JUDGMENT OF THE COURT (Tenth Chamber)

19 March 2020 (*)

(Appeal — Access to documents of the institutions — Regulation (EC) No 1049/2001 — Article 4(1)(a), third indent, and (6) — Exceptions to the right of access — Protection of the public interest as regards international relations — Documents drawn up by the European Commission's legal service concerning Investor-State Dispute Settlement and the Investment Court System in EU trade agreements — Partial refusal of access)

In Case C-612/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 September 2018,

**ClientEarth,** established in London (United Kingdom), represented by O.W. Brouwer and E.M. Raedts, advocaten, and N. Frey, Solicitor,

appellant,

the other party to the proceedings being:

**European Commission,** represented by J. Baquero Cruz, F. Clotuche-Duvieusart and C. Ehrbar, acting as Agents,

defendant at first instance,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis (Rapporteur), President of the Chamber, E. Juhász and C. Lycourgos, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 By its appeal, ClientEarth asks the Court of Justice to set aside the judgment of the General Court of the European Union of 11 July 2018, *ClientEarth* v *Commission* (T-644/16, not published, 'the judgment under appeal', EU:T:2018:429), by which the General Court dismissed its action for annulment of Commission Decision C(2016) 4286 final of 1 July 2016 refusing access to certain documents relating to the compatibility with EU law of the Investor-State Dispute Settlement and the Investment Court System in EU trade agreements ('the decision at issue').

## Legal context

2 Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provides:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

…

– international relations,

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.’

## Background to the dispute

3 The background to the dispute has been set out as follows by the General Court in paragraphs 1 to 11 of the judgment under appeal:

‘1 On 19 January 2016 the applicant, ClientEarth, submitted a request for access to documents to the European Commission, relying on Regulation … No 1049/2001 …

2 That request sought access to: (i) “all documents containing legal advice by the Commission’s legal services on the compatibility of [Investor-State Dispute Settlement] … and Investment Court System … in [European Union] trade agreements with the EU Treaties”; (ii) “all documents, including email correspondence, agendas and minutes of meetings, on discussions between the Commission’s legal service and [the Commission’s Directorate-General (DG) for Trade] on the compatibility of [Investor-State Dispute Settlement] and the [Investment Court System] with the EU Treaties”; (iii) “all documents on the assessment of that legal advice of the Commission’s legal service by DG Trade”; and (iv) “any other correspondence, documents and reports pertaining to the compatibility of [Investor-State Dispute Settlement] and [Investment Court System] with the EU Treaties … other than those that are publicly available”.

3 On 9 March 2016 the Commission informed the applicant that seven documents had been identified as falling within the scope of the request. Access to some of those documents was refused, partially or entirely, on the basis of, inter alia, the third indent of Article 4(1)(a) of Regulation No 1049/2001, concerning the protection of the public interest as regards international relations, the second indent of Article 4(2) of that regulation, concerning the protection of legal advice, and the first subparagraph of Article 4(3) of that regulation, concerning the protection of the Commission’s decision-making process.

4 In particular, access was partially refused to the following documents:

– Note to the file of 9 December 2014 entitled: “The relationship between international investment tribunals and domestic courts and rule of law requirements for international investment tribunals” (Ares(2014)4123374);

– Document entitled “[Investor-State Dispute Settlement ] and the principle of autonomy of EU law following Opinion 2/13” (Ares(2016)947907);

– Document entitled ‘Review and enforcement of [Investor-State Dispute Settlement awards]’ (Ares(2016)948083);

– Document entitled “The relationship between [Investor-State Dispute Settlement] and domestic judicial systems” (Ares(2016)948172).

5 Access was refused entirely to the Note de réflexion [discussion note] of 26 January 2015 entitled “Conditions pour la compatibilité d’un mécanisme de règlement des différends entre investisseurs et États dans un accord de protection d’investissement conclu entre l’Union et un État tiers” [Conditions for compatibility of investor-state dispute settlement in an investment protection agreement concluded between the European Union and a third country] (Ares(2015)306625) …

6 On 1 April 2016 the applicant sent to the Commission a confirmatory application, pursuant to Article 7(2) of Regulation No 1049/2001.

7 On 1 July 2016 the Commission adopted [the decision at issue] confirming, inter alia, the Commission’s initial decision in respect of the documents identified in paragraphs 4 and 5 above (“the requested documents”).

8 In the [decision at issue], the Commission stated, inter alia, having regard to the protection of the public interest as regards international relations, the following:

“The (parts of) the withheld documents describe and assess possible legal options on open sensitive issues relating to [Investor-State Dispute Settlement] (including the creation of an [Investment Court System]) which are still under negotiation in the framework of the Transatlantic Trade Investment Partnership … and other agreements. [The documents in question] were drafted by staff members of the Legal Service as a contribution to an ongoing discussion within the Commission aiming to assess the options of what is legally possible in relation to [Investor-State Dispute Settlement] and the [Investment Court System] and how this could be achieved.”

