DÁIL ÉIREANN

AN COMHCHOISTE UM CHOMHSHAOL AGUS GHNÍOMHÚ AR SON NA HAERÁIDE

JOINT COMMITTEE ON ENVIRONMENT AND CLIMATE ACTION

Dé Máirt, 23 Samhain 2021

Tuesday, 23 November 2021

Tháinig an Comhchoiste le chéile ag 3 p.m.

The Joint Committee met at 3 p.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	Lynn Boylan,
Réada Cronin,	Timmy Dooley,
Cormac Devlin,	Alice-Mary Higgins,
Alan Farrell,	John McGahon,
Darren O'Rourke,	Pauline O'Reilly.
Jennifer Whitmore.	

Teachta / Deputy Brian Leddin sa Chathaoir / in the Chair.

Energy Charter Treaty and Energy Security: Discussion

Chairman: I have received apologies from Deputy Christopher O'Sullivan. I welcome to this meeting Dr. Yamina Saheb of the Intergovernmental Panel on Climate Change and Dr. Michael de Boeck of the European legal studies department in the College of Europe. On behalf of the committee, I thank the witnesses for coming before us to share their expertise. The purpose of this meeting is to have a discussion on issues around the Energy Charter Treaty and energy security. We have had related sessions on the use of liquefied natural gas and data centres. Today we will be focusing more specifically on the Energy Charter Treaty.

Before we begin, I will read a note on privilege. I remind our guests of the long-standing parliamentary practice that they should not criticise or make charges against any person or entity by name or in such a way as to make him, her or it identifiable or otherwise engage in speech that might be regarded as damaging to the good name of the person or entity. Therefore, if their statements are potentially defamatory in relation to an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative they comply with any such direction. For witnesses who are attending remotely outside the Leinster House campus, which includes both of our witnesses today, there are some limitations to parliamentary privilege and, as such, they may not benefit from the same level of immunity from legal proceedings as a witness who is physically present on the Leinster House campus does.

Members of the committee are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the Houses or an official either by name or in such a way as to make him or her identifiable. I also remind members that they are only allowed to participate in this meeting if they are physically located on the Leinster House complex. In this regard, I ask all members, prior to making their contributions, to confirm that they are on the grounds of the Leinster House campus.

Dr. Yamina Saheb: I thank the committee for the invitation. The Energy Charter Treaty, ECT, is a multilateral agreement from the 1990s that has been ratified by all EU countries. As of today, there are 53 contracting parties, including the EU. Italy is the only EU country that has withdrawn from the treaty, having done so in 2016. The treaty protects foreign investment in energy production without distinguishing between environmentally harmful and environmentally friendly energy sources. Protection is given by means of private arbitration. This means that foreign investors - and, as a French citizen, I would be considered a foreign investor in the committee's country, Ireland, and *vice versa* - can sue governments for any changes in their energy policies or subsidies. As of today, there have been 143 investor-state dispute settlements under the Energy Charter Treaty, two thirds of which are related to changes in subsidies for renewable energy in Spain and Italy. The rest of these cases, which are outside the EU, mainly relate to fossil fuels. What we have started to see, and what will accelerate with the implementation of the carbon or climate neutrality target, is investor-state dispute settlement, ISDS, cases in EU countries in respect of the phasing out of fossil fuel. The Netherlands has been sued over the phasing out of coal power plants. Germany is to be sued again. It was sued in the past over its coal and nuclear phase-out. The German Government signed an agreement with investors to provide them with compensation. The compensation amounts to billions of euro if they do not sue the German Government using the Energy Charter Treaty. By January 2020, we estimated the value of stranded fossil fuel assets protected by the ECT to be €2.15 trillion, and we estimated the potential cost of ISDS cases related-----

(Interruptions).

Chairman: The connection dropped for a moment. Could Dr. Saheb repeat her last few lines?

Dr. Yamina Saheb: We estimated the value of stranded fossil fuel assets that are protected by the ECT at €2.15 trillion, and we estimated the potential cost of ISDS cases that could accrue due to the phasing out of fossil fuels at €1.3 trillion by 2050. The most recent ruling of the European Court of Justice regarding the ECT states that intra-EU disputes do not violate EU law. Therefore, the intra-EU disputes no longer exist. This is a very important ruling from the European Court of Justice because more than 60% of the-----

(Interruptions).

Dr. Yamina Saheb: This also means that if EU countries withdraw, collectively or individually, the sunset clause that protects investments made 20 years or more before the withdrawal will not apply any more, except if the foreign investors find a way to locate their investment somewhere else, for example, in the UK or Switzerland, which are neighbouring countries close to the EU, from where they could still sue us. Basically, the ECT is a real threat to the implementation of the climate neutrality target and the Paris Agreement, not only in the EU but also outside it, because the new strategy is to extend the ECT to African countries and developing countries. They are mainly targeting African and Latin American countries. In these countries, there is no technical capacity to fight back in respect of the treaty. There is already no technical capacity in the EU to fight back in respect of this treaty. If the members have any questions, I will be happy to answer them.

Chairman: I thank Dr. Saheb for her presentation. I am sure we will have many questions, but first we will hear the opening statement of Dr. de Boeck.

Dr. Michael de Boeck: I thank the committee for inviting me to address it. I hope I can contribute meaningfully to its consultations on what I believe is surely one of the most important problems we will face in our lifetimes. Climate change is an inescapable problem that does not know borders or nationality. In deciding how best to contribute to this committee's work, I decided I would like to shed some light on the Energy Charter Treaty and ISDS provisions in general, in respect of both energy security and the EU green transition.

I find myself agreeing with several remarks very astutely made by Dr. Saheb but would like to add nuance to the analysis. The question that has guided my brief opening statement concerns whether the Energy Charter Treaty as it is today — the phrase "as it is today" is an important nuance — is a liability in realising the ambitious climate change and sustainable development goals. Unfortunately, I believe the answer to that question is "Yes". I say "unfortunately" because I am not in principle opposed to the Energy Charter Treaty and believe it has some redeeming qualities. One of its benefits is that it regulates the trade and transit of energy.

ISDS provisions are certainly the most controversial provisions of the Energy Charter Treaty but they are only a part of it. Although the Energy Charter Treaty could ensure or help to ensure the EU's security of energy supply, it is the ISDS provisions that likely bring themselves to bear on the EU's green transition. I will give a brief explanation as to why that is the case. I will try to show members some of the high-level tendencies that I believe show the important conflict that will arise in the years to come.

The Energy Charter Treaty, as many people know, was concluded with an eye to our eastern

and central eastern neighbours to ensure the protection of investments there, thereby creating stability, prosperity and stable regimes and, as a consequence, a stable energy supply. That was important in the 1990s, particularly with respect to the precarious circumstances after the collapse of the Soviet Union. The treaty was very successful then. However, since that time, the situation has changed considerably, as we all know. First, Russia, one of the major suppliers of energy to our east, definitively withdrew from the Energy Charter Treaty. A little later, the EU expanded to the east, meaning the only non-EU states between the Union and Russia were Moldova, Ukraine and Belarus. The EU also gained competence in respect of energy as a policy matter. As a result, we have paid much more attention to energy security in the European neighbourhood policy, which is extended by the energy charter community to other states and by association agreements we conclude with other states, such as Ukraine. A recent agreement covers energy, trade and transit.

