

# REPORT ON THE MODERNISATION OF THE **ENERGY CHARTER TREATY**

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A REPORT OF THE  
**FRENCH HIGH COUNCIL ON CLIMATE**

OCTOBER 2022

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## EXECUTIVE SUMMARY

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The Energy Charter Treaty (ECT) is an international trade and investment agreement intended to promote cooperation in the energy industry. It was signed by France in 1994 and ratified in 1999.

The ECT includes an investor-state dispute settlement (ISDS) mechanism enabling investors to bring international arbitration cases against signatory States, in particular in the event of unilateral changes to their legislative or regulatory frameworks covering the energy industry. This mechanism has brought about a greater risk of loss of sovereignty for signatory States in developing or implementing their energy and climate policies, resulting in numerous cases and arbitration judgments that conflict with the decisions of domestic and European courts. The need for clarification of the ECT's legal provisions was one of the drivers behind the opening of negotiations to modernise the Treaty.

There have been fifteen negotiation rounds on modernisation of the ECT since the idea was first set in motion in 2017, the most recent ending on 23 June 2022. The European Commission conducted negotiations on behalf of Member States on the basis of a mandate bestowed by the Council and Member States on 2 July 2019. It made its proposals in support of ECT amendments public on 6 October 2022. Progress reports on the draft ECT modernisation agreement were not however made public by the Energy Charter Secretariat.

The objective of greening the ECT set by the Member States should be stressed, and it has led the Commission to negotiate amendments including the introduction of a voluntary "flexibility mechanism" applicable in particular to the EU and the UK. This flexibility mechanism stipulates an end to protection for new fossil-fuel investments as from 15 August 2023, with a transition period for existing investments for which protection in the EU would be maintained for 10 years after the entry into force of the modernised Treaty (which could itself however take several years, or even never happen, given the time needed for ratification), and up to 31 December 2030 or 2040 at the latest, depending on the investments in question.

**The main obstacle posed by the ECT, even in a modernised version, is the incompatibility between the timetables for decarbonisation of the energy sector with the safeguards stipulated in the Treaty.** Decarbonisation efforts in the energy industry needed to meet the Paris Agreement targets will mean public- and private-sector divestment from fossil-fuel infrastructure by 2030, together with support for the development of carbon-free energy sources, including renewables and nuclear power. Under the International Energy Agency's "Net Zero by 2050" scenario, these divestments should lead to the complete decarbonisation of the energy industry by 2035, and an end to the operation of coal-fired power plants in industrialised countries by 2030.

**None of the possible outcomes of the fifteenth round of negotiations on the ECT modernisation agreement will enable signatory parties to commit to a trajectory that would decarbonise their respective energy industries by 2030, in line with the Paris Agreement targets:**

1. If the ECT were maintained as is for lack of any adopted or ratified agreement on modernisation, existing and new fossil-fuel installations covered by the Treaty would be protected indefinitely; and if a signatory party withdraws, protection runs for 20 years by virtue of the "sunset clause", i.e. until at least until 2043.
2. If the ECT was modernised by including the new flexibility mechanism, its adoption and ratification times when added to the investment protection period, even reduced to ten years, would result in de facto protection for existing fossil-fuel assets covered by the Treaty beyond 2030.

**The draft ECT amendments do not in themselves remove the threat of litigation related to investments in low-carbon energies.** As regards litigation caused by the ECT within the EU, the Court of Justice of the European Union (CJEU) concluded in its "Komstroy" judgment on 2 September 2021 that the ISDS mechanism does not apply to intra-EU disputes. However, international arbitration tribunals are not bound by CJEU judgments, and the ECT in its current or modernised form does not protect Member States and France in particular against the risk of litigation. The threat of litigation could limit State's ambitions and lead to "regulatory chill" as regards their low-carbon energy roll-out policies, while such policies must necessarily be flexible in the face of unknown factors such as cost and technological potential.

**Only withdrawal from the ECT combined with cancelling out its "sunset clause" would eliminate the Treaty's incompatibility with timetable for decarbonisation by 2030,** and restore Member States' sovereignty over their climate and energy policies while limiting the risk of litigation.

