

 <p>Council of the European Union General Secretariat</p>	
<b>Trade Policy Committee</b> <b>(Services and Investment)</b>	
<b>m.d. :</b>	<b>24/16</b>
<b>source :</b>	<b>NL Presidency</b>
<b>for :</b>	<b>Examination / Endorsement</b>
<b>date :</b>	<b>06 - 04 - 2016</b>

**Note for attention of the Trade Policy Committee (Services and Investment)**

**Subject: Presidency compromise proposal regarding the statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities**

For the sake of transparency, and following the adoption on 23 July 2014 of "*Regulation (EU) No 912/2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*"<sup>1</sup>, the revised statement amends the 1997 statement adopted by the Council on 24 July 1997 and submitted to the Energy Charter Treaty Secretariat on 17 November 1997.

Based on the Commission's initial proposal and building upon the Luxembourg Presidency's compromise proposal, the revised Presidency compromise proposal:

- comprises a new consolidated version of the entire earlier statement and not simply an amendment of paragraph 3 of the earlier statement, as already reflected in the Luxembourg Presidency compromise proposal.
- makes technical adaptations following the entry into force of the Lisbon Treaty. In particular, the European Communities have been replaced not only by the European Union, but also by the European Atomic Energy Community (Euratom) which was also already taken into account by the Luxembourg Presidency compromise proposal.

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<sup>1</sup> OJ L 257, 28.8.2014, p. 121-134

- reflects the view of the Council that competence with regard to investment is shared between the Union and its Member States. Thus, the statement is made not only on behalf of the European Union and Euratom, but also on behalf of their Member States. This is indicated in the "chapeau" paragraph of the statement. A draft decision by the Representatives of the Governments of the Member States is also added to that effect.
- accommodates a concern by one delegation by specifying that "*The Regulation applies to investor-to-state disputes initiated by a claimant from a **third** country under the Energy Charter Treaty*".
- proposes that the European Commission informs the third State claimant of the identity of the Respondent pursuant to the procedures set out in Regulation No 912/2014. The statement confirms expressly that this will be without prejudice to the division of competence between the Union and the Member States regarding investment.
- Finally, the paragraphs of the statement have been renumbered in order to improve the clarity of the document.

The consolidated version of the Statement and the draft Decision of the Representatives of the Governments of the Member States are set out in ANNEX to this note.

The compromise proposal will be discussed at the TPC (Services and Investment) meeting on 13 April 2016. The draft text is distributed in two versions, a clean and track changed version.

**Legend :**

- [track changes](#) - amended in comparison to the Commission's initial proposal (m.d. 149/15).
- yellow highlight - amended in comparison to the Luxembourg Presidency's compromise proposal (m.d. 163/15).

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**Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities**

The European Union, and the European Atomic Energy Community (Euratom) and their Member States, as Contracting Parties to the Energy Charter Treaty, make the following statement concerning their policies, practices and conditions with regard to investor to state disputes settlement under the ECT between an investor and a Contracting Parties and their submission to the international arbitration or conciliation:

1. "The European Union and Euratom are regional economic integration organisations within the meaning of the Energy Charter Treaty. The European Union and Euratom exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions.

2. The European Union, Euratom and their Member States have all concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein within the Energy Charter Treaty, in accordance with their respective competences.

1. On 17 November 1997 the European Communities (now the European Union) submitted a statement of relevant policies, practices and conditions pursuant to Article 26(3)(b)(ii) ECT.

2.3. On 23 July August 2014, the European Union adopted Regulation (EU) No 912/2014<sup>1</sup>, of the European Parliament and of the Council was adopted. This Regulation establishes establishing a framework for managing financial responsibility linked to investor-to-state-dispute settlement tribunals established by international agreements to which the European Union is a party was adopted ('Regulation 912/2014'). Regulation 912/2014 lays down inter alia arrangements for determining whether the European Union or a Member State shall act as respondent in the disputes brought by an investor under an international agreement with a third country to which the European Union is party. Those arrangements The Regulation apply applies to investor-to-state disputes brought initiated by a claimant investor from a third country under the Energy Charter Treaty. In view of this, and for the sake of transparency, the European Union would like to update the information provided in paragraph 3 of the statement made on 17 November 1997 as follows: This Regulation provides, in particular:

A. In accordance with Article 4(1) of Regulation 912/2014, in the case of disputes concerning exclusively treatment afforded by the institutions, bodies, offices or agencies of the European Union, the European Union shall act as respondent.

