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Delegations will find attached document COM(2022) 523 final.

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, AS WELL AS TO THE MEMBER STATES

on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty

Introduction

The European Union, the European Atomic Energy Community (hereinafter - 'EURATOM') and 26 Member States are Contracting Parties to the Energy Charter Treaty (hereinafter 'ECT')[1]. A large number of arbitral tribunals have interpreted Article 26 ECT as applying to disputes between an investor from one EU Member State and another Member State. In so doing, they have rejected the contrary position taken by the Commission in the first case of this kind[2] and in all similar cases to date.

The Court of Justice of the European Union (hereinafter 'CJEU') has now confirmed in a binding and authoritative manner that intra-EU arbitration under Article 26 of the ECT is incompatible with the EU Treaties.[3] And yet, in their consistent and almost unanimous decision-making practice, arbitral tribunals continue to consider that Article 26 ECT applies intra-EU.[4] According to the CJEU, any such arbitral award must be regarded as incompatible with EU law, in particular Articles 267 and 344 TFEU. Such an award cannot therefore produce any effect and thus cannot be enforced in order to pay the compensation awarded by it.[5]

Article 26 ECT provides for the possibility of ICSID arbitration. This creates the risk that third countries will recognise and enforce these arbitration awards without the possibility for an EU court to declare them null and void. As a matter of fact, Article 54 ICSID sets up a simplified recognition and enforcement mechanism.[6] To date, the Australian courts consider that this mechanism does not allow a Member State to claim before them the lack of a valid arbitration agreement, once the arbitral tribunal has rejected this argument.[7] A request to take a position to that effect is also pending before the US courts and courts in the UK.[8] Even under the UNCITRAL rules or those of the Arbitration Institute of the Stockholm Chamber of Commerce, arbitrators often decide to place

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1 OJ 1998, L 69, p. 26. Italy withdrew from the ECT with effect from 1 January 2016.

2 *Electrabel S.A.* v *Hungary*, ICSID Case No ARB/07/19.

3 Judgment in *République de Moldavie v Komstroy*, C-741/19, EU:C:2021:655.

4 To this day there are no fewer than 31 arbitration awards holding, in one way or another, that Article 26 ECT, applies intra-EU. The one exception is *Green Power K/S and Obton A/S v Kingdom of Spain* (SCC Case No. 2016/135).

5 Judgment in *Romanian Air Traffic Services Administration (Romatsa)*, C-333/19, not yet published, paras 42 and 43 and operative part.

6 The Commission, on behalf of the Union, and the Member States faced with such scenarios insist that the court must first, by virtue of the general principle of customary international law of immunity from jurisdiction enjoyed by a State, establish the existence of a valid arbitration agreement. This interpretation of Article 54 ICSID is, however, disputed.

7 See Full Federal Court of Australia interlocutory judgment of 1 February 2021, *Kingdom of Spain v Infrastructure Services Luxembourg S. à r.l.* [2021] FCAFC 3. An appeal before the High Court of Australia is pending.

8 The US courts had stayed all pending cases brought before them on the basis of the comity principle pending a ruling of the Court on the question of intra-EU applicability of Article 26 ECT. Since the judgment in *Komstroy*, suspensions are being lifted and judgments are awaited.

the seat of the arbitral tribunal outside the European Union[9], thus avoiding review by the courts of the Member States and, by extension, the CJEU.[10]

There is therefore a risk of conflict between the Treaties and the ECT as interpreted by some arbitral tribunals which, if confirmed by the courts of a third country, would de facto turn into a legal conflict because arbitration awards violating EU law would circulate in the legal orders of third countries.

According to the case-law of the Court, the risk of legal conflict is such as to render an international agreement incompatible with EU law[11]. In the Commission's view, in order for the ECT to be compatible with the Treaties, all risk of conflict needs to be eliminated. It will also be important that the risk is addressed from the perspective of public international law, if it is to have the desired effect on the decision-making practice of arbitral tribunals. The Commission is, therefore, of the view that the appropriate response is to adopt an instrument that is a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).

