

Brussels, 13 February 2023
SG/23/E/0047

Ms. Roberta Metsola
President
European Parliament
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Dear Ms. President,

I reply to your letter (D314849) sent by the Deputy Secretary-General, Mr Winkler, on your behalf and received in early January 2023 informing the Energy Charter Secretariat of the resolution adopted by the European Parliament on 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (the resolution).

While it is regrettable that the European Parliament (and the Council) did not hear the opinion of the Secretariat before taking the resolution, let me clarify some relevant points:

- Contrary to what it is stated in the resolution, the Intergovernmental Panel on Climate Change did not mention in its 2022 report on the mitigation of climate change that the ECT is 'a serious obstacle to climate change mitigation' (such quote appeared only for the first time in a news item of an NGO). On the contrary, the report considers the modernisation of the ECT as part of the ongoing reform processes incorporating climate change.
- The resolution does not clarify how the modernised ECT 'is not aligned to the Paris Agreement', which does not require the 'immediate prohibition of fossil fuels investments'. The modernised ECT introduces a stand-alone provision on the Paris Agreement (reaffirms the respective rights and obligations) and a flexibility mechanism based on the principle of 'Common But Differentiated Responsibilities' underpinning the Paris Agreement, allowing the Contracting Parties to exclude investment protection of some energy materials and products, or activities, based on their energy security and climate goals. The modernised ECT further requires to review the scope of protected investments under the ECT every five years to update it to the evolving needs of Contracting Parties and society as well as to technological developments. The modernized ECT sets a cut-off date for the protection of fossil fuels that falls within the EU's objective of becoming climate neutral by 2050 (while still providing protection to investments in green energy) and is based on the deadlines contained in the proposal submitted by the EU in February 2021. The European Commission acknowledged in October 2022 that the amendments will effectively bring the ECT in line with EU's modern standards of investment protection and energy and climate objectives, including the Paris Agreement.

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- In fact, the Agreement in Principle implements most of the reform policy options relevant for climate action (as paragraph 10 of the resolution of the European Parliament confirms and welcomes), and could also be considered the first coordinated multinational effort to implement a comprehensive review aligned with the Paris Agreement.
- As mentioned in the resolution, EU Member States have around 1,500 bilateral investment treaties (BITs) that protect fossil fuels and include investment arbitration (ISDS); also the new international investment agreements of the EU (such as CETA) do not exclude fossil fuels and do not contain any provision on the Paris Agreement and climate change (only recently it is proposed for negotiation as a clarification decision for CETA). If for coherence the EU and its Member States have to withdraw from those agreements instead of reviewing them, how will the 'acceleration of global investments in clean energy' be protected? Furthermore, investment guarantee agencies require (as an essential precondition for granting an investment guarantee -which covers only a limited number of political risks-) sufficient legal protection of the investment in the host country, which is generally ensured through BITs (as confirmed by the German investment promotion scheme among others). Similarly, MIGA (the World Bank's Multilateral Investment Guarantee Agency) confirmed that ratification of the ECT is an important sign that the host country is willing to accord adequate legal protection for investments.
- While the resolution complains about the modernised ECT still having ISDS provisions:
 - o it does not mention that on 14 March 2022 the Council of the European Union allowed Member States to adopt the amendments to the ICSID (International Centre for Settlement of Investment Disputes) rules (ISDS) instead of requesting withdrawal from it. While the EU is not a member of ICSID, it has also incorporated by reference the ICSID rules into its trade and investment agreements as it is mentioned in the Council decision.
 - o article 26 of the ECT still allows the application of any previously agreed dispute settlement procedure.
 - o among the ISDS cases under the ECT against the EU or an EU Member state, only 4 cases (of which 1 was withdrawn and other is suspended) were related to an environmental measure. The majority of cases (76%) refer to renewable energy.
 - o Even if the ECT and all BITs are terminated, investment insurers would still be able to enforce the claims the insured has against the state in arbitration (e.g. Art 57 and Annex II of MIGA convention).
- The withdrawal of the EU from the ECT will also affect:
 - o the Association Agreement with Ukraine, which incorporates Article 7 of the ECT (Transit).
 - o the current application, through the ECT, of WTO rules to non-WTO members such as Azerbaijan (the partnership and cooperation agreement expressly refers to the ECT) and Turkmenistan in case of trade disputes.
 - o the current energy transit rules (which include the obligation not to stop energy transit in case of a dispute) with non-EU members who are Contracting Parties to the ECT.
 - o international energy cooperation between OECD and non-OECD countries.
- The suggested *inter-se* agreement (based on the Vienna Convention on the Law of Treaties) 'clarifying that the ECT and its sunset clause do not, and never did, apply in an intra-EU context' may not provide the expected legal certainty and protection since it:
 - o could be considered as a reservation (which is not allowed by Article 46 of the ECT) or as a 'protocol' for complementing or supplementing the provisions of the ECT (which would require approval by the Energy Charter Conference).
 - o could only be entered into by Contracting Parties (so it would not apply to Italy and any other EU Member state that withdraws before the entry into force of the inter-se agreement).

- article 16 of the ECT (which disappears in the proposed modernisation and has been frequently used by arbitral tribunals in the past) would not allow such inter-se agreement to apply since it would be less favourable for investors.
- Neither the EU nor other Contracting Parties to the ECT (e.g. Afghanistan, France, Iceland, Jordan, Romania, Türkiye and Yemen) are parties to the Vienna Convention on the Law of Treaties, which would hinder any *inter-se* agreement based on that Convention.
- Contrary to what it is mentioned in the resolution of the Parliament, new investments in fossil fuels after 15 August 2023 won't lose protection unless the EU stops blocking the adoption of the modernisation. In fact, a withdrawal from the ECT without adopting the modernisation would mean:
 - no express confirmation that the ECT does not apply intra-EU, while the adoption of the modernisation would include a clear disconnecting clause.
 - new investments in fossil fuels made until end of 2023 (for Germany, France and Poland) or much later in 2024 (for the EU and other member states, depending on the effective date of withdrawal) will obtain protection for the following 20 years under the current ECT rules. Only the adoption of the modernisation would limit protected investments to those made until 15 August 2023.
- While some EU Member States have notified their intention to withdraw from the ECT, they have also confirmed they did not intend to block the adoption of the modernisation. However, the abstention of four EU Member States in the Council discussions on the position of the EU, has resulted in a *de facto* block by the EU of the adoption of the modernisation, i.e. an express prohibition to non-EU Contracting Parties from better aligning their obligations under the ECT to the Paris Agreement as the modernised ECT would facilitate.

For all those reasons, the potential withdrawal from the ECT should be separated from the adoption of the modernisation. As already stressed by the European Commission, it is in the best interest of the EU and its Member States not to object to the adoption of the modernisation before any potential withdrawal; otherwise, the EU and its Member States would be deliberately (i) not approving the disconnecting clause, (ii) prohibiting other Contracting Parties to better align their ECT obligations with the Paris Agreement and (iii) extending the protection coverage to many new fossil fuels investments in the EU (including those made after 15 August 2023 until the effective date of withdrawal). Furthermore, the EU non-objection to the adoption of the modernisation of the ECT would not require the EU or its Member States to ratify the modernised ECT.

Yours sincerely,

Guy Lentz



Copy :

- Ms. Kadri Simson, European Commissioner for Energy
- Mr. Charles Michel, President of the European Council
- Mr. Frans Timmermans, Executive Vice President of the European Commission