The Energy Charter Treaty has lost much of its original rationale, which involved investment protection in the eastern and central eastern regions, but that shift was reflected in a rather recent energy charter-----

(Interruptions).

Dr. Michael de Boeck: The recent reform of the energy charter process reflects the shift by putting more emphasis on broadening the geographic membership of the charter. This could help to diversify the energy supply, including with regard to liquid natural gas and renewables. I will not wade too far into that because my primary area of expertise is the ISDS provisions, which I will now discuss.

I am sure members have already heard arguments from others who testified before this committee. I want to address a counterargument often raised by proponents of ISDS and the Energy Charter Treaty, namely, the working of Article 19. It is often said that the Energy Charter Treaty already protects the regulatory margin of host states to a good extent in relation to environmental protection. I would offer the retort that the idea that Article 19 sufficiently incorporates environmental protection is a fallacy because that protection is only put into the context of investment protection principles on long-term energy investments, that is to say, that the host state may subject investments to conditions, impact assessments, the performance of building conditions, etc. However, it can only do so *ex ante*. It does not actually provide for an *ex post* right for a host state to change its regulatory framework even for the protection of the environment. Environment protection is then recognised as part of the regulatory framework, which can change over time within certain limits, but it is not recognised at the level of an overriding justification for breaches of the investment protection principles. That, in legal terms, is a wholly different dynamic than, for instance, a carve-out provision or an exception.

Moreover, as we see in practice, Article 19 is actually not subject to the ISDS provisions, yet we see a number of cases that concern regulatory incentive regimes, particularly for solar energy such as in Spain, the Czech Republic and Italy that have rather mixed outcomes. The reality is that investors who have legitimate expectations under international investment law to have regulatory stability may in fact block some of the needed reforms or at least render them excessively costly.

To come back to the idea of presenting the high-level tendencies, we have to recognise that we are at the precipice of a tremendous transition effort, which is almost inevitably likely to affect the regulator frameworks of many, if not all, sectors. We will fund that transition effort with a staggering €750 billion EU investment fund. However, we risk subsidising or incentivis-

ing investments with taxpayers' money only then to be faced with claims for damages and lost profits. This is an important caveat because whereas under national law the state can be sued for damages but not lost profits, under international investment law, a state can also be sued for lost profits. What we have then incentivised with taxpayers' money could ultimately turn against us in a suit for lost profits when the original regulatory efforts at the beginning of the long-term investment - investments could be for 25 or 30 years - turn out to be insufficient and we have to recalibrate our environmental measures in order to meet targets. That is a real risk.

My overarching message is that the Energy Charter Treaty has some merit with regard to all the other provisions but probably not with regard to the ISDS provisions as they are now. It is a fact that the Energy Charter Treaty is currently being modernised but the results of that process are as yet very unsure and it is very hard to make any prediction on that.

Chairman: This meeting is confined to a maximum of three hours. I propose that each member have two minutes to address their questions. We will have second and third rounds if there is time.

As I must leave the meeting early, I will contribute first. I have a high-level question which I will address to both the witnesses. Let us take a step back. The Energy Charter Treaty was introduced during the seismic political shift that took place 30 years ago when the Soviet Union collapsed. It was brought in for very good reasons, namely, to ensure the continued energy flow to countries, especially in Europe. Given that we are in another seismic period with respect to climate change, is there an argument or is there time to go back and look at the purpose of the Energy Charter Treaty? Should it be thrown out? Is that feasible? If not, is the treaty aligned with the goals under the Paris Agreement and the ambition to limit warming over the pre-industrial average to 1.5°C or at most 2°C? Is it aligned with the sustainable development goals? If not, what can be done to ensure that it is?

Dr. Yamina Saheb: Perhaps the Energy Charter Treaty made sense in the 1990s. However, when Russia withdrew in 2009 the treaty's *raison d'être* disappeared. That is why today the treaty does not make sense today. The EU and the energy sector do not need it. One of the main arguments made is that one of the treaty's benefits is to regulate trade and transit in the energy sector. However, this is already done in the World Trade Organization. The Energy Charter Treaty made sense at the time because we did not have the WTO, the energy community treaty and the various partnerships the EU has built since the 1990s. Today, the Energy Charter Treaty would be useful to us for our relations in respect of energy with Afghanistan, although it is not really a provider of energy to us; Australia, which was providing us with coal but withdrew from the treaty only recently and we no longer need because it is not important for our energy security; and Jordan, Mongolia and Yemen, which are not important for our energy security. These are the only countries which are not covered and with which we do not have any other agreement for our energy security. We have different kinds of agreement with all other countries that are parties to the Energy Charter Treaty. Russia, the main provider of fossil fuels to Europe, has joined the WTO and withdrawn from the treaty. Therefore, from an energy security perspective, the ECT does not make sense.

From the flow of investment perspective, with respect to investment in ECT contracting parties, we see that EU investors invest in EU counties and non-EU investors, namely, those from former Soviet Union republics, invest in those republics. The OECD has an explanation for that, which is set out in its studies relating to investment treaties and trade agreements as opposed to energy. It is not the trade agreements and ISDS that attract investors in the first place; there are other factors that attract investors. In the EU's case, one of the explanations

is the Single Market. Because EU countries are in the Single Market and operate under EU rules, there are EU investors investing in other EU countries. We do not see any risk when we invest in other EU countries because we are protected by the EU rules. Then, when you look at it from-----

(Interruptions).

Dr. Yamina Saheb: -----climate perspective, so by protecting foreign investment in-----

(Interruptions).

Chairman: The connection to Dr. Saheb has broken down. Sorry, Dr. Saheb. We-----

Dr. Yamina Saheb: Is it better now? Do you hear me?

Chairman: Maybe it is back. We will try again. Dr. Saheb should go ahead.

Dr. Yamina Saheb: I do not know when the connection went.

According to the International Energy Agency, 99% of investment in the energy sector is in fossil fuels rather than investment in renewable and clean energy sources. Therefore, by protecting foreign investment in energy supplies, we are protecting foreign investment in greenhouse gas emissions. As a basic principle, that does not align with the Paris Agreement. When you estimate the investments already protected under the ECT, they are found to be above the remaining carbon budget for all the EU 28, that calculation relating to the time when the UK was in the EU. Basically, therefore, we are protecting with the ECT what has already been done. We are protecting greenhouse gas emissions that are above the remaining EU carbon budgets. We cannot say that that aligns with the Paris Agreement.

As for the modernisation proposal, the Commission, on behalf of the member states, proposed to protect the investment that already exists until 2040 in the case of gas, if we can convert it to hydrogen, and to phase out and to stop protecting foreign investment in fossil fuels as soon as the new treaty is agreed. However, this proposal, first, is not Paris-compatible or climate-compatible and has been rejected by all other contracting parties-----

(Interruptions).

