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Withdrawing from the Energy Charter Treaty: The End is (not) Near

Johannes Tropper (University of Vienna) · Friday, November 4th, 2022

In [November](#) this year, the Energy Charter Conference will meet to adopt amendments to the ECT in accordance with the [agreement in principle on the modernised ECT](#). However, the text of the modernised ECT has received much criticism in recent weeks (see e.g., [here](#)). Despite the fact that the modernised text of the ECT largely reflects the EU proposal for modernisation (see [here](#) and [here](#)), various EU member States have announced their intention to withdraw from the ECT.

This blogpost outlines the procedure for withdrawing from the ECT and the legal risks that EU States will face once the withdrawal of an EU member State or a coordinated withdrawal of all EU member States takes effect.

Withdrawals by EU Member States

Already in 2016 [Italy](#) withdrew from the ECT. In [August 2022](#) the Polish government submitted a law to parliament to initiate withdrawal from the ECT (see analysis [here](#) and [here](#)). Similarly, [Spain](#) and [the Netherlands](#) have announced their intention to withdraw, followed by [France](#) and [Belgium](#). [Germany](#) also considers withdrawal from the ECT and the Slovenian Infrastructure Minister has recently stated that [Slovenia](#) would probably withdraw from the ECT as well. In contrast, the [EU Commission](#) announced that it was not preparing a coordinated withdrawal of EU member States and the EU would still remain party to the ECT.

Applicable Legal Framework for Withdrawing from the ECT

A withdrawal from the ECT is not going to happen overnight. According to [Article 47\(2\) ECT](#), there is a one year notice period before a withdrawal becomes effective ('shall take effect upon the expiry of one year after the date of the receipt of the notification'). After the withdrawal becomes effective, the survival or sunset clause is triggered. According to the provision, the ECT continues to apply to investments made prior to withdrawal for another 20 years ([Article 47\(3\) ECT](#)). Any investment made during the notice period will be protected under the sunset clause.

For instance, after Italy's withdrawal from the ECT, [Rockhopper](#) started proceedings against Italy because of Italy's offshore oil and gas drilling ban which resulted in the rejection of Rockhopper's

application for an exploitation concession. On 31 December 2014 Italy had notified the Depository of its withdrawal and on 1st January 2016 the withdrawal became effective. The proceedings were initiated in 2017, thus under the sunset clause regime of the ECT, which will only end on 1st January 2036.

Breathing life into an Old ECT

Withdrawing from the ECT might have the paradoxical effect of prolonging protection under the old ECT regime. The EU was the driver behind the modernisation of the ECT. Recently announced intentions to withdraw might very well convince States which are critical of the modernisation process (e.g., [Japan](#)) to block the modernised text at the Energy Charter Conference in November and maintain the old version of the ECT.

In addition, under the sunset clause withdrawing States may be subjected to claims with respect to existing investments under the unreformed ECT for another 20 years. Yet, any governmental measures taken by States against fossil fuel investments in order to reduce carbon emissions will have to target already existing fossil fuel investments and thus expose those States to investment claims under the old ECT.

Coordinated Withdrawal as a Catch-all Solution?

Some NGOs and scholars have advocated for a coordinated withdrawal for which an *inter se* agreement is concluded between States withdrawing from the ECT to eliminate the applicability of the sunset clause between withdrawing States (see e.g., [here](#), [here](#)). However, it is highly uncertain whether such an *inter se* modification would be compatible with the ECT (see [here](#)).

The ECT includes a safety net in [Article 16](#) to preserve the highest level of investment protection and access to arbitration in case Contracting Parties conclude an agreement relating to investment protection standards or ISDS. Any *inter se* agreement concluded between EU States to eliminate the sunset clause prior to exiting from the ECT may be considered contrary to this provision and/or ‘incompatible with the effective execution of the object and purpose of the treaty as a whole’ ([Article 41\(1\)\(b\) VCLT](#)). On the basis of [Article 16 ECT](#) and/or [Article 41 VCLT](#) arbitral tribunals have repeatedly rejected the argument that EU membership resulted in an *inter se* modification of the ECT eliminating consent to intra-EU arbitration (see e.g. [Vatenfall v. Germany](#) [2018] paras. 221, 229; [Landesbank v. Spain](#) [2019] para. 186; [Eskosol v. Italy](#) [2019] para. 151; [BayWa v. Spain](#) [2019] para. 276; [Silver Ridge v. Italy](#) [2021] paras. 228-229; [Sevilla Beheer v. Spain](#) [2022], paras. 648-650, 670; see however, [Green Power v. Spain](#) [2022] paras. 468-470 which found that EU law prevails over the ECT including Art 16 ECT). Thus, an *inter se* modification removing the sunset clause prior to withdrawal is fraught with legal uncertainty. It is highly likely that many arbitral tribunals will still uphold jurisdiction given Article 16 ECT and previous case law on *inter se* modifications.

Even if a coordinated withdrawal eliminating the sunset clause between withdrawing States is successful and tribunals reject jurisdiction, any such *inter se* modification will only cover those States that have signed up to it. Unless several corporate hubs outside the EU were on board, in

particular the UK and Switzerland, a coordinated withdrawal might not have the intended effects. There is more leeway for corporate restructuring under the old ECT than under the modernised version. Corporations most likely affected by governmental measures targeting fossil fuel investments may have already taken steps to ensure continued protection under the ECT if EU States withdraw in a coordinated manner. A case in point is Shell which even [moved its headquarters](#) from the Netherlands to the UK in January 2022 – not because of the ECT, but this may have its benefits with respect to investment protection under the ECT and BITs.

