



## Is the sun setting on the Energy Charter Treaty? - Alexander Uff and Claire Stockford

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On 22 February 2024 the UK Government announced its [intention to withdraw](#) from the Energy Charter Treaty (ECT).

In doing so, the UK joins a growing number of EU Member States which have either withdrawn (Italy, whose withdrawal became effective on 1 January 2016, France, Germany and Poland, whose withdrawals all became effective in December 2023, and Luxembourg, whose withdrawal is due to take effect in June 2024) or announced their intention to do so (The Netherlands, Slovenia, Spain, Denmark, Ireland and Portugal).

The withdrawals follow a growing tide of criticism of the ECT, spurred by the large number of claims against state parties that it has generated, the perception that it could hamper decarbonization efforts, and the stalled attempts to reform the ECT.

Withdrawal however fails to provide a solution to the criticisms levelled against the ECT, because investments made before the withdrawal becomes effective will remain protected for 20 years after a state's withdrawal as a result of the ECT's "sunset clause", and can be expected to continue to generate claims over this period.

### Dissatisfaction with the ECT and Failure of Proposed Reforms

The ECT is a multilateral treaty designed to promote international development, investment and cooperation in the energy sector, including by providing for the protection of foreign investments in the energy sector in a manner similar to bilateral investment treaties (BITs). It was signed in 1994 (and entered into force on 16 April 1998) against the backdrop of the dissolution of the USSR, and aimed in particular to facilitate investment from developed economies into energy production in Eastern Europe. The ECT was, thus, a product of a particular time and circumstances. While it is not possible to quantify the ECT's impact in stimulating investment, its one-time popularity is reflected in the significant number of signatories (more than fifty at its peak) and, while concentrated particularly in Europe, the CIS and central Asia, their spread crosses the globe, from Afghanistan to Yemen.

In more recent times the ECT has faced mounting opposition and has come to be perceived in some quarters as outdated.

First, the European Commission has revised its view of the protections offered by investment treaties. After encouraging candidate Member States to conclude BITs as part of their accession process, and the EU itself becoming a party to the ECT, the Commission changed its view, and considers that investment treaties are incompatible with EU law. This position is now supported by CJEU authority which has considered investor-state dispute resolution via arbitration to be incompatible with EU law, as articulated in its judgments in *Achmea* (Case C-284/16, judgment of 6 March 2018) and *Komstroy* (Case C-741/19, judgment of 2 September 2021).

At a political level, this position appears to be motivated by the fact that capital exporting Member States including Spain, Germany, Italy and The Netherlands have faced significant investment treaty claims, many of which have been brought under the ECT. Spain has faced more than 50 such claims concerning changes to its renewable energy subsidies with several other states facing similar claims; Germany has faced a substantial claim relating to its decision to accelerate the phase out of nuclear power; and The Netherlands has faced claims concerning its decarbonization initiatives.

Second, related to recent investment treaty claims against Member States, it is vociferously argued that treaties offering protections to foreign investments, and the ECT especially, inhibit states' transition to greener forms of energy, through their "regulatory chilling" effect.

Trying to address these concerns, the ECT parties engaged in lengthy efforts beginning in 2017 to modernise the ECT and, in particular, its investment protection provisions. These efforts included broadening the business activities covered by the treaty

to include the capture, utilisation and storage of carbon dioxide in order to decarbonise energy systems, extending protections to energy sources such as hydrogen and biomass, the curtailment of certain investment protection standards to promote the right to regulate, and the possibility for states to exclude fossil fuels from protection under the ECT.

Although a proposal to modernise the treaty was ultimately agreed in June 2022, it then failed to secure the support of many of the ECT's contracting states and the reform process has since stalled, leading the European Commission to call for a "coordinated withdrawal" from the ECT.

### Implications of Withdrawal from the ECT

What is occurring instead of a [coordinated withdrawal](#) is a series of unilateral, piecemeal withdrawals by individual states, as noted at the start of this article.

Withdrawal from the ECT is governed by Article 47. Articles 47(1) and (2) provide that a contracting party may give written notification of its withdrawal any time after five years from the ECT's entry into force and that withdrawal takes effect one year after the Depositary's receipt of the written notification.

Article 47(3) provides that, after a withdrawal, the ECT's provisions continue to apply to investments made by investors of other contracting parties in the area of the withdrawing party, and to investors of the withdrawing party in the area of other contracting parties as of the date of the withdrawal "*for a period of 20 years from such date*".

Article 47(3) is known as a "sunset clause". These clauses are routinely included in BITs and protect a legitimate interest of investors who have made investments in the expectation of protection under a treaty. Sunset clauses provide assurance to investors that these protections will not be abruptly terminated. Sunset clauses typically range from 5 to 20 years, and the 20 year duration of the ECT sunset clause is a reflection of the long term nature of many investments in the energy sector.

As part of its initiative to dismantle the architecture of intra-EU investment protection treaties, the Commission advised Member States which were parties to bilateral investment treaties first to amend their BITs to remove the sunset clause, before terminating them. Following the abandonment of efforts to reform the ECT, the Commission also proposed in July 2023 a [coordinated withdrawal](#) of EU Member States and the EU itself from the ECT, hoping in this way to neutralize the effects of the sunset clause (though it is open to question whether this would have the desired effect). With a substantial number of states having now withdrawn from the ECT in a piecemeal fashion, this possibility now appears foreclosed.

According to the ECT's terms, any covered investment that was made before a state's withdrawal takes effect (i.e., within a year of the Depositary's receipt of the notification of withdrawal) will remain entitled to benefit from the provisions of the ECT, including the investment protection and dispute resolution provisions, for a period of 20 years.

The irony is, therefore, that piecemeal withdrawal by the UK and other contracting states from the ECT will in fact ensure that the ECT remains applicable for decades, with older hydrocarbon energy assets continuing to receive protection while new, predominantly green energy investments made after the withdrawal takes effect would not be able to benefit from the same protections.

In the case of EU Member State withdrawals, investors taking advantage of the sunset provision would still need to overcome objections to intra-EU investment arbitration based on the *Komstroy* judgment. This has not impeded ICSID arbitral tribunals from accepting jurisdiction to arbitrate claims under the ECT to date: while it seems clear that such awards would not be enforceable within the EU, the major battleground is now over their enforceability in major jurisdictions where respondent states have assets outside the EU, with enforcement proceedings underway in the UK (the most recent being *Infrastructure Services v Kingdom of Spain* [2023] EWHC 1226 (Comm)), as well as the US and Australia.

As concerns the UK's withdrawal, following the UK's departure from the EU no intra-EU objection arises and as England already appears a favourable jurisdiction for enforcement of ECT awards, the "crystallising" effect that withdrawal from the ECT will have is likely to ensure that such claims continue to be made for years to come.



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*"Superlative, practical, commercially sensible, to the point and strong on the law, he provides hard-hitting analysis and compelling presentation." (Legal 500, 2022)*

Alexander Uff has over two decades of experience as a specialist in international commercial and investment treaty arbitration. Originally qualified as a barrister, Alexander was a partner in an elite global arbitration practice at Shearman & Sterling LLP for several years before joining Quadrant Chambers in 2021.

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*"Claire Stockford puts in the hours to get the job done and leaves no stone unturned." (Legal 500 2023)*

Claire Stockford specialises in arbitration, both international commercial arbitration and investor state disputes. Claire was called to the Bar of England and Wales in 1999. Before joining Quadrant, Claire spent more than 20 years practising from the London offices of international and UK law firms, for the last seven of those years as a partner.

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