Dr. Yamina Saheb: -----this is what they are discussing now. I refer to differentiated phase-out of the protection of fossil fuels as if greenhouse gas emissions have recognised our administrative borders. Climate change does not recognise our administrative borders. The greatest risk is the fact that, since Russia's withdrawal from the treaty, the strategy has been to replace Russia with other countries with fossil fuel reserves. Attracting other countries has been financed so far with EU money, that is, our money as taxpayers. If we, the EU countries, stay in the treaty, our taxes will again be used to attract these countries. We know that these countries - Nigeria, for example, and other African countries - are making income out of fossil fuels. They do not have climate neutrality targets, they are not planning to stop the-----

(Interruptions).

Dr. Yamina Saheb: -----and this means that we will increase the share of greenhouse gas emissions that are protected by fossil fuels.

Chairman: The connection is not very good but I thank Dr. Saheb for her comprehensive

answer. Does Dr. de Boeck wish to have a go at answering the question?

Dr. Michael de Boeck: That was a comprehensive answer. I will complement it by reaffirming that while the premise of ISDS and investor-state dispute resolution clauses as a means to attract foreign direct investment into a host state is often used, many studies in fact find conflicting outcomes in that regard. It is actually not clear that offering ISDS increases the foreign direct investment flows into the host state. The uncertainty of that whole basic premise is very important in considering whether or not to continue using it.

Chairman: If members will allow me to ask a quick follow-up question, my concern is that something else is needed in this great transition we are trying to achieve. If it is not to be the energy charter, can we get a replacement in place, or is it the case that we can modify this or that we do not need anything like it? I ask the witnesses to answer briefly in order that I may bring in other members.

Dr. Yamina Saheb: There is a proposal to work on the fossil fuel non-proliferation treaty. That would be a good Paris-compatible replacement. It is already on the table, although not in every chartered community, and much can be done on it given the people working on it.

Chairman: Thank you, Dr. Saheb. Dr. de Boeck, do you wish to respond?

Dr. Michael de Boeck: I am sorry but I do not at this time have a good answer for you, Chairman, as to an alternative.

Chairman: Thank you for your answers.

Deputy Richard Bruton: I apologise, as I was in the Chamber for the start of the first presentation. I have a few basic questions.

First, how much freedom of manoeuvre does either an individual member state or the EU as a whole have in this respect? I understand from having listened to Dr. Saheb that the EU is trying to make proposals but they have been rejected. In practical terms, is unanimity required to replace this agreement with another?

Second, I wish to understand the exact nature of the protection. I know that modern protections in investor disputes protect a foreign investor from rules that are not being applied to domestic investors, but in the case of climate action, we would be applying the same regulations to all investors. That would be our ambition. Is that distinction of discriminatory rules not part of this agreement such that, even if our national fossil fuel companies are having to change their practices, the others can get damages for either damage or lost profits?

Does this existing treaty anticipate anything like *force majeure*, which is really what is happening here in that complete transformation is necessary? No treaty, you would think, would give away the ability to respond to an existential crisis of this nature. Has this one been particularly badly drawn?

Finally, emissions trading forces coal generators, for example, to pay much higher carbon taxes than gas or renewable generators. Has that already triggered a series of claims by the fossil fuel industry against the emissions trading system, ETS? It seems that almost everything the EU is doing and has been doing for many years could potentially be portrayed as inflicting either damage or a lost expectation of profits in respect of coal producers, for example.

Chairman: Which of our witnesses would like to go first?

Dr. Yamina Saheb: I will answer Deputy Bruton's question. To amend the treaty, we need a unanimous vote from all the contracting parties, which limits the room for manoeuvre for EU countries. This means that to change-----

Dr. Michael de Boeck: I think we have lost the connection to Dr. Saheb.

Chairman: We have lost the connection to Dr. Saheb. I invite Dr. de Boeck to answer the questions asked by Deputy Bruton.

Dr. Michael de Boeck: The Deputy asked how much room there is for manoeuvring. Under the current set-up, there is not a lot of room to manoeuvre. We are a contracting party to an international agreement. That agreement sets out certain rules with which we are no longer very happy and we would like to modify them. One option is to withdraw. We can do that jointly with all of the EU member states but then, of course, we would be, from the perspective of international law, unilaterally withdrawing states, and the consequence of that would be to lock in the investment protections that are guaranteed in that treaty for another 20 years. That is not our intent. The intent is to replace the current framework, but that has to happen through the energy charter itself, with a treaty modification. That requires unanimity of all the parties. That is why the European Commission is currently negotiating for a change in almost all the notions and definitions, as is clear if one looks at the draft text, several of the protection standards and more qualified protection standards, and the exceptions. What are the standards? One of the difficulties with and criticisms of international law is that the provisions that contain the investment protection standards are rather vague and they are interpreted by many different international investment tribunals that are composed on an *ad hoc* basis. That is why one of the envisaged changes is to have a sort of appellate body that could be responsible for a kind of co-ordination of the different strands in the jurisprudence.

All of these different protections are interpreted, sometimes with quite a bit of divergence. The most well known is the protection of fair and equitable treatment. Even its name is rather vague. One of the contents of that particular standard of protection is whether the investor had a legitimate expectation. The difficulty - and this has particularly been the case in the Spanish, Czech and Italian solar cases - is in determining when an investor has a legitimate expectation. Tribunals have reached diverging reasonings on that issue. I refer to whether there has to be a specific commitment on the part of the host state. If the host state makes a specific commitment in a contract, or any type of commercial agreement, to induce investors to make an investment in its territory, that would be seen as giving rise to a legitimate expectation on the part of the investor that the regulatory regime will not change or, at least, not change to such an extent that it would alter the economic rationale of the investment. Some tribunals, however, have determined that an implicit commitment of the host state *vis-à-vis* the investor could lead to legitimate expectations and, therefore, the mere fact that a regulatory regime exists - such as, in the Spanish case, an incentive subsidy for solar energy - automatically creates a legitimate expectation on the part of the investor that the regime will not radically alter. Of course, there are always definitional problems such as what is radical and what constitutes changing the economic rationale of the investment. One of the major criticisms of investment arbitration is that it is all one-off decisions that try to meander to a consistent strand of jurisprudence but there is no one co-ordinating it.

In the context of the investment standards, the provisions from the international treaty are very vague, so it leaves a lot of leeway for the investment tribunals to make those determinations. That was particularly the case in respect of treaties dating from the 1990s, such as the Energy Charter Treaty and all of what we now call the older generation of bilateral investment

treaties. The idea of the European Commission and the member states is that all of the new generation free trade and investment agreements that are concluded by the European Union or by the member states, subject to an authorisation by the Union, should contain qualified investment protection standards, which simply means more lengthy clauses that clearly delineate the scope and what is covered. Of course, those only exist once they have been concluded. Unless they have been concluded, the old regime still applies.

As regards exceptions, there are very few exceptions in the treaties that were concluded in the 1990s. Very little attention was paid to that. One of the things that has changed in the practice of the conclusion of investment agreements is that far more attention is being offered to qualifications of scope, exceptions, justifications for breaches, etc. They would not then actually be breaches.

As regards the question on the emissions trading system, I apologise, but I am not competent to answer it.

Chairman: I thank Dr. de Boeck for his answer. We have re-established the connection with Dr. Saheb. Did she hear the Deputy's questions?

Dr. Yamina Saheb: Yes.

Chairman: I invite her to have a go at answering them.

