



Plenary sitting

B9-0536/2022

21.11.2022

MOTION FOR A RESOLUTION

to wind up the debate on the statement by the Commission

pursuant to Rule 132(2) of the Rules of Procedure

on the outcome of the modernisation of the Energy Charter Treaty
(2022/2934(RSP))

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on behalf of the S&D Group

B9-0536/2022

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

The European Parliament,

- having regard to its previous resolutions, notably those of 6 April 2011 on the future European international investment policy¹, of 13 December 2011 on trade and investment barriers², of 7 July 2015 on the external impact of EU trade and investment policy on public-private initiatives in countries outside the EU³, of 5 July 2016 on a new forward-looking and innovative future strategy for trade and investment⁴, of 23 June 2022 on the future of EU international investment policy⁵, and of 20 October 2022 on the 2022 UN Climate Change Conference in Sharm El-Sheikh, Egypt (COP27)⁶,
- having regard to the Commission communication of 18 February 2021 entitled ‘Trade Policy Review – An Open, Sustainable and Assertive Trade Policy’ (COM(2021)0066),
- having regard to the Commission communication of 11 December 2019 on the European Green Deal (COM(2019)0640),
- 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 UN 2030 Agenda for Sustainable Development adopted in 2015, and in particular the 17 Sustainable Development Goals that accompany it,
- having regard to the agreement in principle on the modernisation of the Energy Charter Treaty (ECT), reached at the ad hoc meeting of the Energy Charter Conference on 24 June 2022,
- 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 Italy’s decision to withdraw from the ECT as of 1 January 2015,
- 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

¹ OJ C 296E , 2.10.2012, p. 34.

² OJ C 168E , 14.6.2013, p. 1.

³ OJ C 265, 11.8.2017, p. 17.

⁴ OJ C 101, 16.3.2018, p. 30.

⁵ Texts adopted, P9_TA(2022)0268.

⁶ Texts adopted, P9_TA(2022)0373.

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 case-law of the Court of Justice of the European Union (CJEU), notably its judgment of 6 March 2018 in case C-284/16⁷ and its judgment of 2 September 2021 in case C-741/19⁸,
 - having regard to the declaration of the representatives of the EU Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union,
 - having regard to the Commission communication of 5 October 2022 on an agreement between the Member States, the EU, and the European Atomic Energy Community (Euratom) on the interpretation of the Energy Charter Treaty (COM(2022)0523),
 - having regard to Rule 132(2) of its Rules of Procedure,
- A. whereas the ECT was signed in 1994 and entered in force in 1998; whereas there are 53 signatories and contracting parties to the ECT, including the EU, Euratom and all EU Member States except for Italy, which withdrew in 2015;
- B. whereas the ECT, as well as around 1 500 bilateral investment treaties (BITs) ratified by the EU Member States before the Treaty of Lisbon are still in place, include the old model of investor-state dispute settlement (ISDS);
- C. whereas the ECT has become the most litigated investment agreement in the world, with the majority of disputes being intra-EU, that is involving investors from one EU Member State against investors from another EU Member State; where, 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 them in relation to fossil fuel investments;
- D. whereas the value of fossil infrastructure in the EU protected by the ECT is EUR 202.4 billion, according to an analysis by Investigate Europe, based on available data on oil and gas fields, coal-fired power plants and gas-fired power plants, liquefied natural gas terminals and gas pipelines;
- E. whereas the ECT is fundamentally 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

⁷ Judgment of 6 March 2018, *Republic of Slovakia v Achmea BV*, C-284-16, ECLI:EU:C:2018:158.

⁸ Judgment of 2 September 2021, *Republic of Moldova v Komstroy LLC*, C-741/19, ECLI:EU:C:2021:655.

operation of the EU institutions in accordance with the EU's constitutional framework;

- F. whereas, in view 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 on 15 July 2019, the Council gave the Commission a mandate to begin negotiations on the modernisation of the ECT and adopted corresponding negotiating directives;
- G. 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;
- H. whereas, after two years of negotiations, on 24 June 2022, the contracting parties reached an agreement in principle on the modernisation of the ECT;
- I. whereas on 22 November 2022, the Energy Charter Conference was meant to formally approve the negotiated amendments to the ECT and to its Annexes; whereas the Council has failed to reach a qualified majority in favour of the modernisation of the ECT as a basis for the position of the EU at the Energy Charter Conference;
- J. whereas in its judgment of 6 March 2018 in case C-284/16 (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 of this incompatibility, cannot be applied after the date on which the last of the parties to an intra-EU bilateral investment treaty became an EU Member State; whereas, applying the same principles, in its judgment of 2 September 2021 in case C-741/19 (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*;
- K. whereas the Commission communication of 5 October 2022 sought to initiate a negotiation process on an agreement between the EU Member States, the EU, and Euratom on the interpretation of the ECT; whereas the preliminary draft of such an agreement would help eliminate present or future risks of intra-EU arbitration under the ECT, and includes, in particular, a confirmation that the ECT has never applied, 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; whereas, in view of the retroactive effect attributed to such an agreement, it would also apply to pending disputes;
- L. whereas the EU is a global leader in investment policy reform; whereas significant reform of investment policy has been undertaken at EU and international level since the entry into force of the Treaty of Lisbon, at the insistence and with the support of Parliament; whereas the EU has launched and concluded international investment agreements with partner countries, reformed investment protection provisions, replaced

