COURT OF JUSTICE
OF THE EUROPEAN UNION

1952 - 2022

PRESS RELEASE No 100/22
Luxembourg, 16 June 2022

Opinion 1/20

Draft modernised Energy Charter Treaty: Belgium's request for an Opinion is inadmissible on account of its premature nature.

The Court does not have sufficient information on the content of the envisaged Treaty.

The Energy Charter Treaty (ECT), approved on behalf of the European Communities in 1997, [1] has not been the subject of major revision since its entry into force in 1998. In 2020 negotiations on its modernisation were started. Those negotiations were to be based inter alia on a list of areas open to negotiation adopted in 2018 by the Charter Conference. [2]

During the negotiations, the European Union proposed amending the mechanism for the settlement of disputes between investors and Contracting States. [3] Since the field to which that mechanism belongs was not included in that list, the opening of negotiations on this area had to be the subject of consensus between the contracting parties. In the present case, that consensus was not reached.

On 2 December 2020, the Kingdom of Belgium submitted to the Court a request for an Opinion [4] on the compatibility with the Treaties of the dispute settlement mechanism provided for in the draft modernised ECT, and of the concepts of 'investment' and 'investor'. [5] In essence, that Member State harbours doubts as to the applicability of that mechanism to disputes between an investor from one Member State, and another Member State.

In its Opinion, the Court takes the view that it does not have sufficient information on the actual content of the envisaged agreement and that, therefore, the present request for an Opinion must be regarded as inadmissible on account of its premature nature.

Findings of the Court

The Court, after finding that at the date on which the request for an opinion was made, there was no document containing the text of the ECT, in its updated version, or that of Article 26 thereof, observes, first of all, that on that date negotiations were at a very early stage. Even if a list of areas open to negotiation had been identified and did not include the dispute settlement mechanism, a consensus could have, and might still, emerge, among the contracting parties, in favour of the inclusion in that list of the area covering the dispute settlement mechanism.

[1] The ECT was approved by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1).

[2] Article 34 of the ECT provides that the Contracting Parties are to meet periodically in the Energy Charter Conference ('the Charter Conference').

[3] The mechanism for the settlement of disputes between an investor and a Contracting Party is provided for in Article 26 of the ECT.

[4] Under Article 218(11) of the TFEU.

[5] Set out in the proposal for amendment of Article 1 of the ECT.

Accordingly, the outcome of any negotiations concerning that area is not sufficiently foreseeable and it cannot be ruled out that the provision relating to that provision may be amended.

Next, the Court considers that the scope of the dispute settlement mechanism is dependent on the definition of the concepts of 'investment' and 'investor', which are the subject of negotiations. However, no amendment of the provision laying down those concepts was adopted at that stage. In addition, the impact that any amendments to those concepts might have on that dispute settlement mechanism cannot be assessed in the absence of any element making it possible to ascertain, with a certain degree of precision, the rules governing that mechanism.

In the light of those uncertainties, the Court considers that it does not have sufficient information on the content and, more particularly, the scope of the provision relating to the dispute settlement mechanism, as it will appear in the modernised ECT. Therefore, the request for an opinion appears premature.

Finally, the Court examines the considerations of expediency, expressed by certain Member States which have intervened in the proceedings, which justify its taking a position on the question of the compatibility of the dispute settlement mechanism with the Treaties. Those considerations concern, inter alia, the absence of unanimous interpretation by the Member States as to the application of the dispute settlement mechanism at issue to disputes between an investor from one Member State and another Member State and arbitrators' refusal to find that they have no jurisdiction in such disputes, in arbitration proceedings based on that mechanism. In that regard, first, the Court finds that such considerations are unrelated to the purpose of the opinion procedure, since the dispute settlement mechanism [6] is already in force. Secondly, the Court notes that it has already held [7] that, in accordance with the principle of the autonomy of EU law, [8] the dispute settlement mechanism provided for in the ECT is not 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.

NOTE: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties or as to competence to conclude that agreement. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

The full text of the Opinion is published on the CURIA website on the day of delivery

Press contact: Jacques René Zammit ✆ (+352) 4303 3355

[6] As provided for in Article 26 ECT.

[7] Judgment of 2 September 2021, Republic of Moldova (C-741/19, EU:C:2021:655), paragraphs 40 to 66.

[8] Article 344 TFEU.