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Subject:	ANNEX to the Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty

Delegations will find attached document COM(2022) 523 final.

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EUROPEAN
COMMISSION

Brussels, 5.10.2022

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ANNEX

ANNEX

to the

**Communication from the Commission to the European Parliament and the Council, as
well as to the Member States**

**on an agreement between the Member States, the European Union, and the European
Atomic Energy Community on the interpretation of the Energy Charter Treaty**

SUBSEQUENT AGREEMENT
ON THE INTERPRETATION OF THE ENERGY CHARTER TREATY

THE CONTRACTING PARTIES,

THE KINGDOM OF BELGIUM,

THE REPUBLIC OF BULGARIA,

THE CZECH REPUBLIC,

THE KINGDOM OF DENMARK,

THE FEDERAL REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA,

IRELAND,

THE HELLENIC REPUBLIC,

THE KINGDOM OF SPAIN,

THE FRENCH REPUBLIC,

THE REPUBLIC OF CROATIA,

THE ITALIAN REPUBLIC,

THE REPUBLIC OF CYPRUS,

THE REPUBLIC OF LATVIA,

THE REPUBLIC OF LITHUANIA,

THE GRAND DUCHY OF LUXEMBOURG,

HUNGARY,

THE REPUBLIC OF MALTA,

THE REPUBLIC OF AUSTRIA,

THE KINGDOM OF THE NETHERLANDS,

THE REPUBLIC OF POLAND,

THE PORTUGUESE REPUBLIC,

ROMANIA,

THE REPUBLIC OF SLOVENIA,

THE SLOVAK REPUBLIC,

THE REPUBLIC OF FINLAND,

THE KINGDOM OF SWEDEN,

THE EUROPEAN UNION and

THE EUROPEAN ATOMIC ENERGY COMMUNITY

HAVING in mind the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Treaty establishing the European Atomic Energy Community (EURATOM) and general principles of European Union and EURATOM law,

HAVING in mind the Energy Charter Treaty (ECT),

HAVING in mind the rules of customary international law as codified in the Vienna Convention on the Law of Treaties (VCLT), and in particular the rules as codified in Articles 31(3)(a) and Article 41 VCLT,

RECALLING that, as the Court of Justice of the European Union (CJEU) held in its judgment of 2 September 2021, in Case *République de Moldavie v Komstroy*, C-741/19 (EU:C:2021:655, paragraph 64, the *Komstroy* judgment), despite the multilateral nature of the ECT, the ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of a bilateral investment treaty, and therefore, as explained by the Advocate General of the CJEU in its opinion of 3 March 2021 in *Komstroy* (EU:C:2021:164, paragraph 41), the rights and obligations under the ECT apply only bilaterally, between the two Contracting Parties concerned, in accordance with the judgment of the International Court of Justice of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3, paragraphs 33 and 35,

RECALLING that according to Article 344 TFEU and Article 193 EURATOM, Member States undertake not to submit a dispute concerning the interpretation or application of the TEU, the TFEU and EURATOM to any method of settlement other than those provided for therein,

RECALLING that the CJEU held in its judgment of 30 May 2006, *Commission v Ireland (Mox Plant)*, C-459/03 (EU:C:2006:345, paragraphs 129 to 137) that that exclusive competence to interpret and apply EU law and EURATOM law extends to the interpretation and application of international agreements to which the European Union, EURATOM and the Member States are parties, to the extent that it concerns the application of the international agreement in the relationship between two Member States or the European Union or EURATOM and a Member State,

RECALLING that in *Achmea* (Case C-284/16), the Court of Justice held that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded

between Member States, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept,

RECALLING that the CJEU held in the *Komstroy* judgment (paragraph 66) that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State,

RECALLING that the *Komstroy* judgment is an application of the judgment of the CJEU of 6 March 2016, *Achmea*, C-284/16 (EU:C:2016:158, the *Achmea* judgment), and that in the judgment of 26 October 2021, *PL Holdings*, C-109/20 (EU:C:2021:875), the CJEU has rejected a request to limit in time the application of the *Achmea* judgment; and that, as a result, the interpretation of the ECT in the *Komstroy* judgment applies *ex tunc* as of the approval of the ECT by the Member States, the European Union and EURATOM,

RECALLING that this rule on the application in time of the interpretation of international law given by the competent international court reflects a general principle of public international law, as confirmed by the Permanent Court of International Justice in its advisory opinion No. 40, 15.5.1931, Rights of minorities in Upper Silesia (Germany v Poland), Series A/B, n° 40, p. 19, where that Court held, in relation to a Convention of 15 May 1922 between Germany and Poland concerning Upper Silesia that “*in accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect — in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation.*”,

SHARING the common understanding expressed in this Agreement between the parties to the TEU, TFEU, EURATOM and the ECT that the ECT in its entirety does not apply and has never applied in intra-EU relations,

NOTING that, for greater certainty, this has been specifically confirmed in relation to a number of provisions in Article 24 of the modernised ECT based on the draft text communicated to the Contracting Parties for adoption by the Energy Charter Conference of 22 November 2022,

