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Member States Hold all the Necessary Bargaining Power to Decide the Future of the Energy Charter Treaty (ECT), Not the European Union

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In the past weeks, several Member States pursued withdrawal from the ECT, a multilateral investment treaty to which both the EU and the Member States are party. Some Member States, however, are hesitating because they feared that withdrawal without the EU may have little practical effect for the controversial investor-state-dispute settlement (ISDS) mechanism. We argue that these doubts are not legally justified. As a matter of EU law, the EU cannot hold Member States that have withdrawn liable under EU law as this would go against the internal division of competences. What is more, the EU's own membership and ability to amend the ECT is legally in doubt as it lacks the necessary competence to assume responsibility for the entirety of the agreement under EU law.

The ECT has become more and more controversial due to the impact the agreement's ISDS provisions have on climate and energy policies of governments. It is the most litigated investment treaty in the world with [150 reported cases](#). Investors can and do make high claims for damages in response to domestic energy and climate policies. In August 2022, for example, the ECT forced Italy to pay 240 million euros to the British oil and gas company Rockhopper. Earlier, the Netherlands was targeted by claims of allegedly 2.4 billion euros from German energy giants RWE and Uniper in response to the Netherlands' policy decision to phase out the use of coal. In July 2022, [Uniper put its claim on hold as part of a bailout deal with the German government](#).

On 6 October 2022, the Polish parliament passed a bill (pending confirmation by the Senate) to withdraw from the ECT. On 12 October 2022, the Spanish minister of ecology,

Teresa Ribera, announced that Spain is also withdrawing. In the Netherlands, the House of Representatives passed on 23 June 2022 a motion to join Spain's earlier appeal and work towards a concerted withdrawal from the ECT. Italy already withdrew from the agreement in 2015. [France and Germany](#) have not excluded withdrawal as the best way forward.

While Politico fittingly reported that an 'ECT exit storm brews in Europe', some Member States fear that withdrawal may not end future claims if the EU remained a party to the agreement. They suggest therefore that the legal effects of withdrawal would be limited, as long as the EU remains a party. Last week, for instance, [Dutch Minister for Climate and Energy, Rob Jetten, argued](#), while keeping all options on the table, that withdrawing would only make sense for the Netherlands if the EU exited itself, together with all the remaining signatory Member States.

In this post, we set out the legal reasoning behind this claim. We subsequently argue that this claim ignores both the division of powers between the EU and the Member States for investor-state dispute settlement as established by the Court of Justice in [Opinion 2/15](#). It also ignores that under international law Member States, as parties in their own right, are free to withdraw from the ECT (Article 47). Such unilateral withdrawal has the result to eliminate the Member States' prior consent to be subject to arbitration. The so-called sunset clause of the ECT can be excluded between all withdrawing parties through a subsequent agreement. Importantly, the EU cannot bind the Member States to the amended provisions on ISDS in the modified ECT.

The argument against unilateral withdrawal: the Member States shall pay investment awards regardless because *they can be held liable via the EU*

In [response](#) to questions from Dutch parliamentarians on why the Netherlands has not yet decided to pull out of the ECT, Minister Rob Jetten stated: 'If I as a country terminate the agreement, but the EU remains a party, and companies can still sue the Netherlands before an arbitration tribunal, we would all find that ridiculous as well'. This argument suggests that the Member States can still be sued under the ECT *as long as the EU remains a party to the ECT*.

This argument appears to be based on a fear of international liability as a result of the EU being a signatory party to the ECT. We cannot know with absolute certainty. The argument is not legally underpinned and both the ECT amendment process ([only a leaked version of the amended text is publicly available](#)) and the [EU's considerations](#) on how to deal with the challenge that the current ECT poses for domestic sustainability policies are surrounded by secrecy.

We understand the position to mean that withdrawal of a Member State does not relieve that Member State from potential liabilities under ECT. The argument appears to be based on the internal EU distribution of liability. This distribution assumes that a Member State can internally be held responsible for conduct that is found to be contrary to an international treaty. In this respect, recital 5 of the [Financial Responsibility Regulation \(912/2014\)](#) makes clear:

'Where the Union, as an entity having legal personality, has international responsibility for the treatment afforded, it will be expected, as a matter of international law, to pay any adverse award and bear the costs of any dispute. However, an adverse award may potentially flow either from treatment afforded by the Union itself or from treatment afforded by a Member State. It would as a consequence be inequitable if awards and the costs of arbitration were to be paid from the budget of the Union where the treatment was afforded by a Member State, unless the treatment in question is required by Union law.'