9 Next, the Commission explained that disclosure of the requested documents could undermine the public interest as regards international relations, in that disclosure would reveal the “legal considerations underpinning the Commission’s negotiating proposals in ongoing negotiations on [the Transatlantic Trade and Investment Partnership] and other agreements”. That would weaken the Commission’s negotiating position by giving to the Commission’s “negotiating partners … an insider look into the Union’s strategy and negotiating margin of manoeuvre”. That disclosure would negatively affect the Commission’s effectiveness in the negotiations, “in a realistic and non-hypothetical way”.

10 Furthermore, the Commission considered, relying on the judgment of 19 March 2013, *In ’t Veld* v *Commission* (T-301/10, EU:T:2013:135), that “public disclosure of [parts of the requested documents] would reveal an assessment of the legal options in relation to [Investor-State Dispute Settlement] and the [Investment Court System] and how this could be achieved by the EU with regard to [Investor-State Dispute Settlement] and the [Investor Court System]” [and that] public disclosure thereof would therefore reveal the European Union’s negotiating margin.

11 In conclusion, the Commission stated that:

> “The [parts of documents not disclosed] concern the issue of the relationship between [Investor-State Dispute Settlement] and EU domestic courts in the light of the principle of autonomy of EU law. These documents were specifically prepared in relation to the ongoing [Transatlantic Trade and Investment Partnership] negotiations, but they are also relevant in connection with other ongoing trade and investment negotiations with third countries. Making available the withheld parts of these documents to the public would seriously prejudice the negotiating position of the Union in all those ongoing negotiations, as the considerations they contain remain valid for all ongoing trade and investment negotiations with other third countries”.’

## The procedure before the General Court and the judgment under appeal

4 By application lodged at the General Court Registry on 9 September 2016, ClientEarth brought an action for the annulment of the decision at issue.

5 In support of its action before the General Court, ClientEarth relied on five pleas in law. The first plea alleged errors of law, a manifest error of assessment and a failure to state reasons in the application of the third indent of Article 4(1)(a) of Regulation No 1049/2001, while the fifth plea alleged errors of law, a manifest error of assessment and a failure to state reasons in the application of Article 4(6) of that regulation.

6 By order of 15 November 2017, the General Court ordered the Commission, on the basis of Article 91(c) of the Rules of Procedure of the General Court, to produce a complete version of the requested documents. The Commission complied with that request within the period prescribed. In accordance with Article 104 of the Rules of Procedure, those documents were not communicated to ClientEarth.

7 In the judgment under appeal, the General Court rejected the first and fifth pleas in law and, without examining the other pleas, dismissed the action and ordered ClientEarth to bear its own costs and to pay those incurred by the Commission. In so ruling, the General Court held, in essence, that the Commission had not erred in law in considering, in the light of the context and the subject matter concerned, that disclosure of the requested documents would have weakened its position in the ongoing negotiations and its negotiating margin and would, therefore, have undermined the protection of the public interest as regards international relations.

## Forms of order sought by the parties before the Court of Justice

8 By its appeal, ClientEarth claims that the Court should:

– set aside the judgment under appeal,

– refer the case back to the General Court, and

– order that costs be reserved, or

– if the Court gives final judgment in the matter, order the Commission to pay the costs of the proceedings.

9 The Commission contends that the Court should:

– dismiss the appeal as manifestly unfounded or, in any event, as unfounded, and

– order ClientEarth to pay the costs.

## The appeal

10 ClientEarth relies on seven grounds in support of its appeal. The first ground of appeal, alleging errors of law and breaches of procedure in the judgment under appeal in relation to ClientEarth's argument that disclosure of the requested documents could not weaken the Commission's negotiating position, is divided into four parts. The second ground of appeal alleges that the General Court erred in law in rejecting ClientEarth's argument that disclosure of those documents would not undermine the European Union's objectives. In the third ground of appeal, ClientEarth complains that the General Court committed a breach of procedure and an error of law in rejecting its argument that disclosure of the requested documents furthers rather than undermines the public interest. The fourth ground of appeal alleges a procedural irregularity and an error of law in the General Court's considerations relating to ClientEarth's argument that non-disclosure of the requested documents, as long as there are ongoing negotiations, effectively results in indefinite non-disclosure. In the fifth ground of appeal, ClientEarth alleges distortion of the arguments relied on before the General Court. The sixth ground of appeal alleges a breach of procedure in the General Court's considerations relating to ClientEarth's argument that disclosure of the requested documents cannot be made dependent on equal transparency obligations of the Commission's partners taking part in the negotiations. Lastly, the seventh ground of appeal alleges an infringement of Article 4(6) of Regulation No 1049/2001.

11 It is appropriate to examine, first of all, the first part of the first ground of appeal, then, together, the second part of the first ground of appeal and the second ground of appeal and lastly, in turn, the third and fourth parts of the first ground of appeal and the third to seventh grounds of appeal.

***The first part of the first ground of appeal***

*Arguments of the parties*

12 In the first part of the first ground of appeal, ClientEarth complains that the General Court extended the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 to material not specifically related to an envisaged international agreement. In finding that the requested documents were capable of falling within the scope of that exception, since they had been drawn up as part of negotiations which were to lead to the conclusion of an international agreement and that, therefore, the analysis carried out by the Commission's legal service was necessarily linked to the specific context of that agreement, the General Court erroneously broadened the test for applying that exception which it applied in the judgment of 4 May 2012, *In 't Veld* v *Council* (T-529/09, EU:T:2012:215). Such an extension would mean that the institutions could invoke the exception provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001 for any document or legal advice that discussed a topic that could be relevant for an international agreement, irrespective of whether the document or advice in question would actually be linked to a particular negotiation or contain concrete choices regarding the content or strategy of a particular agreement or negotiation.

