

MODERNISING THE ENERGY CHARTER TREATY - WHAT IS THE SWISS POSITION?

by Isabel San Martin and Lorette Giacometti

While many EU countries have decided to leave the Energy Charter Treaty – citing incompatibility with green energy goals – Switzerland is maintaining a wait-and-see approach, mindful of its potential impact on Swiss energy companies and investment funds.

Denmark is the latest country to announce its withdrawal from the Energy Charter Treaty (“ECT”) following a spate of similar announcements from other EU member states last year – although only France, Germany and Poland have formally triggered the withdrawal process.

In the face of this apparent EU exodus, the Head of International Affairs of the Swiss Federal Office of Energy (SFOE) stated that Switzerland would not follow EU Member States in their exit from the ECT.¹ However, Switzerland has yet to adopt a final decision; this may depend, to some extent, on the EU’s final position, but the protection of Swiss investors abroad (particularly those in the energy sector) is also an important consideration.

1 THE TUG OF WAR OVER THE ECT

The ECT modernisation process began in 2017, largely as a result of the EU trying to align the treaty with the Paris Agreement. Despite initial reluctance from some non-EU Contracting Parties (who didn’t see the need for reform) an **Agreement in Principle** on modernisation was reached on 24 June 2022 – following 15 rounds of negotiations.

This is one of the **most progressive treaty reform efforts** to date, with the Agreement in Principle including:

- a provision on the right to regulate (including climate change mitigation and adaptation);

¹ EURACTIV, *Switzerland says won’t follow EU out of beleaguered Energy Charter Treaty*, 11 February 2023, available at: <https://www.euractiv.com/section/energy/news/switzerland-says-wont-follow-eu-out-of-beleaguered-energy-charter-treaty/>.

- more limited definitions of “investor” and “investment”;
- a mechanism for early dismissal of frivolous claims; and
- more limited standards of treatment, including a list of factors to be considered when assessing indirect expropriation claims.²

The most novel addition to the ECT is an optional **fossil fuel carve-out**: Contracting Parties can decide to exclude fossil fuel investments made after August 2023 from protection under the treaty, and to protect existing fossil fuel investments for ten years only from the entry into force of the modernised treaty.

The Agreement in Principle was due to be adopted at the Energy Charter Conference in November 2022, but a few weeks before the vote several EU member states **announced their intention to withdraw** from the ECT altogether,³ arguing that the modernised ECT would limit their ability to adopt measures to combat climate change. Others have since followed suit, with Denmark announcing its withdrawal on 13 April 2023.⁴

As a result of these statements and a resolution from the European Parliament,⁵ the vote on the modernised treaty had to be postponed.

The European Commission (“**Commission**”) has since issued a “non-paper” setting out the **three options available to EU member states**:

- (1) a co-ordinated withdrawal by the EU and its member states;

² https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf.

³ While Spain, Germany, France, the Netherlands, Poland, Slovenia, Belgium, Portugal and Luxembourg all announced their intention to withdraw in 2022, to date, only France, Germany and Poland appear to have submitted their written notification of withdrawal. See <https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/>.

⁴ Danish announcement on 13 April 2023, available at: <https://kefm.dk/aktuelt/nyheder/2023/apr/danmark-udtraeder-af-energichartertraktaten>.

⁵ Resolution dated 24 November 2022 here: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.pdf. The Energy Charter Secretariat submitted a letter in response, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/News/0047-SG-13022023-EP_President.pdf.

