Thursday 24 November 2022

P9_TA(2022)0421

Outcome of the modernisation of the Energy Charter Treaty

European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP))

(2023/C 167/10)

The European Parliament,

— having regard to the Energy Charter Treaty (ECT) signed in 1994 and which entered into force in 1998,

— having regard to the modernisation process of the Energy Charter Treaty, which was initiated in 2017, and to the EU's proposal thereon,

— having regard to the Agreement adopted at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change in Paris on 12 December 2015 (the Paris Agreement),

— having regard to the Commission communication of 11 December 2019 on the European Green Deal (COM(2019)0640),

— having regard to Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') ([1]),

— having regard to Commission Recommendation (EU) 2021/1749 of 28 September 2021 entitled 'Energy Efficiency First: from principles to practice' ([2]) and the guidelines annexed thereto,

— having regard to Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (Renewable Energy Directive) ([3]),

— having regard to Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency ([4]),

— having regard to the case law of the Court of Justice of the European Union, notably its opinion 2/15 of 16 May 2017 on the Free Trade Agreement between the EU and the Republic of Singapore ([5]), its judgment of 6 March 2018 in Case C-284/16 (preliminary ruling on *Slovak Republic* v *Achmea BV*) ([6]), its opinion 1/17 of 30 April 2019 on the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States ([7]), its judgment of 2. September 2021 in Case C-741/19 (preliminary ruling on *Republic of Moldova* v *Komstroy LLC*) ([8]), and its judgment of 26 October 2021 in Case C-109/20 (preliminary ruling on *Republic of Poland* v *PL Holdings Sàrl*) ([9]),

— having regard to the mandate given to Working Group III of the UN Commission on International Trade Law (UNCITRAL) in 2017 to work on a reform of investor-state dispute settlement (ISDS),

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([1]) OJ L 243, 9.7.2021, p. 1.
([2]) OJ L 350, 4.10.2021, p. 9.
([3]) OJ L 328, 21.12.2018, p. 82.
([4]) OJ L 328, 21.12.2018, p. 210.
([5]) Opinion of 16 May 2017, EU:C:2017:376.
([6]) Judgment of 6 March 2018, Slovak Republic v Achmea BV, C-284/16, EU:C:2018:158.
([7]) Opinion of 30 April 2019, EU:C:2019:341.
([8]) Judgment of 2 September 2021, Republic of Moldova v Komstroy LLC, C-741/19, EU:C:2021:655.
([9]) Judgment of 26 October 2021, Republic of Poland v PL Holdings Sàrl, C-109/20, EU:C:2021:875.

— having regard to Italy's decision to withdraw from the ECT from 1 January 2016,

— having regard to the draft law on the termination of the ECT adopted by the Polish Government on 10 August 2022 and referred to the Polish Parliament on 25 August 2022,

— having regard to the announcements by the Spanish Government of 12 October 2022, by the Dutch Government of 19 October 2022, by the French Government of 21 October 2022, by the Slovenian Government of 10 November 2022, by the German Government of 11 November 2022, and by the Luxembourgish Government of 18 November 2022 of their intention to withdraw from the ECT,

— having regard to the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, signed on 5 May 2020 ([10]),

— having regard to its most recent resolutions, notably those of 23 June 2022 on the future of EU international investment policy ([11]), and of 20 October 2022 on the 2022 UN Climate Change Conference in Sharm El-Sheikh, Egypt (COP27) ([12]),

— having regard to the failure to reach a qualified majority in the Council in favour of the modernisation of the ECT as a basis for the position of the EU at the 33rd meeting of the Energy Charter Conference,

— having regard to the Commission communication of 5 October 2022 on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty (COM(2022)0523),

— having regard to Rule 132 (2) and (4) of its Rules of Procedure,

A. whereas the ECT is an international agreement; whereas the treaty was signed in December 1994 and came into effect in April 1998; whereas there are 53 signatories and contracting parties to the ECT, including the European Union, and Euratom and all its member states except for Italy, which withdrew in 2016; whereas the EU and its Member States represent over half of the voting membership of the ECT;

B. whereas the initial aim of the ECT was to create a forum for East-West policy cooperation in the fields of energy, investment protection, trade and transit; whereas the Treaty's investment protection provisions have not been updated since the 1990s and are outdated in comparison to the new standards established by the EU's reformed approach on investment policy; whereas there was no attempt to integrate the urgency of mitigating climate change and phasing out fossil fuel investments until 2018;

C. whereas Member States have around 1 500 bilateral investment treaties (BITs), ratified before the Treaty of Lisbon, which still protect fossil fuel investments, include the old model of ISDS and contain outdated provisions and mechanisms that are incompatible with the EU's values and principles of law; whereas none of the new international investment agreements following a modern approach negotiated by the EU since the Treaty of Lisbon have entered into force;