13 The Commission contends that the first part of the present ground of appeal is inadmissible, since the arguments expounded in it raise an issue which was not pleaded at first instance. In any event, it contends that the first part of first ground of appeal is unfounded.

*Findings of the Court*

– *Admissibility*

14 It must be borne in mind that, in an appeal, the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the General Court. A party cannot, therefore, put forward for the first time before the Court of Justice a plea in law which it could have raised before the General Court but did not raise, since that would allow that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (see, to that effect, judgments of 1 June 1994, *Commission* v *Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 59, and of 18 February 2016, *Council* v *Bank Mellat*, C-176/13 P, EU:C:2016:96, paragraph 116 and the case-law cited).

15 However, the Court has repeatedly held that an appellant is entitled to lodge an appeal relying, before it, on grounds which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgment of 6 September 2018, *Czech Republic* v *Commission*, C-4/17 P, EU:C:2018:678, paragraph 24 and the case-law cited).

16 In the present case, while it is apparent from the application before the General Court, and from paragraph 34 of the judgment under appeal, that ClientEarth did not argue that the requested documents could not in themselves fall within the scope of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, but rather that their disclosure could not undermine the public interest protected by that exception, the General Court nonetheless found, in paragraph 36 of the judgment under appeal, that, if ClientEarth sought to dispute whether that exception was applicable to those documents, it was to be noted that, having regard to the content of those documents and the context in which they had been drawn up, they were capable of falling within the scope of the exception in question.

17 It follows that it is open to ClientEarth to criticise that assessment by the General Court and the considerations in the judgment under appeal on which it is based. Accordingly, the first part of the first ground of appeal is admissible.

– *Substance*

18 Contrary to what ClientEarth maintains, the General Court did not extend the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 to material which is not specifically linked to an envisaged international agreement, since it found, in paragraph 37 of the judgment under appeal, that the requested documents had been drawn up as part of negotiations which were to lead to the conclusion of an international agreement and that, accordingly, the analysis carried out by the Commission's legal service was necessarily linked to the specific context of the envisaged international agreement.

19 In addition, in paragraph 46 of the judgment under appeal, the General Court found that the requested documents constituted material on the basis of which the Commission determined its position in the ongoing negotiations on Investor-State Dispute Settlement ('ISDS') and the Investment Court System ('ICS'), and that, as stated in the decision at issue, disclosure of those documents would reveal the 'legal considerations underpinning the Commission negotiating proposals in ongoing negotiations'. The General Court held that, therefore, 'those documents relate[d] to the specific content of those mechanisms in the envisaged agreements and [that] their disclosure m[ight] reveal the strategic objectives pursued by the European Union in the negotiations'.

20 It follows that, in finding that the requested documents were capable of falling within the scope of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court did not extend that exception to any document or legal advice that discussed a topic that could be relevant for an international agreement, irrespective of whether the document or advice in question would actually be linked to a particular negotiation or contain concrete choices regarding the content or strategy of a particular agreement or negotiation.

21 While the General Court did not indeed find, as it had held in the case giving rise to the judgment of 4 May 2012, *In 't Veld* v *Council* (T-529/09, EU:T:2012:215), which was confirmed by the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039), that the requested documents had been drawn up specifically for the opening of negotiations which were to lead to the conclusion of an international agreement, it held in the present case that those documents, drawn up as part of ongoing negotiations for several international agreements, in particular, the Transatlantic Trade Investment Partnership, contained legal considerations relating to the dispute settlement mechanisms included in those agreements, on the basis of which the Commission determined its position in those negotiations, and that their disclosure might reveal the strategic objectives pursued by the European Union in the negotiations. The General Court did not, therefore, err in law in holding that those documents were capable of falling within the scope of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

22 The first part of the first ground of appeal must, therefore, be rejected as unfounded.

***The second part of the first ground of appeal and the second ground of appeal***

*Arguments of the parties*

23 In the second part of the first ground of appeal, ClientEarth submits that, even assuming that the requested documents were capable of falling within the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, the mandatory nature of that exception did not release the Commission from its duty to demonstrate that the risk that disclosure would harm international relations was reasonably foreseeable and not hypothetical, nor did it release the General Court from its own duty to review whether the Commission had fulfilled its duty.

24 In finding that all material connected with the specific content of an envisaged agreement fell within the exception, the General Court misinterpreted and misapplied the approach taken by it in the judgment of 4 May 2012, *In 't Veld* v *Council* (T-529/09, EU:T:2012:215) — confirmed by the Court of Justice in the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039) — from which it follows that it is only if the passages in the requested document containing the analysis of the specific content of the envisaged agreement can reveal the strategic objectives pursued by the European Union that that exception applies. The word 'specific' used in that judgment essentially entails that the relevant content of the envisaged agreement be clearly identified in the withheld parts of the requested document.

