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Poland to Withdraw from the ECT: Who Does It Benefit?

Wojciech Sadowski (Queritius) · Tuesday, September 27th, 2022

Poland surprised the world when on 25 August 2022 the Government submitted to the Polish Parliament a [draft law](#) authorizing the President of Poland to terminate the Energy Charter Treaty (ECT) and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects. The idea of Poland terminating the ECT had not been floated in the media nor was it on Poland's political parties' agenda before the step was taken. This post presents Poland's stated reasons for withdrawal of the ECT and explains why the actual motives behind this decision remain unclear.

Draft Law

The draft law and the termination instrument attached to the Polish Government's decision are simple and succinct. They are limited to a plain vanilla authorization for the President to withdraw from the ECT unilaterally. Attached to them is an interpretative declaration to the ECT, which seeks to reflect Poland's position that, following *Komstroy*, arbitral tribunals lack jurisdiction to hear intra-EU claims under the ECT.

As required by Polish law, the draft act is accompanied by a written statement of motives explaining the need for the new regulation, its basic concepts, anticipated social and economic impact, as well as the assessment of conformity of the proposed act with EU law.

Official Reasons for Poland to Leave the ECT

According to the statement of motives, Poland considers the withdrawal from the ECT to be necessary, primarily because the treaty is incompatible with EU law. Poland asserts that most ECT arbitral tribunals disrespect jurisdictional limitations resulting from EU law. It also perceives that the chances to accomplish a successful reform of the ECT in the current negotiations process are low. Thus, unilateral withdrawal is presented as the only way to achieve compliance with EU law.

Poland asserts that the negotiations mandate of the European Commission does not entail the amendment to Article 26 ECT. This statement does not address the fact that in accordance with draft [Modernized ECT](#) released in June 2022, the application of Article 26 ECT shall be excluded, as between Member States of the same Regional Economic Integration Organization.

Poland also maintains that while its nationals are reportedly uninterested in the investment protection options under the ECT, Poland has been a respondent state in numerous arbitrations under this treaty, incurring significant defence costs. These costs are now presented as the potential savings which Poland stands to gain upon its withdrawal from the ECT. The document also asserts that the “*accelerating energy transformation*” would be “*impaired*”, if Poland were obliged to pay “*high damages based on vague treaty standards to fossil fuel investors*” for “*alleged breaches of their rights*”. Again, no reference is made to the draft Modernized ECT, which seeks to address the risk of slowing down the climate change by fossil fuel industry investors.

The statement of motives maintains that there is no clear evidence to suggest that Poland remaining as a party to the ECT would attract new investments. It suggests that other legal mechanisms, including proceedings before domestic courts and international human rights bodies, offer comparable standards of protection to individuals and their investments. At the same time, the document underlines the reported vagueness of the ECT provisions and refers to the risk of ‘regulatory chill’ which the ECT is said to produce. Again, no reference is made to the way in which the Modernized ECT purports to address this problem.

Appraisal of Poland’s Stated Reasons for Withdrawing from the ECT

These reasons for withdrawal can, of course, be easily criticized. Poland pretends to be a defender of EU law, when it ostensibly violates EU law on various points, including judicial independence. Poland considers its domestic court system and the international human rights protection system as equivalent to investor-state dispute settlement mechanisms under the ECT, while it has spent the last six years dismantling the independence of its judiciary. Indicatively, the Polish Constitutional Court even issued a politically-loaded judgment stating that Article 6(1) of the European Convention of Human Rights is inconsistent with the Polish Constitution (Case No. K 7/21 of 10 March 2022, in the aftermath of the ECtHR judgments in the case of *Xero Flor v. Poland* (application no. 4907/18), as well as in the case of *Dolińska-Ficek and Ozimek v. Poland* (applications nos. 49868/19 and 57511/19). Poland refers to the risk of from fossil fuel claims when it has promoted the coal and gas sectors in the past several years. None of these officially stated reasons is really convincing.

