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'I/A' ITEM NOTE

From: General Secretariat of the Council

To: Permanent Representatives Committee (Part 2)/Council

Subject: Statement to be submitted by the European Union, the European Atomic Energy Community (Euratom) and those Member States that are party to the Energy Charter Treaty (ECT) to the 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

- Approval

1. On 23 September 1997, following completion of the procedures for the conclusion of the Energy Charter Treaty (ECT) and the Energy Charter Protocol on energy efficiency and related environmental aspects by the three Communities, the Council and Commission Decision on the conclusion of the ECT and the Energy Charter Protocol on energy efficiency and related environmental aspects¹ was adopted. The ECT entered into force in April 1998 and it binds the Union, EAEC (Euratom), Member States and third states.

¹ Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998, p. 1-116.

2. Under Article 26, paragraph 3(b)(ii) of the ECT "*each Contracting Party*" shall, "*for the sake of transparency*", "*provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41*".
3. On 24 July 1997 the Council adopted as an "A" item a statement to be submitted by the European Communities pursuant to Article 26, paragraph 3(b)(ii) ECT, decided on the publication of this statement in the Official Journal², and decided also on two statements to be entered in the Council minutes³.
4. On 17 November 1997 the European Communities submitted the statement in relation to Article 26, paragraph 3(b)(ii) ECT to the Energy Charter Treaty Secretariat.
5. On 23 July 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-to-state dispute settlement tribunals established by international agreements to which the European Union is party.⁴ As a result of the adoption of this Regulation, the third paragraph of the statement made on 17 November 1997 needs to be amended.

² OJ L 69, 9.3.1998, p. 115.

³ doc. 10044/97 ADD 1.

⁴ OJ L 257, 28.8.2014, p. 121-134.

6. On 3 November 2015 the Commission proposed a text to replace the third paragraph of the statement adopted by the Council on 24 July 1997.
7. On 16 May 2017, the Court of Justice of the European Union issued its opinion 2/15 on the Free Trade Agreement with Singapore, confirming that competence with respect to investor-to-state dispute settlement is shared between the Union and its Member States.
8. On 2 April 2019 the Trade Policy Committee (Services and Investment), after an informal silence consultation, agreed to a Presidency compromise proposal aimed at replacing the previous statement made on 17 November 1997 with a new consolidated statement. It was agreed that replacing the earlier statement was necessary for transparency reasons and in order to include the required technical adaptations following the entry into force of the Lisbon Treaty. This consolidated version is set out in ANNEX I to this note.
9. In this light and subject to confirmation by the Permanent Representatives' Committee:
 - the Council is invited to approve as an "A" item, the new consolidated version of the statement submitted pursuant to Article 26, paragraph 3 (b) (ii) of the Energy Charter Treaty, as set out in ANNEX I to this note;
 - the Representatives of the Governments of those Member States that are party to the ECT, meeting within the Council, are invited to adopt the Decision as set out in ANNEX II to this note;
 - the Council and the Representatives of the Governments of those Member States that are party to the ECT are invited to decide that the new consolidated version of the said statement be submitted to the ECT Secretariat by the Commission;
 - the Council is invited to decide to publish the above-mentioned statement in the Official Journal.

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:

- "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 912/2014¹ 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')². 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.

¹ 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.

² For greater certainty, this statement is intended to address the consequences of the adoption of Regulation 912/2014 in relation to cases initiated by a claimant from a non-EU Contracting Party under the Energy Charter Treaty. Disputes between an investor of a Member State and a Member State under the Energy Charter Treaty do not fall within the scope of this statement. The EU and its Member States may address this matter at a later stage.

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:

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 Treaty³. Given that the Union's legal system provides for means of such action, neither the European Union nor Euratom has 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."

³ 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 those Member States that are party to the Energy Charter Treaty (ECT), meeting within the Council

The Representatives of the Governments of those Member States that are party to the ECT, meeting within the Council, hereby decide to adopt the statement as set out in ANNEX I to this note (document 7830/19).

Done at.....,

For the Representatives
of the Governments
of those Member States that
are party to the ECT

The President
