

ReedSmith

The Energy Charter Treaty (ECT) At the Precipice of Change

Juliya Arbisman

Partner, Reed Smith (New York & London)

Energy Charter Treaty - Background

- Multilateral treaty from the 1990s was initially designed to protect investments made by European Union energy majors in post-Soviet states, reflecting its origins as a tool for stimulating and integrating the energy market in the region.
- Legal framework with investment protections and ISDS (investor-State and State-to-State).
- Four pillars: Energy Trade and Investment, Energy Efficiency, Energy Transit, Dispute Settlement
- ECT has garnered significant attention in recent years amid decarbonization ambitions, the intra-EU trade protections debate (*Achmea*, *Komstroy*) and more recently, concerted effort to decrease dependence on Russian energy sources (REPowerEU plan).
- Still Fit for Purpose?
- Legacy Claims under Sunset Clauses...

Exodus from the ECT

- Sustainability concerns have been a significant factor in the exodus from the ECT, as countries argue that its provisions, particularly on investment protections, restrict their sovereign ability to adopt policies aimed at promoting renewable energy and addressing climate change.
 - In May 2024, the Council of the European Union (EU) moved forward with the EU's and Euratom's withdrawal from the ECT, while allowing member states the option to either support the treaty's modernization or refrain from opposing it.
 - The EU's coordinated withdrawal, along with similar actions by member states such as France, Germany, and Spain, driven by concerns over potential multi-billion-euro lawsuits from fossil fuel investors, introduces new dynamics for CIS countries navigating the treaty's provisions.
- ❖ In recent years, several countries, including Spain, France, Portugal, Germany, Italy, the Netherlands, Poland, Belgium, Denmark, Slovenia, and Luxembourg, have announced their withdrawal from the treaty, citing failed modernization efforts.
 - ❖ The UK also announced its exit in February 2024.

Modernization Efforts

- After 15 rounds of negotiations starting in 2017, the final agreement on the ECT's modernization was reached on December 3, 2024.
- The amendments will be provisionally applied starting September 3, 2025, unless a state opts out by March 3, 2025. Full implementation will follow ratification by three-quarters of the remaining contracting parties. In the meantime, investors retain the right to initiate arbitration claims under the existing treaty framework.
- The modernized ECT expands the scope of investment protection to encompass emerging energy technologies and fuels, including carbon capture, utilization and storage, hydrogen, anhydrous ammonia, biomass, biogas, and synthetic fuels.
- While its incorporation of renewable energy and climate-friendly provisions aligns with global trends, these reforms may necessitate significant policy and infrastructure adjustments, posing challenges for coal economies

Category	Original ECT	Modernized ECT
Fossil Fuel Investments	Fully protected, enabling significant investments in hydrocarbons.	Protections phased out by 2040; new fossil fuel projects face reduced protections.
Regulatory Sovereignty	Limited acknowledgment of state regulatory rights.	Explicit affirmation of states' rights to regulate for public policy and climate objectives.
Arbitration Framework	Broad access to investor-state dispute settlement mechanisms.	Enhanced transparency, mechanisms to dismiss frivolous claims, and mandatory third-party funding disclosures.
Intra-EU Disputes	Covered under the treaty.	Excluded following CJEU rulings (Achmea, Komstroy), creating enforcement challenges for EU-related investments.

- The enforcement of arbitral awards under the ECT is litmus case of its utility. However, the modernization of the treaty and the withdrawal of the EU and several member states are reshaping its enforcement framework, bringing new challenges and opportunities for both investors and states.
- Substantial compensation awards, with protracted histories that continue...
 - An arbitral tribunal ordered Kazakhstan to pay approximately \$497 million plus interest and legal costs to the Stati parties in SCC Case No. V 116/2010. *Anatolie Stati, Gabriel Stati, Ascom Group S.A., and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Arb. Case No. V (116/2010), Final Award (Dec. 19, 2013).
 - Legendary Yukos award of \$50bn undergoing various stages of enforcement *Yukos Capital S.a.r.l. v. Russian Federation*, PCA Case No. 2013-31, Final Award (July 23, 2021).
 - In February 2021, Ukraine successfully defended a \$6 billion claim brought by minority shareholders of Ukrnafta, with the SCC tribunal dismissing the case for lack of jurisdiction. *Littop Enterprises v. Ukraine*, SCC Arbitration Case No. V 2015/092, Award of February 4, 2021.

CIS Region Cases	Damages Awarded
<i>Yukos Capital S.a.r.l. v. Russian Federation</i> , PCA Case No. 2013-31	USD 2.63 Billion
<i>Anatolie Stati, Gabriel Stati, Ascom Group S.A., and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan</i> , SCC Arb. Case No. V (116/2010)	USD \$497 million
<i>Azerbaijan v. Armenia</i> , PCA Inter-State Arbitration, ongoing as of December 15, 2024	Pending
<i>Republic of Moldova v. Komstroy LLC</i> , ECLI:EU:C:2021:655 (Sept. 2, 2021), Case C-741/19	Purely Legal Ruling
Ukrainian Cases:	
<i>Remington Worldwide Limited v. Ukraine</i> , SCC Case, (28 April 2011)	USD 4,493,464.97
<i>Limited Liability Company Amtto v. Ukraine</i> , SCC Case No. 080/2005	ZERO
<i>Komstroy (formerly Energoalians) v. Republic of Moldova</i> , UNCITRAL	MDL 195,547,212
<i>State Enterprise "Energoynok" (Ukraine) v. Republic of Moldova</i> , SCC Case, No. V 2012/175	ZERO
<i>JKX Oil & Gas, Poltava Gas B.V. and Poltava Petroleum Company v. Ukraine</i> , SCC Case	ZERO
<i>Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine</i> , SCC Case No. V 2015/092	ZERO (BUT NOTE recent Ukrainian Supreme Court decision regarding martial law expropriation, No. 910/14243/22)
<i>Modus Energy International B.V. v. Ukraine</i> , SCC Case No. 2021/039	N/A
<i>Ostchem Holding v. Ukraine</i> , SCC Case	N/A

Energy Investments in Europe – What will be the Future role of ECT?

- ❖ Challenges and Opportunities for the CIS region in upcoming years
- ❖ Irrefutable global shift toward green energy priorities
- ❖ Differing Political tides & players
 - Ukrainian Prime Minister Denys Shmyhal reaffirmed Ukraine's commitment to honoring its obligations under the Energy Charter Treaty. Cabinet of Ministers of Ukraine, Denys Shmyhal: Ukraine's Strategic Goal is to Deprive the Kremlin of Profits from the Sale of Hydrocarbons Used to Finance the War, October 7, 2024, available at <https://www.kmu.gov.ua/en/news/denys-shmyhal-stratehichna-meta-ukrainy-pozbavyty-kreml-prybutkiv-vid-prodazhu-vuhlevodniv-za-iaki-ahresor-finansuie-viinuu>.
 - Csaba Marosvári, Hungary's Deputy State Secretary for Energy Security, expressed strong support for ECT modernization, emphasizing the need to balance stability with adaptability by integrating renewable energy and addressing climate change while maintaining a stable legal environment to foster investment and connectivity. *MCC Hosts Energy Charter Treaty at a Crossroads Conference*, Mathias Corvinus Collegium (Dec. 2, 2024), <https://mcc.hu/en/article/mcc-hosts-energy-charter-treaty-at-a-crossroads-conference>.
 - European block exodus follow through?