Kluwer Arbitration Blog

Opinion 1/20 and the Conclusion of the Modernisation Negotiations of the Energy Charter Treaty – Hitting the Home Stretch?

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Amidst the still ongoing negotiations on the modernisation of the Energy Charter Treaty (ECT), which were concluded with an agreement in principle yesterday (24 June 2022), the Court of Justice of European Union (CJEU) delivered its ruling on Belgium's request for an opinion on the compatibility of intra-EU investor-state arbitration under a modernised text of the ECT with EU law on 16 June 2022. The CJEU found that it 'does not have sufficient information on the actual content of the envisaged agreement and that, therefore, the present request for an Opinion, on account of its premature nature, must be regarded as inadmissible.' (Opinion 1/20, para. 48).

Against this backdrop, this blogpost briefly addresses the reasoning of the CJEU in Opinion 1/20 and outlines the most contentious topics in the past few ECT modernisation negotiation rounds prior to the agreement in principle adopted yesterday. Given the confidentiality of the modernisation negotiations, the 'actual content of the envisaged agreement' remained unknown until the press release on the agreement in principle, but some major fault lines and points where consensus emerged in the modernisation negotiation could already be identified on the basis of press releases of the ECT secretariat.

Opinion 1/20 and Intra-EU Arbitration Under the ECT

Following the CJEU's judgment in *Achmea* finding the Dutch-Slovak BIT incompatible with the autonomy of EU law, disagreements persisted among EU member states whether the *Achmea* reasoning applied to the plurilateral ECT as well since the EU itself is party to the ECT and non-EU members are also parties to the ECT. The EU proposal for modernizing the ECT, which was published in May 2020, did not address intra-EU investor-state arbitration. In December 2020 Belgium submitted a request for an opinion pursuant to Article 218(11) TFEU, which permits an EU member state and EU institutions to 'obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.' The Belgian request sought clarification on whether intra-EU arbitration under a modernised ECT was compatible with EU law. However, at that point in time only the comprehensive EU proposal for amending the ECT existed. Eventually, in September 2021, the CJEU held in an *obiter dictum* in *Komstroy* that intra-EU arbitration under the current version of the ECT was not permitted by EU law (see analysis here). In light of this finding, Belgium was asked whether it wanted to withdraw its request, but Belgium declined

(Opinion 1/20, paras. 17-18).

On 16 June 2022, the Fourth Chamber of the CJEU found the Belgian request to be inadmissible. It held that it did not have sufficient information on the actual content of that agreement and could not conclude that the provision providing for investor state arbitration under the ECT, i.e. Article 26, 'will not be subject to amendments at the end of those negotiations' (Opinion 1/20 para. 43). The Court emphasized that the situation had changed since the request was submitted in December 2020. At that point in time negotiations on the modernisation of the ECT had only just started a few months ago –in July 2020– and the *Komstroy* judgment had not been delivered (Opinion 1/20 para. 44). Accordingly, it was still possible that intra-EU arbitration had already been addressed or would be addressed (Opinion 1/20 para. 44). In addition, the negotiations on the definitions of investor and investments under the ECT were on the table and could indirectly affect the scope of investor-state arbitration (Opinion 1/20 para. 44). Thus, the CJEU regarded the request as premature and inadmissible (Opinion 1/20 para. 46). However, the CJEU also reaffirmed its *Komstroy* Judgment pointing out that intra-EU arbitration under the existing ECT was not applicable because it contravened EU law (Opinion 1/20 para 47).

Overall, this ruling provides little additional guidance on intra-EU investment arbitration as it treated the request as inadmissible and simply re-affirmed what was already known: intra-EU arbitration under the ECT is contrary to EU law. While investment tribunals have generally not dismissed jurisdiction on the basis of an intra-EU objection even after *Komstroy* (see e.g. *Mathias Kruck v. Spain*), the tribunal in *Green Power v. Spain* for the first time declared that it has no jurisdiction. In light of *Achmea* and *Komstroy*, 'Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations' (*Green Power v. Spain*, para. 445) (see here). Given the unfinished negotiations at that point in time, the CJEU's decision to treat the request as inadmissible was certainly the most prudent approach.

