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EU Member States' Diverging Declarations on the Intra-EU Applicability of the ECT: Can the ECT be Disapplied Intra-EU as a Matter of International Law Without Modernization?

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On 26 June 2024, 26 of the 27 EU Member States, along with the EU, signed a [Declaration](#) on the Legal Consequences of the Judgment of the Court of Justice of the EU (“CJEU”) in [Komstroy](#) and a Common Understanding on the Non-applicability of Article 26 of the [Energy Charter Treaty](#) as a Basis for Intra-EU Arbitration Proceedings (“Majority ECT Declaration”). The Majority ECT Declaration intends to disapply the ECT in both pending and future intra-EU arbitrations that may be brought under the ECT’s survival clause. The following day, on 27 June 2024, EU and Euratom formally [withdrew](#) from the treaty. The 27th EU Member State, Hungary, chose to adopt a [separate declaration](#), taking the position that the non-application of the ECT in intra-EU disputes must be achieved in accordance with the Vienna Convention on the Law of Treaties (“VCLT”) and principles of public international law (“Hungary ECT Declaration”), preferably via the adoption of the modernized ECT.

This post aims to address the content and possible effects of the two declarations and discusses whether the ECT can be disconnected in intra-EU disputes without adopting the modernized ECT.

Background

Over the past 30 years, the ECT has become the [most frequently litigated](#) investment treaty, with a majority of claims initiated by EU investors against EU Member States under the ICSID Rules. Since 2009, the Commission has contended that the ECT was never meant to apply between EU Member States and that EU law prohibits arbitral tribunals from exercising jurisdiction in intra-EU ECT arbitrations (see e.g., [Electrabel](#), paras. 4.89-4.110; [Vattenfall](#), paras. 80-91). Following the CJEU’s 2018 [Achmea judgment](#), which ruled that investment arbitration under intra-EU Bilateral Investment Treaties (“BITs”) was precluded by EU law, the Commission [argued](#) that the CJEU’s findings should also apply to the ECT. When the CJEU’s 2021 [Komstroy judgment](#) extended [Achmea’s](#) reasoning to the ECT in a surprising obiter dictum, [non-ICSID intra-EU ECT tribunals](#) seated in the EU eventually agreed to decline jurisdiction. However, ICSID tribunals sitting in intra-EU ECT disputes continued to refuse to decline jurisdiction despite these developments (see e.g., [Sevilla Beheer](#), paras. 655-676; [Encavis](#), paras. 476-486). Therefore, the Commission

proposed a new Article 24(3) for inclusion in the [modernized ECT](#) to exclude the treaty's future application between EU Member States.

Despite the modernized ECT text was [set for adoption](#) at the November 2022 Energy Charter Conference, several major EU Member States [withdrew](#) from the treaty in the fall of 2022, citing its alleged non-conformity with climate goals.

The unanimous adoption of the modernized ECT became impossible for the time being. Therefore, in July 2023, the Commission instead [proposed a coordinated withdrawal](#) from the unmodernized ECT, which the majority of EU Member States did not support, however.

The stalemate was resolved thanks to a political compromise adopted in the Council in May 2024, which paved the way for the EU's and Euratom's withdrawal from the ECT, and for EU Member States to choose whether to withdraw from the unmodernized ECT or to adopt the modernized treaty.

Majority ECT Declaration

To address the threat of continued intra-EU ECT arbitrations under the ECT's survival clause for the EU, Euratom, and EU Member States withdrawing from the unmodernized treaty, the Majority ECT Declaration aims to cancel the ECT's survival clause for future intra-EU disputes. At the same time, possibly due to pressure from certain EU Member States facing pending intra-EU ECT arbitrations, the text of the Majority ECT Declaration also seeks to retroactively disconnect the ECT for pending intra-EU cases.

Accordingly, the Majority ECT Declaration reaffirms the signatories' "common understanding" that Article 26 ECT "cannot and never could serve as a legal basis for intra-EU arbitration proceedings" and that Article 47(3) ECT "cannot extend, and could not have been extended, to such proceedings".

The Majority ECT Declaration conspicuously omits citing any legal basis for its adoption under the VCLT. However, for it to be valid not only under EU but also under public international law, and to bind the decision-making of intra-EU ECT tribunals, especially tribunals constituted under the ICSID Rules, it must adhere to the requirements of the VCLT regarding the interpretation and modification of multilateral treaties.