25 In the present case, without considering the requested documents or carrying out a specific analysis of them, the General Court rejected in principle the possibility that the withheld parts of the requested documents are concerned with the purely legal question of the compatibility of ISDS with the Treaties, relying, in paragraphs 38 to 48 of the judgment under appeal, on general considerations, not the specific content of the documents themselves. In so doing, the General Court erred in law in finding that the Commission had established to the requisite legal standard that disclosure of the requested documents would undermine the public interest protected by the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, when the Commission had not established that the withheld parts of those documents concerned the specific content of the envisioned agreements and that they revealed the strategic objectives of the European Union.

26 In addition, by the second ground of appeal, ClientEarth submits that the General Court erred in law, in paragraphs 52 and 53 of the judgment under appeal, in rejecting its argument that disclosure of the requested documents would not undermine the strategic objectives of the European Union. The statement that disclosure 'may reveal aspects of the strategic objectives' is a misreading and misapplication of the case-law stemming from the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039), since the term 'may' reveals an approach to the risk of undermining the public interest which is clearly speculative and hypothetical, and is too broad, and the expression 'aspects' is unduly vague and broad, whereas the institution must indicate a specific and actual risk.

27 The Commission contends that the second part of the first ground of appeal is unfounded. In its view, ClientEarth confuses the general test that has been adopted by the EU judicature to assess the application of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, which is to be found in paragraph 64 of the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039), with the concrete analysis carried out by the General Court in the case which gave rise to the judgment of 4 May 2012, *In 't Veld* v *Council* (T-529/09, EU:T:2012:215), when that concrete analysis is just an illustration of how the test may be applied in one case and does not constitute a test of general application, transposable to other cases which may be quite different.

28 According to the Commission, the General Court correctly stated and applied the general test in the present case, not by applying a general presumption, but by examining the content of the requested documents. In any event, the grounds referred to of the judgment under appeal address the appellant's argument that since the content of the requested documents was of a legal nature, its disclosure could not

affect international negotiations. In addition, the argument that those documents did not refer to the specific content of any envisaged international agreement is manifestly wrong, since the undisclosed parts of those documents related to the heart of the new generation of trade agreements and the system for the resolution of investment disputes which was legally controversial.

29 Furthermore, the Commission contends that the second ground of appeal is ineffective, as it does not refer to a necessary support of the General Court's ruling in the judgment under appeal, and is manifestly unfounded, since the General Court used the word 'may' only to reject ClientEarth's argument that the Commission had failed to demonstrate that disclosure of the requested documents would reveal the strategic objective of the European Union in the negotiations.

*Findings of the Court*

30 Contrary to what ClientEarth maintains, the application of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 does not necessarily presuppose that the documents whose disclosure is requested clearly indicate the content of the envisaged international agreement as certain elements of the document at issue did in the case giving rise to the judgment of 4 May 2012, *In 't Veld* v *Council* (T-529/09, EU:T:2012:215) and to the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039). In that regard, it must be pointed out that it is not apparent from those judgments that that is the only situation in which that provision is capable of being applied, the General Court having only found in its judgment in that case — as the Court of Justice noted in paragraph 65 of its judgment in the same case — that, with the exception of the elements of that document, concerning the specific content of the proposed agreement or the negotiating directives, which could reveal the strategic objectives pursued by the European Union in the negotiations concerning that agreement, the Council had not shown how, specifically and actually, wider access to that document would have undermined the public interest in the field of international relations.

31 By contrast, as ClientEarth argues, the existence of a mere link between the elements contained in those documents and the objectives pursued by the European Union in the negotiation of an international agreement is not sufficient to establish that the disclosure of the former would undermine the public interest protected by that exception.

32 The Court of Justice held, in paragraphs 52 and 64 of the judgment of 3 July 2014, *Council* v *In 't Veld* (C-350/12 P, EU:C:2014:2039), that, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the public interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical.

33 Consequently, when an action has been brought before the General Court against a Commission decision refusing access to a document on the basis of the third indent of Article 4(1)(a) of Regulation No 1049/2001, in support of which the applicant submits that the Commission has not demonstrated that disclosure of that document would undermine the public interest protected by the exception laid down in that provision, the General Court must ascertain, within the limits of the pleas in law raised before it, whether the Commission has indeed provided in its decision the requisite explanations and established that there is a reasonably foreseeable risk of that interest being undermined, which is not purely hypothetical.

34 In the present case, ClientEarth argued, as may be seen from paragraph 34 of the judgment under appeal, that disclosure of the requested documents cannot weaken the Commission's position in the negotiations, because as was apparent from their titles, those documents merely contained legal analysis and did no more than give a view of what it was legally possible for the Commission to negotiate. The General Court then noted, in paragraph 38 of the judgment under appeal, that the premiss that the requested documents could put forward only observations on the legal limits of the international agreements concerned and thus merely set out views on the law to be observed, since the negotiating position and margin of the European Union are necessarily limited by the Treaties and the rule of law, was misconceived.

35 In that regard, the General Court found, in paragraphs 43 and 44 of the judgment under appeal, that the European Union had a wide discretion with regard to ISDS and ICS and the rules for their implementation, and that the legal assessment contained in the requested documents could not be confined to merely stating unbiased views on the law to be observed, but necessarily implied a thorough analysis of numerous legal, economic, political and strategic issues related to the choices that the European Union is required to make. The General Court also pointed out that ISDS had become controversial for both legal and political reasons.

