

Reforming or Withdrawing from the ECT: A Legal Can of Worms

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A few legal points on the ECT

- ▶ The **current ECT** is in breach of EU law (*Komstroy*)
 - ▶ = legal obligation of EU and MSs to end this illegality
- ▶ The **reformed ECT** remains in breach of Paris (protection of fossil fuel)
- ▶ Since current non-EU contracting parties have not indicated to use the flexibility clause the climate-balance of the reformed ECT overall is not even better in this respect

Topical detour: position of NL Gov communicated today

- ▶ NL Gov will abstain on 22 November, meeting of Energy Charter Council
- ▶ NL Gov will not seek ratification of reform but withdraw after 22 Nov
- ▶ NL position in EU Council on how the Commission can vote on 22 Nov is not yet determined
 - ▶ EU must at least abstain; hence, NL must form part of the blocking minority on the Commission's proposal to approve the reform

ECT as an obligatory mixed agreement

- ▶ EU has exclusive competence for FDI
- ▶ MS must consent to ISDS
 - ▶ It is legally required that all parties are on board
 - ▶ EU and MSs are one party to the ECT
- ▶ Loyalty obligations to inform, cooperate, and abstain from hindering common strategy

MSs are in charge and can block reform

- ▶ Core of ECT is ISDS
- ▶ EU has consistently internationally communicated also to bind itself to ISDS
- ▶ EU can only do so for whole EU with consent of all MS (Op 2/15)
 - ▶ Italy is already out, Poland to withdraw = EU cannot bind 'whole EU' to ISDS
 - ▶ Council decision to do so is illegal and can be challenged before the Court by any unhappy MS and/or EP

MSs can withdraw from ECT

- ▶ EU loyalty cannot bind national parliaments
 - ▶ That would undermine competence division / purpose of mixity / democratic legitimacy / separation of powers
 - ▶ Also flows implicitly from Opinion 2/15 and Opinion 1/19
- ▶ EU must make clear internationally that it is only bound within its competences
 - ▶ Only for MSs that agreed to ISDS, excluding those that withdraw / do not ratify reform

Why must MSs vote against ECT in the Council?

- ▶ **Climate**, climate, climate = it matters, not only for own Paris obligations but for the protection of fossil fuel elsewhere
- ▶ **Justice** = we should not want to expose 40 additional (largely developing) countries to claims under a flawed treaty
 - ▶ = every vote matters for the EU not to agree and ultimately withdraw
- ▶ **Positive Council decision = common strategy = loyalty obligations on national executive**
 - ▶ Loyalty cannot force parliaments to ratify but require executive to 'seek ratification'
 - ▶ MS cannot withdraw *before* rejection by parliament = withdrawal postponed