The Majority ECT Declaration appears to be primarily aimed at nullifying the jurisdiction of intra-EU ECT tribunals in both future and ongoing cases by interpreting the ECT in a manner that precludes its use as a valid jurisdictional basis. Pursuant to Article 31 VCLT, however, for an agreement on the interpretation of a multilateral treaty to be valid, all contracting parties to the treaty being interpreted must be party to the agreement. The signatories of the Majority ECT Declaration do not include all Contracting Parties of the ECT; in fact, they do not even include all EU Member States, as Hungary chose not to adhere to the Declaration. Conversely, EU Member States whose withdrawal from the ECT has become effective are no longer Contracting Parties of the ECT and therefore cannot participate in the treaty's interpretation. Moreover, under Article 31 VCLT, the interpretation cannot modify or amend the provision being interpreted, let alone cancel it altogether, which is exactly what the Majority ECT Declaration seeks to do. Intra-EU ECT tribunals have already held in the past that an agreement on interpretation under Article 31 VCLT

cannot cancel the treaty provision being interpreted and will likely reach the same conclusion regarding the Majority ECT Declaration (see e.g., [AS PNB Banka](#), paras. 572-581; [Adria Group](#), paras. 200-212; [Sevilla Beheer](#), para. 652).

The Majority ECT Declaration could also be seen as a (disguised) modification of a multilateral treaty among certain parties only pursuant to Article 41 VCLT. However, it falls foul of the requirements of Article 41 VCLT, because it could adversely impact the rights of other, non-EU Contracting Parties to the ECT whose investors would no longer be able to utilize their EU subsidiaries to initiate claims against the EU Member State hosting their energy investments, and because the elimination of the arbitration option contradicts the object and purpose of the ECT by rendering the obligations outlined in the treaty unenforceable. Another challenge arises from Article 16 ECT, which prohibits the modification of the ECT by subsequent agreements in a manner less favourable to investors than the current wording. Moreover, any modification according to Article 41 VCLT would only be applicable for the future, leaving pending intra-EU ECT arbitrations unaffected.

Intra-EU ECT tribunals constituted under the ICSID Rules operate within the realm of public international law. Given that the Majority ECT Declaration fails to meet the requirements laid out in both Article 31 and Article 41 of the VCLT, tribunals are unlikely to accept it as a valid interpretation or inter-se modification of the ECT.

Hungary ECT Declaration

Hungary issued a separate declaration aiming to reconcile the conflict between EU law and public international law while respecting both legal frameworks. The Hungary ECT Declaration reflects Hungary's longstanding support for the ECT, but also for the VCLT. It states that Article 26(2)(c) ECT "shall be interpreted and applied in such a way that it shall no longer serve as a legal basis" for intra-EU ECT arbitrations and that the disapplication of it in intra-EU arbitrations may be ensured in accordance with international law by a future amendment of the ECT" in accordance with Articles 40 or 41 VCLT.

The Hungary ECT Declaration differs from the Majority ECT Declaration in that it does not address the ECT's application in pending intra-EU arbitrations but focuses solely on disapplying the treaty in intra-EU disputes for the future. It emphasizes that achieving this outcome is only possible in compliance with the VCLT, through the adoption of either a separate agreement or the modernized ECT, which includes in Article 24(3) an intra-EU disconnection clause.

The adoption of the modernized ECT is on the agenda for the upcoming Energy Charter Conference scheduled for the end of this year. There may be real momentum for its adoption, especially if EU Member States recognize its potential to end intra-EU ECT arbitration.

EU Withdrawal from the ECT

Following the adoption of the Majority ECT Declaration, the EU and Euratom withdrew from the ECT. This withdrawal will take effect one year after the depositary receives the notification, although the treaty will continue to apply for another 20 years to investments made in the EU prior

to the withdrawal becoming effective. Whether the Majority ECT Declaration will successfully prevent any future intra-EU claims against the EU under the ECT's survival clause remains uncertain.

Conclusion

While Komstroy is effective within the framework of EU law, implementing it in the public international legal order—under which intra-EU ECT tribunals constituted under the ICSID Rules operate—is only feasible if it complies with the VCLT.

The Majority ECT Declaration aims to disapply the ECT in both pending and future intra-EU arbitrations, but its effectiveness remains uncertain due to its inconsistency with the VCLT. The Hungarian ECT Declaration takes a more cautious approach, focusing solely on disapplying the ECT in future intra-EU disputes and emphasizing compliance with international law principles.

Without the adoption of the modernized ECT, the path forward remains unclear, with the fate of intra-EU ECT arbitrations caught between the requirements of EU law and the principles governing multilateral treaty obligations.

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This entry was posted on Wednesday, July 17th, 2024 at 8:15 am and is filed under [Eastern Europe](#),

ECT Modernisation, ECT Withdrawal, Energy Charter Treaty, EU Withdrawal Act, European Union, Hungary, Intra-EU Investment Arbitration

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