36 In addition, the General Court found, in paragraph 46 of the judgment under appeal, that the requested documents constituted material on the basis of which the Commission determined its position in the ongoing negotiations on ISDS and ICS and that disclosure of those documents would reveal the legal considerations underpinning the Commission negotiating proposals in ongoing negotiations, as stated in the decision at issue. Accordingly, the General Court held that those documents related to the specific content of those mechanisms in the envisaged agreements, that their disclosure could reveal the strategic objectives pursued by the European Union in the negotiations and that 'giving access to advice on those analyses would inevitably weaken the European Union's position in the negotiations on ISDS and ICS, and, consequently, is liable to harm the interests of the European Union in the field of international relations'.

37 The General Court concluded from this, in paragraph 48 of the judgment under appeal, that the Commission did not err in law in considering, in the light of the context and the subject matter concerned, that disclosure of the requested documents would weaken its negotiating position and its negotiating margin and would, therefore, undermine the protection of the public interest as regards international relations.

38 It is apparent that the General Court responded to the requisite legal standard, in paragraphs 38 to 48 of the judgment under appeal, to ClientEarth's argument set out in paragraph 34 of the present judgment, without erring in law.

39 However, it is apparent from paragraphs 41 and 42 of the application before the General Court that ClientEarth had also argued before it that the Commission had failed to demonstrate in any concrete fashion that disclosure of the requested documents would weaken the Commission's negotiating capacity and how that disclosure would reveal the European Union's strategic objectives in the context of the negotiations. The reasoning in the judgment under appeal, summarised in paragraphs 34 to 37 above, as well as that set out in paragraph 53 of the judgment under appeal, by which the General Court rejected the latter argument by simply observing that the premiss on which the applicant's reasoning was based was misconceived and that the disclosure of 'the legal analysis contained in the requested documents [might] reveal aspects of the strategic objectives pursued by the European Union in the negotiations', contain only general considerations — since no specific reference was made to the requested documents or to the grounds of the decision at issue — which do not address those arguments to the requisite legal standard. The General Court therefore failed to ascertain specifically whether the Commission had provided the requisite explanations in its decision and established the existence of a reasonably foreseeable risk, which was not purely hypothetical, that the public interest protected by the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 would be undermined. Consequently, the General Court carried out an insufficient review of the decision at issue and therefore made the error of law alleged by ClientEarth in support of the second part of its first ground of appeal and its second ground of appeal.

40 However, it must be borne in mind that, if the grounds of a judgment of the General Court disclose an infringement of EU law but the operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the setting aside of that judgment (judgment of 14 October 2014, *Buono and Others* v *Commission*, C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraph 62 and the case-law cited).

41 In the present case, first of all, it is apparent from the decision at issue, summarised in paragraphs 8 to 11 of the judgment under appeal and reproduced in paragraph 3 above, that the Commission inter alia

explained, in that decision, that the withheld parts of the requested documents described and assessed the legal options on open sensitive issues relating to ISDS, including the creation of an ICS, which were still under negotiation in the framework of the Transatlantic Trade Investment Partnership and other agreements, and that the disclosure of the requested documents could undermine the public interest as regards international relations — in that their disclosure would have revealed the legal considerations underpinning the Commission's negotiating proposals in ongoing negotiations and would thereby have weakened the Commission's negotiating position by giving to the Commission's negotiating partners an insider look into the European Union's strategy and negotiating margin of manoeuvre — with the result that that disclosure would have negatively affected the Commission's effectiveness in the negotiations, in a realistic and non-hypothetical way.

42 Next, it is apparent from the decision at issue that, as regards documents Nos 2 and 4 to 7 referred to in that decision — in respect of which ClientEarth stated, in paragraph 5 of its application before the General Court, that it was maintaining its request for access — the Commission stated that (i) the parts of those documents not disclosed concerned the issue of the relationship between ISDS and domestic courts in the light of the principle of autonomy of EU law, (ii) those documents had been specifically prepared in relation to the ongoing Transatlantic Trade and Investment Partnership negotiations, but were also relevant in connection with other ongoing trade and investment negotiations with third countries and, (iii) making available the withheld parts of those documents to the public would seriously prejudice the negotiating position of the European Union in all those ongoing negotiations, as the considerations they contained remained valid for all ongoing trade and investment negotiations with other third countries.

43 Lastly, it must be noted that, with regard to those documents, the Commission stated, in the decision at issue, that more details could not be revealed without revealing the contents of the withheld parts of the documents and without thereby depriving the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001 of its purpose.

44 It follows from those grounds of the decision at issue that the Commission provided in that decision the explanations which it could give, without revealing the content of the undisclosed parts of the requested documents, as to how access to those parts of documents could specifically and actually undermine the public interest protected by the exception laid down in Article 4(1)(a) of Regulation No 1049/2001 and that it established that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical.

45 Consequently, the error of law by the General Court has no bearing on the operative part of the judgment under appeal.

46 The second part of the first ground of appeal and the second ground of appeal are ineffective and must, therefore, be rejected.

