiction of the multilateral court.¹
7. The principal mechanism of the Convention should be that the jurisdiction of the multilateral court extends to a bilateral agreement when both Parties to the agreement have agreed to submit disputes arising under the agreement to the jurisdiction of the multilateral court. In the case of multilateral agreements, the Convention should allow two or more Parties to such an agreement to agree to submit disputes under the multilateral agreement to the jurisdiction of the multilateral court.
8. The multilateral court should be composed of a tribunal of first instance and an appeal tribunal. The appeal tribunal should have the competence to review decisions issued by the tribunal of first instance on the grounds of errors of law or manifest errors in the appreciation of facts. The appeal tribunal should have the power to send

¹ Disputes arising from bilateral investment treaties concluded among Member States (i.e. intra-EU BITs) and disputes between an investor of a Member State and a Member State under the Energy Charter Treaty are outside the scope of this decision.

back cases to the tribunal of first instance for the completion of the proceedings in light of the findings of the appeal tribunal ("remand").

9. The independence of the Court should be guaranteed. Members of the court (both of the tribunal of first instance and of the appeal tribunal) should be subject to stringent requirements regarding their qualifications and impartiality. Rules on ethics and challenge mechanisms should be foreseen within the Convention. The members of the court should receive a permanent remuneration. They should be appointed for a fixed, long and non-renewable period of time and enjoy security of tenure, as well as all necessary guarantees of independence. Members should be appointed through an objective and transparent process.
10. The Convention should include the necessary flexibilities to adapt to an evolving membership, as well as to possible evolutions in the nature of agreements that could be submitted to the jurisdiction of the court. The Convention should not exclude the possibility for the court to rely on the secretarial support of an existing international organisation, nor to be integrated into the structure of any such organisation at a later stage.
11. Proceedings before the multilateral court should be conducted in a transparent manner, including the possibility of submitting third party interventions, similar to or utilising the rules and standards provided for within the UNCITRAL Rules on Transparency for treaty-based investor-state arbitration.
12. Decisions of the multilateral court should benefit from an effective international enforcement regime.
13. One objective of the negotiations should be that the multilateral court operates in a cost-effective way, ensuring its accessibility for small and medium-sized enterprises and natural persons. The fixed costs of the court, including costs of remuneration of its members and costs of administrative and secretarial support, should in principle be borne by the Contracting Parties to the Convention establishing the multilateral court. The distribution of such costs among the Contracting Parties should be decided on an equitable basis which may take into account factors such as the Parties' level of economic development, the number of agreements covered per Party, the Parties' respective volume of international investment flows or stocks.
14. The Union should strive to ensure that support can be made available to ensure that developing and least developed countries can operate effectively in the investment dispute settlement regime. Such an initiative may form part of the process of establishing a multilateral investment court or may be conducted separately.
15. The Convention establishing the multilateral court should be open for signature and accession by any interested country and regional economic integration organisation that is a party to an investment agreement. It should allow for an early entry into force as soon as a minimum number of ratification instruments have been deposited.