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### **'I/A' ITEM NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)/Council
Subject:	Commission's intervention on behalf of the Union before a US Court as amicus curiae regarding the recognition and enforcement of intra-EU investment arbitration awards

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1. At the Working Party of Financial Counsellors' meeting of 5 February 2019, the Commission informed delegations of its intention to intervene on behalf of the Union before a US Court as amicus curiae regarding the recognition and enforcement of intra-EU investment arbitration awards.
2. Several arbitration tribunals have rendered awards in intra-EU investment arbitration proceedings against the Kingdom of Spain on the basis of Article 26 Energy Charter Treaty. Certain of the investors try now to enforce those awards before the U.S. District Court for the District of Columbia, as permitted for arbitral awards under the New York Convention and the ICSID Convention and the relevant legislation implementing those conventions in the U.S. legal order.
3. The Kingdom of Spain has presented as main line of defence that it enjoys immunity under the Foreign Sovereign Immunity Act. The investors claim that the so-called arbitration exception under that Act applies, but that exception applies only where the arbitral award was issued pursuant to a valid arbitration agreement.

As a result, the decisive question for the U.S. judge hearing the case may be the impact of the judgment in *Achmea* on the applicability or the validity of a possible offer made by Spain to investors from other Member States to submit disputes to investor-State arbitration.

4. The aim of the Commission's intervention is to set out why and how primary EU law as interpreted by the ECJ in the judgment in *Achmea*, from the point of view of EU law and public international law, has as consequence that there is no valid offer to arbitrate in intra-EU investment arbitration proceedings. The position is in line with the position taken by the Commission in Commission decisions and its Communication "Protection of intra-EU investment" .
5. It is suggested that COREPER recommend the COUNCIL to authorise the Commission to intervene on behalf of the Union before US Courts as *amicus curiae* regarding recognition and enforcement of intra-EU investment arbitration awards, in line with the position presented to the Council Working Party on 5 February 2019.