

Prohibition of arbitration in the single energy market

Decision (EU) 2025/1904 of the European Parliament and of the Council of 10 September on the approval by the Union of the Agreement on the interpretation and application of the Energy Charter Treaty.

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The *Official Journal of the European Union* of 19 September publishes Decision (EU) 2025/1904 of the European Parliament and of the Council of 10 September on the approval by the Union of the Agreement on the interpretation and application of the Energy Charter Treaty (hereinafter also referred to as the ‘Treaty’ and the ‘ECT’; treaty signed in Lisbon on 17 December 1994 and approved on behalf of the European Communities by 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997).

1. Introduction: withdrawal from the ECT due to its incompatibility with new environmental objectives; effects of the withdrawal

The European Parliament has stated that the ECT is the most used investment treaty by multinational fossil fuel corporations to sue governments that implemented policies aimed at phasing out fossil fuels and transitioning to renewable energy (Recommendation on the draft Council decision on the withdrawal of the Union from the

Energy Charter Treaty, adopted on 11 April 2024¹). This is corroborated by a number of cases listed by Parliament in the aforementioned recommendation, which show that “the ECT not only hinders climate action, but also the ability of states to manage the energy crisis and transition”.

In this context, both the European Union and many Member States, including Spain, have withdrawn from the Treaty², considering that the protection it affords to investments in fossil fuels (mainly gas fields, oil fields and pipelines) may interfere with the new objectives of transitioning to more sustainable energy sources, as defined in the Paris Agreement³, the European Climate Law⁴ and the European Green Deal⁵.

In accordance with Articles 47(2) of the Energy Charter Treaty and 20(3) of its protocol, the withdrawal will affect new investments, but existing investments will be protected for a further twenty years, thanks to the clause provided for in Article

47(3), which provides that the Treaty shall continue to apply to investments made in the area of the withdrawing State by investors from other contracting States or in the area of those contracting States by investors from the withdrawing State for a period of 20 years from the date on which the withdrawal takes effect.

Going a step further than the withdrawal and with the aim of circumventing the

Arbitral tribunals must not register any future intra-EU arbitration proceedings

twenty-year investment protection period following the withdrawal, the European Parliament called on the Commission to continue its efforts to reach an agreement with the Member States “that would codify the interpretation that the ECT does not apply and was not meant to apply to disputes between a Member State and an investor of another Member State con-

¹ 06509/2024 — C9-0059/2024 — 2023/0273 (NLE). See this [link](#).

² Council Decision (EU) 2024/1638 of 30 May on the withdrawal of the Union from the Energy Charter Treaty. Withdrawal by Spain from the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, done at Lisbon on 17 December 1994 (*Official Journal of Spain* of 14 May 2024).

³ Agreement adopted at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015.

⁴ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

⁵ Communication from the Commission of 11 December 2019.

cerning an investment made by the latter in the first Member State”. This agreement is the one now adopted.

2. Common understanding: non-applicability of the ECT as a basis for intra-EU arbitration proceedings

In the Agreement on the interpretation and application of the Energy Charter Treaty, the parties reaffirm that they share a common understanding of the interpretation and application of the Treaty. Such a common understanding means that Article 26 of the Treaty, which sets out various mechanisms for the settlement of disputes between a contracting State and an investor of another contracting State⁶, does not and could not apply as a legal basis for intra-EU arbitration proceedings.

The agreed interpretation gives the case law of the Court of Justice of the European Union (CJEU), which is the body to which the Member States have assigned the right of giving authoritative interpretations of Union law, the force and effect of law. This exclusive competence also extends to the interpretation and application of international agreements to which the European Union and its Member States are parties in the case of a dispute between two Member States or between the European Union

and a Member State (CJEU judgment of 30 May 2006, case C-459/03, *Commission v Ireland*, ECLI:EU:C:2006:345, paras. 129 to 137).

The Court of Justice of the European Union has ruled 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 (CJEU judgment of 2 September 2021, case C-741/19, *Republic of Moldova v Komstroy*⁷). According to that court, any award made in arbitration proceedings within the Union brought under Article 26 of the Energy Charter Treaty to resolve a dispute between, on the one hand, an investor from a Member State and, on the other hand, another Member State or the European Union, is incompatible with European Union law, in particular Articles 267 and 344 of the Treaty on the Functioning of the European Union⁸. Therefore, such awards cannot produce legal effects and the payment of compensation further to those awards cannot be enforced.

This interpretation is based on an analysis of the intention of the parties when ratifying the Energy Charter Treaty. The European Union’s repeated position is that

⁶ Among other mechanisms provided for, arbitration before the International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’), or arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (‘SCC’).