- (2) a withdrawal by the EU, but allowing some member states to remain Contracting Parties to the modernised ECT; or
- (3) the adoption of the modernised ECT, followed by a co-ordinated withdrawal.⁶

Withdrawal from the ECT would inevitably trigger the **20-year sunset clause**⁷ – a fact recognised by the Commission and seen in the case of Italy (which withdrew in 2016). This has also been acknowledged by the Energy Charter Secretariat.⁸

The vote on the modernised ECT was initially postponed until April 2023,⁹ but no date has yet been confirmed. And, while Denmark has recently confirmed its intention to withdraw, many other member states continue to be silent on this issue, **indicating there is not yet a common position on whether to adopt the modernised treaty or withdraw.**

However, since France, Germany and Poland have now formally triggered the ECT withdrawal process (with withdrawal coming into effect in December 2023),¹⁰ this may make it difficult for the EU to jointly vote in favour of the modernised treaty (the Commission's third option).

2 SWITZERLAND'S STANCE

Switzerland attaches great importance to international law. It is reliant on international co-operation to secure its energy supply, so it is **in its interest to have international rules in place for the transfer of energy and the protection of energy investments.** In line with this policy, in October

⁶ Commission's non-paper, available at: https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf.

⁷ Article 47(3) of the ECT.

⁸ Energy Charter Secretariat note dated 3 November 2022, available at: <https://www.energycharter.org/media/news/article/sunset-clause-article-47-of-the-ect-in-relation-to-article-62-of-the-vienna-convention-on-the-law/>.

⁹ Decision of the Energy Charter Conference of 22 November 2022, available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202232.pdf>.

¹⁰ News report on Energy Charter Secretariat website on 22 March 2023: <https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/>.

2019, the Swiss government agreed to negotiate the modernisation of the ECT.¹¹

Switzerland generally adopts a liberal, pro-investment protection stance in international investment agreement negotiations. This is down to several factors, such as its small domestic market and the fact that it is a capital-exporting country, with its prosperity heavily dependent on foreign trade. As the **world's ninth-largest foreign investor**, Switzerland's foreign policy focuses on ensuring protection of Swiss investors abroad, with a **network of bilateral investment protection treaties** second only to Germany and China.¹²

2.1 The Swiss position on the modernised ECT

Despite the SFOE's February 2023 assertion **that Switzerland would not follow the EU in its apparent attempt to exit the ECT**, a final position has yet to be adopted.

The Swiss government mandated the SFOE to approve the modernised ECT (subject to ratification) in November 2022 and, once approved, to prepare an analysis for the Federal Council on how Switzerland could position itself with regard to the modernised ECT. The Swiss parliament would then decide on the ratification, based on this analysis. **The report was initially expected to be issued by February 2023, but is unlikely to be completed until the modernised ECT is approved by the Energy Charter Conference.** The SFOE will first want to know what the EU's position is, since an EU withdrawal from the ECT would have a significant impact on Swiss energy companies and investment funds (since they invest

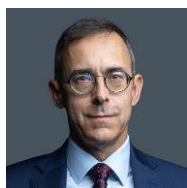
¹¹ Press release of the Swiss Federal Office of Energy, *Federal Council approves the modernised Energy Charter Treaty*, dated 9 November 2022, available at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-91286.html>.

¹² See Website of the State Secretariat for Economic Affairs (SECO), Switzerland's Investment Treaty Policy, available at: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz.html.

almost exclusively in the EU and the European Free Trade Association (EFTA), mostly in renewable energy).¹³

If Switzerland ultimately remains in the ECT, as the current position seems to indicate, Swiss investors will continue to have the option to initiate international arbitration proceedings under the ECT if necessary. EU investors may also consider restructuring their investments through Switzerland, to continue to benefit from the protection of the ECT in some member states (assuming that some are allowed to remain parties to the ECT) and during the treaty's 20-year sunset clause for those that do eventually withdraw.

For further questions or comments about this topic, please contact:



Matthias Scherer
Partner
mscherer@lalive.law



Isabel San Martin
Associate
isanmartin@lalive.law



Lorette Giacometti
Associate
lgiacometti@lalive.law

¹³ Media release of the Swiss Federal Office of Energy, *Federal Council approves the modernised Energy Charter Treaty*, dated 9 November 2022, available at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-91286.html>.