

# All change at the Energy Charter Treaty – what now for your investments?

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**Speakers:**

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# Agenda

- What is the ECT?
- What we have learnt from previous arbitrations under the ECT?
- The status and effect of the announced withdrawals
- What changes a modernised ECT might bring and how likely this now appears?
- What other legal avenues might be open if ECT protection is no longer available?
- What practical steps you can take now to minimise political risk?



# What is the ECT?

- Multilateral investment treaty
- Signed in 1994, entered into force in 1998
- 53 signatories across Europe, Middle East, Central Asia and Far East
- Detailed investment protection provisions
- Dispute resolution provisions permitting court proceedings or international arbitration

# Poll question 1

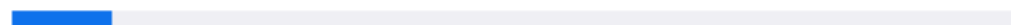
## Question

 0:46 | 1 question | 29 of 49 (59%) participated

1. In general, how valuable do you think ECT protection is to your (or your client's) investments in the energy sector? (Single Choice) \*

29/29 (100%) answered

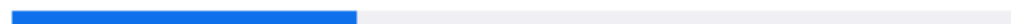
Very valuable (3/29) 10%



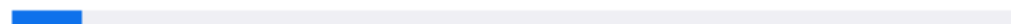
Valuable (14/29) 48%



Somewhat valuable (10/29) 34%



Not valuable (2/29) 7%





# ECT Arbitration: Statistics

158 known ECT  
investment  
arbitration cases

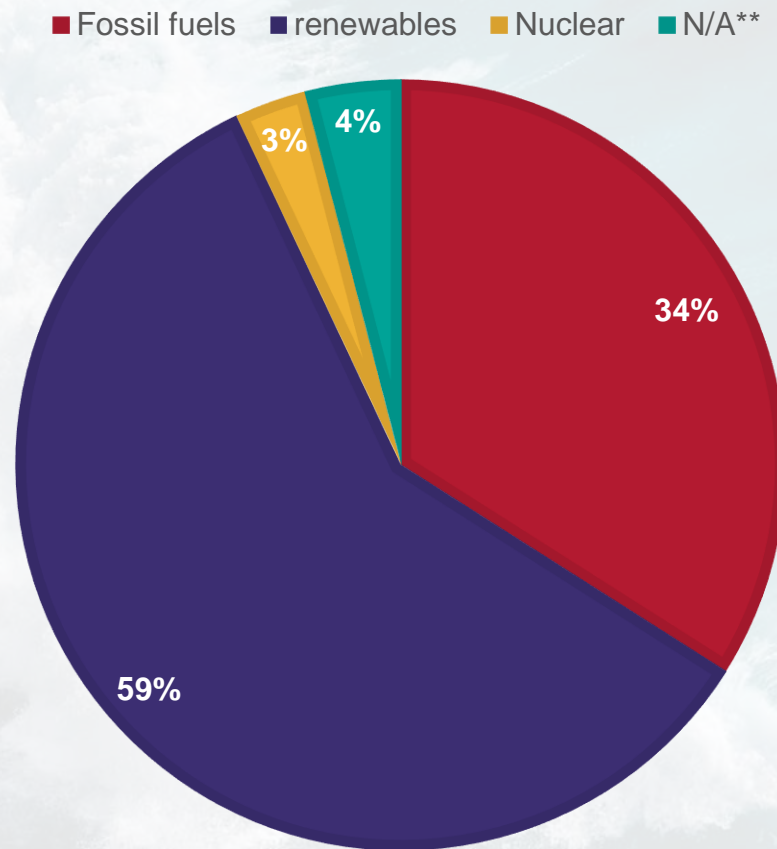
Around 50% of  
cases awards  
decided in  
investor's favour

Most frequent  
respondents:  
Italy (14), Spain  
(51), driven by roll  
back of renewable  
incentives

°Source: "ECT Secretariat, Statistics of ECT Cases as at 1 May 2023"



