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Proposal for a

COUNCIL DECISION

**on the signing, on behalf of the European Union, of the United Nations Convention on
transparency in treaty-based investor-State arbitration**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Traditionally, investor-state dispute settlement has been conducted on the basis of commercial arbitration rules, which do not provide for transparency. Greater transparency in investor-state dispute settlement is an important objective, as it aims at providing maximum access of the public to documents and hearings, as well as allowing interested third parties to make submissions. This is important as Investor-State dispute settlement may concern disputes raising questions relating to public policies or impact public finances.

The Commission has since 2010 focussed on improving transparency for investor-state dispute settlement.¹ This was explicitly requested by the European Parliament in its resolution on the future European Investment Policy.² At the same time as ensuring that future EU agreements provide for a high degree of transparency, the Commission has been instrumental in pushing in the United Nations Commission on International Trade Law (UNCITRAL) for global transparency rules for investor-state dispute settlement and to develop mechanisms to apply these improved transparency rules to the 3,000 existing investment treaties. The present proposal delivers on the policy objectives set in 2010 and the European Parliament's request of 2011, demonstrates the Commission's determination to reform and improve the investor-state dispute settlement system as a whole and is tangible proof of the benefits of a common EU external investment policy – such a result would have been highly unlikely without such a common EU external investment policy.

UNCITRAL adopted on 10 July 2013 rules on transparency for investor-state dispute settlement (“the Transparency Rules”), which were in turn endorsed by the United Nations General Assembly on 16 December 2013.³ These provide for all documents to be made public (both decisions of the tribunal and submissions of the parties), for hearings to be open to the public and for interested parties (civil society) to make submissions to the tribunal. Appropriate protections for confidential information are provided, but these do not go beyond comparable protections in domestic courts. The Union will use these rules as the basis for the provisions on transparency on investor-state dispute settlement in all agreements currently under negotiations and has included them or comparable rules and indeed gone further in the draft Comprehensive Economic and Trade Agreement (CETA) with Canada and the draft EU-Singapore FTA.

The rules became effective on 1 April 2014. They apply automatically to investor-state dispute settlement arising on the basis of treaties concluded after 1 April 2014 where a reference was made therein to UNCITRAL Arbitration rules. At the same time, the Transparency Rules do not apply to treaties concluded prior to that date. Given the very high number of existing investment agreements concluded prior to 1 April 2014, it is important to ensure the application of the Transparency Rules to those agreements. The European Union is a party to one such agreement - the Energy Charter Treaty - and the Member States of the European Union are parties to around 1,400 such agreements with third countries.

As a consequence, together with other UNCITRAL Members, the Union has pushed for the negotiation of a multilateral convention which would facilitate the application of the UNCITRAL Transparency Rules to existing investment treaties. On 10 February 2014, the Council authorised the Commission to negotiate such a convention under the auspices of UNCITRAL (The Convention) and the Union, represented by the Commission has actively participated in the negotiation of the Convention. The negotiations were concluded on 9 July 2014 and the Convention adopted by the United Nations General Assembly on 10 December 2014⁴. The Convention will be open for signature on 17 March 2015 in Port Louis, Mauritius and thereafter at the United Nations Headquarters in New York.

¹ Commission Communication 'Towards a comprehensive European international investment policy' (COM (2010)343 final); For the Commission's commitment on transparency, page 10.

² Report on the future European International investment policy (A7-0070/2011), para. 31.

³ Resolution adopted by the UN General Assembly on 16 December 2013, Sixty-eighth session.

⁴ Resolution A/RES/69/116.

The Convention applies to investment treaties concluded before 1 April 2014 and establishes a mechanism allowing countries and regional economic integration organisations to agree between themselves to apply the UNCITRAL Transparency Rules in disputes covered by investment treaties to which they are parties. It permits both the Union and the Member States to adhere to the Convention and to apply the Transparency Rules to their existing investment treaties. By signing the Convention, the European Union could become a party to the Convention in respect of the Energy Charter Treaty and the Member States could become a party to the Convention in respect of their existing agreements. The Convention provides for a negative list approach, i.e. the Transparency Rules will apply unless a signatory lists particular agreements as not being subject to the Convention by making a reservation under Article 3.

With respect to the Energy Charter Treaty, the European Union would become a party to the Convention in order to extend the scope of application of the Transparency Rules to investor-State disputes under the Energy Charter Treaty in which the Union is a respondent and the claimant is of a non-EU State that has not excluded the application of the convention to disputes arising under the Energy Charter Treaty.