**The European Commission's proposal to adopt a subsequent agreement between Member States confirming the inapplicability of the ECT within the EU, reinforced by its cancelling out of the "sunset clause" among EU Member States, is a major step forward**

**to be highlighted** <sup>1</sup>. This proposed Agreement on the interpretation of the Energy Charter Treaty of 5 October 2022<sup>2</sup> could be implemented immediately, irrespective of the outcome of the ongoing negotiations on ECT modernisation.

**A coordinated withdrawal from the ECT by France and the EU, combined with cancelling out the “sunset clause”, appears to be the least risky option in terms of meeting domestic, European and international climate commitments.** Such a withdrawal would also make it possible to raise awareness among all the other signatory parties, and to curb geographical extension of the ECT to new parties that would expose themselves to the same risk of incompatibility between the Treaty's provisions and the pursuit of their climate objectives.

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<sup>1</sup>European Commission, [Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference](#), 6 October 2022.

<sup>2</sup>European Commission. [Communication on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty. Annex: Agreement on the interpretation of the Energy Charter Treaty](#), 5 October 2022.

# RECOMMENDATIONS OF THE HIGH COUNCIL ON CLIMATE

Under its self-referral in respect of the modernisation of the Energy Charter Treaty, the High Council on Climate:

- 1. Reaches the conclusion that the ECT, even in a modernised form, is not compatible with the pace of decarbonisation of the energy sector and the intensity of emissions reduction efforts needed by 2030**, as reiterated by the IEA and assessed by the IPCC. Particularly before any entry into force of the modernisation agreement, there is a risk that the ratification timescales required for that entry into force will extend the current ECT provisions and its sunset clause well beyond the reduced term of 10 years proposed in the new flexibility mechanism.
- 2. Emphasises that the risks of litigation arising from the ECT's investor-state dispute settlement mechanism could pose an obstacle to states developing and implementing their necessary decarbonisation policies in the short term.**
- 3. Concludes that the coordinated withdrawal from the ECT by France and EU Member States appears to be the least risky option to enable climate objectives to be met and to respect the necessary decarbonisation rates by 2030**, because this is the only option that guarantees the end of protections granted to new fossil-fuel investments from the effective date of the withdrawal (one year after notice is served to the Energy Charter Conference). To be compatible with the decarbonisation timetables implied by the Paris Agreement, and to restore sovereignty over energy and climate policies to the signatory parties concerned, the coordinated withdrawal must be combined with the cancelling out of protection for investments covered by the ECT known as the "sunset clause".

- 4. Concludes that at the same time as a coordinated withdrawal from the Treaty, which has to remain the goal to be achieved if the Paris Agreement targets are to be met, the proposed amendments do represent progress in comparison with current ECT provisions.**
- 5. Recommends supporting the European Commission's proposal intended to confirm that the ECT does not apply within the EU, reinforced with the effect of cancelling out the "sunset clause" between Member States,** in the form of a subsequent agreement as mentioned in the communication of 6 October 2022. Such an agreement on the interpretation of the Energy Charter Treaty would make it possible to confirm the primacy of the European and EU Member States' domestic courts over international arbitration tribunals.
- 6. Recommends that the Government, irrespective of the outcome of the current negotiations, immediately begins the process of cancelling out the ECT's "sunset clause",** as part of the Commission's proposed subsequent agreement, and that it suggests extending this cancellation effect beyond the EU to other relevant contracting parties.
- 7. Recommends that the Government fully includes both the current consequences of the ECT and the objective of withdrawing from the ECT in its ongoing deliberations on France's energy and climate strategy.**

**The Energy Charter Treaty (ECT) is the result of a European initiative on energy cooperation that started in 1990, culminating in an international agreement that came into force in 1998.**

The Energy Charter Treaty (ECT) is an international trade and investment agreement intended to promote cooperation in the energy sector. It is the outcome of a European initiative launched on the margins of the Dublin European Council of June 1990, in the form of the European Energy Charter adopted and signed on 16 and 17 December 1991 in The Hague<sup>3</sup>.