Factual context

The ECT is a trade and investment agreement for the energy sector gathering 53 Contracting Parties, including the EU, EURATOM and 26 EU Member States[12], signed in 1994 and in force as of 1998. It provides rules for trade and transit of energy products, as well as for the protection for energy investments.

In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated whereas, at the same time, the EU has considerably developed its approach with regard to the substantive standards on investment protection, which in more recent agreements are defined so as to ensure that protection of investment does not affect its right to regulate. It also became one of the most litigated investment treaties in the world, with EU Member States being the principal target of claims by investors, most of them based in other EU countries.

In the face of growing dissatisfaction from Contracting Parties and civil society, a modernisation process, driven by the EU and its Member States, was initiated in November 2018, and focused mostly on investment protection standards, as well as on the limitation of the protection granted to fossil fuels and on fostering sustainable development.

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9 The Swiss Federal Court has so far refused to declare three intra-EU investment arbitration awards null and void, see judgments of the Swiss Federal Court of 23 February 2021 on the arbitration award in *AES Solar et al. (PV Investors)* v *Kingdom of Spain*, PCA Case No 2012-14, reference 4A 187/2020; of 7 February 2020 on the arbitration award *G.I.H.G. Limited, Natland Group Limited, Natland Investment Group NV, and Radiance Energy Holding S.A.R.L.* v *Czech Republic*, PCA Case No 2013-35, reference 4A_80/2018, and of 11 July 2015, on the arbitral award *EDF International S.A.* v *Hungary*, UNCITRAL ad hoc, reference 4A_34/2015. However, for procedural reasons and because the Czech Republic and Hungary did not rely on the *Achmea* judgment, none of these judgments discusses the question of the legal effects of the *Achmea* judgment on the merits.

10 In certain arbitration cases, the arbitrators even decided to move the seat outside the EU after the Commission had made an application to intervene as *amicus curiae*: *Antaris Solar GmbH and Dr Michael Göde* v *Czech Republic*, PCA Case No 2014-01, arbitration award of 2 May 2018, paragraph 38 (the arbitral tribunal had initially established its seat in Paris, after the Czech Republic had confirmed that it had no objections on the basis of the *Achmea* judgment but moved its seat to Geneva in the order granting the Commission leave to be heard as *amicus curiae*).

11 Judgments in *Commission* v *Sweden*, C-249/06, EU:C:2009:119, paragraph 42; *Commission* v *Austria*, C-205/06, EU:C:2009:118, paragraph 42; and, similarly, Judgment in *Commission* v *Finland*, C-118/07, EU:C:2009:715, paragraph 33. See Judgment in *Commission* v *Belgium* (Open Skies), C-471/98, EU:C:2002:628, paragraphs 137 to 142.

12 Italy withdrew in 2015.

The negotiations took place between 2019 and 2022. An "agreement in principle" on the draft modernised ECT was reached on 24 June 2022. On that occasion, the Member States, the European Union and EURATOM informed the other Contracting Parties of the ECT of their intention to conclude a subsequent agreement on the interpretation of the ECT. On 22 November 2022, the Energy Charter Conference ('the Conference') will be called upon to formally approve the negotiated amendments to the ECT and to its Annexes.

The modernised ECT will facilitate sustainable investments in the energy sector by creating a coherent and up-to-date framework. It will provide legal certainty by ensuring a high level of investment protection, while reflecting clean energy transition goals and contributing to the achievement of the objectives of the Paris Agreement.

The ECT will offer investment protection reflecting the reformed and modernised standards developed by the EU in its recent trade and investment agreements, preserving the right of governments to pursue their public policy objectives, including in relation to climate change mitigation and adaptation. It will reinforce the pursuit of the EU's climate policies. The modernised ECT will also allow the Contracting Parties, including the EU and EURATOM, to exclude new fossil fuel related investments from investment protection and to phase out protection for existing investments.

Finally, the modernised ECT includes, for greater certainty, a clause confirming that an investor from a Contracting Party that is a member of a regional economic integration organisation (REIO), like the EU, cannot bring an investor-state dispute settlement (ISDS) claim against another Contracting Party member of the same REIO.

