EUROPEAN
COMMISSION

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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

Introduction

The European Union, the European Atomic Energy Community (hereinafter - 'EURATOM') and 26 Member States are Contracting Parties to the Energy Charter Treaty (hereinafter 'ECT')[1]. A large number of arbitral tribunals have interpreted Article 26 ECT as applying to disputes between an investor from one EU Member State and another Member State. In so doing, they have rejected the contrary position taken by the Commission in the first case of this kind[2] and in all similar cases to date.

The Court of Justice of the European Union (hereinafter 'CJEU') has now confirmed in a binding and authoritative manner that intra-EU arbitration under Article 26 of the ECT is incompatible with the EU Treaties.[3] And yet, in their consistent and almost unanimous decision-making practice, arbitral tribunals continue to consider that Article 26 ECT applies intra-EU.[4] According to the CJEU, any such arbitral award must be regarded as incompatible with EU law, in particular Articles 267 and 344 TFEU. Such an award cannot therefore produce any effect and thus cannot be enforced in order to pay the compensation awarded by it.[5]

Article 26 ECT provides for the possibility of ICSID arbitration. This creates the risk that third countries will recognise and enforce these arbitration awards without the possibility for an EU court to declare them null and void. As a matter of fact, Article 54 ICSID sets up a simplified recognition and enforcement mechanism.[6] To date, the Australian courts consider that this mechanism does not allow a Member State to claim before them the lack of a valid arbitration agreement, once the arbitral tribunal has rejected this argument.[7] A request to take a position to that effect is also pending before the US courts and courts in the UK.[8] Even under the UNCITRAL rules or those of the Arbitration Institute of the Stockholm Chamber of Commerce, arbitrators often decide to place

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1 OJ 1998, L 69, p. 26. Italy withdrew from the ECT with effect from 1 January 2016.

2 *Electrabel S.A.* v *Hungary*, ICSID Case No ARB/07/19.

3 Judgment in *République de Moldavie v Komstroy*, C-741/19, EU:C:2021:655.

4 To this day there are no fewer than 31 arbitration awards holding, in one way or another, that Article 26 ECT, applies intra-EU. The one exception is *Green Power K/S and Obton A/S v Kingdom of Spain* (SCC Case No. 2016/135).

5 Judgment in *Romanian Air Traffic Services Administration (Romatsa)*, C-333/19, not yet published, paras 42 and 43 and operative part.

6 The Commission, on behalf of the Union, and the Member States faced with such scenarios insist that the court must first, by virtue of the general principle of customary international law of immunity from jurisdiction enjoyed by a State, establish the existence of a valid arbitration agreement. This interpretation of Article 54 ICSID is, however, disputed.

7 See Full Federal Court of Australia interlocutory judgment of 1 February 2021, *Kingdom of Spain v Infrastructure Services Luxembourg S. à r.l.* [2021] FCAFC 3. An appeal before the High Court of Australia is pending.

8 The US courts had stayed all pending cases brought before them on the basis of the comity principle pending a ruling of the Court on the question of intra-EU applicability of Article 26 ECT. Since the judgment in *Komstroy*, suspensions are being lifted and judgments are awaited.

the seat of the arbitral tribunal outside the European Union[9], thus avoiding review by the courts of the Member States and, by extension, the CJEU.[10]

There is therefore a risk of conflict between the Treaties and the ECT as interpreted by some arbitral tribunals which, if confirmed by the courts of a third country, would de facto turn into a legal conflict because arbitration awards violating EU law would circulate in the legal orders of third countries.

According to the case-law of the Court, the risk of legal conflict is such as to render an international agreement incompatible with EU law[11]. In the Commission's view, in order for the ECT to be compatible with the Treaties, all risk of conflict needs to be eliminated. It will also be important that the risk is addressed from the perspective of public international law, if it is to have the desired effect on the decision-making practice of arbitral tribunals. The Commission is, therefore, of the view that the appropriate response is to adopt an instrument that is a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).

