

SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 12

05 May 2015

Italy's Withdrawal from the Energy Charter Treaty

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INTRODUCTION

1. The aim of this note in the Series of Notes on the Energy Charter Treaty (ECT or Treaty) is twofold: first, to review the possible reasons for Italy's recent notification expressing its intent to withdraw from the ECT; second, to examine briefly the nature and legal consequences of such a withdrawal according to the ECT.
2. It is now known that on 31 December 2014 Italy notified the ECT Depository of its intention to withdraw from the Treaty.
3. It is understood that the official reason for Italy's withdrawal is of a financial nature. Some commentators believe, however, that the impending ECT claims relating to Italy's reduction of solar energy incentives may be the straw that broke the camel's back.¹

¹ Italy to quit Energy Charter Treaty, 23 April 2015 <http://globalarbitrationreview.com/news/article/33745/italy-quit-energy-charter-treaty/> See also, Italy risks claims over solar subsidies, 08 December 2014 <http://globalarbitrationreview.com/news/article/33231/italy-risks-claims-solar-subsidies/>

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4. Italy's perplexing decision will no doubt have serious political implications, unless the stakeholders and decision makers mitigate the damage and answer a list of serious questions as to where the Energy Charter process is going. The real danger is in the snowballing effect as other ECT Contracting Parties may follow in Italy's steps.
5. In order to place the legal part of this note in a proper context, it may be appropriate first to take a brief look at a few potential reasons for Italy's decision to withdraw from the ECT.
6. *Budgetary Constraints.* As noted above, the official reason seems to be Italy's attempt to re-examine its budgetary contributions to international organisations. It is to be noted that on the basis of Article 37 ("Funding Principles") of the ECT, Italy's contribution to the cost of the Energy Charter Secretariat (Secretariat) is EUR 370,204 or 8.23% of the Secretariat's EUR 4,497,460 budget.²
7. In this regard, Italy's plan to withdraw from the ECT appears to have been stealthily contemplated last year. Thus, according to Law No. 190 of 23 December 2014 (Law of Stability 2015, or Law) Italy's Ministry of Foreign Affairs and International Cooperation (MFA) has been mandated to negotiate reductions of Italy's contributions to international organisations by EUR 25,243,300 in 2015, and from 2016 onwards, by EUR 8,488,300.³
8. More specifically, Annex 8 of the Law provides a list of organisations and corresponding reductions in contributions to be achieved. It is evident that the Secretariat is not the only affected organisation; reduction of Italy's contribution to the United Nations by EUR 20 million in 2015 is a point in question.
9. An extract from Annex 8 of the Law relevant to Italy's contribution to the Secretariat is provided below:

² Financial Statements for the Year Ending 31 December 2013, Annex II to CC494 http://www.encharter.org/ntc_admin/dev_extranet/files/CCDEC2014101_1425823486.pdf (last accessed on 26 April 2015)

³ Italy's Law No. 190 of 23 December 2014, Article 1, Section 318 and Annex 8: http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2014-12-29&atto.codiceRedazionale=14G00203&elenco30giorni=false

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10. Apart from the obvious remark that in 2015 Italy's MFA did not have to negotiate a reduction of its contribution, it appears that Italy's contribution to the Secretariat was even expected to increase by EUR 80,000 to EUR 450,000 from 2016 onwards.
11. Of significant importance, however, is the term placed next to the *CARTA EUROPEA DELL'ENERGIA* (European Energy Charter). Instead of *RIDUZIONE* (Reduction), the term is *RECESSO* (Withdrawal). It is curious that this serious development went unnoticed until it was revealed by other sources.⁴
12. It may be argued that there were and still are less radical and damaging options available to the Italian Government other than withdrawing from the ECT outright due to budget cuts. A number of viable options are envisaged in Article 34 ("Energy Charter Conference") of the ECT: Italy could still use its political leverage to propose either to reconsider the budget of the Secretariat (Article 34(3)(e)), or to "*discharge the Secretariat*" (Article 34(7)). Compared to Italy's withdrawal, the latter may be the lesser of two evils. Saving the only legal framework that intends "*to promote long-term co-operation in the energy field, based on complementarities and mutual*

⁴ Italy follows Russia in withdrawing from Energy Charter Treaty, but for surprising reason, 17 April 2015 http://www.iareporter.com/articles/20150417_1

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benefits” is a worthy cause.⁵ As suggested below there is still time for Italy to reassess its intended withdrawal from the ECT.