Legal context

In *Achmea*[13], the CJEU held that investor-State arbitration clauses in international agreements concluded between the Member States of the European Union 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 a Member State of the European Union. Applying the same principles, the CJEU held in *Komstroy*[14] that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State. It is well-established that judgments of the CJEU apply *ex tunc*.[15] In *PL Holdings*[16], the CJEU rejected a request to limit in time the application of the *Achmea* judgment. In *Romatsa*,[17] the CJEU held that any intra-EU arbitration award, including an ICSID award, rendered in violation of those findings, has to be set aside and, therefore, may not, in any event, be enforced in order to enable its beneficiaries to obtain payment of the damages which it awards them.

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13 Judgment in *Achmea*, C-284/16 (EU:C:2018:158.

14 Cited in footnote 3 above.

15 Judgment in *Vent de Colère*, C-262/12, EU:C:2013:851, paragraph 39 and the case law cited there in. This principle is also well-established in relation to decisions of international courts generally: *Access to German Minority Schools in Upper Silesia*, 1931 P.C.I.J Series A/B, No. 40, at 19.

16 Judgment in *PL Holdings*, C-109/20 (EU:C:2021:875.

17 Judgment in *Romanian Air Traffic Services Administration (Romatsa)*, C-333/19, not yet published, para 44 and operative part.

Process for adoption

On 22 November 2022, during its 33rd meeting, the Energy Charter Conference is to take four decisions related to the modernisation of the ECT. These decisions will be taken simultaneously and their purpose is to: (1) adopt the proposed amendments to the text of the ECT (CC 760); (2) approve the proposed modifications and changes to the Annexes to the ECT (CC 761); (3) approve the proposed changes to Understandings, Declarations and Decisions (CC 762); and (4) approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes (CC 763). These decisions will be subject to a unanimity vote. If the vote is successful, i.e. if no Contracting Party raises an objection, the decisions for the modernisation of the ECT will be considered as "adopted by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package.

In that context, the Commission is making a proposal for a Council decision under Article 218(9) TFEU to establish the position to be taken on behalf of the Union at the Charter Conference, in order to support and approve the four decisions related to the modernisation of the ECT. The Commission is also making a parallel proposal for a Council decision under Article 101(2) of the Treaty establishing the European Atomic Energy Community to establish the same position on behalf of EURATOM.

The EU and its Member States have always considered that the ECT in its entirety does not apply intra-EU. In light of the contrary view taken by arbitral tribunals, it is necessary, to address any risk of conflict between the ECT and the EU Treaties, to clarify this point in a formal international agreement. The present Communication, issued simultaneously with the two proposals to the Council referred to in the previous paragraph, seeks to initiate a negotiation process on the subsequent agreement between the Member States, the European Union, and EURATOM on the interpretation of the ECT, and a preliminary draft of such agreement for negotiation is annexed to this Communication as its integral part. Once negotiations are completed, the Commission will make a proposal for the conclusion of the subsequent agreement on behalf of the Union and of EURATOM. While that agreement will codify the interpretation of the EU and its Member States in a separate treaty (something that is possible because of the bilateral nature of the obligations), the ECT modernisation will embed in the text itself and via a "for greater certainty" clause, the understanding of all Contracting Parties that its Article 26 does not apply intra-EU. Both elements will help to remove any ambiguity and eliminate present or future risks of intra-EU arbitration under the ECT with the necessary degree of legal certainty.

Conclusion

The Commission is, therefore, of the view that a subsequent agreement between the Member States, the European Union, and EURATOM on the interpretation of the Energy Charter Treaty constitutes the most appropriate tool offered by international law to put an end to the risk of a conflict between the ECT and the Treaties. That agreement should include, in particular, a confirmation that the ECT has never, 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. It should also set out the obligations of the Member States in the event that they are involved in arbitration proceedings pursuant to a request based on Article 26 ECT. In view of the retroactive effect attributed to such a subsequent agreement, it would also apply to pending disputes.

A draft of such an agreement is attached to this Communication as the basis for discussion.