



Council of the  
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#### 'I/A' ITEM NOTE

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From: General Secretariat of the Council

To: Permanent Representatives Committee/Council

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Subject: Recommendation for a Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty

- Council Decision
- Decision of the Representatives of the Governments of the Member States that are parties to the Energy Charter Treaty
- Negotiating Directives

*Adoption*

*Statements*

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## **Statement by Poland, Czech Republic, Slovakia and Lithuania**

### **Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty**

Poland, Czech Republic, Slovakia and Lithuania support the necessity of modernising the Energy Charter Treaty in line with the modern standards as reflected in the EU's reformed approach on investment protection. We also believe that the Energy Charter Treaty should contain sound references on sustainable development, including on climate change and clean energy transition in line with the Paris Agreement to better reflect the new realities of the energy sector, especially the growing need for enhanced regional and global cooperation on environmental protection.

In accordance with the Commission's explanatory memorandum (COM(2019) 231 final), Poland, Czech Republic, Slovakia and Lithuania understand that, as it stems from the EU reformed approach on the investment protection, the modernised provisions of the Energy Charter Treaty in the area of sustainable development and corporate social responsibility will have non-binding nature. Thus, we call upon the Commission to follow this approach and to seek guidance of the Member States on each and every text proposal submitted in the process of modernisation of the Energy Charter Treaty.

**Statement by the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the French Republic, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, Romania, the Slovak Republic and the Kingdom of Spain**

The Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the French Republic, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, the Kingdom of the Netherlands, the Republic of Poland, the Portuguese Republic, Romania, the Slovak Republic and the Kingdom of Spain hereby reiterate and confirm their positions, expressed in the *Declaration on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection the European Union* dated 15 January 2019, according to which, inter alia:

‘International agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.’

They hereby declare that the adoption of the negotiating directives for the modernisation of the Energy Charter Treaty shall not affect their position regarding the non-application of Art. 26 of the Energy Charter Treaty in disputes between an investor from one EU member state and another EU member state, as expressed in the above-mentioned declaration. This issue will be dealt with as soon as possible.”

**Statement by the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Slovenia and the Kingdom of Sweden:**

THE GRAND DUCHY OF LUXEMBOURG, THE REPUBLIC OF MALTA, THE REPUBLIC OF SLOVENIA AND

THE KINGDOM OF SWEDEN, hereby reiterate and confirm their positions, expressed in the *Declaration on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection the European Union* dated 16 January 2019, which states that, inter alia:

“The Achmea case concerns the interpretation of EU law in relation to an investor-state arbitration clause in a bilateral investment treaty between Member States. The Member States note that the *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty. A number of international arbitration tribunals post the *Achmea* judgment have concluded that the Energy Charter Treaty contains an investor-State arbitration clause applicable between EU Member States.<sup>1</sup> This interpretation is currently contested before a national court in a Member State<sup>2</sup>. Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty. “

They hereby declare that the adoption of the negotiating directives for the modernisation of the Energy Charter Treaty shall not affect their position regarding the application of Art. 26 of the Energy Charter Treaty in disputes between an investor from one EU member state and another EU member state, as expressed in the above-mentioned declaration.

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<sup>1</sup> *Masdar Solar & Wind Cooperatief U.A. vs the Kingdom of Spain*, ICSID Case No ARB/14/1, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l vs the Kingdom of Spain*, ICSD Case No. ARB/13/36, *Antin Infrastructure Services Luxembourg S.à.r.l vs the Kingdom of Spain* and *Antin Energia Termosolar B.V. vs the Kingdom of Spain*, ICSID Case No. ARB, 13/2, *Vattenfall AB; Vattenfall GMBH; Vattenfall Europé Nuclear Energy GMBH; Kernkraftwerk Krümmel GMBH & Co. oHG; Kernkraftwerk Brunbüttel GMBH & Co. oHG vs the Republic of Germany*, ICSID Case No. ARB/12/12, *Antaris Solar GmbH and Michael Gode vs Czech Republic*, PCA CASE No. 2014-01, *Athena Investments A/S vs the Kingdom of Spain*, SCC Case No. 150/2015

<sup>2</sup> Set-aside proceeding in Svea Court of Appeal, Case No 4658-18, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR vs the Kingdom of Spain*, SCC Arbitration (2015/06)

**Declaration of the representative of the Government of Hungary of 15 July 2019, on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection in the European Union regarding the Energy Charter Treaty Modernisation**

THE REPRESENTATIVE OF HUNGARY, hereby reiterate and confirm its position, expressed in the *Declaration of the Representative of the Government of Hungary of 16 January 2019 , on the legal consequences of the judgement of the Court of Justice in Achmea and on investment protection* , which states that, inter alia:

*“Hungary further declares that in its view, the Achmea judgement concerns only the intra-EU bilateral investment treaties. The Achmea judgement is silent on the investor-state arbitration clause in the Energy Charter Treaty. (hereinafter: ECT) and it does not concern any pending or prospective arbitration proceedings initiated under the ECT.*

*Against this background, Hungary underlines the importance of allowing for due process and considers that it is inappropriate for a Member State to express its view as regards the compatibility with Union law of the intra-EU application of the ECT. The ongoing and future applicability of the ECT intra-EU relations requires further discussion and individual agreement amongst the Member States.”*

Hungary hereby declares that the adoption of the negotiating directives for the modernisation of the Energy Charter Treaty shall not affect its position regarding the application of Art. 26 of the Energy Charter Treaty in disputes between an investor from one EU member state and another EU member state, as expressed in the above-mentioned declaration.

## Statement by the Commission

The Commission takes note of the Council's request for the EU to engage on the matter of transparency for investment dispute settlement in the context of the ECT modernisation. The Commission notes that the Council has already requested the Commission to negotiate an agreement which provides for transparency for investment dispute settlement through the authorisation and negotiating directives granted to negotiate the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention") in 2014. The Commission notes that the Commission made proposals for the EU to sign and conclude the Mauritius Convention on 20 February 2015 and that the Council has not yet acted on these proposals. Adopting these proposals would provide a mechanism for transparency to apply to disputes under the ECT and would avoid the duplication involved in seeking to create a new set of rules for transparency in the ECT. The Commission therefore urges the Council to adopt the proposals on the Mauritius Convention and then to work with the Commission to ensure that other countries party to the ECT ratify the Mauritius Convention.

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