



Several EU Member States to withdraw from the Energy Charter Treaty despite progress on its modernisation

Within the last two months, several EU Member States - Spain, the Netherlands, France and Poland - have confirmed that they intend to withdraw from the Energy Charter Treaty ("ECT"), despite agreement in principle between Contracting Parties on a modernised treaty having been reached in June 2022. It appears that these decisions to withdraw are based on the view that the ECT is not in line with commitments under the Paris Agreement and that the ECT hinders the fight against climate change. Indeed, it had already been reported in May 2022 that a number of EU Member States were assessing exit scenarios for withdrawing from the ECT (including Germany, the Netherlands, Poland and Spain) but up until now only Italy had actually withdrawn from the treaty. It is now reported that, in addition to the four EU Member States which have publicly confirmed their withdrawal, a number of other EU Member States are also considering leaving the ECT, reportedly including Germany and Belgium..

BACKGROUND

The ECT is a multilateral economic agreement, in force since April 1998, which aims, inter alia, to protect investments in the energy sector. There are currently fifty-three Signatories and Contracting Parties to the ECT, including the European Union and all of its Member States (except Italy which withdrew from the treaty in 2016, see below). A major feature of the ECT is its Investor-state dispute settlement ("ISDS") mechanism. A considerable share (17%) of all investor-state disputes from fossil fuel investors [have been brought under the ECT](#). In case of a breach of a States' obligations to foreign investors under the treaty, Article 26(3)(a) of the ECT states that, "each Contracting Party hereby gives its unconditional consent to the submission of a dispute [regarding alleged breach of an obligation by a Contracting Party to an Investor] to international arbitration or conciliation".

Following negotiations to reform and update (or "modernise") the ECT, which started in 2020, the Contracting Parties announced in June 2022 that they had reached an agreement in principle to revise the ECT. These revisions will reportedly allow Contracting Parties to exclude new fossil fuel related investments from investment protection from mid-August 2023, and to phase out protection for already existing investments within 10 years from the entry into force of the relevant provisions.

Withdrawal from the ECT

Article 47 of the ECT governs the rules for withdrawal from the ECT, allowing a party to withdraw at least five years from the date at which the treaty entered into force for that party. Withdrawal will only take effect one year after the date of notification of withdrawal (or on a later date, if specified), which in the case of Spain and the Netherlands would not be before October 2023..

However, notwithstanding the right of withdrawal under Article 47 ECT, the ECT contains a sunset clause, (Article 47(3)), which states that the provisions of the treaty will continue to apply to investments made in the area of a Contracting Party by investors of other Contracting Parties, or in the area of other Contracting Parties, or in the area of other Contracting Parties by investors of that contracting party, for a period of 20 years from the date of withdrawal. It is understood that the sunset clause remains in the revised version of the ECT.

As such, regardless of the most recently announced withdrawals from the ECT by Poland, Spain, the Netherlands and France, under the current text of the treaty these Contracting Parties will still be subject to potential claims from covered investors in their territory for the next 20 years. Withdrawal should also not affect pending cases or the enforcement of the arbitral awards rendered.

It is instructive to note that whilst Italy withdrew from the ECT in 2016, the 20-year sunset clause in the ECT allowed for an ISDS claim to be successfully brought against the country in 2022 to the value of EUR 190 million, in response to a 2015 decision to ban new oil and gas projects within 12 nautical miles of the coast.

Under the strict terms of the ECT, it is not possible for a Contracting Party to waive the sunset clause. However, on 5 October 2022, the European Commission [proposed](#) the adoption of a subsequent agreement between the European Union and its Member States on the interpretation of the ECT including a specific “confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU arbitration proceedings, and that the sunset clause does not apply intra-EU”. The basis for this understanding is that the EU has consistently taken the view that the ECT does not apply to disputes between a Member State and an investor of another Member State in respect of investments made in the former, as confirmed by the Court of Justice of the European Union (“CJEU”) ([Case C-741/19, Komstroy](#)).

The European Commission seems to believe that an unambiguous subsequent agreement on the ECT’s interpretation, will prevent a majority of ISDS claims against Member States and thereby significantly limit the majority of fossil fuel investment claims in the European Union. While the potential effect of this subsequent agreement on the interpretation of the ECT can be debated, it is possible that, if embraced, intra-EU investors may face difficulties attempting to enforce an arbitral award in an EU Member State.

Effect on the Modernisation Process

The Contracting Parties of the ECT are scheduled to meet on 22 November 2022 to vote on the revised, modernised version of the treaty. Any amendment must be accepted by consensus. Despite withdrawing from the ECT, the Netherlands has already confirmed that it will not vote down the revisions and it is possible that other Member States will follow suit in allowing amendment to the treaty. However, what remains to be seen over the coming month is whether further Contracting Parties decide to withdraw from the ECT.

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