## Distribution of Arbitration Cases under the ECT by Energy Sources Involved\*



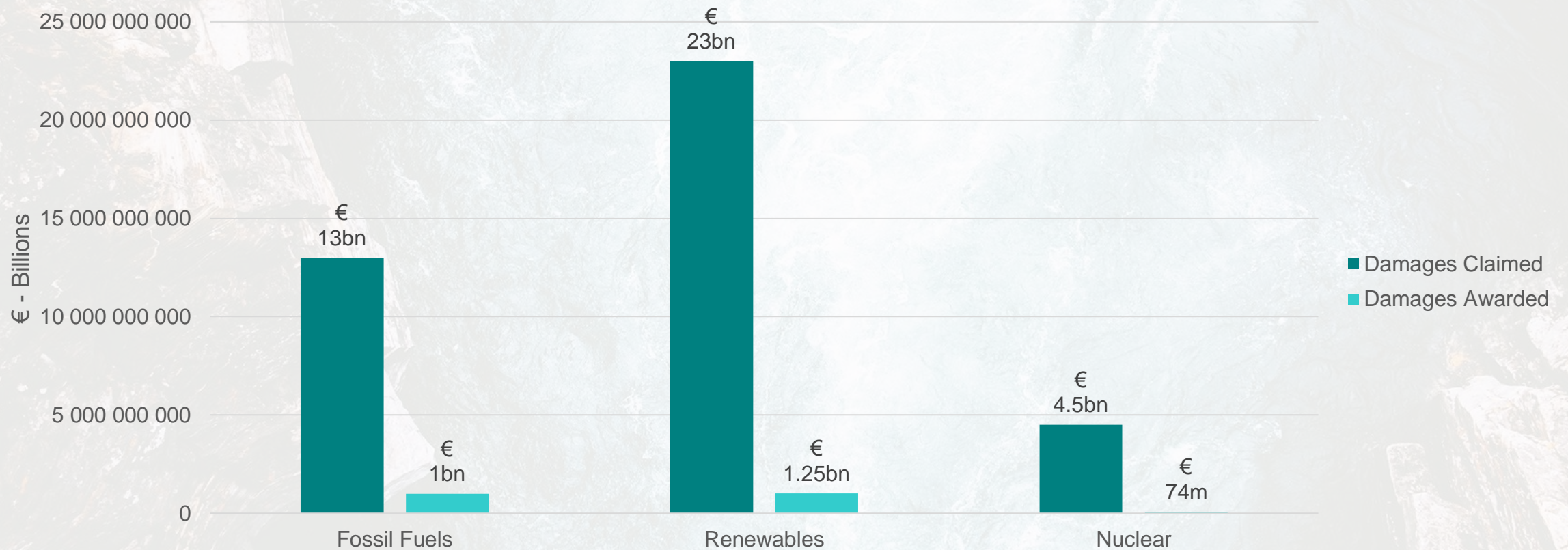
*°Source: "ECT Secretariat, Statistics of ECT Cases as at 1 May 2023"*

*\* One case involves more than one form of energy sources.*

*\*\* In six cases, it was not possible to identify particular energy sources.*



# Damages claimed and awarded in ECT cases (excluding Yukos)



°Source: "ECT Secretariat, Statistics of ECT Cases as at 1 May 2023"