The State of the Modernisation Negotiations Prior to the Agreement in Principle

In order to modernise the ECT, the modernisation group, which was established by the Energy Charter Conference, i.e. all contracting parties to the ECT, in November 2019, held fifteen formal negotiation rounds between July 2020 and June 2022 discussing a wide array of procedural and substantive issues. The last negotiation round was initially scheduled for 8-10 June 2022, but was subsequently extended for one day (14 June 2022). Not all outstanding issues could be settled in the last round, thus informal discussions continued ahead of an in-person meeting of the modernisation group on 23 June 2022 (fifteenth negotiation round), which prepared the ad hoc meeting of the Energy Charter Conference for the agreement in principle on 24 June 2022.

Contested Topics in the Last Negotiation Rounds

The most contested topics plagued the modernisation group up until the very last negotiation round on 23 June 2022. This blogpost outlines some of these controversial topics and how the negotiations proceeded in the last few negotiation rounds.

*A*ccording to a leaked document from the EU's Trade Policy Committee, the 'most controversial issue given the EU's demand to exclude fossil fuels from the treaty' was the '*Definition of*

"economic activity in the energy sector"'. The EU proposed a redefinition of 'economic activity in the energy sector' by gradually phasing out investment protection for fossil fuel based energy production within ten years after the amendment of the ECT takes effect or by 2040 the latest (for an analysis see here). This topic had been intensively discussed since the fourth negotiation round (2-5 March 2021). In the fifth negotiation round (1-4 June 2021) delegations stressed the importance of taking into account the individual climate goals and energy security goals as well as their specific energy mixes when it comes to re-defining 'economic activity in the energy sector'. In the sixth negotiation round (6-9 July 2021), these discussions continued and the ECT secretariat presented some options to implement flexibility for each contracting state. The ECT secretariat was then tasked with further developing the options for flexibility and the principle of flexibility guided these discussions ever since. In the fourteenth negotiation round (8-10 and 14 June 2022) 'proposals of individual Contracting Parties were considered in combination with rules on reciprocity among Contracting Parties as well as transition periods.' The agreement in principle incorporates a flexibility mechanism, which permits the Contracting Parties –on the basis of a decision by the Energy Charter Conference– to exclude fossil fuel based investments in their territories from the scope of protection of the ECT. In addition, a review mechanism has been added, which allows the Contracting Parties to review the flexibility mechanism and the list of energy materials and products that are protected by the ECT.

Another controversial topic was 'Sustainable development and corporate social responsibility'. The EU proposed the inclusion of references to international instruments on sustainable development and responsible business conduct as well was the Paris Agreement and an obligation to conduct environmental impact assessments. Moreover, it advocated for a state-to-state dispute settlement mechanism with respect to these provisions. Already in the sixth negotiation round (6-9 July 2021) compromise drafts on these provisions were discussed and since the eleventh negotiation round (1-4 March 2022) particular attention was paid to the proposed dispute settlement mechanism. While there seem to have been considerable disagreements on these provisions (see progress report 2021), some agreement was reached in the fourteenth negotiation round, including on the dispute settlement mechanism. According to the agreement in principle, provisions were introduced that reaffirm exiting obligations under various multilateral treaties, including the Paris Agreement. The dispute settlement mechanism with respect to these new provisions on 'Sustainable development and corporate social responsibility' appears to be limited to a conciliation procedure rather than an arbitration mechanism as foreseen by the EU proposal.

In addition, there was consensus in the modernisation group on e.g. Fair and Equitable Treatment (FET). Here, the EU favoured a closed list of measures, which constituted a breach of FET, whereas other states favoured an open list (see here). Apparently, such a closed list is now part of the agreement.

Moreover, in the fourteenth negotiation round, a major success for transparency was achieved by reaching consensus to have the UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration applied to investment disputes under the ECT. This is particularly significant given the lack of support for the 'Mauritius Convention on Transparency', which also requires states to apply the aforementioned UNCITRAL Transparency Rules in investor-state disputes, but has only been ratified by nine states thus far.

