France urges the EU to withdraw from the ECT

France has recently sent a strong signal to the international community by enjoining the EU to withdraw from the Energy Charter Treaty (the **ECT**) and to abandon the prospect of reforming this treaty.

In an undated letter signed by four French ministers and sent to the European Commission, France expresses growing impatience with the slow progress in the ECT reform negotiations. The French ministers urge the EU to face up to the sedate progress of these negotiations, and draw all necessary inferences therefrom: the parties are unlikely to reach an agreement in the near future, while the objectives set by the Member States and the European Council are already failing to be met.

It is time for the EU, says France, to live up to its ecological ambitions by refusing to cater to States that do not share these. To that end, the EU should publicly advertise its readiness to proceed to a "coordinated withdrawal" from the ECT, together with all its Member States, should the negotiation process fail to produce the expected results.

This declaration appears in a charged context, marked by the overt hostility displayed by the EU towards Investor-State Dispute Settlement mechanisms and the increasingly stark daylight between the interests pursued by fossil fuel-dependant states, and those pursued by States for whom climate change has become the most pressing issue of our time.

The EU's defiance towards ISDS certainly looms over the tense negotiation process that started in 2020, and is supposed to usher in a new, modernized version of the ECT. The reader will remember that in its *Achmea* decision, dated 6 March 2018, the ECJ had seemingly announced that the bell had tolled for Intra-EU BITs.

Since then, many investment tribunals have appeared unruffled by the *Achmea* decision, as they did not consider themselves bound by the ECJ's case law. On the other hand, several EU Member States embarked upon a practice of systematically challenging awards on the grounds set by *Achmea*. In an effort to comply with the EU's position, Member States have eventually resolved to terminate all Intra-EU BITs.

On 5 May 2020, twenty-three EU Member states entered into the Termination Agreement (the **TA**) to enforce the *Achmea* judgment. The TA provides for the termination of 130 intra-EU BITs. The sunset clauses found in these BITs are equally terminated, which deprives existing investors of the right to assert claims under the BIT as of the date of entry into force of the TA.

Furthermore, the TA also terminates all outstanding sunset clauses that have survived the previous termination of some Intra-EU BITs. Indeed, Member States such as Italy, Romania, Poland and Ireland had already terminated their Intra-EU BITs, but the sunset clauses found therein remained in force, granting protection to existing investors up until five to twenty five years after the BIT's termination. The TA has now put an end to this situation.

Article 16(1) of the TA subjected its entry into force to the elapsing of a 30 days period after "*the date on which the Depositary receives the second instrument of ratification, approval or acceptance*". The TA entered into force on 29 August 2020, 30 days after the receipt by the Secretary-General of the Council of the EU of the instrument of ratification sent by Hungary.

The TA was yet another testament to the EU's willingness to overhaul the entire system of Investor-State Dispute Resolution. The heated debates that these decisions have spawned were thereafter exported to the international scene, when the negotiations for the modernisation of the ECT began.

The European Commission has indeed evoked the intra-EU issue in its communication on the First Negotiating Round to Modernize the Energy Charter Treaty dated 10 July 2020. Furthermore, in its text proposal for the modernisation of t he ECT, the EU advocates the establishment of a multilateral investment court, in an attempt to withdraw intra-EU disputes from the cognizance of arbitral tribunals. Indeed, the EU's proposed text provides that, in case of an agreement between two contracting parties to refer disputes to said investment court, recourse to arbitration for nationals of these contracting parties would be foreclosed.

The EU's position as regards international arbitration has proven contentious. Japan has steadfastly rejected the proposal and expressed its commitment to maintaining the current investor-state dispute resolution mechanism in place. Japan's position is likely to become a hurdle that the EU would find quite difficult to surmount: any change to the ECT must be unanimously approved, so any of the ECT's 53 signatories can block a proposal.

But those oppositions are not limited to the issue of whether investment tribunals are the appropriate forum for solving energy disputes. The EU views the modernisation process as an opportunity to enact an ecologically-conscious treaty, which could be conducive to a transition to a low-carbon energy system. Other States do not share the same vision and these two different positions are bound to collide: Japan, supported by Kazakhstan, has declared that modernisation should be minimal and opposes the language on the right to regulate that the EU proposes to introduce. These countries' reluctance to amend the ECT reflects diverging economic interests: Many of the contracting parties have fossil-fuel dependant economies. Japan is the only G7 country to continue building coal-fired power plants.

Furthermore, until recently Japan had never been sued by foreign investors, whereas Japanese companies have often relied on the ECT to take action against other governments. By contrast, other contracting parties have already incurred significant liability. The concern is that fossil fuel companies could heavily rely on the treaty's provisions so as to hamper any attempt to transition to a low-carbon energy system.

These grim negotiation prospects have compelled France to call for withdrawal. France's position is, however, far from consensual in the EU community: albeit Spain has backed calls to leave the ECT, the EU does not seem enthralled by the idea. Brussels said that updating the ECT remains a priority, pointing out that the sunset clause found under Article 47 of the treaty subjects departing parties to litigation from investors up until 20 years after they leave.

In case of a withdrawal without successful modernisation, the current version of the ECT, with the extended protection it grants to fossil fuel investors, could therefore remain the basis for new investor-state disputes in the next 20 years. The only way to circumvent the sunset clause would be to terminate the agreement altogether. But the ECT does not contain any provision governing its termination. Thus, Article 54 of the Vienna Convention on the Law of Treaties applies, making termination conditional upon the unanimous agreement of the contracting parties.

Given the vigorous opposition with which modernisation proposals were met by some of the contracting parties, it seems those States are unlikely to be delighted by a termination proposal. Probably aware of these difficulties, France's letter states that the option of EU's withdrawal should be "*appraised in its legal*, *institutional and budgetary modalities*". To be continued then.

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