At the same time as adopting the European Energy Charter, the signatory parties began negotiations to enlarge the scope of this first agreement beyond cooperation alone so as to include legal guarantees concerning energy investment, transit and trading. These negotiations ended in 1994 and gave rise to a second agreement, the ECT.

The ECT was signed in 1994 by all European Union Member States, and by countries in the Commonwealth of Independent States of the former USSR, including Russia<sup>4</sup>. It entered

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<sup>3</sup> Foreword, [Energy Charter Treaty](#) (English).

<sup>4</sup> French Senate information report no. 307 (2006-2007) [on the relationship between the European Union and Russia \(in French\)](#)

into force on 16 April 1998 and has since that date constituted an international agreement that is legally binding on those contracting parties that have ratified it. France signed the ECT in 1994 and ratified it in 1999<sup>5</sup>.

The ECT numbers 54 contracting parties taken from the membership of the Energy Charter Conference, which includes all the EU Member States with the exception of Italy which withdrew in 2015, plus the United Kingdom, Norway<sup>6</sup>, Switzerland, Turkey, Japan and some States in central and western Asia. The Energy Charter Conference also includes some observer members, including Italy since its withdrawal, the United States, Australia and Canada, along with some international organisations<sup>7</sup>.

A number of signatory parties have withdrawn from the ECT. Russia notified its refusal to ratify the Treaty on 30 July 2009, on the grounds it ran counter to its interests as a producer country and was ineffective in resolving transit issues<sup>8</sup>. More recently, Italy served notice of its decision to withdraw on 31 December 2014, effective on 1 January 2016<sup>9</sup>. Australia meanwhile served notice to terminate its provisional application of the Treaty on 15 October 2021, effective on 13 December 2021<sup>10</sup>.

**The ECT grants legal protection to energy investment through investor-state dispute settlement, the consequences of which as regards litigation on signatory parties are one of the drivers behind the Treaty modernisation process.**

In accordance with the progress its founder members wanted to see the European Energy Charter make in 1991, the ECT as adopted in 1994 goes beyond mere cooperation between signatory parties, and includes legally-binding provisions intended to safeguard investments made in the energy industry.

**The ECT stipulates a dispute settlement mechanism between investors and contracting parties (Article 26) as well as between contracting parties (Article 27).** It enables investors to institute proceedings in the judicial or administrative courts of a contracting party (i.e. a contracting state), or to submit a dispute to one of the international arbitration procedures stipulated under Article 26-4 of the Treaty:

- the International Centre for Settlement of Investment Disputes (ICSID), part of the World Bank;
- arbitration on the basis of the United Nations Commission on International Trade Law (UNCITRAL) ad-hoc rules;
- arbitration under the aegis of the Arbitration Institute of the Stockholm Chamber of Commerce.

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<sup>5</sup> Energy Charter Treaty, available from [energychartertreaty.org](http://energychartertreaty.org)

<sup>6</sup> Norway has signed the ECT but has not yet ratified it.

<sup>7</sup> The full list of Energy Charter Conference members and observers is appended.

<sup>8</sup> French Senate information report no. 182 (2006-2007)(2009-2010) [on whether Russia is an energy power or is interdependent.](#)

<sup>9</sup> Notice of Italy's withdrawal, available online: [Notification of 31 December 2014](#)

<sup>10</sup> Notice of Australia's termination, available online at [Notification of 15 October 2021](#)

**The ECT also describes the terms under which a contracting party can withdraw, in Article 47-3 which stipulates a special clause, called the “sunset clause”,** by virtue of which the Treaty’s provisions continue to apply for 20 years “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”. Article 47-2 of the ECT states that a contracting party’s withdrawal takes effect one year after receipt of notification of withdrawal by the Energy Charter Conference.

This investment protection mechanism has shown its reach in respect of litigation between investors and States following changes in energy industry policy or regulations, such as the early decommissioning of fossil-fuel infrastructure or policy reforms in support of renewables. The amount of compensation awarded to investors, or claimed in arbitration decisions, by virtue of the ECT is of the order of €1 billion. The majority are intra-EU disputes<sup>11</sup>. France has also been involved in an arbitration procedure<sup>12</sup>.