Dr. Yamina Saheb: To amend the treaty, a unanimous vote of all the contracting parties is needed. This limits the room for manoeuvre by EU countries. The first thing we need to keep in mind is that the EU proposal to amend the treaty in respect of protection of fossil fuels is not Paris-compatible. Second, this proposal was rejected by the contracting parties. Whatever will be agreed, by the end there is a need to have a unanimous vote. The treaty cannot be amended unless there is a unanimous vote.

As regards whether there are any force measures, the treaty does not foresee that at all. The EU has been trying to introduce the right to regulate because, basically, when a country is a party to this treaty, it loses its right to regulate its energy sector. This is what we have learned over time. The EU has been trying to introduce the right to regulate. At present, Japan, which is another contracting party, and an important one in terms of contribution to the ECT secretariat, is completely opposed to the right to regulate and to modernisation in principle. There are other countries that do not see why the right to regulate and provisions on climate change protection should be introduced.

I refer to the ETS case. What needs to be kept in mind is that there are currently 143 known cases but there could be other cases of which we are unaware because there is no requirement for the countries or the investors to make their cases known. It could be there are cases we do not know about. Based on the existing cases, I do not know any case that is directly related to EU-ETS. In the cases that we have, investors are related to changes in subsidies, and these are the cases in Italy and Spain, or, for example, the phase out or the closure of an installation. These are the fossil fuel cases.

Chairman: Thank you. It is good to have Dr. Saheb back with us. Hopefully, the technology plays ball with us from here on. I must vacate the Chair. Is it agreed that Deputy Alan Farrell will step into the Chair? Agreed. I will return after I speak in the House.

Deputy Alan Farrell took the Chair.

Senator Lynn Boylan: I welcome both speakers and commend them on their contributions. It is very important to distinguish between the fact we have the current Energy Charter Treaty, as Dr. de Boeck said, and the modernisation process and how likely it is for that modernisation process to achieve anything, given the resistance. We know Japan is on record as saying it does not think the treaty needs changing at all. Is valuable time being wasted in addressing climate action by trying to amend a treaty that is unlikely to be amended because of the requirement for unanimity? Even if it is amended, and even if the EU proposals were all accepted in their entirety, it still would not make the agreement Paris-compliant.

Neither speaker referred to Article 16 of the treaty. While I am not a legal expert, my understanding is that it does not matter what other international agreements a country signs up to, if the provisions of those agreements are less favourable than the ECT, then the tribunal accepts Article 16 as the provision that it is going to be protected under. What does that mean for the Paris Agreement but also the ECJ ruling in both in the Achmea case and the more recent one on the ECT specifically? The tribunals are saying, "That is not our problem." If it is not compatible with EU law, it is not their problem because countries are obliged to protect the investors under the treaty. I would like the witnesses' views on that.

Dr. Saheb touched on the ethical question of trying to carve out an intra-EU dispute, or to remove those intra-EU disputes while expanding the treaty into the oil and gas rich global South, which will protect European investors going into those countries. What is his view on that, in particular the ethics of that from a climate justice perspective?

Dr. Yamina Saheb: My answer to the first question is, unfortunately, yes, we are wasting our time. It is unlikely that the treaty could be made Paris-compatible. The time and great effort that, as Europeans, we are putting into the fake modernisation of this treaty is a waste of time.

The second question is on Article 16. The treaty is in practice above any other international agreement or treaty. This is how the intra-EU cases have been justified so far by private arbitrators. There is a high risk that the ECJ ruling shows that the intra-EU disputes violate EU law, which is something that several other lawyers used to say. It is good to have this ruling from the ECJ. However, it is likely that arbitrators outside the EU will not consider this ruling and, again, this means a continuation of the treaty. The risk of continuation is quite high, even for intra-EU disputes.

Regarding the ethical question, as someone who is at the same time from the global North and the global South, I feel uncomfortable that my country, France, and my other continent, Europe, still see the South as just a source for our investors in the North, without taking into account that climate change does not recognise our administrative borders and that the global South is in huge need of moving directly and leapfrogging from its current situation, where there is a lack of access to energy, directly to renewable energy. As a climate change scientist, I know this is scientifically doable. That is why I feel extremely bad and sorry for the global South if the global South is locked in the treaty because we do not manage, as Europeans, to have the courage to end this treaty.

Dr. Michael de Boeck: Let me the address the question on Article 16. It acts like what I would call a ratchet in that it always provides the highest possible protection to the investor and it never goes down. The argument on the part of the European Commission, in some of the cases where it has intervened as *amicus curiae* in this area, is that the ECT had in fact been replaced between the member states because they acceded to the EU treaties. The legal basis for that was article 59 of the Vienna Convention on the Law of Treaties, namely, that a prior

agreement was terminated by accession to a later agreement. That was never accepted by any of the investment tribunals that had to rule on this. It was also because there was in fact a failure of express notification and it was not clear at all whether the intention was to terminate the ECT, given there was also a need for internal markets in energy.

The following argument is then whether, on the basis of a conflict between successive treaties, one could also argue that the EU treaties should prevail over the application of the ECT, under Article 30 of the Vienna Convention on the Law of Treaties. This was also not accepted by any of the investment tribunals, as a consequence of which we are at present simply faced with two legal regimes and two treaty regimes that apply side by side. I agree with Dr. Saheb that there is the high likelihood that the ECJ rulings recently involving Achmea, Komstroy and PL Holdings will not stop investment arbitrations between member states, that is to say, between an investor of one member state and another member state.

As a legal analysis, that is not because it is invalid but simply because it is beyond the reach of EU law. EU law, as the court famously said in Van Gend en Loos and Costa *v*. ENEL, is a new and autonomous legal order and it is distinct from national and international law. The consequence, on the flipside of the coin, is that if the ECJ makes a ruling between member states, it is not necessarily binding in international law. Therefore, the validity of the commitments under international law is simply not affected by the Achmea and Komstroy judgments. Hence, investment tribunals will simply continue for as long as the legal regime applies. Senator Boylan also asked whether we are simply wasting our time in trying to amend the ECT. I would say "No"; we are not wasting our time at all. Given the lack of decent alternatives, we need to keep pushing and going for that as there is no alternative. It is an effort we must seriously make.

Acting Chairman (Deputy Alan Farrell): I am conscious that Deputy O'Rourke has to be somewhere else in ten minutes and I call him to speak next.

Deputy Darren O'Rourke: I thank the Chairman and I very much appreciate that. I also thank the witnesses. My apologies to Dr. Saheb as I did not quite hear a couple of figures that she referred to and I may ask her to repeat them. I believe she mentioned that there were €2.15 trillion in stranded assets and also referred to a €1.3 trillion figure. Can she clarify what those figures relate to?

I have a question now for both witnesses. They say that there are 143 ISDS cases ongoing at the minute. Can they give two or three examples of the types of previous cases that have been successfully taken and the implications in fines, or otherwise?

I have a follow-on question which relates to some questions that have already been asked. There has been a suggestion that the ECT can be repurposed to support a decarbonisation strategy, which picks up on the last question that was asked. Do our witnesses feel that this is possible and how might that progress, if at all possible?

