

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

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 912/2014 ⁽¹⁾ 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 (EC) No 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 (EC) No 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.
 - B. In the case of disputes concerning treatment afforded, fully or partially, by a Member State, Article 8 of Regulation (EC) No 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 (EC) No 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

⁽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 (EC) No 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) 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 (EC) No 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 Treaty⁽³⁾. 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.