13. *ECT claims against Italy.* As of 05 May 2015, there is only one known pending ECT claim against Italy initiated by a group of solar investors in February 2014.⁶ It is to be noted, however, that energy investors have filed 15 ECT claims against Spain, and seven against the Czech Republic.⁷ So far, neither Spain nor the Czech Republic have intimated their intent to withdraw from the Treaty. Of course, it may be argued that Italy decided to withdraw from the ECT because of the potential flood of ECT claims against it; but this argument does not withstand closer scrutiny because of Article 47(3) considered below.

14. *European Union.* Interestingly, according to a recently published article in the Italian press, a source at Italy’s Ministry of Economic Development mentioned that the EU Commission was aware of Italy’s decision to withdraw from the ECT in advance and even confirmed the possibility of Italy’s withdrawal:

La Commissione Ue è al corrente di tutto, sottolinea il Mise: «L’abbiamo informata in via preventiva e ci hanno confermato che il nostro recesso era possibile.»⁸

15. It appears that the EU Commission did not prevent or discourage Italy’s intent to withdraw from the ECT. But, until more information is available, any speculation should be avoided. This notwithstanding, the EU Commission as a guardian of the rule of law, should have made this matter public as soon as it was known to it, considering that transparency is one of the EU’s mantras; but shamefully it did not.

ARTICLE 47 ECT (WITHDRAWAL)

16. Before analysing the ECT provisions that deal with withdrawal of a Contracting Party (CP), it may be helpful to note the following facts:

⁵ Article 2 (“Purpose of the Treaty”) of the ECT.

⁶ *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3) <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/3&tab=PRO> (last accessed on 19 April 2015) See also, ICSID tribunals finalized in *Blusun and others v. Italy* [...] http://www.iareporter.com/articles/20140630_1

⁷ See MENA Chambers’ Database of Disputes under the ECT (available in PDF and Excel), <http://www.menachambers.com/expertise/energy-charter-treaty/>

⁸ *Dal 2016 Italia fuori dalla Carta dell’energia*, 25 April 2015 <http://www.ilsole24ore.com/art/finanza-e-mercati/2015-04-24/dal-2016-italia-fuori-carta-dell-energia--211423.shtml?uqid=ABV1qOVD>

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- Italy is one of the original signatories to the ECT;
- Italy signed the Treaty on 17 December 1994;
- Italy ratified the Treaty on 05 December 1997;⁹
- The ECT entered into force for Italy, as a CP, on 16 April 1998; and
- According to Article 50 (“Authentic Texts”) ECT, the Treaty’s text in the Italian language is one of six equally authentic signed texts.¹⁰

17. Article 47 (“Withdrawal”) ECT provides a withdrawal mechanism for Contracting Parties:

- (1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty.
- (2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal.
- (3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party’s withdrawal from the Treaty takes effect for a period of 20 years from such date.
- (4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.

