



Plenary sitting

B9-0498/2022

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))

Emmanuel Maurel
on behalf of The Left Group

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

The European Parliament,

- having regard to the agreement in principle on the modernisation of the Energy Charter Treaty (ECT) reached on 24 June 2022,
- 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 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 Singapore², its judgment of 6 March 2018 in Case C-284/16 (preliminary ruling on *Slovak Republic v Achmea BV*)³, its opinion 1/17 of 30 April 2019 on the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States⁴, its judgment of 2 September 2021 in Case C-741/19 (preliminary ruling on *Republic of Moldova v Komstroy LLC*)⁵, and its judgment of 26 October 2021 in Case C-109/20 (preliminary ruling on *Republic of Poland v PL Holdings Sàrl*)⁶,
- having regard to Italy's decision to withdraw from the ECT from 1 January 2016,
- having regard to Poland's decision to withdraw from the ECT,
- having regard to Spain's decision to withdraw from the ECT,
- having regard to Germany's decision to withdraw from the ECT,
- having regard to the Netherlands' decision to withdraw from the ECT,

¹ OJ L 243, 9.7.2021, p. 1.

² Opinion of 16 May 2017, EU:C:2017:376.

³ Judgment of 6 March 2018, *Slovak Republic v Achmea BV*, C-284/16, EU:C:2018:158.

⁴ Opinion of 30 April 2019, EU:C:2019:341.

⁵ Judgment of 2 September 2021, *Republic of Moldova v Komstroy LLC*, C-741/19, EU:C:2021:655.

⁶ Judgment of 26 October 2021, *Republic of Poland v PL Holdings Sàrl*, C-109/20, EU:C:2021:875.

- having regard to France’s decision to withdraw from the ECT,
 - having regard to Slovenia’s decision to withdraw from the ECT,
 - having regard to Luxembourg’s decision 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 2020⁷,
 - having regard to the Intergovernmental Panel on Climate Change’s recent description of the ECT as ‘a serious obstacle to climate change mitigation’,
 - having regard to the assessment of the agreement in principle on the ECT by the High Council for Climate, an independent body that advises the French Government on climate policies,
 - having regard to its resolution of 23 June 2022 on the future of EU international investment policy⁸,
 - having regard to Rule 132(2) of its Rules of Procedure,
- A. whereas the EU and 26 of its 27 Member States (Italy being the only exception since its withdrawal) have been party to the ECT since 1994-1995 and represent around 50 % of the membership;
 - B. whereas the ECT is the investment treaty most widely used by investors to sue countries and the number of investor-State dispute settlement (ISDS) cases is rising each year; whereas, on 1 June 2022, there were 150 known investment arbitration cases that had been initiated under the ECT, of which around 70 % were intra-EU ECT-based investment arbitration cases;
 - C. whereas governments have been ordered or have agreed to pay more than USD 57.2 billion in damages in relation to ECT cases; whereas experts estimate that the value of stranded fossil fuel assets protected by the ECT could reach EUR 2.15 trillion by 2050;
 - D. whereas the Court of Justice of the European Union clarified in its *Komstroy* ruling that ISDS provisions in the ECT are not applicable in the case of intra-EU disputes; whereas arbitrators have ignored the Court of Justice of the European Union’s rulings;
 - E. whereas countries that have ratified or acceded to the ECT may terminate their membership 12 months after notifying their withdrawal; whereas protection ends immediately for all new investments, but investments realised before the exit date are still protected for 20 years; whereas the Member States could enter into an *inter se* agreement to forgo the application of the sunset clause before withdrawing;
 - F. whereas, in 2016, the EU adopted a reformed investment protection model and decided to replace ISDS with the investment court system as part of a sustainable investment

⁷ OJ L 169, 29.5.2020, p. 1.

⁸ Texts adopted, P9_TA(2022)0268.

policy reform agenda;