One could read Article 3 of the Regulation as requiring a Member State that is responsible for a breach of an international agreement to which the EU is party to bear the financial responsibility arising from its 'illegal' conduct. In other words, the EU will simply forward the bill to the Member State for any violation of an international agreement to which the EU is a party, even if that Member State is not itself a party or has, at an earlier point in time, withdrawn from the treaty. However, this reading disregards *Opinion 2/15*. It would therefore go against the accepted principles of legal interpretation within the EU that require secondary EU law to be read – as far as possible – in compliance with higher ranking primary EU law, as understood by the Court of Justice, and higher-ranking international law.

Opinion 2/15 and the Financial Responsibility Regulation

The Financial Responsibility Regulation predates [Opinion 2/15](#). It is based on an assumption about the division of powers between the EU and the Member States that has proven to be legally incorrect in [Opinion 2/15](#).

Recital 3 of the Financial Responsibility Regulation stipulates: 'International responsibility for treatment subject to dispute settlement follows the division of competences between the Union and the Member States.'

However, in *Opinion 2/15* found that investor-state dispute settlement itself 'cannot be of a purely ancillary nature [to the substance of an international agreement] and *cannot, therefore, be established without the Member States' consent.*' (para. 292, *emphasis added*)

The Court of Justice arrived at this conclusion because parties to international agreements containing ISDS give their unconditional consent to resolve disputes through ISDS and therefore 'remove[...] disputes from the jurisdiction of the courts of the Member States'. In other words, pursuant to *Opinion 2/15*, even if the EU is exclusively competent for substance of an international agreement, *i.e.* in the case of the ECT the treatment for 'foreign direct investment', ISDS still requires *under EU law* consent of the Member States. Equally, and by analogy, it remains entirely within the prerogatives of the Member States under EU law to revoke their unconditional consent to arbitration by withdrawing from a mixed international agreement containing an ISDS mechanism.

International law

Under international law, as a signatory party to the ECT, Member States are in the position to withdraw from the ECT. This is permitted by Article 47 ECT. However, this may not be the last word on the *liability of the EU under international law*.

The EU and the Member States have been made explicit in a ['statement submitted to the Energy Charter Treaty \(ECT\) Secretariat pursuant to Article 26\(3\)\(b\)\(ii\) of the ECT'](#) that 'The European Union, Euratom and their Member States are internationally responsible for the fulfilment of the obligations contained within the Energy Charter Treaty, *in accordance with their respective competences.*' Generally, the internal division of competence within the EU would not as such have the effect to limit responsibility under international law unless everyone agrees (see [here](#) and [here](#)). The latter is not the case for the EU and Member States' unilateral statement, which is not sufficiently clear with its general reference to EU competences and cannot shift the 'burden of proof' to the other parties. In principle, third parties cannot be expected to be *au courant* of the division of competences between the EU and its Member States.

On the one hand, under the law of international responsibility, wrongful conduct must be attributed to a party. If a Member State has withdrawn from the ECT, its conduct can no longer be litigated under a treaty to which it is no longer a party. In general, the EU cannot be held responsible for a conduct that cannot be attributed to it. On the other, as explained

above, international law also protects third parties from having to know the internal competence division of their international treaty partner. In other words, the EU could potentially internationally be held liable for the conduct of the Member States, even after their withdrawal; however, it cannot contrary to the internal competence division, as explicated by the Court of Justice in Opinion 2/15, hold the Member States internally liable *under EU law*. Nor can the Member States themselves be held liable under the ECT after their withdrawal.

In any event, as the amended ECT widens the scope of application of the ISDS mechanism under Article 26 ECT, *e.g.* to cover also investments into renewable energy ([see here why this is problematic for the energy transition in Europe](#)), the EU is not competent either to approve the ECT amendment, nor to conclude later the amended agreement. This further underlines the significance of the Member States' position on and participation in the amendment process, notwithstanding the very real concerns surrounding the problem of liability and sunset clause removal.