18. Generally speaking, it may be noted that withdrawal from the ECT for a CP is a two-step process comprising (i) CP’s notification (paragraph (1)), and (ii) a one-year interval after which withdrawal takes effect (paragraph (2)), what may be regarded as “a cooling off” period, after which the provisions of paragraph (3) will be triggered, namely, the extension of protection to

⁹ Italy – a Member of the Energy Charter Conference: <http://www.encharter.org/index.php?id=310&L=0L%200%828id#c947> (last accessed on 26 April 2015). Italy’s Law No. 415 of 10 November 1997 ratifying the ECT: http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1997-12-04&atto.codiceRedazionale=097Go438&elenco10giorni=false

¹⁰ For Italian version of the ECT, please visit http://www.encharter.org/fileadmin/user_upload/Publications/IT.pdf (last accessed on 26 April 2015). Other authentic texts of the Treaty have been signed in English, French, German, Russian and Spanish languages. See also, Note 3 (on Interpretation of Treaties), Series of Notes on the Energy Charter Treaty, 10 March 2014 <http://www.menachambers.com/expertise/energy-charter-treaty/> (last accessed on 28 April 2015)

relevant energy investments for the next 20 years. Paragraph (4) provides for cessation of any Energy Charter protocol in force for the CP on the date when that CP's withdrawal takes effect.

19. Let us now examine each paragraph of Article 47 ECT in turn.

PARAGRAPH (1)

At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty.

20. A CP may withdraw from the Treaty, pursuant to this paragraph, “*at any time after*” the Treaty has been in force for that CP for five years. As noted above, the Treaty entered into force for Italy, as a CP, on 16 April 1998. Therefore, the relevant time period, within which Italy may not have withdrawn from the ECT pursuant to Article 47, expired on 16 April 2003 (more than 10 years ago).

21. From the provisions of this paragraph read in conjunction with paragraph (2), it is clear that the meaning of the term “*may*” is not to present a CP with a choice of whether or not to give notification *per se*. The term “*may*” provides a CP with a right to withdraw from the Treaty. A right that Italy has decided to exercise.

22. Furthermore, this paragraph contains a specific additional requirement that a CP is to “*give written notification*”. For the purposes of this note, and until details of Italy's notification come to light, it shall be assumed that Italy has given its withdrawal notification in writing.¹¹

23. Notification of withdrawal from the Treaty, in accordance with this paragraph, is to be transmitted to “*the Depository*”. According to Article 49 (Depository) of the ECT, the CPs have agreed that: “The Government of the Portuguese Republic shall be the Depository of this

¹¹ For an example of a written notification to the Depository, please see Annex 2 of Note 2 (Introduction), Series of Notes on the Energy Charter Treaty, 10 March 2014 <http://www.menachambers.com/expertise/energy-charter-treaty/> (last accessed on 28 April 2015)

Treaty.” It has been reported that the Secretariat has confirmed Italy’s notification to the Depository.¹²

PARAGRAPH (2)

Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal.

24. This paragraph comes into play as a consequence of a CP’s (Italy’s) withdrawal notification made pursuant to paragraph (1). The language of the paragraph is prescriptive and mandatory as evidenced by the term “*shall*”.
25. The paragraph initially provides for a default time limit after which withdrawal takes effect for a CP: “*upon expiry of one year after the date of the receipt of the notification by the Depository*”. Alternatively, this paragraph allows a CP to specify in the notification a “*later date*” when withdrawal shall take effect. We have been informed that Italy has not provided “*such later date*” for its withdrawal. Accordingly, Italy’s withdrawal from the ECT shall take effect on 01 January 2016.
26. Another element that should be considered in respect of calculation of time is that it starts running from the “*receipt of the notification by the Depository*” and not when the notification has been sent. One assumes that the Depository will inform the CP concerned of receipt of its notification and the date on which it was received.
27. The consequence of withdrawal taking effect on 01 January 2016 for Italy is that, on the one hand, the Treaty will no longer cover new Investments¹³ made by Investors¹⁴ of other CPs¹⁵ in Italy, and on the other hand, the Treaty will also no longer cover new Investments made by Italian Investors in territories of other CPs.

¹² Italy to quit Energy Charter Treaty, 23 April 2015 <http://globalarbitrationreview.com/news/article/33745/italy-quit-energy-charter-treaty/>

¹³ As defined in Article 1(6) of the ECT.

¹⁴ As defined in Article 1(7) of the ECT.

¹⁵ As defined in Article 1(2) of the ECT.