The recent [Rockhopper case against Italy](#) under the sunset clause of the ECT is the perfect example for the potential futility of a coordinated withdrawal limited to EU States. The company has been incorporated under the laws of the UK and even if the sunset clause had not applied between EU member States or had been successfully removed between EU member States, these arbitration proceedings would have still been possible under the ECT.

Modernisation as a Suitable Alternative to Withdrawal

The modernised ECT has its shortcomings, but for EU States it greatly minimizes the risks of successful claims by fossil fuel investors. Importantly, it eliminates intra-EU arbitration ([Article 24\(3\) new ECT](#)) as well as Article 16 ECT and includes the option to phase out protection for fossil fuel investments ([annex NI](#)). The [EU and the UK](#) have made use of the option to carve out protection for fossil fuel investments: any new fossil fuel investments in their territories will lose protection under the ECT as of 15 August 2023. Most existing fossil fuel investments in the EU will lose protection 10 years after the phase-out period has been triggered either by provisional application of the modernised ECT or its entry into force (see [here](#)). The same applies to the UK, although coal-based energy production will already lose protection as of 1 October 2024. Provisional application of the modernised ECT as of 15 August 2023 will be the default rule unless a Contracting Party notifies its opt-out from provisional application before 23 February 2023 (see [here](#)).

Even though not all States will apply the ECT provisionally, the majority of ECT Contracting Parties including the EU member States and the UK have a clear incentive to do so. Together with the exclusion of intra-EU disputes, this will eliminate the risk of a large number of investment arbitration claims under the ECT as of August 2023 or August 2033.

In contrast, withdrawal will eliminate protection for all existing energy investments at least ten years later than the phase-out period. For instance, if Poland notifies its withdrawal by 30 November 2022, the withdrawal will take effect on 1 December 2023 and the survival period under the sunset clause will only end on 1 December 2043.

Conclusion

Withdrawal has the definitive effect of freeing States from their international obligations under the ECT. Yet access to investment protection under the ECT will be available for much longer than most States desire. The sunset clause preserves protection for existing investments for 20 years after withdrawal, and there is much legal uncertainty about a potential elimination of the sunset clause between withdrawing States. Viewed against the backdrop of the phase out timelines under

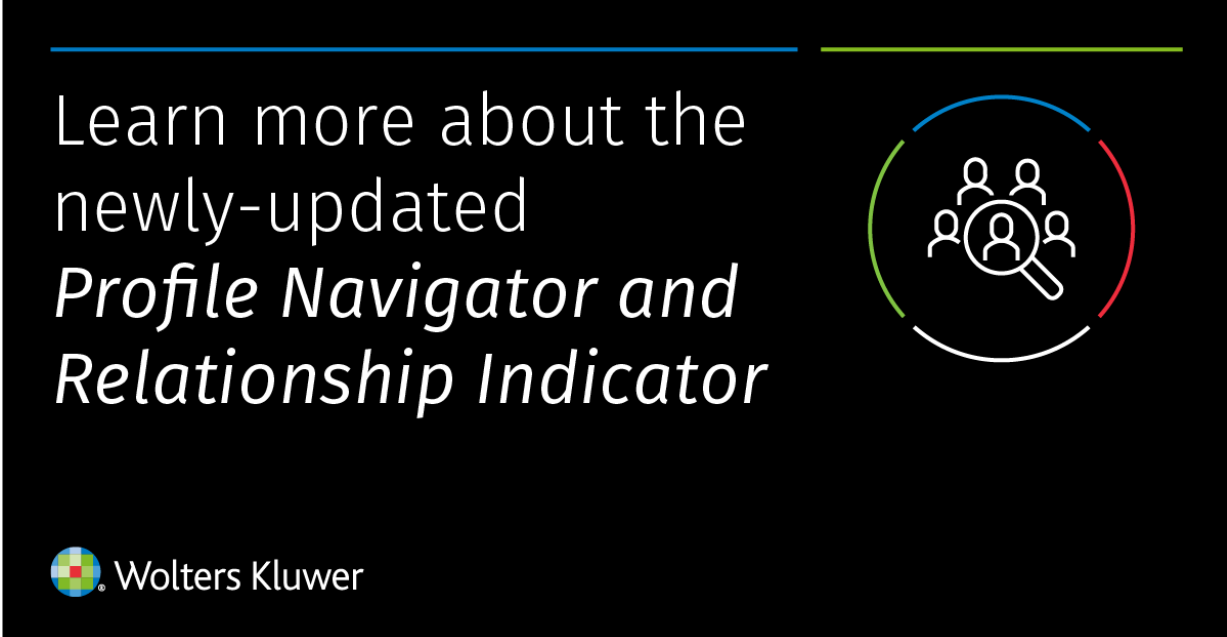
the modernised ECT, a withdrawal might expose States to claims from fossil fuel investors under the old ECT for a longer period of time than under the modernised ECT. However, it is exactly the existing fossil fuel investments which will most likely be affected by restrictions in the upcoming years. Accordingly, withdrawals motivated by a desire to meet the objectives of the Paris Agreement may be well intentioned, but not achieve the desired results.

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