The ECT's Sunset Clause

The Member States' position is determinative for the future of the ECT. Yet, another argument often advanced against unilateral withdrawal is the sunset clause. It is correct that unilateral withdrawal of individual Member States, as opposed to a concerted withdrawal of the EU and all remaining Member States, cannot do away with the ECT's rather generous (to investors) sunset clause. Article 47(3) ECT reads:

'The provisions of this Treaty shall continue to apply to investments made in the area of a Contracting Party by investors of other Contracting Parties or in the area of other Contracting Parties by investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.'

The only way to terminate this clause is by agreeing with other parties to the ECT to terminate this provision, for example as part of the overall amendment, or to conclude an inter se modification treaty amongst all withdrawing parties, *i.e.* the EU, all Member States and those states that join the concerted withdrawal.

Withdrawal by individual Member States does not stand in the way of coming to a subsequent inter se modification treaty between the EU, the Member States, and other

withdrawing parties to end the application of the ECT amongst themselves with immediate effect. In other words, the application of the sunset clause can also be ended in inter se modification.

Hence, while the sunset clause is one of the main reasons why concerted withdrawal of the EU, the Member States and as many likeminded signatory parties as possible remains the best option. However, if this is not achievable many small steps can also lead the EU out of the ECT. Unilateral withdrawal of as many individual (Member) States as possible is the second best and can set the trend to the final result of ending the application of the ECT in Europe.

Amending the Energy Charter Treaty: mission impossible for an invested European Commission?

In this rising storm of withdrawal, the Commission is nonetheless invested in 'modernising' the ECT. The question is whether, in light of the increasing number of Member States withdrawing from the ECT, the Commission can even succeed in amending it.

On 22 November 2022, at the 33rd meeting of the Energy Charter Conference, the 54 contracting parties to the ECT are meeting to adopt the amendments to the ECT, as agreed in the (publicly available) [agreement in principle](#) on 24 June 2022. This adoption by the Energy Charter Conference of the amendments does not have legal effects under international law. The adoption is not equivalent to a signature but to the initialling of the negotiated text. For the amendments to take legal effects, the signatory parties must ratify (or in the case of the EU 'conclude') the amended treaty text. This requires parliamentary approval of national parliaments of the Member States and the European Parliament.

The positions of the Council and of the governments of the signatory Member States need to be determined before the meeting of the Energy Charter Conference on 22 November. In other words, it is in the coming weeks that the executives of the signatory parties to the ECT take this fundamental decision of how to proceed with the ECT, which in its current form is a costly obstacle to the necessary energy transition in Europe. Despite the lack of legal effects, approval at the Energy Charter Conference is a formal international commitment and stepping away from that commitment comes with reputational damage in international relations.

Originally, the discussion of the EU's position on the amendment of the ECT was scheduled to take place at the EU Energy Council meeting on 25 October 2022; recently the discussion has been taken off the agenda. This is likely due to the lack of agreement

among the Member States on how to deal with the ECT. In light of the 'ECT exit storm' and the increasing [civil society mobilisation](#) against ISDS in general and ECT in particular, a qualified majority in the Council in favour of the amendment seems increasingly unlikely. So far, only the [Commission appears to remain unwaveringly in favour of amending the ECT](#).

However, as mentioned above, ratifying an agreement that contains ISDS cannot be done 'without the Member States' consent.' If several Member States have withdrawn or at least signalled that they will do so, it becomes legally impossible for the EU to approve or conclude the amended ECT that does not only maintain but extends ISDS. Hence, even in the unlikely event that a qualified majority in favour of amending the ECT could be reached in the Council, the Council decision would be acting *ultra vires* and vulnerable for legal challenges to the Court of Justice. Both an action for annulment by one of the withdrawing states, as well as another request for a Court opinion on the compatibility of an envisaged agreement under Article 218(11) TFEU is imaginable (see earlier the inadmissible request by Belgium in [Opinion 1/20](#)). In fact, the EU's own current membership to the current ECT is legally problematic with several Member States withdrawing from it, as the EU's membership to an international agreement containing ISDS requires the Member States consent. In that sense, one should not question Member State withdrawal, but EU membership to an agreement that undermines the EU's own climate ambitions.