B. In the case of disputes concerning treatment afforded, fully or partially, by a Member State, Article 8 of Regulation 912/2014 provides that

1. Where the Commission receives notice by which a claimant states its intention to initiate arbitration proceedings, in accordance with an

<sup>1</sup> Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28.8.2014, p. 121-134

agreement, it shall immediately notify the Member State concerned. When a claimant states its intention to initiate arbitration proceedings against the Union or a Member State, the Commission shall inform the European Parliament and the Council, within 15 working days of receiving the notice, of the name of the claimant, the provisions of the agreement alleged to have been breached, the economic sector involved, the treatment alleged to be in breach of the agreement and the amount of damages claimed.

2. Where a Member State receives notice by which a claimant states its intention to initiate arbitration proceedings, it shall immediately notify the Commission.

Article 9 of Regulation 912/2014 further provides that:

1. The Member State concerned shall act as the respondent except where either of the following situations arise:

- (a) the Commission, following consultations pursuant to Article 6, has taken a decision pursuant to paragraph 2 or 3 of this Article within 45 days of receiving the notice or notification referred to in Article 8; or
- (b) the Member State, following consultations pursuant to Article 6, has confirmed to the Commission in writing that it does not intend to act as the respondent within 45 days of receiving the notice or notification referred to in Article 8.

If either of the situations referred to in point (a) or (b) arise, the Union shall act as the respondent.

2. The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States, in accordance with the advisory procedure referred to in Article 22(2), that the Union is to act as the respondent where one or more of the following circumstances arise:

- (a) the Union would bear all or at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3; or
- (b) the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.

3. The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States in accordance with the examination procedure referred to in Article 22(3), that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case.

5. The Commission and the Member State concerned shall immediately after receiving the notice or notification referred to in Article 8 enter into consultations pursuant to Article 6 on the management of the case pursuant to this Article. The Commission and the Member State concerned shall ensure that any deadlines set down in the agreement are respected.

C. Having made a determination of who shall act as respondent in a dispute in accordance

with the above provisions of Regulation 912/2014, the European Union will inform the investor claimant within 60 days from the date on which the investor claimant has given notice of its intention to initiate a dispute. ~~Where the European Union shall act as respondent in a dispute in accordance with the above provisions of Regulation 912/2014, the European Commission will inform the investor within 60 days from the date on which the investor has given notice of its intention to initiate a dispute under the Energy Charter Treaty.~~ This is without prejudice to the division of competences between the European Union and the Member States for investment.

4. The Court of Justice of the European Union, as the judicial institution of the European Union and Euratom, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the European Union and Euratom, which under certain conditions may be invoked before the Court of Justice.
5. Any case brought before the Court of Justice of the European Union by a claimant of another non-EU Contracting Party in application of the forms of action provided by the constituent treaties of the Union falls under Article 26(2)(a) of the Energy Charter Treaty<sup>2</sup>. Given that the Union's legal system provides for means of such action, the European Union has not given its unconditional consent to the submission of a dispute to international arbitration or conciliation.
6. As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Union and Euratom to become parties to it. The provisions of the ICSID Additional Facility also do not allow the European Union and Euratom to make use of them. Any arbitral award against the European Union and Euratom will be implemented by the Union's institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty."

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<sup>2</sup> Article 26(2)(a) is also applicable in the case where the Court of Justice of the European Union may be called upon to examine the application or interpretation of the Energy Charter Treaty on the basis of a request for a preliminary ruling submitted by a court or tribunal of a Member State in accordance with Article 267 of the Treaty on the Functioning of the European Union.

**Decision by the Representatives of the Governments of the Member States, meeting within the Council**

The Representatives of the Governments of the Member States, meeting within the Council, hereby decide to adopt the statement as set out in ADD 1 to the I/A note (document ST 7361/16<sup>3</sup>).

Done at.....

For the Representatives  
of the Governments  
of the Member States

The President

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<sup>3</sup> For information: this document will contain the I/A note.

**Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities**

The European Union, the European Atomic Energy Community (Euratom) and their Member States make the following statement:

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1. "The European Union and Euratom are regional economic integration organisations within the meaning of the Energy Charter Treaty. The European Union and Euratom exercise the competences conferred on them by their Member States through autonomous decision-making and judicial institutions.
2. The European Union, Euratom and their Member States are internationally responsible for the fulfilment of the obligations contained within the Energy Charter Treaty, in accordance with their respective competences.
3. On 23 July 2014 Regulation (EU) No 912/2014<sup>1</sup> of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state-dispute settlement tribunals established by international agreements to which the European Union is party was adopted ('Regulation 912/2014'). The Regulation applies to investor-to-state disputes initiated by a claimant from a third country under the Energy Charter Treaty. This Regulation provides, in particular:
  - A. In accordance with Article 4(1) of Regulation 912/2014, in the case of disputes concerning treatment afforded by the institutions, bodies, offices or agencies of the European Union, the European Union shall act as respondent.
  - B. In the case of disputes concerning treatment afforded, fully or partially, by a Member State, Article 8 of Regulation 912/2014 provides that
    1. *Where the Commission receives notice by which a claimant states its intention to initiate arbitration proceedings, in accordance with an agreement, it shall immediately notify the Member State concerned. When a claimant states its intention to initiate arbitration proceedings against the Union or a Member State, the Commission shall inform the European Parliament and the Council, within 15 working days of receiving the notice, of the name of the claimant, the provisions of the agreement alleged to have been breached, the economic sector involved, the treatment alleged to be in breach of the agreement and the amount of damages claimed.*
    2. *Where a Member State receives notice by which a claimant states its intention to initiate arbitration proceedings, it shall immediately notify the Commission.*

Article 9 of Regulation 912/2014 further provides that:

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1. *The Member State concerned shall act as the respondent except where either of the following situations arise:*
  - (a) *the Commission, following consultations pursuant to Article 6, has taken a decision pursuant to paragraph 2 or 3 of this Article within 45 days of receiving the notice or notification referred to in Article 8; or*
  - (b) *the Member State, following consultations pursuant to Article 6, has confirmed to the Commission in writing that it does not intend to act as the respondent within 45 days of receiving the notice or notification referred to in Article 8.*

*If either of the situations referred to in point (a) or (b) arise, the Union shall act as the respondent.*

2. *The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States, in accordance with the advisory procedure referred to in Article 22(2), that the Union is to act as the respondent where one or more of the following circumstances arise:*
  - (a) *the Union would bear all or at least part of the potential financial responsibility arising from the dispute in accordance with the criteria laid down in Article 3; or*
  - (b) *the dispute also concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.*
3. *The Commission may decide by means of implementing acts, based on a full and balanced factual analysis and legal reasoning provided to the Member States in accordance with the examination procedure referred to in Article 22(3), that the Union is to act as the respondent where similar treatment is being challenged in a related claim against the Union in the WTO, where a panel has been established and the claim concerns the same specific legal issue, and where it is necessary to ensure a consistent argumentation in the WTO case.*
5. *The Commission and the Member State concerned shall immediately after receiving the notice or notification referred to in Article 8 enter into consultations pursuant to Article 6 on the management of the case pursuant to this Article. The Commission and the Member State concerned shall ensure that any deadlines set down in the agreement are respected.*

C. Having made a determination of who shall act as respondent in a dispute in accordance with the above provisions of Regulation 912/2014, the European Union will inform the claimant within 60 days from the date on which the claimant has given notice of its intention to initiate a dispute. This is without prejudice to the division of competences between the European Union and the Member States for investment.

4. The Court of Justice of the European Union, as the judicial institution of the European Union and Euratom, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the European Union and Euratom, which under certain conditions may be invoked before the Court of Justice.
5. Any case brought before the Court of Justice of the European Union by a claimant of another non-EU Contracting Party in application of the forms of action provided by the

constituent treaties of the Union falls under Article 26(2)(a) of the Energy Charter Treaty<sup>2</sup>. Given that the Union's legal system provides for means of such action, the European Union has not given its unconditional consent to the submission of a dispute to international arbitration or conciliation.

6. As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Union and Euratom to become parties to it. The provisions of the ICSID Additional Facility also do not allow the European Union and Euratom to make use of them. Any arbitral award against the European Union and Euratom will be implemented by the Union's institutions, in accordance with their obligation under Article 26(8) of the Energy Charter Treaty."

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Done at.....,

For the Representatives  
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The President

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