***The third part of the first ground of appeal***

*Arguments of the parties*

47 In the third part of the first ground of appeal, ClientEarth complains that, in paragraph 43 of the judgment under appeal, the General Court unlawfully substituted reasoning, in finding that 'the legal assessment contained in the requested documents cannot be confined to merely stating unbiased views on the law to be observed, but necessarily implies a thorough analysis of numerous legal, economic, political and strategic issues related to the choices that the European Union is required to make', whereas the decision at issue states only that the legal issue of the relationship between ISDS and domestic courts in the light of the principle of autonomy of EU law involved options of what was legally possible and how the desired result could be achieved.

48 The Commission contends that the third part of the first ground of appeal is ineffective.

*Findings of the Court*

49 The Court points out that, in order to refuse access to the requested documents in part, the Commission did indeed explain that those documents provided a detailed analysis of several legal options relating to the substance of the mechanisms provided by ISDS and ICS; however, the Commission also put forward political reasons, stating that the improvements proposed by it, in relation to the provisions usually contained in bilateral investment treaties, reflected both policy and legal considerations, that those improvements had not always been accepted immediately by the European Union's negotiating partners, that it expected negotiations with some partners to be difficult and that giving access to the withheld parts of the requested documents would allow the Union's negotiating partners to gain insight into the different components of the European Union's tactics.

50 ClientEarth's contention that, in essence, the decision at issue referred only to legal considerations is, therefore, incorrect. On the other hand, it is true that the Commission did not rely, in that decision, on economic considerations and that the assertion, in paragraph 43 of the judgment under appeal, that the legal assessment in the requested documents necessarily implied a thorough analysis of numerous issues, in particular economic issues, is unsubstantiated. However, that lacuna has no bearing on the conclusion, in paragraph 48 of the judgment under appeal, that the Commission did not err in law in considering that disclosure of the requested documents would weaken its negotiating position and would, therefore, undermine the protection of the public interest as regards international relations.

51 It follows that the third part of the first ground of appeal is ineffective and must, therefore, be rejected.

***The fourth part of the first ground of appeal***

*Arguments of the parties*

52 In the fourth part of the first ground of appeal, ClientEarth alleges distortion of the evidence with regard to the state of the ongoing negotiations: the General Court stated, in paragraph 45 of the judgment under appeal, that 'it [wa]s common ground that, at the time of the adoption of the [decision at issue], the Commission, as negotiator, had not yet adopted a definitive position on ISDS and ICS', whereas ClientEarth had indicated that the Commission had already adopted a definitive position on ISDS and ICS in the context of the negotiations between the European Union, Canada, the Republic of Singapore, the Socialist Republic of Vietnam and the United States of America, and that the ISDS and ICS provisions were already in the public domain. In the reply, ClientEarth adds that, by distorting that evidence, the General Court failed to carry out a reasoned assessment of that question of fact.

53 The Commission contends that the fourth part of the first ground of appeal is manifestly unfounded.

*Findings of the Court*

54 It must be noted that, in paragraph 46 of the application before the General Court, ClientEarth submitted that the European Union had made public the texts of a number of ISDS mechanisms in envisaged trade agreements, which showed that the analysis contained in the requested documents could also for that reason hardly be considered sensitive. In support of that argument, ClientEarth mentioned and produced several publicly available texts. The Commission, for its part, stated, in paragraphs 26 and 27 of the defence before the General Court, that 'the sensitive issue relating to ISDS and ICS is still under negotiation in the framework of Transatlantic Trade and Investment Partnership (TTIP), and at the time of the [decision at issue] it was also under negotiation in the Comprehensive Economic and Trade Agreement (CETA)'. It also stated that the discussion was ongoing in other trade and investment negotiations, for example with Japan and the Socialist Republic of Vietnam. The Commission explained that, 'at the time the [decision at issue] was adopted, the Commission as an institution had not yet taken a definite line on this legal and policy issue' and that 'a position [had been] taken, at least implicitly, some days after the confirmatory decision, on 5 July 2016, when the Commission made a proposal for a Council decision on

the signing on behalf of the Union of the CETA, thus implying that it considered that the ICS system included in that agreement was legally feasible'.

55 It is apparent that, in stating, in paragraph 45 of the judgment under appeal, that 'it [wa]s common ground that, at the time of the adoption of the [decision at issue], the Commission, as negotiator, had not yet adopted a definitive position on ISDS and ICS', the General Court considered that that alleged fact, put forward by the Commission and not disputed by ClientEarth in the reply before the General Court, had been established. In so doing, the General Court did not in any way distort the evidence.

56 To the extent that ClientEarth relies on a failure to respond to its argument, it must be stated that, in paragraph 50 of the judgment under appeal, the General Court pointed out that, contrary to what ClientEarth submitted, the fact that the European Union had made public certain texts relating to mechanisms contained in the draft agreements concerned did not detract from the sensitivity of the analysis contained in the requested documents. The General Court has, therefore, responded to that argument.