- G. 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;
 - H. whereas the EU taxonomy aims to facilitate the shift of investments from unsustainable economic activities to those that are needed to achieve environmental sustainability, and, more specifically, climate neutrality in the next 30 years;
 - I. whereas averting severe climate crises will require accelerating the process of phasing out fossil fuels and a rapid transition to renewable energy;
 - J. whereas an increasing number of legal proceedings before investment tribunals are targeting environmental measures; whereas the Member States are being sued in relation to policies on the climate, the phasing out of fossil fuels and the just transition;
 - K. whereas the clause on fair and equitable treatment (FET) is the substantive protection that is most widely relied on in investment arbitration generally and was invoked in 33 ECT-based arbitrations in which the investor succeeded, out of a total of 36 known cases (according to the United Nations Conference on Trade and Development's investment dispute settlement navigator);
1. Takes note of the efforts undertaken by the Commission since 2018 to reform the outdated ECT; regrets the fact that other ECT members have resisted this modernisation; notes that the Commission has presented the advantages of the reformed ECT but has not provided a risk analysis;
 2. Believes that the final text of the modernised ECT is not aligned with the Paris Agreement, the European Climate Law or the objectives of the European Green Deal; considers it necessary to phase out all fossil fuels in order to fulfil the Paris Agreement goal of limiting global warming to 1.5 °C and strongly believes that governments should not be impeded in doing this;
 3. Regrets the fact that the agreed modernisation fails to comply with key elements of the position that Parliament set out in June 2022;
 4. Takes note of the fact that, so far, eight Member States (Germany, France, Spain, the Netherlands, Italy, Poland, Slovenia and Luxembourg), which together represent more than 70 % of the EU population, have decided to exit the ECT;
 5. Takes note of the fact that the modernised ECT has failed to be approved by the European Council;
 6. Regrets the fact that the modernised ECT maintains the protection of existing fossil fuel investments; considers that the time frame of a minimum of 10 years for phasing out the protection of existing investments in fossil fuels runs counter to the EU's climate objectives and will hinder their achievement; 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’;

7. Is concerned about the fact that no clear date has been established for the end of the protection of fossil fuel investments; notes that the ratification of the modernised ECT by three quarters of the members could take a long time, and the time frame of three years suggested by the Commission is unrealistic;
8. Regrets the fact that, under the modernised ECT, many of the EU signatories have decided to maintain the protection of fossil fuel investors indefinitely;
9. Regrets the fact that the modernised ECT expands such protection to investments in new energy sources considered to be ‘significantly harmful’ according to EU law;
10. Regrets the fact that the modernised ECT leaves the outdated ISDS mechanism untouched, even though it is incompatible with EU law and contrary to EU policy;
11. Regrets the fact that the modernised ECT fails to address the issue of excessive compensation in investment lawsuits or the practice of investors claiming damages for the loss of expected future profits;
12. Regrets the fact that the modernised ECT includes the standard of FET; is particularly concerned about the fact that the definition of FET included refers to investors’ ‘legitimate expectations’ as a cause for investors to claim a violation of the FET clause; notes that the inclusion of legitimate expectations as a stand-alone factor that would constitute a violation of FET is a highly contentious and problematic approach that runs counter to the current reform trends in respect of FET;
13. Regrets the fact that the modernised ECT includes the standard of indirect expropriation; is concerned about the fact that the clause requiring that public policy measures be ‘non-discriminatory’ in order to be excluded from the definition of indirect expropriation might have the effect of undermining targeted policy measures for the clean energy transition, given that this transition will require some level of discrimination (i.e. differentiation);
14. Regrets the fact that the modernised ECT fails to reduce the duration of the sunset clause and will instead lock in existing investment protection for 20 years post-withdrawal; recalls the fact that Parliament explicitly called for new agreements to ‘significantly shorten sunset clauses’;
15. Warns of the danger of the EU remaining a party to the ECT when the modernisation has failed to be approved and a number of major EU countries have decided to withdraw; warns that remaining a party to the old ECT would be unacceptable;
16. Supports the seven Member States that have followed Italy’s example by deciding to exit the ECT and calls on other contracting parties to follow suit;
17. Calls on the Commission to solve the current legal and political confusion and preserve EU unity and coherence by immediately initiating a coordinated exit from the ECT; trusts that the Commission will, without further delay, prepare a communication to Parliament, the European Council and the Member States on the withdrawal from the ECT of the EU and its Member States, to be submitted for approval by the European Council;

18. Calls on the Commission to present to the Member States a modified *inter se* agreement stating that the ECT does not apply to intra-EU disputes and also clearly neutralising the application of the sunset clause between willing contracting parties (including any outside the EU that wish to join); urges the Member States to approve it without delay;
19. Denies that Parliament in any way supports an agreement that continues to obstruct climate action and to hinder states' ability to navigate the energy crisis and transition, and which multiple Member States, representing more than 315 million European citizens, have opposed; states that Parliament is ready to consent to a coordinated exit;
20. Calls on the Commission to stop funding the Energy Charter Secretariat and any activities related to the expansion of the ECT;
21. Calls on the Commission to exclude the protection of fossil fuel investments from all EU investment protection treaties and to promote the amendment or termination of Member States' bilateral investment treaties that continue to protect fossil fuel investors;
22. Instructs its President to forward this resolution to the Commission and the Council.