D. whereas averting severe climate crises and protecting our energy security will require accelerating the process of phasing out fossil fuels and a rapid transition to renewable energy;

E. whereas the European Green Deal aims to respond to the challenges of climate change and environmental degradation; whereas all EU policies need to contribute to this goal, including investment policy;

F. whereas the Intergovernmental Panel on Climate Change described the ECT as 'a serious obstacle to climate change mitigation' in its 2022 report on the mitigation of climate change, issued in April 2022;

([10]) OJ L 169, 29.5.2020, p. 1.
([11]) Texts adopted, P9_TA(2022)0268.
([12]) Texts adopted, P9_TA(2022)0373.

Thursday 24 November 2022

G. whereas the energy transition requires an acceleration of global investment in clean energy and incentives for European energy companies to invest in renewable energy;

H. whereas, in the light of the growing legal and political concerns about the ECT, a modernisation process driven by the EU and its Member States was initiated in November 2018, focused on investment protection standards, as well as on the limitation of the protection granted to fossil fuels and on fostering sustainable development; whereas on 27 November 2018, the Energy Charter Conference approved the list of topics for modernisation; whereas the Council gave the Commission a mandate to negotiate a modernisation of the ECT in July 2019; whereas in May 2020, the EU submitted a proposal for the modernisation of the ECT; whereas on 15 February 2021, the EU submitted to the Energy Charter Secretariat a supplementary proposal to address the issue of the definition of economic activity in the energy sector, also known as the fossil fuel carve out;

I. whereas the contracting parties reached an agreement in principle on 24 June 2022 on the modernisation of the ECT; whereas amendments to the Treaty include changes to the ECT's investment protection standards and a reference to the right of countries to take regulatory action for reasons such as environmental protection or climate action;

J. whereas the legal text of the final agreement has not yet been formally published, which does not meet the level of transparency of other EU trade and investment agreements;

K. whereas since the conclusion of negotiations, Germany, France, Spain, the Netherlands, Poland, Slovenia and Luxembourg, who combined represent more than 70 % of the EU's population, announced their intention to withdraw from the ECT; whereas Italy left the ECT in 2016; whereas other Member States are still considering the option of leaving the ECT;

L. whereas the Council has failed to reach a qualified majority in favour of the modernisation of the ECT, as a basis for the adoption of the modernisation at the Energy Charter Conference of November 2022; whereas, as a result, the modernisation was taken off the agenda of the Energy Charter Conference;

M. whereas the EU has a number of votes equal to the number of its Member States that are contracting parties to the ECT; whereas only if the EU does not exercise its right to vote may its Member States exercise theirs; whereas ratification by those EU Member States which are parties to the ECT would have to be carried out in accordance with their national ratification rules and with the division of competences between the EU and the Member States;

N. whereas Parliament would have to give its consent to the ECT modernisation before the EU could start provisionally applying the modernised treaty, in accordance with Commission's political guidelines; whereas Parliament would have to consent to the EU exiting the ECT;

O. whereas an alarming number of investment claims target environmental measures; whereas various countries, including the Member States, are being sued in relation to policies on climate or the just transition; whereas the ECT is the most litigated of all investment protection agreements; whereas more than 40 intra-EU investment arbitration cases are currently ongoing; whereas, as of 1 June 2022, according to the Energy Charter Secretariat, at least 150 investment arbitration cases have been instituted under the ECT, one third of which relate to fossil fuel investments and 70 % of which are intra-EU ECT-based investment arbitration cases;

P. whereas the ECT is currently incompatible with the EU Treaties, as it enables investment tribunals to interpret and apply EU law without introducing the necessary safeguards that preserve the EU's regulatory autonomy, and as it adversely affects the operation of the EU institutions in accordance with the EU's constitutional framework;

Q. whereas in its judgment of 6 March 2018 in case C-284/16 (preliminary ruling on *Slovak Republic* v *Achmea BV*), the CJEU held that investor-state arbitration clauses in international agreements concluded between the EU Member States are contrary to the EU Treaties and, as a result, cannot be applied after the date on which the last of the parties to an intra-EU BIT became an EU Member State; whereas, while applying the same principles, in its judgment of 2 September 2021 in case C-741/19 (preliminary ruling on *Republic of Moldova* v *Komstroy LLC*), the CJEU held that Article 26(2)(c) of

the ECT must be interpreted as not being applicable to disputes between an EU Member State and an investor of another EU Member State concerning an investment made by the latter in the former; whereas it is well established that judgments of the CJEU apply *ex tunc*; whereas arbitrators have ignored those CJEU rulings in their deliberations;

