

EU and Euratom to Withdraw From the Energy Charter Treaty: The End of an Era?

The EU and Euratom will withdraw from the Energy Charter Treaty with Member States permitted to support modernisation in the future.

The European Council has adopted four decisions, confirming that the EU and Euratom will leave the Energy Charter Treaty (ECT), while permitting any EU Member States still remaining as Contracting Parties to vote in favour of modernisation at the next Energy Charter Conference.

While this development is by no means a surprise, it may have significant implications for investors depending on the time and place at which an investment was made.

After years of debate around the reform of the ECT, the European Commission formally recommended a coordinated EU withdrawal from the ECT in July 2023, citing concerns about the ECT's compatibility with the EU's energy transition goals, and the claims brought by investors challenging government climate measures. During this period, an increasing number of the ECT's Contracting Parties decided to withdraw from the ECT, including Germany, France, and the UK.

The decisions to withdraw entered into force on 30 May 2024 and withdrawal will take effect one year after the receipt of the notification. For EU investors with existing investments, their ECT protections will continue to benefit from ECT protection for 20 years from 30 May 2024, while those with new energy investments made after 30 May 2025 will no longer benefit from ECT protections.

Background

The ECT is a multilateral international agreement that entered into force in 1998. Introduced to promote international investment in the energy sector by providing certain protections for investors in fossil fuels, it granted those investors certain protections, including the right to commence investor-state dispute settlement proceedings against a State for claimed breaches of the ECT.

In the wake of the Paris Agreement, proposals were made to modernise the text of the ECT to bring it in line with the principles of the new agreement and States' climate change goals. This modernisation process, which began in 2018, was also aimed at refreshing the investment protection standards in the ECT. This was largely in response to a series of high-profile, high-value arbitrations since 2010, in which Contracting Parties to the ECT had been subject to significant damages awards, valued at up to €10 billion.

Following many years of debate, a modernised text was finally agreed in principle in June 2022, but adoption of the text was postponed due to a continued lack of consensus. During this period, a number of Contracting Parties announced their intention to withdraw from the ECT, in what has been described as a mass exodus. This decision by the EU and Euratom is therefore only the latest in a series of declarations to withdraw by EU Member (and former member) States, including Germany, France, Spain, the Netherlands, and the UK.

States that have not yet withdrawn from the ECT are set to vote on the updated agreement at the upcoming Energy Charter Conference and, as the EU decisions issued on 30 May 2024 emphasised, any remaining EU Member States are entitled to vote on the modernised agreement at that time. There are several Member States that have expressed their support of the new text and intend to remain Contracting Parties if modernisation goes ahead.

Consequences of Withdrawal for Energy Investors in the EU

The implications on investors of the withdrawal of the EU and Euratom will primarily depend on the time and place in which the investment was made:

- Qualifying investors with **new** energy investments made in any EU Member State will not benefit from ECT protection one year from the date of formal notification of withdrawal (i.e., 30 May 2025).
- Qualifying investors with **existing** investments made in any EU Member State (i.e., those in existence on 30 May 2024) should continue to benefit from ECT protection for 20 years from the date of withdrawal, by virtue of the sunset clause at Article 47 of the ECT.

In a previous Council decision, the European Council had suggested that it was negotiating an *inter se* agreement with EU Member States, to clarify that the ECT, including its sunset clause, did not apply within the EU and between its Member States. In other words, under the terms of that agreement, an investor from one EU Member State would not benefit from ECT protections for their investment in another EU Member State. This *inter se* agreement, if agreed, would be treated as a subsequent agreement between the parties regarding the interpretation of the ECT (under Article 31(3)(a) of the Vienna Convention on the Law of Treaties) and may create obstacles for EU investors seeking to pursue claims against the EU or its Member States.

Latham's International Arbitration team will continue to monitor these developments.

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