⁷ ECLI:EU:C:2021:655, paragraph 66, judgment confirmed in its ruling of 16 June 2022, 1/20, EU:C:2022:485, paragraph 47.

⁸ CJEU judgment of 6 March 2018, *Achmea*, case C-284/16, ECLI:EU:C:2018:158.

the Treaty was not intended to apply to relations within the Union, as it was negotiated as an instrument of the European Union's external energy policy to establish a framework for energy cooperation with third countries, whereas, on the contrary, the European Union's internal energy policy consists of a complex system of rules aimed at creating an internal market in the field of energy, which exclusively regulate relations between Member States in that field.

The CJEU's case law has proved insufficient, since, as acknowledged in the explanatory notes to the decision in question, arbitration claims have continued to be submitted by investors from one Member State against another Member State, and arbitral tribunals have continued to accept jurisdiction and to issue awards in intra-EU arbitration proceedings. This undermines the effective application of Union law, as the interpretation by some arbitral tribunals raises a risk of conflict between the European Union treaties and the Energy Charter Treaty. According to the case law of the CJEU, the risk of legal conflict is sufficient to render an international agreement incompatible with Union law. The adoption of the agreement is intended to eliminate the risk of such legal conflict between those treaties.

3. Scope and consequences of the interpretation

The Agreement on the interpretation and application of the Energy Charter Treaty

covers all investor-State arbitration proceedings involving the parties in intra-EU disputes based on Article 26 of the

Arbitral tribunals must recuse themselves from any pending intra-EU arbitration proceedings

Energy Charter Treaty under any arbitration convention or set of rules, including ICSID and the ICSID arbitration rules, the Arbitration Institute of the SCC arbitration rules, the United Nations Commission on International Trade Law arbitration rules and ad hoc arbitration.

By virtue of the principle of primacy of European Union law, the agreement will require that Article 26 of the Energy Charter Treaty be considered as not serving and not being able to serve as a basis for intra-EU arbitration proceedings. Consequently, Article 47(3) of the Treaty has no effect either on the States that withdrew from the Treaty before the adoption of the agreement or on those that have not yet withdrawn from it.

The interpretation given by the CJEU and now ratified by the signatories to the agreement in question gives rise to the following consequences, which are already set out in the "Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as

a basis for intra-EU arbitration proceedings” of 26 June 2024⁹:

- 1.st *Obligation for arbitration institutions not to register any future intra-EU arbitration proceedings* (in line with Art. 36(3) ICSID Convention and Article 12 SCC Arbitration rules), without prejudice to the parties’ right to make such claims as they consider appropriate in relation to costs incurred by them as respondents in relation to intra-EU arbitration proceedings. Where notice of arbitration is nevertheless delivered, the parties that are concerned by those proceedings, whether as respondent or as the Member State of an investor, should cooperate in order to ensure that the existence of this Agreement is brought to the attention of the arbitral tribunal concerned to allow the appropriate conclusion to be drawn that Article 26 of the Energy Charter Treaty cannot serve as a legal basis for such proceedings.
- 2.nd *Obligation for arbitral tribunals to immediately terminate any pending intra-EU arbitration proceedings*. As a result of the non-applicability of Article 26 of the Energy Charter Treaty as a legal basis for intra-EU arbitration proceedings, the parties that are concerned by pending intra-EU arbitration proceedings, whether as respondent or as the Member State of an investor, should cooperate in order to ensure that the existence of this Agreement

is brought to the attention of the arbitral tribunal concerned to allow the appropriate conclusion to be drawn as to the absence of jurisdiction of that tribunal.

- 3.rd *Validity of final awards or settlements*. The agreement stipulates that “settlements and awards in intra-EU investment arbitration cases that can no longer be annulled or set aside and that were voluntarily complied with or definitively enforced should not be challenged”.
- 4.th *Unenforceability of existing arbitral awards* (awards subject to appeal or those which, not having been appealed, have not yet been enforced), given that, under Article 26 of the Energy Charter Treaty, this does not constitute sufficient legal basis.

4. Signatories

The Agreement, subject to ratification, approval or acceptance, is signed by the following parties: Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the European Union.

No reservations may be made to the Agreement on the interpretation and application of the Energy Charter Treaty.

⁹ OJ L, 2024/2121, of 6 August 2024, ELI. See this [link](#).

Appealable or unenforced awards have no legal effect

5. Entry into force

The Agreement shall enter into force 30 calendar days after the date on which the depositary (Secretary-General of the Council of the European Union) receives the second instrument of ratification, approval or acceptance.

For each party that ratifies, approves or accepts it after its entry into force, the Agreement shall enter into force 30 calendar days after the date of deposit by such party of its instrument of ratification, approval or acceptance.