R. whereas the EU has taken leadership in investment policy reform; whereas since the entry into force of the Treaty of Lisbon, at the insistence and with the support of Parliament, the EU adopted a reformed investment protection model and decided to replace ISDS with the investment court system, launched negotiations for a multilateral investment court (MIC), adopted legislation to regulate foreign subsidies that distort the internal market, and adopted legislation for the screening of inward foreign direct investment; whereas these developments are significant steps in the right direction for a modernised and sustainable investment policy; whereas much more remains to be done to advance this reform agenda;

S. whereas the EU supports the ongoing negotiations in UNCITRAL Working Group III, and the establishment of the MIC;

1. Recognises that the ECT has come under heavy criticism as an obstacle to the transition to renewable energy and to the protection of energy security in the EU and its Member States; considers the current ECT an outdated instrument which no longer serves the interest of the European Union, especially with regard to the objective to become climate neutral by 2050;

2. Welcomes the efforts by the EU and its Member States to drive the modernisation process of the ECT; commends the Commission's negotiation efforts to achieve the alignment of the ECT with the mandate it received from the Council to preserve the EU's ability to develop public policy measures consistent with the Paris Agreement, the objectives of the European Green Deal and the priorities of the European Parliament;

3. Recognises that the modernised ECT was negotiated in response to strong demand from EU Member States since November 2018; underlines that amending the ECT requires unanimity of all contracting parties voting at the annual ECT conference;

4. Reiterates its concerns that many contracting parties, including high-income industrialised countries, seem not to share the EU's ambitions in modernising the ECT, mitigating climate change, fostering sustainable development and supporting the energy transition, despite the fact that all of them are also signatories of the Paris Agreement;

5. Underlines that the final text of the modernised ECT integrates elements of the negotiating mandate given to the Commission, is not aligned with the Paris Agreement, the EU Climate Law or the objectives of the European Green Deal, is not in line with the objectives laid down by Parliament in its resolution of 23 June 2022 on the future of EU international investment policy, including, most notably, the immediate prohibition of fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels, in line with their international commitments, the significant shortening of the time frame for phasing out the protection of existing investments in fossil fuels, and the removal of the ISDS mechanism; stresses that Parliament has expressed the position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; reiterates that if established, the MIC could directly apply to all ongoing bilateral and multilateral investment agreements — including the ECT — of countries subscribing to it;

6. Welcomes the EU's and the UK's intention to carve out fossil fuel investments from ECT protection; welcomes the fact that for the EU and its Member States, most new investments in fossil fuels are due to lose protection as of 15 August 2023;

7. Notes that the modernised ECT proposal maintains protection for existing fossil fuel investments for at least 10 years; notes that the 10-year countdown would start from the entry into force of the modernised ECT, a period that would begin on 15 August 2023 if the EU, its Member States and the other contracting parties were to agree to provisionally apply the agreement, and that it would otherwise only start after ratification by three quarters of contracting parties, extending protection for fossil fuel investment for a period close to the 20 years provided for in the ECT sunset clause; notes that the modernised ECT sets a cut-off date of 2040, by which all investments in fossil fuels will no longer be protected in the case of contracting parties opting in to the carve-out; expresses great concern that this time line is at odds with current knowledge

on the speed of fossil fuel phase-out needed to limit global warming to 1,5 °C above pre-industrial levels and that it will undermine the EU's climate objectives; recalls the fact that Parliament had taken the position that the ECT should 'immediately prohibit fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement'; notes that the definition of existing investments covers projects in the exploration phase and their potential future exploitation;

8. Regrets the fact that, under the modernised ECT, most contracting parties have decided to maintain the protection of fossil fuel investors indefinitely;

9. Stresses that the modernised ECT can only be used as the basis of new claims after its full entry into force, or if the investor's host state and the respondent states both provisionally apply the modernised ECT; deeply regrets the lack of clarity this situation creates, as it generates a piecemeal implementation and delays and risks prolonging the application of the non-reformed ECT;

10. Welcomes the inclusion in the modernised ECT of new provisions guiding the treaty's interpretation, especially provisions on the right to regulate in the interest of legitimate public policy objectives, the urgent need to effectively combat climate change, the rights and obligations of the contracting parties under multilateral environmental and labour agreements including the Paris Agreement, their commitment to promoting energy investment in a manner that would contribute to sustainable development, and responsible business conduct; notes the inclusion of a conciliation-based mechanism to resolve disputes relating to sustainable development;

11. Recalls its position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; regrets the fact that the modernised ECT maintained this outdated dispute settlement mechanism and stresses the considerable evidence of investment arbitrators disregarding state's intent to protect their public policy objectives, especially when it comes to phasing out fossil fuels or the protection of the environment;