I also ask for our witnesses' advice for the Irish Government at this time, based on all their considerations. Do they think it should be advancing the case for a collective withdrawal? What is the state of play? We know where Italy is and we have an indication from France and Spain but where are other countries on that? If that is not the approach, what is the way forward here as they see it? I thank the Chairman and our witnesses.

Acting Chairman (Deputy Alan Farrell): I thank Deputy O'Rourke. Would Dr. Saheb like to reply first?

Dr. Yamina Saheb: Yes. The €2.15 trillion figure is an estimate of the investment in fossil fuels that has already been made and is already protected by the ECT, and the investment that will be protected until 2050 if we do not phase out the protection of fossil fuels in all the ECT contracting parties. These are stranded assets. The €1.3 trillion figure is the estimate of potential ISDS cases that may occur because of the implementation of the Paris Agreement in ECT contracting parties. This means that we have to stop these fossil fuel installations earlier as these will trigger ISDS cases.

On the question of a few cases that are well known, Germany has been sued three times so far and there are two cases that are very well known. One case was related to the phase-out of nuclear power. Germany has been sued twice by the Swedish Vattenfall company. One of these cases was related to the phase-out of nuclear power plants. The company asked for €1.4 billion. The arbitration on this case was done in the US. As the Deputy will see, the tribunal was not in the EU. The other German case, involving Vattenfall again, related to coal-powered plants and they asked for €4.3 billion. This case relates to the pollution of a river next to Hamburg, if I remember correctly, and to the impact of using coal-powered plants.

The last case I will mention in Germany, which is a new one, relates to the changes in subsidies for wind-powered plants. One can see what happened in Spain and then in Italy because of the Spanish and Italian cases. All of the Spanish cases are related to changes in subsidies in renewables. In the Italian cases, there is one that is related to the ending of the licence for exploring fossil fuels in the sea around Italy with a British company.

In the estimate I provided, I did not include at that time the phase-out of subsidies because it was not actually on the table. If one, however, includes the phase-out of fossil fuel subsidies as called for by COP26, this figure will increase to a much higher one.

The Deputy concluded by asking if it is possible to make the ECT compatible with the Paris Agreement. I do not think that it is possible because to amend the treaty, one needs a unanimous vote. That is why I consider it a waste of time to discuss this treaty. The countries, parties and the current constituency of the treaty include countries making income out of fossil fuels. In some countries like Azerbaijan and Uzbekistan, fossil fuels account for more than 10% of GDP. If more than 10% of your country's GDP came from fossil fuels, would you phase out fossil fuel investment protection? The answer is obviously "No". If you have the right to vote to phase out fossil fuel protection, would you vote to phase out fossil fuel protection? The answer again is obviously "No". I do not think the current constituency of the ECT allows it to become compatible with the Paris Agreement. In any event, the EU proposal is not compatible with the Paris Agreement because it is about not protecting new fossil fuel investment but keeping the protection of the existing investment which is not compatible with the Paris Agreement. The International Energy Agency report, Net Zero by 2050, says that by 2025 we should stop investment in fossil fuels. One can see, therefore, that it is not compatible.

What is the solution then? The ideal solution from the climate and justice perspective for areas of the south would be that all contracting parties come together to end the ECT. They could sincerely do this, but it is not on the negotiation table because of the differences in the implementation of the Paris Agreement between different countries and the position of Japan, which is very bad from a climate perspective because its position is very negative and conservative.

The only hope is that the Europeans, the EU countries, withdraw collectively. Why do we need a collective withdrawal? If we have a collective withdrawal, we could decide between ourselves to end the sunset clause between ourselves. By doing this, we would end the protec-

tion of more than 60% of the foreign investments in the EU. This would be one outcome of the collective withdrawal. The other outcome is that if we withdraw collectively, there will be no one to finance the expansion of the ECT to the global south because this expansion is financed with our money.

Acting Chairman (Deputy Alan Farrell): I thank Dr. Saheb very much. Does Dr. de Boeck wish to respond to the questions?

Dr. Michael de Boeck: Yes, I would like to do so. I agree with Dr. Saheb. I would like to add one nuance, which is that if we all collectively decide to withdraw from the ECT, it does not seem self-evident to me that we get to decide between ourselves to disapply the so-called sunset or survival clauses. The applicable principle would be Article 41 of the Vienna Convention on the Law of Treaties which allows an *inter se* modification of certain commitments in an international treaty between certain of the parties only. That is, however, subject to certain limitations which are not, I believe, met in this case. For instance, it has to be allowed by the treaty that is being modified, which is not the case with the ECT, if I am not mistaken. This modification may also not concern an essential provision. The argument on the part of any investor bringing a claim would be that the ISDS is the absolute and most critical protection contained within the ECT. I have a mind to think an investment tribunal would probably agree with that. I am not so sure, therefore, that if we decide to simply upend this process and leave and then agree between ourselves to disapply the survival clauses, investment tribunals would see it the same way. That said, the result would be that we would have to apply the protections for another 20 years. If we were to leave unilaterally, the result would probably be the same, given that we may not have an agreement between all the parties.

The other part of the question that we have not touched upon was what should be the position of the Irish Government. The Energy Charter Treaty is a mixed agreement. It is being negotiated by the European Commission, but it would be concluded by the European Union and the member states themselves. There is a certain division of competences that the Court of Justice of the European Union already clarified in several cases, most notably Opinion 2/15. The main takeaway from that is that since the Lisbon Treaty, under Article 207 of the Treaty on the Functioning of the European Union, foreign direct investment, FDI, is an exclusive competence of the European Union. By contrast, because the article explicitly refers to foreign direct investments, it does not include foreign indirect investments. However, as the court reasoned, that belongs to a shared competence of the EU.

The term "shared competences" does not actually mean that the EU and the member states must act at the same time, as the members probably very well know. It means that the EU might also act alone. It is not entirely clear to what extent a member state, as such, has bargaining power here. The control would probably have to be indirect through the trade policy committee in the EU Council, I suspect and, of course, at the moment ratification, because Ireland will need to ratify it. A similar thing happened with the Canadian Comprehensive Economic and Trade Agreement, CETA, which was also a mixed agreement. It was ultimately not ratified by Cyprus, if I am not mistaken, because there was insufficient protection of halloumi cheese. That is of course a legitimate concern for Cyprus, but the consequence of non-ratification by one of the member states is that the treaty does not enter into force for any of the EU member states.

There are certain authors who consider that member states have an obligation to ratify a mixed agreement once it has been concluded by the European Union, but that is not a certainty. It has not been said so far by the Court of Justice of the European Union. Therefore, I would think that if the Energy Charter Treaty moves forward in a form that is no improvement, then

the Irish Parliament could in this case exert some control by refusing to ratify that agreement. Of course, whether that is useful in this case is a bit of a question, since the former agreement would then remain in force. It does not seem to be an attractive option.

Dr. Yamina Saheb: May I add one further point?

Acting Chairman (Deputy Alan Farrell): Yes.

