ECT Withdrawals Don’t End Investor Protection: Why Treaty Strategy Still Matters in Energy Projects

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At first sight, this may appear to mark the decline of the ECT as a source of legal protection for energy investors. However, that conclusion would be premature. Withdrawal changes the investment protection landscape, but it does not necessarily remove protection for existing investments. Instead, investors need to approach treaty protection with greater care, particularly when projects are exposed to regulatory change, fiscal intervention, permitting risk or energy transition measures.

For investors with long-lived energy assets, the practical question is not simply whether a host state is withdrawing from the ECT, but whether treaty protection remains available for existing projects, whether alternative treaties may apply and whether investment structures remain fit for purpose.

What Are Investment Treaties, and Why Does the ECT Matter?

Investment treaties are agreements between states in which each state promises to give certain legal protections to qualifying investors from the other state or states. Those protections do not insure investors against ordinary commercial risk, and they do not prevent governments from regulating in the public interest. They do, however, provide a framework for challenging certain forms of state conduct that adversely affect protected investments.

Common protections include fair and equitable treatment, protection against discrimination, protection against uncompensated expropriation and free transfer of funds. These protections sit alongside, and are available in addition to, rights investors may have under applicable contracts or local law. Many treaties also allow investors to bring claims directly against the host state before an international arbitral tribunal, rather than relying on local courts.

The ECT matters because it applies that treaty framework specifically to the energy sector. For qualifying cross-border energy investments, it has historically been one of the principal treaty instruments through which investors have sought protection where political or regulatory measures affect project rights or economics.

Does Withdrawal End Protection?

Not necessarily. Article 47(3) of the ECT contains a 20-year “sunset clause.” In broad terms, when a state withdraws from the ECT, investments already covered by the treaty at the time withdrawal takes effect may continue to benefit from treaty protection for a further 20 years.

For existing investments, therefore, the first question is not simply whether the host state has withdrawn from the ECT. It is also when the investment was made, when withdrawal took effect and whether any continuing treaty protection may still be available.

The position is more complex for intra-EU disputes – that is, disputes brought by an investor from one EU Member State against another EU Member State. The EU and Member States have taken the position that intra-EU arbitration under the ECT is incompatible with EU law and have sought, as between themselves, to exclude such arbitration and neutralise the sunset clause. Whether and to what extent those measures will be given effect by arbitral tribunals and enforcement courts, particularly outside the EU, remains complex and forum-sensitive.

A Modernised but More Fragmented Landscape

The ECT has also been modernised. The modernised treaty text was adopted in December 2024 and is subject to provisional application from September 2025 for contracting parties that have not opted out. Full entry into force remains subject to the treaty's ratification requirements, so the practical position may differ between contracting parties.

The reforms narrow certain protections, reinforce states' right to regulate, introduce more detailed rules on fair and equitable treatment and permit contracting parties to exclude protection for certain fossil fuel investments. They also introduce more demanding investor eligibility requirements and expressly exclude intra-EU investor-state arbitration.

These reforms reflect the broader policy debate around how investment protection should operate in the context of climate policy and the energy transition. But modernisation has not produced a single, settled landscape. Some states have withdrawn rather than remain within the modernised framework. Others remain parties. Some protections may continue under the original treaty during sunset periods. For remaining contracting parties, the modernised ECT may still protect qualifying cross-border energy investments, but within a more regulation-sensitive framework.

The result is a patchwork rather than a single replacement regime, making it important to assess the position by reference to the relevant host state, investor nationality, investment date and applicable treaty text.

Treaty Protection Remains Relevant Across the Energy Transition

Treaty protection remains relevant across the energy transition, and not only for fossil fuel investments. Many ECT claims have arisen from changes to renewable energy support schemes, including Spain's reforms to solar incentives. Those disputes illustrate a broader point: energy transition risk can affect both legacy and low-carbon assets.

More broadly, treaty claims in the energy sector may arise from all kinds of state measures affecting the legal, regulatory or fiscal framework for a project. These may include changes to subsidy or tariff regimes, permitting decisions, licence or concession issues, taxation or royalty measures, grid access, production or export restrictions, or project suspension or closure. Similar issues may arise not only in power generation, transmission and distribution, but also in mining, oil and gas and related infrastructure.

Of course, not all such state measures necessarily breach applicable treaty rights. The analysis is case-specific and will depend on the relevant treaty, the exact nature of the state measure, the investor's rights and expectations and the impact on the investment. But investors should be aware that treaty protections may be relevant where state measures affect their projects, and they should assess their treaty position before a dispute arises.

Looking Beyond the ECT: BITs and Structuring

The withdrawal wave also reinforces the importance of looking beyond the ECT. Bilateral investment treaties, or BITs, are treaties between two states that protect qualifying investors from one state when they invest in the territory of the other. They remain a major part of the investment protection landscape and may, depending on the jurisdictions involved, provide protections comparable to, or more favourable than, the ECT.

The United Kingdom's first case before the International Centre for Settlement of Investment Disputes, or ICSID, a leading forum for investor-state arbitration, illustrates the point. It was not brought under the ECT, but under the UK-Singapore BIT. The dispute concerns a coal mining project whose planning permission was quashed following environmental and climate-related challenges. For energy investors, the example highlights a broader point: where the ECT is unavailable or uncertain, other treaties may still matter.

The availability of protection will usually depend on the nationality of the investor, the ownership chain, the definition of protected investment, any denial of benefits or substantial business activity provisions and the timing of the investment. A group may have valuable treaty rights if an investment is held through one jurisdiction, but no equivalent protection if it is held through another. Conversely, restructuring after a dispute has become foreseeable may be ineffective and give the state grounds to object to treaty protection.

What Should Investors Do Now?

The ECT withdrawal wave is not the end of investment treaty protection in the energy sector. It marks the beginning of a more fragmented landscape, in which treaty protection will depend more heavily on timing, structure and the particular treaties available.

Energy investors should review treaty coverage now, particularly where projects are exposed to energy transition measures, fiscal intervention, permitting risk, sanctions or political change. That review should identify the nationality and ownership chain of each relevant investment; map available ECT and BIT protections by host state and holding company jurisdiction; assess timing issues, including withdrawal dates and sunset clauses; and preserve evidence of state assurances, approvals, licences, tariff regimes, permitting decisions and regulatory commitments.

The practical point is straightforward: treaty protection is most valuable when it has been considered before it is needed. Investors who understand their treaty position in advance will be better placed to manage political risk, preserve potential claims and avoid discovering too late that protection which might have been available is not, or is no longer, available to affected investments.