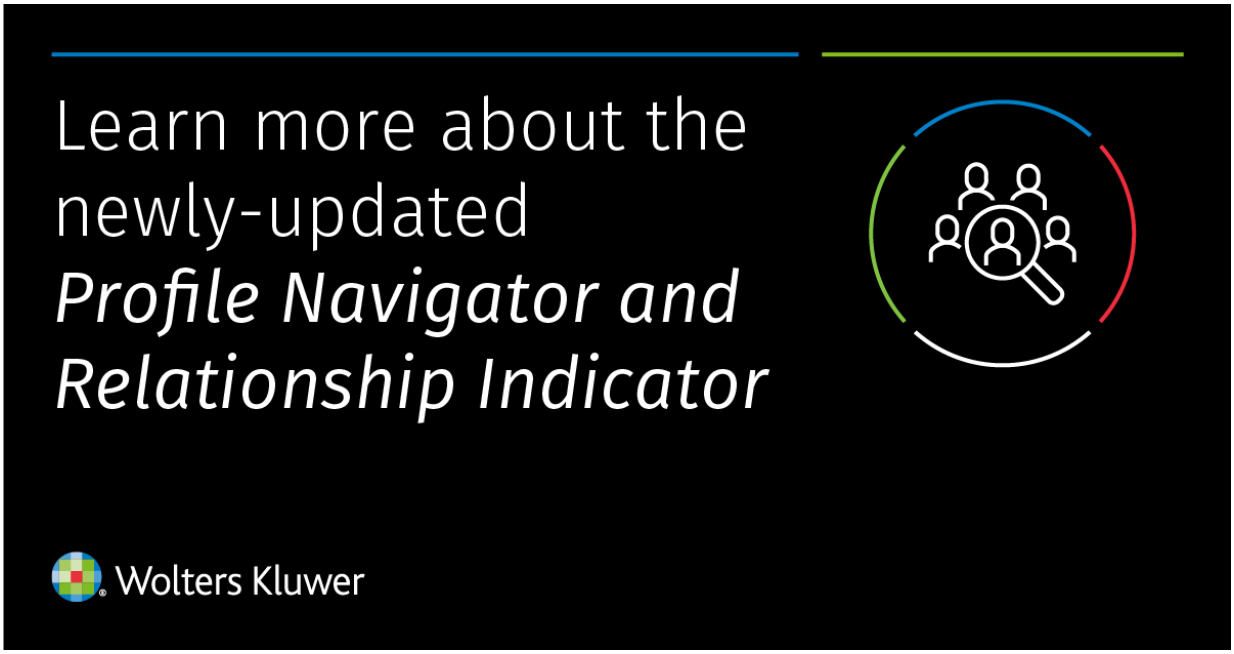
Finally, an agreement was reached to exclude intra-EU arbitration from the ECT in the thirteenth negotiation round (16-20 May 2022). The agreement in principle indicates that a provision has been added clarifying that investor-state dispute settlement does not apply between contracting

parties which are members of a Regional Economic Integration Organisation (REIO). The only REIO that is party to the ECT, is the EU. Thus intra-EU arbitration will be excluded, which satisfies the criteria established by the CJEU in *Komstroy* and reaffirmed in Opinion 1/20 and the modernised draft of the ECT will be compatible with EU law insofar as it concerns intra-EU arbitration.

Various other important aspects have been covered in the modernisation negotiations and are covered in the ECT's public communication on the agreement in principle. The full text of the agreement in principle is not publicly available yet.

Outlook

With the CJEU having stayed on the sideline in the final phase of the modernisation negotiations, the negotiations concluded on 24 June with the agreement in principle, but the future of the modernised text of the ECT still remains uncertain. The draft text should now be communicated to the contracting parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022. The modernised ECT will only enter into force 90 days after ratification of three-fourths of the contracting parties. An entry into force of the modernised ECT may face serious political obstacles, in particular in the European Parliament and some EU member states, which may still opt for withdrawal instead of amending the ECT.



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