Dr. Yamina Saheb: In theory, what was known in 2019 before the negotiations on modernisation started was that regarding the amended treaty the EU, representing member states, had a mandate from the European Council to negotiate on behalf of the member states. I guess there is an Irish representative in these negotiations, as representatives from all the member states attend. Those representatives attend meetings, but it is the EU that talks on behalf of all 27 member states. Then, if an agreement is reached, what will happen is that the treaty should be ratified at the same time by the European Parliament and by the national parliaments. I do not see, for example, how some of the European national parliaments could ratify a treaty that keeps protections for fossil fuels. What this means in practice is that if our parliaments do not ratify the amended treaty, then it will be necessary to have two thirds of the contracting parties ratify the amended treaty to allow it to be implemented. It is very difficult to reach this two thirds proportion of governments.

What is happening now in the context of modernisation is that an attempt is being made to find a way to avoid an amendment being made to the treaty. I do not know if it is possible for the legal experts to find a way to avoid an amendment, but if it proved possible then it would not be necessary for the national parliaments to ratify the agreement. This is what has happened in the past. Changes were made in the transit articles of the treaty and that did not need an amendment to be made by national parliaments. That is all I have to say by way of clarification. Something to keep in mind for the Irish Parliament is how it would explain to citizens that it is ratifying a treaty that continues to provide protections for fossil fuels. What it means overall is that in the meantime the current treaty remains as it is.

Acting Chairman (Deputy Alan Farrell): I thank Dr. Saheb. I think all the Members of these Houses would recognise the context of EU treaties and Ireland as an interesting debate, one in which we have had plenty of practice in recent years. It is something that we would have to explore. I think it would be a decision made in a referendum of the people rather than one taken by Parliament, but we would have to discuss the depth of this treaty. I have no other speakers volunteering, so we will start again. I call Senator Boylan, whose hand was the first up.

Senator Lynn Boylan: I will definitely take the opportunity of getting a second question in. One of the questions on Ireland's position concerns not what the country's position would be on the modernisation of the treaty, but this question of whether Ireland's position should now follow France and Spain in saying that the EU should walk away. That is the more important question. Anyone who has followed these long-winded negotiations in any detail will have seen that the reports are saying that no headway is being made at all. It would be more interesting to hear about what position Ireland should take in that regard. Should it join France and Spain and adopt their stance? I think more countries are coming around to that position.

The other aspect of interest to me, and I have read the paper written by Dr. Saheb on the modernisation of the Energy Charter Treaty, concerns the impact of third-party funding and investor-state dispute settlement, ISDS, and how this is facilitating more ISDS cases being

taken. Regarding the right to regulate, and a fight about CETA is under way in our national parliament now but I will not go into detail on that now, often when we read about the tribunals in this regard, in those papers which are available to the public, it is the case that they will recognise a state's right to regulate. The issue, however, is how much it costs a state to regulate in that context. Even if the EU does get its amendments in concerning the right to regulate and they are accepted, the key question then will be the cost to the citizens. If we are going to be undertaking the transition to a decarbonised future by staying in the Energy Charter Treaty, are we just making the transition much more expensive for ordinary people, when it is already going to be very expensive?

Acting Chairman (Deputy Alan Farrell): Who wishes to go first in answering? I call Dr. Saheb.

Dr. Yamina Saheb: I did not want to push for Ireland to join the French position, because I am a French citizen, but I am delighted to hear that is being thought about in the Irish Parliament. It is not just France and Spain. France was the first country to send a letter that was made public, and it was followed by Spain. Poland, however, is also pushing for the withdrawal, as is Greece. One of the Baltic states has also adopted this position, as has one of the Nordic states. We already have at least six countries and, to my knowledge, the French Government is trying to build, with the Spanish Government, a coalition of countries that may join the idea of a collective withdrawal. Given the climate emergency situation and given we cannot amend the treaty in such a way that we remove the protection of fossil fuels, I think collective withdrawal is an option we should look at more carefully. The French letter asked the Commission to assess the implications of collective withdrawal. To my knowledge, this kind of assessment has not been published by the European Commission, so if Ireland could join in again asking the Commission to do this assessment, that would be good.

Are we going to make the transition more costly if we stay in the treaty? This is obvious. We will have more cases. In 2018, I first said we will have cases like the one in the Netherlands, or the German case where they signed an agreement to avoid the ISDS case and that agreement was for several billion euro of taxpayers' money. At that time, people could not understand that it was going to happen because only a few people were able to understand the IPCC report and the implications of the 1.5°C target for our countries. There is no doubt that by staying in the treaty, the cost will be extremely high for us. Even when countries win - Spain, for example, won a few cases - they have to pay for the legal costs, and it is quite costly. This money should go to the transition. It should go to support energy-poor people in our countries. I do not see, as a citizen, why our taxpayers should pay the polluters to stop polluting. Basically, it is as if someone who commits crime in our country is paid to stop committing crime. This is what we are doing rather than doing anything against the crime. Actually, climate change is crime. It is not yet recognised as ecocide but that will come in the future. People are already dying because of climate change, and we already have some cases in the EU after what happened this summer, and we expect to have more cases. We will see following the IPCC report, especially report No. 2 this coming February, that the climate risks are extremely high.

Dr. Michael de Boeck: That was also the final part of my opening statement. It is common sense that the ISDS will probably raise the cost of the enormous transition we have ahead of us. If one was in the political opportunity where one considers there is no headway being made on the Energy Charter Treaty, and if one was building coalitions, then, yes, that is certainly an option. In English, we would say "bite the bullet".

I would like to offer one additional rationale, one that we have not touched on yet and one

that is also complicating the discussion a little bit, and that is the Komstroy case, which we have referenced several times. That is the case of the European Court of Justice where it held that the application of the Energy Charter Treaty as between two EU member states, and so between a member state and an investor in another member state, is not compatible with EU law. We have already said that one of the problems there is that it is not clear whether that conclusion also applies on the international plane and, therefore, it undermines the international tribunal.

Another problem that arises from this, and that will probably continue to exist even in the modernised treaty with an exclusion for the intra-EU and extra-EU dimension, is that one can go to pretty much every big law firm to see what techniques they offer for restructuring investments that are currently within the EU to outside of the EU and, therefore, pick and choose which investment protection treaties they would like to use to protect their investments. This is something that is not very often researched but it is a tremendous problem, and the distinction between the intra-EU and extra-EU scope of investment protection is very unclear.

Deputy Réada Cronin: I am sorry that I missed the start of the meeting but I have been catching up on the opening statements. I am sorry if this question has been asked already.

There seems to be a real disconnect between power and people and between political power and energy power. I wonder what to do. I agree with the point about the investor-state dispute settlement and these courts. What we are looking at is the political and economic weaponisation or leveraging of energy. It is something we now depend on in every facet of our lives. Will the witnesses talk about how we could ameliorate this? The idea that taxpayers would be paying compensation to capitalist industries is profoundly anti-democratic. It seems we are at a precipice so how do we step back from it?

Dr. Yamina Saheb: I am not an expert on ISDS cases but I am an energy policy expert and I am used to playing with energy data. As a citizen, when I discovered the investor-state dispute settlement - it was not related to the energy sector and was something else in France - I got a shock when I understood that we had this parallel justice system in our countries. I searched a little as to how we ended up with this system. It seems that when we decolonised our formal colonies, we created this system to continue colonialism in another way. For me, ISDS is a continuation of colonialism that is today applied to us in Europe, as citizens. It is something we cannot explain to citizens. When I try to explain to my students, they are shocked. My other colleague is an expert and a lawyer so he knows better.