Factual context

The ECT is a trade and investment agreement for the energy sector gathering 53 Contracting Parties, including the EU, EURATOM and 26 EU Member States[12], signed in 1994 and in force as of 1998. It provides rules for trade and transit of energy products, as well as for the protection for energy investments.

In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated whereas, at the same time, the EU has considerably developed its approach with regard to the substantive standards on investment protection, which in more recent agreements are defined so as to ensure that protection of investment does not affect its right to regulate. It also became one of the most litigated investment treaties in the world, with EU Member States being the principal target of claims by investors, most of them based in other EU countries.

In the face of growing dissatisfaction from Contracting Parties and civil society, a modernisation process, driven by the EU and its Member States, was initiated in November 2018, and focused mostly on investment protection standards, as well as on the limitation of the protection granted to fossil fuels and on fostering sustainable development.

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9 The Swiss Federal Court has so far refused to declare three intra-EU investment arbitration awards null and void, see judgments of the Swiss Federal Court of 23 February 2021 on the arbitration award in *AES Solar et al. (PV Investors)* v *Kingdom of Spain*, PCA Case No 2012-14, reference 4A 187/2020; of 7 February 2020 on the arbitration award *G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L.* v *Czech Republic*, PCA Case No 2013-35, reference 4A_80/2018, and of 11 July 2015, on the arbitral award *EDF International S.A.* v *Hungary*, UNCITRAL ad hoc, reference 4A_34/2015. However, for procedural reasons and because the Czech Republic and Hungary did not rely on the *Achmea* judgment, none of these judgments discusses the question of the legal effects of the *Achmea* judgment on the merits.

10 In certain arbitration cases, the arbitrators even decided to move the seat outside the EU after the Commission had made an application to intervene as *amicus curiae*: *Antaris Solar GmbH and Dr Michael Göde* v *Czech Republic*, PCA Case No 2014-01, arbitration award of 2 May 2018, paragraph 38 (the arbitral tribunal had initially established its seat in Paris, after the Czech Republic had confirmed that it had no objections on the basis of the *Achmea* judgment but moved its seat to Geneva in the order granting the Commission leave to be heard as *amicus curiae*).

11 Judgments in *Commission* v *Sweden*, C-249/06, EU:C:2009:119, paragraph 42; *Commission* v *Austria*, C-205/06, EU:C:2009:118, paragraph 42; and, similarly, Judgment in *Commission* v *Finland*, C-118/07, EU:C:2009:715, paragraph 33. See Judgment in *Commission* v *Belgium* (Open Skies), C-471/98, EU:C:2002:628, paragraphs 137 to 142.

12 Italy withdrew in 2015.

The negotiations took place between 2019 and 2022. An "agreement in principle" on the draft modernised ECT was reached on 24 June 2022. On that occasion, the Member States, the European Union and EURATOM informed the other Contracting Parties of the ECT of their intention to conclude a subsequent agreement on the interpretation of the ECT. On 22 November 2022, the Energy Charter Conference ('the Conference') will be called upon to formally approve the negotiated amendments to the ECT and to its Annexes.

The modernised ECT will facilitate sustainable investments in the energy sector by creating a coherent and up-to-date framework. It will provide legal certainty by ensuring a high level of investment protection, while reflecting clean energy transition goals and contributing to the achievement of the objectives of the Paris Agreement.

The ECT will offer investment protection reflecting the reformed and modernised standards developed by the EU in its recent trade and investment agreements, preserving the right of governments to pursue their public policy objectives, including in relation to climate change mitigation and adaptation. It will reinforce the pursuit of the EU's climate policies. The modernised ECT will also allow the Contracting Parties, including the EU and EURATOM, to exclude new fossil fuel related investments from investment protection and to phase out protection for existing investments.

Finally, the modernised ECT includes, for greater certainty, a clause confirming that an investor from a Contracting Party that is a member of a regional economic integration organisation (REIO), like the EU, cannot bring an investor-state dispute settlement (ISDS) claim against another Contracting Party member of the same REIO.