**The Court of Justice of the European Union (CJEU) ruled on 2 September 2021 that the investor-state dispute settlement mechanism did not comply with EU law.** However, international arbitration tribunals do not believe themselves to be bound by CJEU judgments, in particular the “Komstroy” judgment, which states that “Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”<sup>13</sup>.

**The ECT modernisation process begun in 2017 ended on 23 June 2022 after fifteen rounds of negotiations, and is to form the subject of a final agreement during the next Energy Charter Conference on 22 November 2022.**

After a consultation initiated in January 2017 in response to requests from contracting parties, the Energy Charter Secretariat began an ECT modernisation process, one aim being to clarify the Treaty’s provisions on protecting investments. The launch of negotiations for the modernisation of the ECT was agreed at the Energy Charter Conference on 27 and 28 November 2017, with objectives to be approved during the ECT ministerial conference on 27 November 2018<sup>14</sup>. This process then continued and gave rise to fifteen rounds of negotiations<sup>15</sup>.

The European Union Member States delegated the conducting of these negotiations to the European Commission, granting the mandate to do so on 2 July 2019, with objectives

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<sup>11</sup> Basedow (2019). “The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration”. *Journal of International Economic Law*.

Saheb, Y. (2020). “[Modernisation of the Energy Charter Treaty](#)”. OpenExp. p. 14.

<sup>12</sup> [Légifrance, Article 225 - Law no. 2020-1721 of 29 December 2020 on the budget for 2021](#)

<sup>13</sup> Case C-741/19: Republic of Moldova v. Komstroy LLC, 2 September 2021. [InfoCuria](#).

<sup>14</sup> Energy Charter Secretariat, [Decision of the Energy Charter Conference](#), 27 November 2018.

<sup>15</sup> [Schedule of negotiation rounds on modernisation of the ECT](#).



including higher environmental and climate ambitions for the ECT, spread across four areas<sup>16</sup>:

- Facilitate investment in the energy sector in a sustainable way between ECT contracting parties;
- Update the ECT's provisions on investment protection and dispute settlement;
- Clarify that the EU can require market participants from third countries operating in the internal market to comply with applicable EU and Member States' laws, including those concerning environmental and safety policy;
- Include climate change and clean energy transition goals and contribute to the attainment of the objectives in the Paris Agreement.

**The fifteenth round of negotiations on modernising the ECT ended on 23 June 2022.** Progress reports on modernisation of the ECT agreement have not been made public by the Energy Charter Secretariat. However, the Secretariat did issue a public report on the 23 June 2022 session, outlining the broad strokes of the ECT amendment submitted to the current signatory parties<sup>17</sup>, which was followed by a **European Commission communication on 6 October 2022**<sup>18</sup>.

At this stage, amendments on modernising the ECT, as summarised by the Energy Charter Conference and presented in the European Commission's communication, would entail:

1. **Extending the list of energy materials and products included** under the Treaty, by adding low-carbon hydrogen, biomass, biogas, anhydrous ammonia and synthetic fuels. The list would be reviewed every five years after the entry into force of the ECT modernisation agreement.
2. **A new flexibility mechanism** making it possible to exclude protection for new investments in fossil fuels in the territory of contracting parties that so wish, on the basis of the climate and supply security objectives they are seeking to achieve. The EU and United Kingdom in particular would opt for this mechanism.
3. **Confirmation of signatory States "right to regulate" by implementing legislative measures regarding investment and investors on the basis of legitimate public policy objectives.** Such objectives include in particular environmental protection, adaptation to and mitigation of climate change, and protection of health.

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<sup>16</sup>EU Council, Press release, 15 July 2019, "[Council adopts negotiation directives for modernisation of Energy Charter Treaty](#)"

<sup>17</sup> Energy Charter Secretariat, [Public Communication explaining the main changes contained in the agreement in principle](#), 24 June 2022.