# Claims in fossil fuels sector

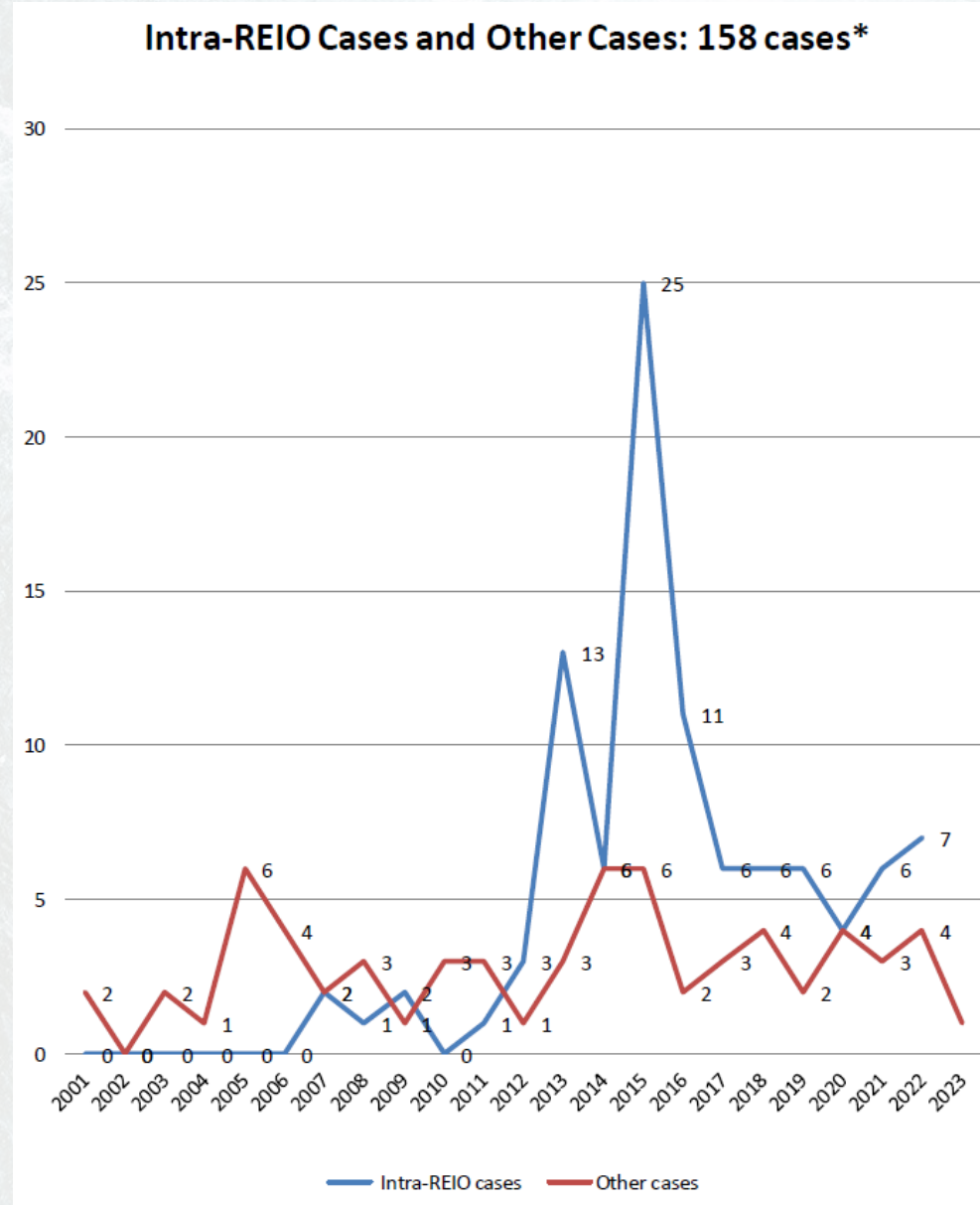
**Yukos Universal Limited v. Russian Federation; Hulley Enterprises Limited v. Russian Federation; Veteran Petroleum Limited v. Russian Federation (Award 18 July 2014):**  
\$50bn awarded regarding Russia's expropriation of investments in Yukos

**Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd., and Rockhopper Exploration Plc v. Italy (Award 22 August 2022):**  
€190m awarded over denial of offshore exploration licence following legislation restricting concessions' distance from coastline

**RWE v. Netherlands (ongoing); Uniper v. Netherlands**  
(withdrawn as condition of German government bailout)



# Intra-EU ECT Arbitrations





# EU law v. Intra-EU ISDS: And the winner is...

- Background:
  - EU's original encouragement of BITs/ECT gave way to alarm at parallel set of trade and investment rules for internal market
  - Political and legal campaign by European Commission – jurisdictional objections based on EU Treaties
  - Arbitral tribunals consistently dismissed objections
- A turning point: **Achmea** – CJEU judgment 6 March 2018 (Netherlands/Slovakia BIT)
- Applicable to ECT? Yes: **Komstroy** – CJEU judgment 2 September 2021
- How far does **Komstroy** extend?