Legal context

In *Achmea*[13], the CJEU held that investor-State arbitration clauses in international agreements concluded between the Member States of the European Union are contrary to the EU Treaties and, as a result of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became a Member State of the European Union. Applying the same principles, the CJEU held in *Komstroy*[14] 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. It is well-established that judgments of the CJEU apply *ex tunc*.[15] In *PL Holdings*[16], the CJEU rejected a request to limit in time the application of the *Achmea* judgment. In *Romatsa*,[17] the CJEU held that any intra-EU arbitration award, including an ICSID award, rendered in violation of those findings, has to be set aside and, therefore, may not, in any event, be enforced in order to enable its beneficiaries to obtain payment of the damages which it awards them.

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13 Judgment in *Achmea,* C-284/16 (EU:C:2018:158.

14 Cited in footnote 3 above.

15 Judgment in *Vent de Colère,* C-262/12, EU:C:2013:851, paragraph 39 and the case law cited there in. This principle is also well-established in relation to decisions of international courts generally: *Access to German Minority Schools in Upper Silesia*, 1931 P.C.I.J Series A/B, No. 40, at 19.

16 Judgment in *PL Holdings,* C-109/20 (EU:C:2021:875.

17 Judgment in *Romanian Air Traffic Services Administration (Romatsa)*, C-333/19, not yet published, para 44 and operative part.

Process for adoption

On 22 November 2022, during its 33rd meeting, the Energy Charter Conference is to take four decisions related to the modernisation of the ECT. These decisions will be taken simultaneously and their purpose is to: (1) adopt the proposed amendments to the text of the ECT (CC 760); (2) approve the proposed modifications and changes to the Annexes to the ECT (CC 761); (3) approve the proposed changes to Understandings, Declarations and Decisions (CC 762); and (4) approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763). These decisions will be subject to a unanimity vote. If the vote is successful, i.e. if no Contracting Party raises an objection, the decisions for the modernisation of the ECT will be considered as "adopted by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package.

In that context, the Commission is making a proposal for a Council decision under Article 218(9) TFEU to establish the position to be taken on behalf of the Union at the Charter Conference, in order to support and approve the four decisions related to the modernisation of the ECT. The Commission is also making a parallel proposal for a Council decision under Article 101(2) of the Treaty establishing the European Atomic Energy Community to establish the same position on behalf of EURATOM.

The EU and its Member States have always considered that the ECT in its entirety does not apply intra-EU. In light of the contrary view taken by arbitral tribunals, it is necessary, to address any risk of conflict between the ECT and the EU Treaties, to clarify this point in a formal international agreement. The present Communication, issued simultaneously with the two proposals to the Council referred to in the previous paragraph, seeks to initiate a negotiation process on the subsequent agreement between the Member States, the European Union, and EURATOM on the interpretation of the ECT, and a preliminary draft of such agreement for negotiation is annexed to this Communication as its integral part. Once negotiations are completed, the Commission will make a proposal for the conclusion of the subsequent agreement on behalf of the Union and of EURATOM. While that agreement will codify the interpretation of the EU and its Member States in a separate treaty (something that is possible because of the bilateral nature of the obligations), the ECT modernisation will embed in the text itself and via a "for greater certainty" clause, the understanding of all Contracting Parties that its Article 26 does not apply intra-EU. Both elements will help to remove any ambiguity and eliminate present or future risks of intra-EU arbitration under the ECT with the necessary degree of legal certainty.

Conclusion

The Commission is, therefore, of the view that a subsequent agreement between the Member States, the European Union, and EURATOM on the interpretation of the Energy Charter Treaty constitutes the most appropriate tool offered by international law to put an end to the risk of a conflict between the ECT and the Treaties. That agreement should include, in particular, a confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for arbitration proceedings, and that the sunset clause does not apply. It should also set out the obligations of the Member States in the event that they are involved in arbitration proceedings pursuant to a request based on Article 26 ECT. In view of the retroactive effect attributed to such a subsequent agreement, it would also apply to pending disputes.

A draft of such an agreement is attached to this Communication as the basis for discussion.

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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:2018:158, 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 ……..