ISDS with the investment court system, launched negotiations for a multilateral investment court, 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;

1. Regrets that the agreement in principle on the modernisation of the ECT does not sufficiently align with the Paris Agreement and the objectives of the European Green Deal, and fails to meet Parliament's modernisation objectives as laid down 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 commitments under the Paris Agreement, 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;
2. Takes note of the absence of a qualified majority enabling the Council to adopt a decision on the position of the EU at the 33rd meeting of the Energy Charter Conference; welcomes the fact that this situation is likely to impede the adoption of the proposed amendments to the ECT;
3. Urges the Commission and the Member States to initiate the process towards a coordinated exit from the ECT, without prejudice to the freedom of Member States to remain in or withdraw from the treaty; believes this to be the best option for the EU to achieve its climate ambitions and to prevent the ECT from further jeopardising the fight against climate change; welcomes, in this regard, the announcement by the Polish, Spanish, Dutch, French, Slovenian, German and Luxembourgish governments of their intention to withdraw from the ECT;
4. Commends the Commission's negotiation efforts to achieve an alignment of the ECT with the Paris Agreement, the objectives of the European Green Deal and the priorities of Parliament; regrets that other contracting parties to the ECT seem not to share the EU's ambitions in the field of climate change mitigation, sustainable development and energy transition, despite the fact that all of them are also signatories of the Paris Agreement;
5. Welcomes the exclusion from the modernised ECT of investment protection for new investments on fossil fuels made in the EU after 15 August 2023, but regrets that such an exclusion would only apply in the EU and the UK, and with exceptions for certain gas investments; regrets that the exclusion of investment protection for all existing investments on fossil fuels made in the EU would only apply after 10 years from the entry into force of the modernised ECT, a period that would start to run from 15 August 2023 if the EU and its Member States agreed to provisional application, or significantly later otherwise, extending investment protection for a period close to the 20 years provided for in the sunset clause of the ECT; expresses great concern that this timeline would be 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;

6. Welcomes the inclusion in the modernised ECT of new 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, and a dedicated dispute settlement mechanism for disputes relating to sustainable development; expresses serious concern, however, about the risk that such new provisions not be sufficiently enforceable on private arbitrators;
7. Recalls its position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; regrets that the modernised ECT fails to substantially reform its ISDS mechanism and to incorporate some of the most positive features of the investment court system model, such as the creation of a fixed roster of arbitrators, an appeal mechanism or a code of conduct for arbitrators; observes that proposed changes to provisions on damages awards would have little impact, as arbitrators tend to interpret the concept of ‘loss’ very broadly; regrets that the modernised ECT fails to address the techniques used for damage valuation for the purpose of calculating compensation, which are highly controversial owing to their very wide margin of discretion and reliance on highly complex and inherently speculative assumptions; fears that the modernised ECT would thus continue to lead to EU taxpayers’ money being used to compensate private investors for public policies in line with the Paris Agreement and the European Green Deal;
8. Is concerned that the modernised ECT would expand ISDS claims to investments in additional energy sources and technologies, which risks restricting the regulatory flexibility states might need when regulating these energy sources and technologies;
9. Regrets that the sunset clause of the modernised ECT would remain unchanged, which entails that the provisions of the ECT would continue to apply to a contracting party’s investments for a period of 20 years after their withdrawal from the ECT takes effect; welcomes the fact, however, that protection ends immediately after withdrawal for all new investments;
10. Welcomes 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 third countries;
11. Welcomes the Commission’s initiation of a negotiation process on an agreement between the Member States, the EU, and Euratom on the interpretation of the ECT, aimed at confirming that the ECT has never applied, 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; urges all EU Member States to engage in the negotiation process and adopt the proposed agreement as soon as possible in order to help eliminate present and future risks of intra-EU arbitration under the ECT; reiterates its call on the Commission to make its best efforts to assert the judgments of the CJEU in the Achmea and Komstroy cases in the ongoing intra-EU arbitration proceedings;

12. Recalls that the EU can only ratify the modernised ECT with the final consent of Parliament; emphasises that its positions should be duly taken into account at all stages of the negotiation of trade and investment agreements; calls on the Council and the Commission to take its position fully into consideration when defining the negotiating directives for all future trade and investment agreements; believes that only in this way can Parliament strengthen the Commission's bargaining position in the negotiations with trade and investment partners;
13. Draws attention to the thousands of existing Member State BITs, which, like the ECT, still protect fossil fuel investments, contain outdated provisions contrary to EU objectives and values, including overly broad protection standards and weak requirements on transparency and ISDS, and are not in line with the EU proposal for a multilateral investment court; points out the inconsistency of exiting the ECT on the basis of climate concerns while leaving these BITs unchanged; calls on the Member States to stay true to their climate ambitions and terminate or modernise their BITs so as to put them in conformity with a reformed model of EU international investment agreements and in line with Parliament's resolution of 23 June 2022 on the future of EU international investment policy;
14. Instructs its President to forward this resolution to the Council, the Commission and the governments and parliaments of the Member States.