<sup>18</sup>European Commission, [Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference](#), 6 October 2022.

4. **New provisions to reduce timescales and costs relating to clearly inadmissible or frivolous claims.**
5. **The introduction of a new article confirming that the ECT does not apply within the EU.** This proposal especially targets the ECT provisions of Articles 7 (transit), 26 (settlement of disputes between an investor and a contracting party), 27 (settlement of disputes between contracting parties), and 29 (interim provisions on trade-related matters) which would not apply to parties that are members of the same regional economic integration organisation.
6. **Tougher provisions on social and environmental responsibility** applicable to companies covered under the ECT, through a reaffirmation of international agreements and standards, including the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, and the International Labour Organisation's Fundamental Conventions.

It should be noted in this regard that all ECT contracting parties are already signatories to the Paris Agreement.

It is expected that the ECT modernisation agreement will be adopted during the next Energy Charter Conference on 22 November 2022. In anticipation of this deadline, on 6 October 2022 the European Commission presented its proposals to Member States to secure the EU's support for the adoption of the ECT amendments.

If adopted, which has to be a unanimous decision, the modernised Treaty will then have to be ratified by at least three-quarters of the signatory parties if it is to come into force, in this instance by Parliament in the case of France<sup>19</sup>.

**The proposed amendments could represent a step forward for Member States if adopted and ratified, but they fall short of France's climate objectives and its international climate commitments.**

**The amendments tabled by the European Commission reflect Member States' aim to make the existing ECT greener**, including by proposing to link the modernised Treaty to key international agreements on climate, environment, labour law, and corporate social and environmental responsibility.

**However, these amendments do not stipulate any hierarchy of international treaties, and in particular do not reaffirm the primacy of the Paris Agreement over the ECT.** Nor does the modernisation of the ECT as proposed by the European Commission resolve the issue of the international arbitration to which contracting parties must submit for the settlement of disputes; arbitration which either ignores or contradicts judgments from domestic courts and the European Court of Justice.

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<sup>19</sup>National Assembly, "[Ratification of treaties](#)", Summary sheet no. 42.

**The proposed amendments do represent progress as regards climate.** In particular, the flexibility mechanism stipulates an end to protection for new fossil-fuel investments from 15 August 2023 for the EU and the UK, with a transition period for existing investments for which protection in the EU would be maintained for 10 years after the modernised Treaty comes into force (which could itself however take several years, or even never happen, given the time needed for ratification), and up to 31 December 2030 or 2040 at the latest, depending on the investments in question. The proposed amendments also stipulate an end to the applicability of the ECT's dispute settlement mechanism to European Union Member States, thereby re-affirming the CJEU's "Komstroy" judgment within the ECT.

**However, these advances still do not enable the timetable for decarbonising the energy industry by 2030 to be met.** In its sixth assessment report, the Intergovernmental Panel on Climate Change (IPCC) reiterates that "Projected cumulative future CO<sub>2</sub> emissions over the lifetime of existing and currently planned fossil fuel infrastructure without additional abatement exceed the total cumulative net CO<sub>2</sub> emissions in pathways that limit warming to 1.5°C (>50%) with no or limited overshoot. They are approximately equal to total cumulative net CO<sub>2</sub> emissions in pathways that limit warming to 2°C (>67%)."<sup>20</sup> As a consequence, "Decommissioning and reduced utilisation of existing fossil fuel installations in the power sector as well as cancellation of new installations are required to align future CO<sub>2</sub> emissions from the power sector with projections in [pathways that limit global warming to far below 2°C]".<sup>21</sup>

Investor-state dispute settlement (ISDS) stipulated in international agreements is in this regard identified by the IPCC, mentioning the ECT<sup>22</sup> specifically, as "designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded"<sup>23</sup>. The development of new fossil-fuel infrastructure moreover runs the risk of leading to future emissions being "locked in"<sup>24</sup>, whereas the current decade is crucial to achieving the structural changes needed, as the International Energy Agency's "Net Zero by 2050" scenario shows, anticipating the complete decarbonisation of the energy industry by 2035, and an end to coal-fired power plants in industrialised countries by 2030<sup>25</sup>.