12. Supports the ongoing negotiations in UNCITRAL Working Group III, in which the EU and its Member States are pursuing the establishment of the MIC, which could become its competent adjudicatory body to resolve international investment disputes; points out that if established, the MIC would directly apply to all ongoing bilateral and multilateral investment agreements — including the ECT — of countries subscribing to it; recalls that as per Article 30(3) of the 1969 Vienna Convention on the Law of Treaties, the MIC system would therefore take precedence over ISDS mechanisms for countries subscribing to it; calls on the Commission to successfully conclude the UNCITRAL Working Group III negotiations as soon as possible;

13. Calls on the Commission to expressly support including within the UNCITRAL process and outputs a mechanism by which states can efficiently withdraw consent for ISDS from their treaties, or terminate their treaties;

14. Worries that the 20-year sunset clause in case of exit remains unchanged in the modernised text and regrets that this was not part of the EU's negotiating mandate, thus continuing to deprive countries that remain parties to the ECT of the possibility to easily leave the treaty should arbitrators continue to undermine states' ability to regulate; stresses that withdrawing from the ECT would subject departing contracting parties to the ECT's 20-year sunset clause, whereby all existing investments not covered by an *inter se* agreement would continue to be protected, under the rules contained in the non-modernised ECT; welcomes, however, the fact that protection would immediately end after withdrawal for all new investments; notes that under a modernised ECT, most new investments in fossil fuels would no longer be protected as of 15 August 2023;

15. Regrets that the modernised ECT fails to address the critical issue of valuation techniques, enabling awards of compensation that vastly outweigh the amounts invested; observes that proposed changes to provisions on damages awards would have little impact, as arbitrators tend to interpret the concept of 'loss' very broadly, including expected future profits; notes that these methods are highly controversial owing to their very wide margin of discretion and reliance on highly complex and inherently speculative assumptions;

16. Welcomes the Court of Justice's clarification that ISDS provisions in the ECT are not applicable in the case of intra-EU disputes, as well as the inclusion in the modernised ECT of the principle that ISDS provisions do not apply among members of the same regional economic integration organisation; expresses concern, however, about the possibility that arbitrators may still decide to hear intra-EU disputes and that cases under the rules of the International Centre for Settlement of Investment Disputes still be enforced in the courts of other countries; notes with concern that the Achmea ruling did not deter arbitrators from continuing to repeatedly ignore the ruling and hear intra-EU disputes; welcomes the Commission's draft of an *inter se* agreement clarifying that the ECT and its sunset clause do not, and never did, apply in an intra-EU context; urges all Member States to ratify such agreements as soon as possible; calls on the Commission to reach out to partner countries and propose a second agreement allowing non-EU ECT contracting parties willing to withdraw to neutralise the sunset clause on a reciprocal basis;

17. Takes note of the absence of a qualified majority of EU Member States willing to support the ECT modernisation which has led to the collapse of the modernisation efforts; is of the opinion that neither the EU nor its Member States can stay party to the current ECT because of its incompatibility with EU law and EU policy;

18. Reiterates that Parliament has called on the Commission and the Member States to start preparing a coordinated exit from the ECT and an agreement excluding the application of the sunset clause between willing contracting parties; recalls that the EU can only ratify the modernised ECT with the final consent of Parliament, and that Parliament will consider its previous positions and the shortcomings of the modernisation if requested to consent to it; takes the position that Parliament will support the EU's exit from the ECT when requested to consent to it;

19. Welcomes the announcement by the Polish, Spanish, Dutch, French, Slovenian, German and Luxembourgish governments of their intention to withdraw from the ECT, and notes that in most cases the decision has been taken on the basis of the outcome of the modernisation process;

20. Underlines the need to act in a coordinated manner in order to be stronger in the withdrawal negotiations and to limit the negative effects of the sunset clause and to effectively prevent intra-EU disputes; urges the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and calls on the Council to support such a proposal; believes this to be the best option for the EU to achieve legal certainty, and prevent the ECT from putting the EU's climate and energy security ambitions in further jeopardy;

21. Stresses that the Commission has not adequately prepared this coordinated withdrawal nor shared any information about it, despite Parliament's several demands since the beginning of the modernisation negotiations, as an alternative in case of unsatisfactory results or the failure of the modernisation process;

22. Draws attention to the lack of consistency between some Member State's positions on the ECT and their BITs which still protect fossil fuel investments and outdated provisions contrary to EU objectives and values;

23. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the Secretariat of the Energy Charter Treaty and the governments of the member countries of the Energy Charter Treaty.