Dr. Michael de Boeck: I am not sure if anyone knows better on the answer to that question. The origin of international investment law is a little bit shrouded in alternative argumentations. The mainstream argumentation that is being given for the rise of international investment law is obviously the premise that offering investor-state dispute resolution clauses, and so dispute resolution independent from the national courts of the host member state where the investment is made, would offer a sense of security for an investor to go ahead and go abroad to regions where, at the time, there was not a strongly developed justice system in place. In that sense, offering these investor dispute resolution provisions also incentivised the flow of direct investment capital into a region that could really use that capital to start building its economy and building its know-how. The effectiveness of that premise is disputed and there are a lot of studies out there going both ways. There are a lot of studies that say there is absolutely no link between offering ISDS and increased foreign direct investment, and *vice versa*. It is a very debated premise.

An alternative argumentation that has been made by Lauge Poulsen, that I thought very

good, is that it is a form of bounded rationality in the sense that everyone was doing this. The World Bank started advancing these collateral investment treaties. They were perceived as being good for business, good for visibility and everyone hopped on the bandwagon, especially all of the least developed nations, to show themselves as liberalising their economy and welcoming foreign investment, etc. That is the origin. I do not know whether that is a sinister or deliberate attempt to resume colonisation in an economic way. I am not really a party to that interpretation of history because I am naive I still believe that people are not inherently sinister. There is, however, obviously some rationale for saying if we are dealing with a region where there is a lack of established justice, there are benefits to appointing a third party to make a determination. The question is whether that still applies to the European Union. I think the answer is quite obviously that it does not, but of course we are not without fault. We always have to be a little bit careful about that. Investment protection within the European Union is not yet really comprehensive and there are areas where we can improve.

Acting Chairman (Deputy Alan Farrell): I thank Dr. de Boeck.

Deputy Réada Cronin: May I ask one other question,?

Acting Chairman (Deputy Alan Farrell): Yes.

Deputy Réada Cronin: The committee heard recently at another meeting that the treaty might be a good idea because it will protect investors in renewable energy. What does Dr. de Boeck think of that as a defence of the treaty?

Dr. Michael de Boeck: That is true. In terms of scope, the Energy Charter Treaty makes no distinction between sectors or origins. It is about anything related to energy and all phases of the production chain are covered by the Energy Charter Treaty. It is true that a start-up in renewable energy making an investment would also be covered by the treaty.

Deputy Réada Cronin: Does Dr. de Boeck think that it could be modified so that we would be protecting renewable energy as opposed to fossil fuels?

Dr. Michael de Boeck: As I understand it, but I cannot be sure, there was a proposal for a carve-out of fossil fuels in this modernisation process.

Dr. Yamina Saheb: No, the proposal from the EU is to not protect new investment in fossil fuels but to continue the protection of renewables, which are currently protected by the ECT, because the ECT protects all investment in energy supply, without any distinction. The proposal from the Commission was to stop the protection of new investment in fossil fuels by the time the treaty will be amended, which we do not know, because one thing we need to keep in mind is that there is no end date for the modernisation process. This is also something that Ireland and other countries should ask for. There is no end date. The EU proposed to keep the protection of investment in fossil fuels that are already protected, and in the case of gas, until 2040, if we could convert them to hydrogen. This proposal was rejected by the contracting parties and what they are discussing now is the differentiated phase-out of the protection of fossil fuels. There is no agreement yet about what that will mean and how it is going to be. One of the proposals that was discussed last month was that in the EU we will not protect new investment in fossil fuels but it will continue for the existing ones. Existing EU fossil fuel companies such as Total or BP will still be protected in countries where there is no phase-out of the protection of fossil fuels. That was one of the options on the table, but there was no agreement on it.

The main points we need to keep in mind is that during this decade, if we look at the Inter-

national Energy Agency report, it is saying that by 2050 we should not invest in fossil fuels any more, so it is during this decade, from a climate perspective, that we need to phase out all fossil fuels. What it means for us, those who are parties to the ECT, is that when we will have to phase out anyway, we will be sued and taxpayers' money will be used for the compensation of fossil fuel companies. This is what is going to happen. It has already started, but it is going to accelerate. EU countries will be the first victims because we are the first ones to implement and the only one in the ECT constituency with the climate targets - our countries plus Switzerland and Norway.

Acting Chairman (Deputy Alan Farrell): I thank both witnesses for their significant contributions.

Senator Alice-Mary Higgins: Acting Chair-----

Acting Chairman (Deputy Alan Farrell): Senator Higgins may go ahead with her question. She was hidden from me and I could not see her.

Senator Alice-Mary Higgins: I again apologise for the conflict I had. I have two or three questions for the witnesses. They can feel free to indicate if they have been answered at length in one of the sections I missed when I was disconnected. I am interested in what Dr. Saheb says about the compensation piece because this was a very strong narrative coming from COP 26, whereby there is a very hard line being held in terms of compensation for loss and damage to the global south, but many of the major extractive and fossil fuel corporations seemed to anticipate the pay-outs they would get, either as subsidies for their new branches if they get into renewable energy, or as compensation for the price of states' exiting.

I will not go deeper into the philosophy of it, but I heard an interesting analogy with the exit from slavery. We had this phenomenon where it was described as a major system change in the economy based on an extractive exploitative model on which a lot of economic activity is based and transitioning away from it involved massive compensation to the slave owners even up until the 1990s. That became a huge economic drain on states as some of them are still paying for it. It certainly was the case up to the 1990s in the UK. There was huge resistance to reparation for slavery. I use this not because of the historically interesting fact but because it is an example we need to learn from. We are making a massive system change. This is not the normal run of course of business. I would like the views of the witnesses on when we are making a system change such as that, what is the extent to which baggage such as these treaties affect it? I want to focus on developing countries in particular. If Europe were to have a co-ordinated exit from the Energy Charter Treaty, which is being advocated for strongly by many, what would be the potential implications for developing countries? We know at the moment there is talk of a co-ordinated exit. There is a discussion among countries in the EU of us holding environmental standards higher, but it is still a fact that European companies may take actions against governments in developing countries.

Acting Chairman (Deputy Alan Farrell): Does Senator Higgins have further questions? We are a bit over time.

Senator Alice-Mary Higgins: It is important to refer to the CETA deal, which relates to that. As I understand it, the protections in terms of CETA are quite strong on certain forms of subsidies, but in terms of regulation, companies still do have the right to seek compensation. I do not know if the witnesses have already spoken on this. I refer to the role of EU courts in potentially enforcing rulings from an arbitration court on other countries or, *vice versa*, the roles

that other national courts may now have to play in enforcing ECT rulings on Europe.

Acting Chairman (Deputy Alan Farrell): I thank the Senator. We are not here to discuss CETA but I understand the idea and comparison.

Senator Alice-Mary Higgins: It is the analogy in terms of courts.

Acting Chairman (Deputy Alan Farrell): In fairness to our witnesses, many of those questions have already been asked.

Senator Alice-Mary Higgins: They are to both witnesses.