**In addition, it could take several years for the modernised Treaty to come into force, which might not happen at all if negotiations fail.** The process for adopting amendments to the ECT requires unanimity between the parties at the next Energy Charter Conference on 22 November 36 (ECT Article 36). The modernised Treaty would then enter into force

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<sup>20</sup> IPCC (2022), "Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report". Summary for Policymakers, B.7, p. 20.

<sup>21</sup> IPCC (2022), "Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report". Chap. 2, p. 7, l. 28-31.

<sup>22</sup> IPCC (2022), "Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report". Chap. 14, p. 81, l. 11-12.

<sup>23</sup> Stranded assets can be defined as investments that lose financial value as a result of changes in climate, policies, regulations, technology, etc.

<sup>24</sup> IPCC (2022), "Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report". Chap. 15, p. 26, l. 39-46.

<sup>25</sup> IEA (2021), "Net Zero by 2050: A Roadmap for the Global Energy Sector".

only for those parties that have ratified the modernised version, provided that three-quarters of the contracting parties have ratified it.

**The periods for which investment protection run consequently come into conflict with the fossil-fuel divestment timetables indicated by the IPCC, the IEA and the agreements signed and the international coalitions that France has joined**, such as the Powering Past Coal Alliance, Beyond Oil and Gas, and the Statement on International Public Support for the Clean Energy Transition<sup>26</sup>.

**The proposed amendments do not remove the threat of litigation** related to investments in low-carbon energies, protection for which would be maintained and extended in the modernised Treaty to low-carbon hydrogen, biomass, biogas, anhydrous ammonia and synthetic fuels.

**The contribution of international agreements in general and the ECT in particular to promoting investment in the energy industry has not been made obvious, including with regard to renewable energy**<sup>27</sup>. The IPCC also identifies a risk of international investment agreements limiting the ambition of States' climate policies and leading to "regulatory chill", particularly in the case of renewable energies, which require flexibility in the implementation of the corresponding measures owing to the uncertainties surrounding their cost and technological potential<sup>28</sup>.

**The High Council on Climate reaches the conclusion that the ECT, even in a modernised form, is not compatible with France's and the European Union's 2030 climate commitments and objectives.**

**Should an agreement on modernisation not be adopted during the Energy Charter Conference on 22 November 2022, the current version of the ECT will remain in force.** So if a contracting party stays in the Treaty, the investments covered by the Treaty would then be protected indefinitely. If a party withdraws, the "sunset clause" would kick in, and existing investments covered by the Treaty would be protected for 20 years.

**If agreement on modernising the ECT is reached, the new flexibility mechanism would bring protection for new fossil-fuel investments to an end** (apart from specific gas investments, Table 1). This mechanism would cut protection for existing fossil-fuel investments to 10 years within the European Union and the United Kingdom, and in other signatories that might opt for the mechanism, while for other signatory parties, the investments covered by the newly-modernised ECT would retain indefinite protection.

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<sup>26</sup> High Council on Climate (2021). "COP26: Implications and opportunities for France's climate policy"

<sup>27</sup> OECD working document (2018), "[Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence](#)".

<sup>28</sup> IPCC (2022), "Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report". Chap. 14, p. 71.

Withdrawing from the ECT alone does not eliminate the incompatibility between the decarbonisation timetable of the States concerned and the length of protection offered for existing fossil-fuel investments on their respective territories.

**To be effective and restore sovereignty to States in their energy and climate policies, any withdrawal must be combined with cancelling out the “sunset clause” stipulated in the ECT.**

On the margin of the negotiations, on 6 October 2022 the European Commission presented a subsequent agreement on the interpretation of the ECT within the EU, confirming the inapplicability of the Treaty within the EU and that the sunset clause is to be cancelled out between Member States<sup>29</sup>.

**This proposal<sup>30</sup>, valid irrespective of the outcome of negotiations on Treaty modernisation, is a major step forward to be emphasised**, and meets the need to confirm the primacy of the European and EU Member States' domestic courts over international arbitration tribunals.