Having regard to the Treaty of the Functioning of the European Union (TFEU) and in particular of Article 207 and Articles 63 to 66, in conjunction with Article 3(2), the conclusion of international agreements in the field of foreign investments is part of the Union's exclusive competence since the entry into force of the Lisbon Treaty. It is the Commission's view that the Union's exclusive competence to adopt legally binding acts in the field of foreign investment covers all matters relating to foreign investment (foreign direct investment and portfolio investment), including matters relating to the settlement of investment disputes.

As a result, the maintenance in force of bilateral investment treaties signed by Member States with third countries before 1 December 2009 has been authorized pursuant to Article 3 of Regulation (EU) No 1219/2012 of 12 December 2012⁵ and the signing and conclusion of bilateral investment treaties between Member States and third countries after 1 December 2009 must be authorized pursuant to Articles 11 or 12 of Regulation (EU) No 1219/2012. The signing and conclusion of this Convention also falls into the ambit of the European Union's exclusive competence and, in accordance with Article 2(1) TFEU, Member States may adopt legally binding acts within this area only if so empowered to do so by the Union. Therefore, the Union should empower Member States to become parties to the Convention to allow them to extend the application of the Transparency Rules to their bilateral investment agreements with non-EU countries concluded prior to 1 April 2014 and which are maintained in force pursuant to Article 3 of Regulation (EU) No 1219/2012. This empowerment also covers Member States when they act as respondents pursuant to the Energy Charter Treaty in respect of cases brought by non-EU investors.⁶ The Commission, consistent with the objective of increasing transparency of the investor-state dispute settlement system considers that Member States should provide for the application of the Transparency Rules to all of the aforementioned treaties, i.e. by ratifying the Convention without carving out its application to any of them.

Finally it should be noted that the Commission plans to provide funding for the website upon which all documents subject to the Transparency Rules will be provided.

The Commission herewith submits a proposal for a Council Decision on the signature of the Convention by the European Union and on the empowerment of Member States to individually adhere to the Convention.

In parallel, the Commission submits a proposal for a Council Decision on the conclusion of the said Convention.

⁵ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ L 351, 20.12.2012, p. 40).

⁶ See Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty (OJ L 69, 9.3.98, p. 115).

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The UNCITRAL Convention on transparency in treaty-based investor-State arbitration allows for the extension of the application of the UNCITRAL Rules on Transparency. Observers and civil society have participated in the negotiation of the Convention. They had the opportunity to make their views known.

3. LEGAL ELEMENTS OF THE PROPOSAL

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), 1st subparagraph in conjunction with Article 218(5) thereof, the Commission is submitting a proposal to the Council for a decision on the signing, on behalf of the European Union, of the United Nations Commission on International Trade Law Convention on transparency in treaty-based investor-State arbitration.

Having regard to the Treaty on the Functioning of the European Union and in particular Article 2(1), this proposal also includes an empowerment of Member States to sign the United Nations Commission on International Trade Law Convention on transparency in treaty-based investor-State arbitration.

4. BUDGETARY IMPLICATION

There are no budgetary implications.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), 1st subparagraph in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union ('TFEU'), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.
- (2) In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States with third countries.
- (3) On 10 February 2014, the Council authorised the Commission to negotiate a convention on the application of rules on transparency for investor-state dispute settlement under the auspices of the United Nations Commission on International Trade (UNCITRAL).
- (4) The negotiations were successfully concluded on 9 July 2014 by the adoption of the text of the Convention by the United Nations Commission on International Trade Law and the Convention will be open for signature on 17 March 2015 in Port Louis, Mauritius and thereafter at the United Nations Headquarters in New York.
- (5) It is desirable to apply transparency rules to investor-State dispute settlement to the greatest extent possible. As regards the European Union, the transparency rules should apply to the Energy Charter Treaty. It is desirable that the Member States sign the Convention, and apply it to existing bilateral investment treaties with third countries.
- (6) The Convention should be signed on behalf of the European Union. Member States should be empowered to sign the Convention and apply it to existing bilateral investment treaties with third countries as well as to disputes under the Energy Charter Treaty with investors of third countries,

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to sign, on behalf of the Union, the Convention on transparency in treaty-based investor-State arbitration elaborated under the auspices of the United Nations Commission on International Trade Law.

The text of the Convention to be signed is attached to this Decision.

Article 2

Member States are empowered to individually sign the Convention in relation to their bilateral investment agreements with third countries and authorised in application of Regulation (EU) No 1219/2012 of 12 December 2012 and in relation to the possible application of the Energy Charter Treaty in disputes between the Member States and investors of third countries as provided for in the context of the Energy Charter Treaty⁷.

Article 3

The Council Secretariat General shall establish the instrument of full powers to sign the Convention on behalf of the Union, subject to its conclusion, for the person(s) indicated by the negotiator of the Agreement.

Article 4

This Decision shall enter into force on [...].

Done at Brussels,

*For the Council
The President*

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See Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty (OJ L 69, 9.3.98,p. 115).