# Status and effect of announced withdrawals

- Right to withdraw under Art. 47(1)
- Current list of recent EU Member State withdrawals:
  - Italy (2016)
  - France, Germany Poland – all due to leave in December 2023
  - Netherlands, Belgium, Luxembourg, Portugal, Slovenia, Spain and Denmark – announced intention to withdraw but notifications not yet sent to ECT Depositary
- November 2022 – EU Parliament calls for coordinated withdrawal



# How is “sunset” protection affected?

- ECT sunset clause: Art. 47(3). Protects existing investments for **20 years** from date withdrawal takes effect
- What happens if Parties decide multilaterally to alter sunset protection?
  - In principle, Parties acting collectively can deploy Art. 42 procedure (or adopt a new Treaty) amending any provision of existing Treaty including sunset clause
  - EU’s modernisation proposals included reduction to **10 years for fossil fuel investments**
  - Can sunset protection be **removed entirely**?
  - Precedent: Intra-EU BIT Termination Agreement 5 May 2020
- Is reduction/removal of sunset protection **legally effective**?



# What this means for investors

- Where is your investor/ investment? Has the relevant State announced an intention to withdraw?
- Most relevant to new investments after withdrawal has taken effect
- For existing investments: sunset provisions should continue to provide protection, subject to any successful amendment/ termination of those provisions among the withdrawing States
- But note scope to challenge arbitration awards going forward, currently most likely on the basis of **Komstroy** but beware awards or potential claims against withdrawing States



# Modernisation of the ECT

- Agreement in principle reached on revised text in June 2022, albeit successive adoption votes postponed:
  - Updated list of energy materials and products covered (e.g. to expressly mention hydrogen)
  - Mechanism for States to exclude or limit protections for fossil fuels
  - Requirement for investors to have substantial business activities in home State, i.e. no “mailbox” companies
  - Exclusion of intra-EU arbitrations



# Alternatives to barred ECT claims (1)

- What happens where the ECT route is effectively barred (withdrawal/ revision, case-law)?
- **Other treaties?**
  - Extra-EU – is there a BIT? Coverage in ECT area patchy
  - Intra-EU – BITs no more effective than ECT (and nearly all caught by Termination Agreement)
- **Domestic judicial claims?**
  - “Fork in road” provision of ECT (Annex ID) has tended to suppress
  - Administrative remedies v. damages claims
  - Wide variation between national legal systems. Some generally effective – eg. UK has avoided ECT claims because of highly developed judicial review regime and “equivalence” approach to damages under ECHR.
  - Availability of third party funding?



# Alternatives to barred ECT claims (2)

- Is the **ECHR** a viable alternative?
- Council of Europe Member States, including (formerly) Russia: **Yukos** case (€1.86 bn)
- **Advantages**
  - Wide net of A1P1
  - Procedure much simpler and cheaper than investor-State arbitration
  - ECtHR (arguably) less agenda-driven than CJEU
  - Doesn't carry legitimacy baggage of ISDS – home and foreign investors on same footing
- **Disadvantages**
  - Compensation (“just satisfaction”) and costs recovery much less generous than arbitral claims
  - Enforcement – political mechanism, but in practice vast majority of awards paid
  - Exhaustion of domestic remedies – but may tilt balance in favour of national proceedings





# **Practical Alternatives?**

- Restructuring investments, subject to treaty framework and timing
- Host Government Agreements: potential to negotiate equivalent protections; stabilization clauses
- Political risk insurance



# Poll question 2

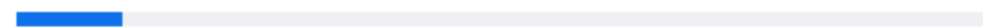
## Question

 0:59 | 1 question | 19 of 45 (42%) participated

1. Which of the following steps are you most likely to consider taking to address these recent ECT developments regarding modernisation of the text and withdrawals? (Single Choice) \*

19/19 (100%) answered

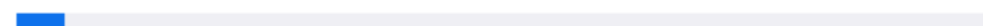
Re-structure investments (2/19) 11%



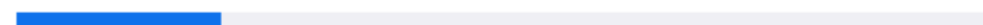
Consider claims in different fora (12/19) 63%



Reduce investment in EU (1/19) 5%



Reduce investment in fossil fuels (4/19) 21%





# Thank you



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