



OPINION

European Economic and Social Committee

Decision on the interpretation and application of the Energy Charter Treaty

Proposal for a 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

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| Advisor | Julia WEGERER |
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1. RECOMMENDATIONS

The European Economic and Social Committee (EESC):

- 1.1 **endorses** 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 the Member States of these bodies;
- 1.2 **welcomes** the Komstroy judgment, in which the Court of Justice of the European Union (CJEU) ruled that Article 26(2) of the Energy Charter Treaty (ECT) on the investor-state dispute settlement (ISDS) mechanism was not applicable to disputes between one Member State and an investor from another Member State. Thus, the CJEU found that this mechanism was not in line with EU law;
- 1.3 **points out** that the EU formally withdrew from the ECT on 27 June 2024, following the unilateral withdrawal of several individual Member States (Italy, France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain) and the announcement of the withdrawal of two others (Denmark, Ireland);
- 1.4 **considers** that the ECT dispute settlement mechanism is not acceptable. The EESC has already expressed criticism of the ISDS system in its Opinions REX/551 and REX/501. This criticism, levelled by civil society, mainly concerns questions about the legitimacy, consistency and transparency of the afore-mentioned arbitration system;
- 1.5 **points out** that the ECT protects, inter alia, investments in fossil energy sources like oil, gas and coal, which run counter to our climate objectives, such as those set out in the European Green Deal and the Paris Agreement. However, it is also important to recognise that the transition to a decarbonised energy system will take time. During this transition period, some investment in fossil fuels, as transitional energy carriers, may still be needed to ensure security of supply in the energy system while accelerating the deployment of renewables and clean technologies. However, investment protection through the ISDS mechanism undermines our aspiration to climate neutrality and must be rejected;
- 1.6 **refers to** the criticism of the ISDS mechanism expressed in its Opinions REX/551, REX/501, REX/464 and REX/411, which fully applies to the ECT. The ECT ISDS mechanism poses fundamental challenges to the rule of law, democracy, transparency and coherence. The mechanism allows foreign investors to circumvent domestic courts by bringing actions directly before an arbitration tribunal, while the exhaustion of domestic remedies remains optional;
- 1.7 **stresses**, furthermore, that the ECT allows foreign investors to challenge any domestic legislation that might harm their profit expectations, as the arbitration system allows investors to challenge national environmental and climate laws;
- 1.8 **emphasises that** the ECT is not intended to apply to intra-EU relations, since it was negotiated as an instrument of the European Union's foreign policy in the context of energy cooperation with third countries. In this regard, the European Commission is proposing that an international

agreement be signed by the EU, Euratom and the Member States, with the aim of confirming their common understanding that Article 26 ETC has never been, is not and never will be applicable in the context of intra-EU relations;

- 1.9 **welcomes** the European Commission's efforts to minimise the risks of intra-EU arbitration proceedings. The inter-agency agreement is an important step towards achieving this objective;
- 1.10 **encourages** the Commission, the Member States and the European Parliament to conclude other inter se agreements with third countries which have withdrawn from the ECT, such as the United Kingdom, to eliminate the risk of arbitration proceedings due to the ECT's 20-year survival clause¹. Although in December 2024 the ECT reform was adopted unanimously, as provided for in Article 36 ETC, the substantive problems remain. Firstly, the defective ISDS mechanism remains the key element of the Treaty. As regards the other deficiencies mentioned above, only partial adjustments to address the most obvious abuses have been negotiated. The phasing out of the protection of investments in fossil fuels laid down in the reformed ECT is not very ambitious: it does not concern all the contracting parties and the long deadlines set forth do not bring it into line with EU law;
- 1.11 **calls on** the European Commission and the Member States to explore legal mechanisms that would enable all the effects of the ECT's 20-year survival clause to be neutralised in one go, to avoid former contracting parties being subject to prolonged arbitration risks that could hinder the EU's climate and energy transition objectives;
- 1.12 in view of the problems referred to above, **calls on** the Member States that are still contracting parties to the ECT to consider withdrawing from it;
- 1.13 **calls for** a new multilateral framework for energy cooperation to be developed that prioritises sustainable and renewable energy sources, ensuring that any future agreement is fully aligned with the objectives of the European Green Deal, takes into account the just transition and respects the principles of transparency, democracy and the rule of law.

2. EXPLANATORY NOTES

Argument in support of recommendation 1.1

- 2.1 The Energy Charter Treaty (ECT) is a multilateral trade and investment agreement applying to the energy sector; it was signed in 1994 and entered into force in 1998. The ISDS mechanism is the key element of the ECT, which is the investment treaty most used by foreign investors, worldwide, to take action against countries. There are currently 162 investment arbitration cases in progress under the Energy Charter Treaty². About 70% of them are intra-EU investment arbitration cases, found by the CJEU to be illegal.