Acting Chairman (Deputy Alan Farrell): Dr. Saheb and Dr. de Boeck may wish to answer Senator Higgins's questions.

Dr. Yamina Saheb: I very much like the analogy with the end of slavery because it is the end of the slavery to fossil fuels. We are fossil fuel slaves. That is why I like this analogy very much. I am delighted to hear that it was discussed at COP26 because it is exactly-----

Senator Alice-Mary Higgins: On the margins.

Dr. Yamina Saheb: Okay. This is exactly what we should expect to happen if we do not take action to end that. The cost will be extremely high.

Regarding the court that enforces the ECT cases, it depends on the court in which it is implemented. It could, therefore, happen that it is an EU court or a non-EU court. Perhaps my colleague from the College of Europe knows more and can answer this question in more detail.

Dr. Michael de Boeck: If the Senator permits, I will limit myself to the second part of the question. I am not very comfortable with or knowledgeable about the analogy to the end of slavery.

I will comment on the enforcement and changes on the regulatory margin under CETA. As we know, CETA is one of the new generation investment treaties that has been concluded by the EU. One of the changes that was implemented is that there is a much more qualified regulatory margin. There is a very explicit reference to the right for a state to regulate. That this was extremely important was also recognised by the European Court of Justice, ECJ, in its opinion on the compatibility of the CETA agreement with EU treaties, which was Opinion 1/17. This opinion also stated that if this regulatory margin was lacking, the agreement would not be compatible with EU law because it is an absolute requirement of a democratic - of course, the EU cannot say sovereign - rule of law nation.

Senator Alice-Mary Higgins: I am conscious of the interpretation of the arbitration panels with regard to the previous Achmea ruling and potentially this ECJ ruling. I am familiar with the ECJ ruling but I wanted to get the intersection with the arbitration panels.

Dr. Michael de Boeck: The intersection is actually this. One of the main new aspects is that there is a joint committee placed in the framework within CETA itself, which means that if there is a certain tendency to interpret a certain provision in one way or another that the contracting parties do not agree with or find really uncomfortable, they can discuss that provision in a joint committee, which can issue a binding interpretation for future panels. There is some way to steer the development of the interpretation of the investment treaty through that joint committee.

As for the enforcement of the awards, once the arbitral tribunal has rendered an award then we actually need to look at the legal framework governing the award. That can differ along the institutional rules that were used to conduct the proceedings. One can either use the International Centre for Settlement of Investment Disputes, ICSID, investment arbitration tribunal and its rules, a non-central *ad hoc* arrangement or any of the existing institutional arbitral institutions, of which there are quite a few. Those are the institutional rules. The International Court of Arbitration and the Stockholm Chamber of Commerce are very well-known examples. What does that mean? It means that in the end, we have an award that is recognised in an international court in accordance with the national arbitration law, unless it is an ICSID arbitration award. Then there is a slightly different procedure. Those awards that are not ICSID awards will usually fall under the New York Convention, which allows a member state or forum state to review the award for compatibility with public policy or public order. That is, however, only a very limited defence and one that is rarely successful.

On the other hand, if it concerns an ICSID award then there is no review at all for the national court that has to recognise and enforce, which is the terminology lawyers would use in that case. Article 54 of the ICSID Convention is very clear. There is no review. As to what happens when one takes the award, in the Belgian procedure, it goes to the foreign minister, who gives it to the clerk of the court of appeal, who rubber stamps it and that is it. That is an enforceable title.

Senator Alice-Mary Higgins: What I really wanted to go to is the question of enforcement.

Acting Chairman (Deputy Alan Farrell): Senator Higgins might be brief in her follow-up.

Senator Alice-Mary Higgins: What I really I wanted to go to is not the mechanisms *per se* but the fact that an enforceable order can be enforced in a local court in other places. We have seen cases of this. As Dr. de Boeck said, it is interesting that it is only in the case of New York state that public policy has been used as a defence and again, this is the defence by states or by public bodies that are being sued by corporations. Under the CETA text, for example, it says that they may consider public law. I suppose the concern, and perhaps Dr. de Boeck can confirm this, is that the ECJ does not have pre-eminence from the perspective of the ECT. It is just something that it may consider and bear in mind but the ECJ ruling does not have a binding case. As I understand, in the case of the Achmea ruling, which was a kind of parallel, again, it was determined that intra-EU cases were not compatible with EU law. I believe two or three of the different arbitration panels have chosen to ignore that ruling and have chosen to meet. That is really one piece. Could either of the witnesses confirm that?

Could either witness comment on the intersection between Europe's relationship with the ECT and the impact on other smaller countries which, in some cases, may have individually signed up to it? Leaving aside what we do intra-EU and considering a more intraglobal role, if the EU were to withdraw from the ECT, would that give more scope to governments in developing countries to perhaps exit from or resist rulings?

Acting Chairman (Deputy Alan Farrell): I thank Senator Higgins very much. Would Dr. de Boeck like to respond?

Dr. Michael de Boeck: Let me address the first question. As we said a little earlier in the meeting, the important rulings of the ECJ on Achmea, Komstroy and PL Holdings are all applicable to international investment awards that were rendered in an intra-EU setting. They are very important and relevant to EU law. However, as I set out earlier, it is not binding on

international investment tribunals. As a consequence of the autonomy of EU law and international law, investment arbitration tribunals will very likely continue to ignore the judgment of the Court of Justice regarding the incompatibility of intra-EU investment arbitration simply because it does not bind them.

Senator Alice-Mary Higgins: Would Dr. Saheb like to comment on how Europe approaches the Energy Charter Treaty? From a climate perspective, the treaty is a global issue.

Acting Chairman (Deputy Alan Farrell): I did not quite catch the Senator's question.

Senator Alice-Mary Higgins: I ask Dr. Saheb to comment on what an exit from the Energy Charter Treaty by Europe might look like and the implications for other countries that are parties to the treaty. EU companies still being able to sue would be a potential issue. Would a large-scale exit from the Energy Charter Treaty perhaps lead to either a full renegotiation or-----

Acting Chairman (Deputy Alan Farrell): I thank Senator Higgins. The question was comprehensively covered in prior answers-----

Senator Alice-Mary Higgins: Apologies, I came from another meeting.

Acting Chairman (Deputy Alan Farrell): -----but Dr. Saheb might briefly address it again for the Senator.

Dr. Yamina Saheb: If the EU countries exit, one of the implications is that EU investors will no longer be able to sue from the EU. They will need to find different legal arrangements to sue other countries. Of course, they can always continue to do it from other parts of the world that are party to the ECT. The other direct implication is the fact that the expansion of the ECT to developing countries will most likely end with the end of the EU contributions to the ECT. EU countries' contribution to the ECT secretariat is around 65%. Basically, the expansion of the ECT to developing countries is paid for by our taxes. This is an important point for us as citizens as we need to know that our taxes are no longer used to expand a treaty that protects fossil fuels in countries where they exist. That is me keeping my answer short.

Acting Chairman (Deputy Alan Farrell): That is appreciated. I thank both witnesses for their comprehensive answers to all the members' questions.

The joint committee adjourned at 4.53 p.m. until 12 noon on Tuesday, 30 November 2021.