57 It follows that the fourth part of the first ground of appeal must be rejected as unfounded.

***The third ground of appeal***

*Arguments of the parties*

58 By the third ground of appeal, ClientEarth complains that the General Court rejected, in paragraphs 54 to 58 of the judgment under appeal, its argument that disclosure of the requested documents furthers rather than undermines the public interest, on the grounds (i) that it was apparent from paragraphs 38 to 48 of that judgment that disclosure of the legal analysis contained in the requested documents might reveal the strategic objectives pursued by the European Union in the negotiations, (ii) that 'initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive, and that public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations', (iii) that 'those negotiations do not in any way prejudice the public debate that may develop once the international agreement is signed, in the context of the ratification procedure' and, (iv) that 'except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty … and its legal service cannot have the role of giving advice to other institutions, Member States or the general public'.

59 None of those grounds deals with the argument put forward, with the result that the General Court committed a breach of procedure and an error of law.

60 The Commission contends that the third ground of appeal is ineffective.

*Findings of the Court*

61 Since, before the General Court examined ClientEarth's argument that disclosure of the requested documents furthers rather than undermines the public interest, it had found, in paragraph 46 of the judgment under appeal, that the disclosure of those documents might reveal the strategic objectives pursued by the European Union in the ongoing negotiations and concluded, in paragraph 48 of that judgment, that the Commission had not erred in considering that disclosure of the requested documents would weaken its negotiating position and its negotiating margin and would, therefore, undermine the protection of the public interest as regards international relations, the General Court was fully entitled, by referring in particular to that finding and to that conclusion in paragraph 55 of the judgment under appeal, to reject ClientEarth's argument.

62 Since those grounds were sufficient to reject that argument, the other grounds of the judgment under appeal referred to in the third ground of appeal were for the sake of completeness and the arguments put

forward to criticise them are, therefore, ineffective.

63 It follows that the third ground of appeal must be rejected as unfounded.

***The fourth ground of appeal***

*Arguments of the parties*

64 By the fourth ground of appeal, ClientEarth complains that the General Court erred in law and committed a breach of procedure, in paragraphs 59 to 67 of the judgment under appeal, in rejecting its argument that non-disclosure of the requested documents as long as there are ongoing trade and investment negotiations with other third countries would allow the Commission to rely indefinitely on the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, and, therefore, amounts to an infringement of the requirement to show that there is a real and foreseeable risk of the public interest protected by that exception being undermined. The General Court examined that argument, in paragraphs 61 to 67 of the judgment under appeal, in the light of Article 4(7) of that regulation, whereas ClientEarth pleaded infringement of Article 4(1)(a) of the regulation. The only reasoning in response to that argument is to be found in paragraph 60 of that judgment, in which the General Court stated that the decision at issue did not refer to hypothetical or indeterminate negotiations, but to specific negotiations. Apart from the fact that that decision does not refer to the existence of any specific link between the requested documents and negotiations, that reasoning is the result of using an incorrect test, since the existence of specific negotiations does not prove that there is an actual and not purely hypothetical risk of undermining the public interest protected by the exception laid down in the third indent of Article 4(1)(a) of that regulation.

65 The Commission contends that the fourth ground of appeal is ineffective and, in any event, manifestly unfounded.

*Findings of the Court*

66 It is apparent from the judgment under appeal that, in order to reject the argument in question, the General Court, in paragraph 60 of that judgment, found in essence that, at the time of the adoption of the decision at issue, the issue of ISDS and ICS was raised in the context of the ongoing negotiation of several international agreements and that that decision did not, therefore, refer to hypothetical or indeterminate negotiations, but to specific negotiations.

67 In addition, in paragraphs 61 to 67 of the judgment under appeal, the General Court, observing that it was not clear whether the applicant also pleaded an infringement *ratione temporis* of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, because it submitted, inter alia, that the Commission's analysis resulted in applying that exception for an undefined and disproportionate period, noted, in essence, that Article 4(7) of that regulation provides that that exception is to apply only for the period during which protection is justified on the basis of the content of the requested documents and for a maximum period of 30 years. The General Court pointed out, in particular, that it was not apparent from the documents before it that the Commission intended to rely on that exception beyond the conclusion of the international agreements under negotiation or, in any event, after such time as the Court of Justice may give a ruling on the issue of the compatibility of ISDS and ICS with EU law.

68 In that regard, it must be borne in mind that, before examining ClientEarth's argument, the General Court held, in paragraph 48 of the judgment under appeal, that the Commission had not erred in considering that disclosure of the requested documents would weaken its negotiating position and its negotiating margin and would, therefore, undermine the protection of the public interest as regards international relations. Since such an assessment presupposes that the risk of that undermining is reasonably foreseeable and not purely hypothetical, as referred to in paragraph 32 of the present judgment, the General Court did not err in law when, at that stage of its reasoning, it rejected the argument put forward on the abovementioned grounds, which show that the application of the exception laid down in the third indent of Article 4(1)(a)

of Regulation No 1049/2001 by the Commission was linked to specific negotiations that were ongoing and was limited in time.

69 It follows that the fourth ground of appeal must be rejected as unfounded.

***The fifth ground of appeal***

*Arguments of the parties*

70 By the fifth ground of appeal, ClientEarth alleges distortion, in paragraphs 68 and 69 of the judgment under appeal, of the argument put forward by the Commission, by which the latter maintained that Regulation No 1049/2001 did not permit the disclosure of documents as long as the position of the Court of Justice was not known. The statement, in paragraph 69 of that judgment, that by that argument the Commission was merely referring to an event capable of putting an end to the application of the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, constitutes a manifest distortion of that argument.