SHARING the common understanding expressed in this Agreement between the parties to the TEU, TFEU, EURATOM and the ECT that, as a result, a clause such as Article 26(2)(c) ECT could not in the past, and cannot now or in the future serve as legal basis for arbitration proceedings,

RECALLING the position of the European Union and EURATOM and the Member States during the negotiation of ECT, during which the European Union, EURATOM, and the Member States acted as one single entity of public international law, that the ECT is inapplicable in its entirety in intra-EU relations,

RECALLING that, in line with the case-law of the Permanent Court of International Justice (Question of Jaivorzina (Polish- Czechoslovakian Frontier), Advisory Opinion, [1923] PCIJ Series B No. 8, 37) and the International Court of Justice (Reservations to the Convention on Genocide, Advisory Opinion, [1951] I.C.J. Reports, 15, 20), the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it, which means that State parties to an international agreement have the inherent right in the matter of its interpretation,

RECALLING that this subsequent agreement on the interpretation of the ECT concerns a multilateral agreement that creates a bundle of bilateral relationships, and that this agreement only concerns the bilateral relationships between the Member States, the European Union, and EURATOM, respectively, and, by extension, the investors from those Contracting Parties, and that as a result, this agreement does not affect the enjoyment by the other parties to the ECT of their rights under the ECT or the performance of their obligations,

RECALLING that the Member States, the European Union and EURATOM have informed the other Contracting Parties of the ECT of their intention to conclude this subsequent agreement on the interpretation of the ECT in conformity with the rules of customary international law as codified in Article 41(2) VCLT, and

CONSIDERING that Article 41(2) VCLT applies *a fortiori* to any subsequent agreement within the meaning of Article 31(3)(a) regarding interpretation of the ECT,

CONSIDERING that arbitral tribunals established on the basis of Article 26 ECT have held in the past and continue to hold, overwhelmingly, that they are not bound by the judgments of the CJEU, and have held, including after the *Komstroy* judgment, that Article 26 ECT applies to disputes

between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State,

REGRETTING that those arbitral tribunals have thus disregarded the applicable rules of public international law and the clearly expressed intention of the relevant Contracting Parties to the ECT,

CONSIDERING that, in order to ensure that arbitral awards already rendered by arbitral tribunals in a manner contrary to the intention of the contracting parties are not enforced in the European Union or in third countries, and that in pending arbitration proceedings based on Article 26 ECT arbitral tribunals decline competence and jurisdiction, and that arbitration bodies no longer register new arbitration proceedings, but reject them as manifestly inadmissible due to lack of consent to an arbitration agreement, it is necessary to reiterate, expressly and unambiguously, the authentic interpretation of the ECT by means of a subsequent agreement on the interpretation of the ECT,

CONSIDERING that, in that manner, Member States, the European Union and EURATOM implement the *Komstroy* judgment, in line with their legal obligations under EU and EURATOM law, and create legal certainty concerning the unenforceability of existing awards, the obligation of arbitration tribunals to immediately terminate any pending arbitration proceedings, and the obligation for arbitration institutions not to register any future case, and for arbitration tribunals to declare that any arbitration proceedings lack a legal basis,

UNDERSTANDING that this Agreement should cover investor-State arbitration proceedings involving the European Union, EURATOM or its Member States as parties in intra-EU disputes based on Article 26 ECT under any arbitration convention or set of rules, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the ICSID arbitration rules, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration rules, the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules and *ad hoc* arbitration,

INVITING the secretariat of ICSID and the secretariat of the SCC not to register any new intra-EU arbitration proceedings based on the ECT, in line with their respective powers under Article 36(3) ICSID Convention and Article 12 SCC Arbitration Rules,

RECALLING that, when investors from Member States exercise one of the fundamental freedoms, such as the freedom of establishment or the free movement of capital, they act within the scope of

application of Union law and, therefore, enjoy the protection granted by those freedoms and, as the case may be, by the relevant secondary legislation, by the Charter of Fundamental Rights of the European Union, and by the general principles of Union law, which include, in particular, the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations (judgment of 30 April 2014, *Pfleger*, C-390/12, EU:C:2014:281, paragraphs 30 to 37). When a Member State enacts a measure that derogates from one of the fundamental freedoms guaranteed by Union law, that measure falls within the scope of Union law and the fundamental rights guaranteed by the Charter also apply (judgment of 14 June 2017, *Online Games Handels*, C-685/15, EU:C:2017:452, paragraphs 55 and 56),

RECALLING that Member States are obliged under the second subparagraph of Article 19(1) TEU to provide in their respective territories remedies sufficient to ensure effective legal protection of investors' rights under Union law. In particular, Member States must ensure that their courts or tribunals, within the meaning of Union law, meet the requirements of effective judicial protection (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 31 to 37),

BEARING in mind that the provisions of this Agreement are without prejudice to the possibility for the European Commission or any Member State to bring a case before the CJEU based on Articles 258, 259 and 260 TFEU,

CONSIDERING that the references to the European Union in this Agreement are to be understood also as references to its predecessor, the European Economic Community and, subsequently, the European Community, until the latter was superseded by the European Union,