¹ [Model Inter Se Agreement to Neutralize the Survival Clause of the Energy Charter Treaty Between the EU and Other non-EU Contracting Parties | International Institute for Sustainable Development \(iisd.org\)](#).

² [Statistics – Energy Charter Treaty](#) as well as [Search Cases | ICSID \(worldbank.org\)](#) for disputes initiated in 2024.

- 2.2 The ECT has not been substantially updated since its creation more than 25 years ago. It is generally acknowledged that the ECT runs contrary to EU law in the areas of Green Deal legislation and investment protection standards.

Arguments in support of recommendations 1.3, 1.4 and 1.5

- 2.3 In June 2022, when the so-called ‘agreement in principle’ that concluded the negotiations on the reform of the ECT was presented, the EU, Euratom and all the Member States (with the exception of Italy, which had withdrawn in 2016) were contracting parties to the ECT, as were Japan, Switzerland, Türkiye and most of the Western Balkan and former Soviet countries, with the exception of Russia and Belarus.
- 2.4 Given the unsatisfactory outcome of the negotiations, the reform of the ECT did not obtain a qualified majority of the Member States’ votes and therefore failed in November 2022. Subsequently, more and more Member States have been withdrawing from the Treaty: France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain. Denmark and Ireland have also announced their intention to withdraw from it. The UK is the first non-EU country to withdraw. The European Parliament has also made it clear that it did not support the ECT reform, calling on the EU and the Member States to organise a coordinated withdrawal from the Treaty³.
- 2.5 Withdrawal from the ECT is possible in accordance with its Article 47(3). Following notification of withdrawal, the country in question remains a contracting party to the ECT for one year. After that date, the survival clause applies, meaning that the ISDS mechanism can still be used for existing investments for 20 years.
- 2.6 In June 2024, the European Union and Euratom each issued notification of their respective withdrawals from the Treaty⁴. At the same time, Member States that were still contracting parties to the ECT were required to undertake not to prevent any future reform of the Treaty, given the outdated Treaty’s lack of compliance with EU climate objectives and investment protection standards.

Arguments in support of recommendations 1.6 and 1.7

- 2.7 The third focus for EU action on the ECT concerns the need to address the situation where foreign investors file arbitration claims in intra-EU disputes, which is contrary to CJEU case law. Although it is no longer possible to enforce an intra-EU arbitration decision within the European Union, that does not stop foreign investors. Specialised law firms openly recommend to potential clients that they search for third countries where Member States have assets and then initiate enforcement proceedings in those countries. This looks like a conflict of norms.

³ Resolution of the European Parliament of 24 November 2022 on the Energy Charter Treaty modernisation.

⁴ [Energy Charter Treaty: EU issues notification of its withdrawal – Consilium \(europa.eu\)](https://www.consilium.europa.eu/en/press/press-releases/2024/06/24-eu-withdrawal-ect/).

2.8 The European Commission has therefore proposed a two-step approach: a statement and an international agreement with similar content have been prepared, confirming the Member States' common understanding that the ECT ISDS mechanism has never been, is not and never will be applicable in intra-EU relations.

Arguments in support of recommendations 1.8 to 1.10

2.9 The proposed reform of the Treaty has not solved its underlying problems. In particular, the ISDS mechanism is still in place, without major changes. Although some definitions, such as those of 'fair and equitable treatment' and 'investor', have been slightly modified, it is clear that the reform process has done nothing more than limit the most obvious faults without affecting the ISDS system itself.

2.10 The same applies to the conflict between the ECT and climate objectives. Although the ECT lays down the gradual phase-out of fossil fuel investment protection, the transition periods stipulated for this do not address the urgency of abandoning fossil fuels and only concern contracting parties that have chosen to discontinue them (the EU and the UK).

2.11 Given the inadequate nature of the reform, it did not obtain the assent of a majority of Member States and therefore failed. Since then, the EU, together with Euratom, 9 Member States (France, Germany, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain) and the United Kingdom, have given notification of their withdrawal from the ECT, while two other Member States (Denmark and Ireland) have also announced their intention to do likewise.

2.12 Moreover, arbitration tribunals are failing to comply with CJEU case law, namely the Komstroy judgment, and are continuing to hand down decisions in intra-EU litigation. Since most disputes based on the ECT are intra-EU disputes, the Union must take appropriate and immediate action.

Brussels, 4 December 2024

The president of the European Economic and Social Committee
Mr Oliver RÖPKE
