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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	Draft DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the approval by the Union of the Agreement on the interpretation and application of the Energy Charter Treaty (first reading) - Adoption of the legislative act = Statements

Statement by Czechia, France, Malta and Austria

The Czech Republic, the French Republic, the Republic of Malta and the Republic of Austria support the objective and substance of the Agreement on the interpretation and application of the Energy Charter Treaty (“Agreement”).

However, the Czech Republic, the French Republic, the Republic of Malta and the Republic of Austria cannot agree to the legal basis chosen for the Decision.

Consistent with previous decisions taken regarding the Energy Charter Treaty, Art. 194 TFEU in conjunction with Art. 207 TFEU would be the more appropriate substantive legal basis.

More importantly, Art. 194 TFEU cannot serve as a procedural legal basis for the Union to sign and conclude the Agreement. The Agreement will constitute a source of public international law in form of a treaty. The applicable procedure in cases where the European Union acts with the aim of becoming a contracting party to an international agreement is set forth in Art. 218 TFEU.

The Union should therefore adopt the Agreement on the basis of Art. 218 TFEU, since Member States, acting as subjects of public international law, assume in this case a similar position to that of third countries, due to the subject matter of the Agreement and as a result of the division of competences. Furthermore, the ancillary character of the Agreement to a treaty concluded with third countries also supports the use of Art. 218 TFEU as a procedural legal basis.

Using Art. 194 TFEU as a procedural legal basis negatively affects the principle of institutional balance, pre-empts the powers of the European Parliament and the Council as co-legislators and could set an unfavourable precedent.

Furthermore, the Czech Republic, the French Republic, the Republic of Malta and the Republic of Austria emphasize that the Decision shall not be construed as affecting the division of competences in relation to investor-state dispute settlement.

The Czech Republic, the French Republic, the Republic of Malta and the Republic of Austria reserve all rights to take any legal action that they deem necessary to seek redress.

Statement by Hungary

Hungary is not in a position to support and join the proposed Council decision of the European Parliament and of the Council on the adoption by the Union of the Agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States. Therefore, the above cited proposal cannot be considered the common understanding of the European Union.

The proposed decision upon adoption cannot be interpreted in a manner that would implicitly or explicitly imply the support of Hungary.

Hungary remains in the position that the conclusion of the Agreement requires the appropriate legal basis under EU and international law.

With regard to the subject matter, Hungary is of the view that, in accordance with the rules of customary international law it is appropriate to establish an agreement with a forward-looking scope and an implementation of the provisions set forth in the Komstroy judgment. The EU's concerns cannot be addressed in an arbitrary manner with retroactive effect, as such an approach could infringe upon the vested rights of investors under the ECT. The lack of legal certainty and the lack of investors' right to legal remedy raise the most serious concerns by ignoring the legitimate interests of the investors, the damages suffered, and the right to legal remedies.

In light of the above, Hungary maintains that the existing legal collision between EU law and the ECT with regard to the applicability of the dispute settlement between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State can only be reconciled in accordance with EU and international law together. On one hand, the conflict may be reconciled namely via Article 40 VCLT, through the modernisation of the ECT applicable for the future or on the other hand, via Article 41 VCLT through bilateral or plurilateral arrangements.

The modernized ECT includes in Article 24(3) an intra-EU disconnection clause with an aim to exclude the treaty's future application between EU Member States. In possible future bilateral and multilateral agreements, the Member States could mutually agree that, in light of the Komstroy judgment and intra-EU relations, the dispute settlement provision of the ECT shall not apply in their reciprocal relations.

Taking into consideration the legal reasoning above, Hungary has the firm position that there is no legal obligation for the proposed inter-se agreement for those Member States that modernized the ECT, including Hungary, in line with the strategy adopted by the Council on the 30th of May with regard to the ECT.