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

ARTICLE 1

Definitions

For the purposes of this Agreement, the following definitions shall apply:

- (1) "Energy Charter Treaty" means the Energy Charter Treaty, signed at Lisbon on 17 December 1994 (OJ 1994 L 380, p. 24; 'the ECT') approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 (OJ 1998 L 69, p. 1), both in its original form and as subsequently amended;
- (2) "Intra-EU relations" means relations between Member States of the European Union and EURATOM or between a Member State, on the one hand, and the European Union or EURATOM, on the other hand;
- (3) "Arbitration Proceedings" means any proceedings before an arbitral tribunal pursuant to Article 26 of the Energy Charter Treaty to resolve a dispute between, on the one hand, an investor of one Member State of the European Union and, on the other hand, another Member State of the European Union, the European Union, or EURATOM ;
- (4) "Arbitration Clause" means the investor-State arbitration clause laid down in Article 26 of the Energy Charter Treaty;

SECTION 2

PROVISIONS CONFIRMING THE NON-APPLICABILITY OF THE ENERGY CHARTER TREATY WITHIN THE UNION

ARTICLE 2

Continued non applicability of the Energy Charter Treaty

1. For greater certainty, the Contracting Parties confirm that the ECT does not apply, and has

never applied to intra-EU relations.

2. For greater certainty, the Contracting Parties confirm, in particular, that, in accordance with paragraph 1, Article 47(3) ECT does not apply, and has never applied, to intra-EU relations. Accordingly, that provision cannot have produced any intra-EU legal effects when a Member State withdrew from the ECT prior to this agreement, nor shall it produce any intra-EU legal effects if a Member State withdraws from the ECT subsequently.

ARTICLE 3

Common provisions

For greater certainty, the Contracting Parties hereby confirm, in particular, that, in accordance with Article 2, Article 26 ECT does not apply, and has never applied, to intra-EU relations. Therefore, Article 26 ECT cannot serve and has never been capable of serving as legal basis for Arbitration Proceedings relating to intra-EU relations.

SECTION 3

PROVISIONS REGARDING CLAIMS MADE UNDER ARTICLE 26 ECT

ARTICLE 4

Concluded Arbitration Proceedings

1. Notwithstanding Article 2, this Agreement shall not affect any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where:

(a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or

(b) the award was set aside or annulled before the date of entry into force of this

Agreement;

Those proceedings (“Concluded Arbitration Proceedings”) shall not be reopened.

2. In addition, this Agreement shall not affect any agreement to settle amicably a dispute being the subject of Arbitration Proceedings initiated prior to 6 March 2018.

ARTICLE 5

Duties of the Contracting Parties concerning pending Arbitration Proceedings

Where the Contracting Parties are parties to Arbitration Proceedings that are not Concluded Arbitration Proceedings pursuant to Article [6], they shall:

- (a) inform, in cooperation with each other and on the basis of the statement in the Annex, arbitral tribunals about the legal consequences of the *Achmea* and *Komstroy* judgments; and
- (b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of Article 26 ECT, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it.

SECTION 4

FINAL PROVISIONS

ARTICLE 6

Depositary

1. The Secretary-General of the Council of the European Union shall act as Depositary of this Agreement.

2. The Secretary-General of the Council of the European Union shall notify the Contracting Parties of:

- (a) any decision on provisional application in accordance with Article 11;
- (b) the deposit of any instrument of ratification, acceptance or approval in accordance with Article 9;
- (c) the date of entry into force of this Agreement in accordance with Article 10(1);
- (d) the date of entry into force of this Agreement for each Contracting Party in accordance with Article 10(2).

3. The Secretary General of the Council of the European Union shall publish the Agreement in the *Official Journal of the European Union* and notify the Energy Charter Secretariat of its adoption and entry into force.

[If applicable] ARTICLE 7

Annexes

The annex to this Agreement constitutes an integral part thereof.

ARTICLE 8

Reservations

No reservations shall be made to this Agreement.

ARTICLE 9

Ratification, approval or acceptance

This Agreement shall be subject to ratification, approval or acceptance.

The Contracting Parties shall deposit their instruments of ratification, approval or acceptance with the Depositary.

ARTICLE 10

Entry into force

1. This Agreement shall enter into force 30 calendar days after the date on which the Depositary receives the second instrument of ratification, approval or acceptance.
2. For each Contracting Party which ratifies, accepts or approves it after its entry into force in accordance with paragraph 1, this Agreement shall enter into force 30 calendar days after the date of deposit by such Contracting Party of its instrument of ratification, approval or acceptance.

ARTICLE 11

Provisional application

1. The Contracting Parties, in accordance with their own constitutional requirements, may decide to apply this Agreement provisionally. The Contracting Parties shall notify the Depositary of any such decision.
2. When two Contracting Parties have decided to apply this Agreement provisionally, the provisions of this Agreement shall apply in relations between those Parties 30 calendar days from the date of the later decision on provisional application.

ARTICLE 12

Authentic texts

This Agreement, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the text in each of these languages being equally authentic, shall be deposited in the archives of the Depositary.

Done at Brussels on