A closer reading of the statement of motives suggests the importance of [Article 47\(3\) ECT](#) for Polish Government. Poland invokes that provision to assert that once the withdrawal takes effect, no new extra-EU investments shall enjoy protection under the ECT in Poland, during the sunset period. In accordance with [Article 47\(2\) ECT](#), the withdrawal shall take effect after one year after the date of the receipt of the notification by the depositary. The investments that shall exist on the date the withdrawal takes effect, shall be protected for 20 more years. In other words, the intention behind the withdrawal is to exclude protection in Poland of the investments from outside the EU, made in late 2023 or later.

With regard to intra-EU investments, Poland relies on the CJEU judgment in *Komstroy*, to conclude that such investments do not enjoy protection under the ECT even now. Upon withdrawal, Poland intends to make a unilateral declaration under [Article 30\(4\) VCLT](#) asserting that the arbitration clause contained in [Article 26 ECT](#) cannot be applied in intra-EU disputes. This declaration is unlikely to be accepted as binding by the arbitral tribunals. It is consistent, however, with the approach recently taken by Poland to terminate its intra-EU BITs invoking their

incompatibility with EU law.

Question Marks

Two questions immediately spring to mind as a reaction to Poland's proposed withdrawal from the ECT. Why now? And, which investors, if any, are targeted by the intended withdrawal?

The timing of the draft law is peculiar. If perfected, the withdrawal shall enter into force around the time of next parliamentary elections in Poland, which may be lost by the incumbent political party. In such case, any perceived benefits of the withdrawal would fall on the opposition.

On the other hand, the proposed withdrawal comes two months after an agreement in principle was reached in June 2022 on the draft Modernized ECT. As stated in the statement of motives, Poland believes that the final approval is unlikely and that the ratification process would take years. This pessimism can be linked with the recent initiative of several EU Member States, including Spain, Germany, and Belgium, to convince the European Commission about the need to collectively withdraw the EU from the ECT. It appears, however, that the European Commission has so far resisted these demands. Hence, either Poland's skepticism is unwarranted, or more withdrawals may be expected to come.

Assuming that the purpose of the withdrawal is to deprive new investors of their protection, the question arises if any particular investor group is at risk. Although the statement of motives specifically refers to fossil fuel investors, this can be a red herring. In Poland, most of the fossil fuel industry is owned by the state who has increased its market share through recent acquisitions of privately-owned power plants and the construction of new power generation units. The largest claims currently pursued against Poland under the ECT, such as *Prairie Mining (now GreenX Metals)*, are not concerned with climate-related decarbonization, but Claimants instead claim that Poland discriminates against them in comparison to state-owned companies regarding access to hard-coal exploitation concessions.

If new claims arise in the future against Poland in the energy sector, they will rather concern energy sectors other than fossil fuels. The dry reality is that the war in Ukraine and Russia's energy blackmail deployed against Europe have mercilessly revealed deficiencies of Poland's energy strategy. The country desperately needs to limit its overdependence on coal and gas. This means the return to renewable energy and an attempt to build nuclear power plants. In all such energy projects, Poland will have to rely on foreign equipment, know-how, capital, and technology. This can be clearly evidenced in the ongoing licensing processes of offshore wind farms on the Baltic Sea, which are expected to bring additional 10 GW to Poland's generation capacity. In turn, Poland's new nuclear project will be constructed in cooperation with a US company – Bechtel. These and similar, capital-intensive, high-tech investments carry an inherent risk of regulatory disputes against the state.

Conclusion

In summary, the proposed withdrawal from the ECT fits into Poland's broader policy of limiting the access of foreign investors to international arbitration as well as curtailing external arbitral and

judicial scrutiny. The financial impact assessment stops at the relatively low savings in arbitration costs or ECT membership fees, while ignoring the costs of raising capital for accelerated energy modernization under unfavorable market and geopolitical conditions. The timing of this move creates confusion, both in terms of the ongoing ECT renegotiations and the energy deficit created by the war. As a result, it raises concerns that the supposed benefits are purely political, and they increase the level of political risk of doing business in Poland.

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