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Directorate F - WTO, Legal Affairs and Trade in Goods
Dispute Settlement and Legal Aspects of Trade Policy

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NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES AND INVESTMENT)

SUBJECT: *Updated statement for the Energy Charter Treaty*

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OBJECTIVE: *For information.*

REMARKS:

The purpose of this note is to inform Member States about the attached statement, which the Commission intends to send to the Energy Charter Treaty (ECT) with a view to replacing an older statement of 1997 that became obsolete.

The update has become necessary as a follow-up of the Financial Responsibility Regulation (FRR)¹ adopted on 23 July 2014, which i.a. sets out how the EU will determine the respondent in investor-to-state dispute settlement (ISDS) cases. The FRR applies to any ISDS conducted pursuant to an agreement to which the Union is party, or the Union and its Member States are parties, and initiated by an investor from a third country. It thus also applies to ISDS cases lodged by third country investors under the ECT. Therefore, the old statement² by which the EU had clarified in 1997 that the EU and the Member States would determine among them who will be the respondent party in arbitration proceedings initiated by a third country investor, has to be updated in order to reflect the present situation.

The update will directly refer to the relevant provisions of the FRR. It serves a transparency purpose towards third countries and is only of a declaratory nature.

After discussion in the TPC SI, the Commission intends to send the attached updated statement to the ECT Depository in Portugal, which will ensure its communication to the ECT members.

Annex: Updated statement

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¹ Regulation 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.

² The Statement was sent on 17.11.1997 to the Secretariat of the ECT and made public on the basis of Article 26(3)(b)(ii) ECT (see also OJ 1998 L 69/115).

Annex: Statement to be communicated to the Energy Charter Treaty

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.

On 23 July August 2014 the European Union adopted Regulation (EU) No 912/2014, of the European Parliament and of the Council, establishing a framework for managing financial responsibility linked to investor-state-dispute settlement tribunals established by international agreements to which the European Union is a Party ('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 apply to investor-to-State disputes brought by an 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:

- 1) In accordance with Article 4(1) of Regulation 912/2014, in the case of disputes concerning exclusively treatment afforded by the European Union, the European Union shall act as respondent.
- 2) 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 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.*
- 3) 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 within 60 days from the date on which the investor has given notice of its intention to initiate a dispute.