28. By way of general observation, it seems that the interval of at least one year between CP's withdrawal notification and effective date of such withdrawal was intended to provide a CP with the possibility to retract its earlier notification to the Depository (e.g. should a CP change its mind due to elections or a change of policy).¹⁶ Otherwise, it could be argued that after the withdrawal has taken effect, a former CP will have to re-join the ECT by way of accession, as provided for in Article 41 ("Accession") ECT "*on terms to be approved by the Charter Conference*".

PARAGRAPH (3)

The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

29. This paragraph is a "sunset provision", triggered when a CP's withdrawal takes effect pursuant to paragraph (2). This paragraph provides for an automatic extension of ECT provisions pertaining to "*Investments made*" for 20 years from the date when CP's withdrawal becomes effective. Therefore, the paragraph provides that the ECT would cover only Investments that are made prior to a CP's withdrawal from the Treaty. In Italy's case, the Treaty will cover Investments made before 01 January 2016, when Italy's withdrawal would become effective, "*for a period of 20 years*": until 01 January 2036.

30. It is important to emphasise that the ECT shall continue to apply to Investments:

- "*made in the Area of a Contracting Party by Investors of other Contracting Parties or*"
- "*made in [...] the Area of other Contracting Parties by Investors of that Contracting Party*".

Therefore, provisions of the Treaty shall continue to apply both ways: to existing Investments made (i) by Investors of other CPs in Italian territory, and (drafters preferred the subjunctive "or") (ii) existing Investments made by Italian Investors in territories of other CPs before Italy's withdrawal takes effect on 01 January 2016.

¹⁶ Review of ECT Travaux Préparatoires may shed light on the actual intentions of the negotiating parties, but it is outside the scope of this note.

PARAGRAPH (4)

All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.

31. This paragraph provides that when a CP's withdrawal takes effect pursuant to paragraph (2), all protocols to which Italy (in this case) is party shall cease to be in force for Italy on the effective date of its withdrawal from the ECT. Thus, protocols "*shall cease to be in force*" automatically as a consequence of withdrawal from the Treaty. It is not a matter of choice. One follows the other.
32. Accordingly, the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), currently the only Energy Charter Protocol, shall also cease to be in force for Italy on 01 January 2016.
33. PEEREA was signed, ratified and came into force for Italy on the same dates as the ECT (see paragraph 16 above).¹⁷ PEEREA's objectives, pursuant to its Article 1(2) are:
 - (a) the promotion of energy efficiency policies consistent with sustainable development;
 - (b) the creation of framework conditions which induce producers and consumers to use energy as economically, efficiently and environmentally soundly as possible, particularly through the organization of efficient energy markets and a fuller reflection of environmental costs and benefits; and
 - (c) the fostering of co-operation in the field of energy efficiency.

CONCLUSION

34. Italy is the first CP (and Member State of the EU) to notify the Depository of its withdrawal from the Treaty. Italy's withdrawal shall take effect on 01 January 2016, unless it reconsiders its position.
35. Whatever the reason(s) for Italy's decision to withdraw, it is imperative to openly discuss the policy issues facing the Energy Charter process because the stakes are indeed very high. Here is where the leadership problem is of utmost importance. If Italy's budget cuts are the reason,

¹⁷ For more information on PEEREA, please visit <http://www.encharter.org/index.php?id=607> (last accessed on 28 April 2015)

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less radical options are available, as envisaged in the Treaty (Article 34 ECT). Alternatively, if the reason is the impending ECT claims, withdrawal from the Treaty will not protect Italy from such claims until 01 January 2036, at least as far as existing investments are concerned. Italy has until 01 January 2016 to *re-evaluate* its decision to withdraw. The EU in general and the EU Commission in particular have a duty to see to it that Italy does do so.

36. Italy's withdrawal might give rise to a legal conundrum for the EU. It is not inconceivable that ECT Investors (including investors of other EU Members States) may still be able to bring claims directly against the EU for breaches of the ECT investment obligations committed by Italy.

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