**A coordinated withdrawal from the ECT by France and the EU, combined with cancelling out the “sunset clause”, appears to be the least risky option in terms of meeting domestic, European and international climate commitments.** Such a withdrawal would also make it possible to raise awareness among all the other signatory parties, and to curb geographical extension of the ECT to new parties that would expose themselves to the same risk of incompatibility between the Treaty's provisions and the pursuit of their climate objectives.

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<sup>29</sup>[European Commission, Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, 6 October 2022.](#)

<sup>30</sup>[European Commission, Communication on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty. Annex: Agreement on the interpretation of the Energy Charter Treaty, 5 October 2022.](#)

Table 1: Duration of investment protection granted by the ECT

Type of investment	Staying in the current ECT	Staying in a modernised ECT	Withdrawing from the current ECT
<b>Existing fossil-fuel investments</b>	Indefinite protection	Under the flexibility mechanism (UE and United Kingdom at this stage), protection limited to 10 years from the point the modernisation agreement comes into force, and to 31/12/2040 at the latest Indefinite protection for signatory parties that do not opt for the flexibility mechanism.	Protection for 20 years equating to the sunset clause, effective 1 year after notification of withdrawal.
<b>New fossil-fuel investments (other than gas)</b>	Indefinite protection	Protection granted until 15/08/2023.	Protection for 20 years for investments made during the year following notification of withdrawal. No protection after effective withdrawal from the ECT (1 year after notification of withdrawal).
<b>New gas investments (infrastructure compatible with hydrogen and low-carbon gas)</b>	Indefinite protection	Protection granted until 31/12/2030 by default. Protection granted until 15/08/2033 where it is replacing a coal or lignite power plant.	Protection for 20 years for investments made during the year following notification of withdrawal. No protection after effective withdrawal from the ECT (1 year after notification of withdrawal).
<b>Existing investments in low-carbon energy (including renewables and nuclear)</b>	Indefinite protection	Indefinite protection	Protection for 20 years equating to the sunset clause, effective 1 year after notification of withdrawal.
<b>New investments in low-carbon energy (including renewables and nuclear)</b>	Indefinite protection	Indefinite protection with investment scope extended to low-carbon hydrogen, biomass, biogas, anhydrous ammonia and synthetic fuels.	Protection for 20 years for investments made during the year following notification of withdrawal. No protection after effective withdrawal from the ECT (1 year after notification of withdrawal).

# APPENDICES

## APPENDIX 1. LIST OF ENERGY CHARTER CONFERENCE MEMBERS AND OBSERVERS<sup>31</sup>

### 53 members of the Energy Charter Conference

Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Belarus\*, Bosnia-Herzegovina, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, Netherlands, North Macedonia, Norway\*\*, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Yemen

\* Belarus: provisional application suspended on 24 June 2022

\*\* Norway: treaty signed but not yet ratified

### Withdrawals

Italy: in accordance with Article 47-3, by notification dated 31 December 2014

Russia: in accordance with Article 45-3.b, by decree of 30 July 2009

### 44 observers of the Energy Charter Conference

- signatories of the European Energy Charter (1991): Australia, Burundi, Canada, Chad, Indonesia, Italy, Mauritania, Morocco, Niger, Pakistan, Palestine, Serbia, Syria, Uganda, USA

- signatories of the International Energy Charter (2015): Bangladesh, Benin, Burkina Faso, Cambodia, Chile, China, Colombia, East African Community, Economic Community of Central African States, Economic Community of West African States, Eswatini, G5 Sahel, Gambia, Guatemala, Guyana, Iran, Iraq, Kenya, Mali, Nigeria, Panama, Rwanda, Senegal, Sierra Leone, South Korea, Tanzania, United Arab Emirates, Vietnam

### International organisations with observer status

ASEAN, BASREC, BSEC, CIS Electric Power Council, Economic Cooperation Organization, EBRD, International Atomic Energy Agency, International Energy Agency, IRENA, OECD, UNECE, World Bank, WTO

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<sup>31</sup> [Members & Observers - Energy Charter](#)