71 The Commission contends that the fifth ground of appeal is ineffective.

*Findings of the Court*

72 It must be held that the fifth ground of appeal is ineffective, since the argument put forward by ClientEarth before the General Court, which did not seek to criticise the decision at issue, but rather to challenge an argument which the Commission had put forward in the defence, was not capable of leading to the annulment of that decision and, consequently, the present ground, even if well founded, cannot lead to the setting aside of the judgment under appeal which dismissed the action for annulment of that decision.

73 It follows that the fifth ground of appeal must be rejected.

***The sixth ground of appeal***

*Arguments of the parties*

74 By the sixth ground of appeal, ClientEarth complains that, in paragraphs 72 to 74 of the judgment under appeal, the General Court circumvented its argument that disclosure of documents cannot depend on whether the Commission's partners taking part in the negotiations have equal transparency obligations and that the General Court accepted that such dependence exists.

75 The Commission contends that the sixth ground of appeal is ineffective and, in any event, manifestly unfounded.

*Findings of the Court*

76 In paragraphs 73 and 74 of the judgment under appeal, the General Court recalled that the 'documents requested [we]re … the material on the basis of which the Commission determines its position in the ongoing negotiations on ISDS and ICS' and, referring to its own case-law, that 'in the context of international negotiations, the positions taken by the European 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'. It added that 'the formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the European Union itself' and that 'in that context, it is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union'.

77 It is apparent from those grounds of the judgment under appeal that the General Court responded to the argument put forward before it by ClientEarth and that it did not in any way accept that the right of access to the documents of the institutions conferred on the public by Regulation No 1049/2001 depends on whether the Commission's partners taking part in the negotiations have equal transparency obligations, since it merely pointed out, in essence, that, in the context of international negotiations, the European Union's negotiating position may be affected if its negotiating positions are disclosed whereas its partners' negotiating positions are not known.

78 It follows that the sixth ground of appeal must be rejected as unfounded.

***The seventh ground of appeal***

*Arguments of the parties*

79 By the seventh ground of appeal, ClientEarth complains that the General Court infringed, in paragraphs 79 to 90 of the judgment under appeal, Article 4(6) of Regulation No 1049/2001 by failing to carry out a review of the content of the requested documents to which it had access, in order to determine which parts of those documents were covered by the exception laid down in the third indent of Article 4(1)(a) of that regulation and which parts were not. In addition, in ClientEarth's view, the General Court erred in law in its interpretation of Article 4(6) of Regulation No 1049/2001 by appearing to justify its lack of review of the content of those documents by the Commission's wide discretion when assessing whether disclosure of a document could undermine the public interest protected by that exception, without examining whether the Commission had established that disclosure of certain parts of the requested documents would actually and specifically undermine that public interest, and that that risk was reasonably foreseeable and not purely hypothetical.

80 The Commission contends that the seventh ground of appeal is unfounded.

*Findings of the Court*

81 After noting, first, in paragraphs 84 and 85 of the judgment under appeal, that the Commission had granted partial access to four of the requested documents and refused access to the entirety of another document requested and that the Commission had, therefore, examined the possibility of granting ClientEarth partial access to those documents and, secondly, in paragraph 87 of that judgment, that the Commission has a discretion when assessing whether disclosure of a document could undermine the public interest protected by the exception laid down in the third indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court found, in paragraph 88 of that judgment, that 'it [wa]s not clear from the documents produced by the Commission before the Court … that it would have been possible to give wider access to the requested documents without that approach involving disclosure of the content of the parts of the documents in respect of which refusal of access was justified and, inter alia, the strategic objectives pursued by the European Union in the negotiation'.

82 It can be deduced from this that the General Court did actually examine the requested documents, in order to review whether the Commission had correctly applied Article 4(6) of Regulation No 1049/2001 and did not, as ClientEarth submits, justify failure to examine the content of those documents by the fact that the Commission has a discretion when assessing whether disclosure of a document could undermine the public interest protected by the exception laid down in the third indent of Article 4(1)(a) of that regulation.

83 As regards the argument the General Court failed to examine whether the Commission had established that disclosure of certain parts of the requested documents would actually and specifically undermine that public interest, and that that risk was reasonably foreseeable and not purely hypothetical, that argument has already been addressed in the examination of the second part of the first ground of appeal and the second ground of appeal.

84 It follows that the seventh ground of appeal must be rejected as unfounded.

85 Consequently, the appeal must be dismissed in its entirety.

**Costs**

86 In accordance with Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to the procedure on appeal in accordance with Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

87 In the present case, since ClientEarth has been unsuccessful and the Commission has applied for it to pay the costs, ClientEarth must be ordered, in addition to bearing its own costs, to pay those incurred by the Commission.

On those grounds, the Court (Tenth Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders ClientEarth to bear its own costs and to pay those incurred by the European Commission.**

Jarukaitis Juhász Lycourgos

Delivered in open court in Luxembourg on 19 March 2020.

A. Calot Escobar I. Jarukaitis

Registrar President of the Tenth Chamber

* Language of the case: English.