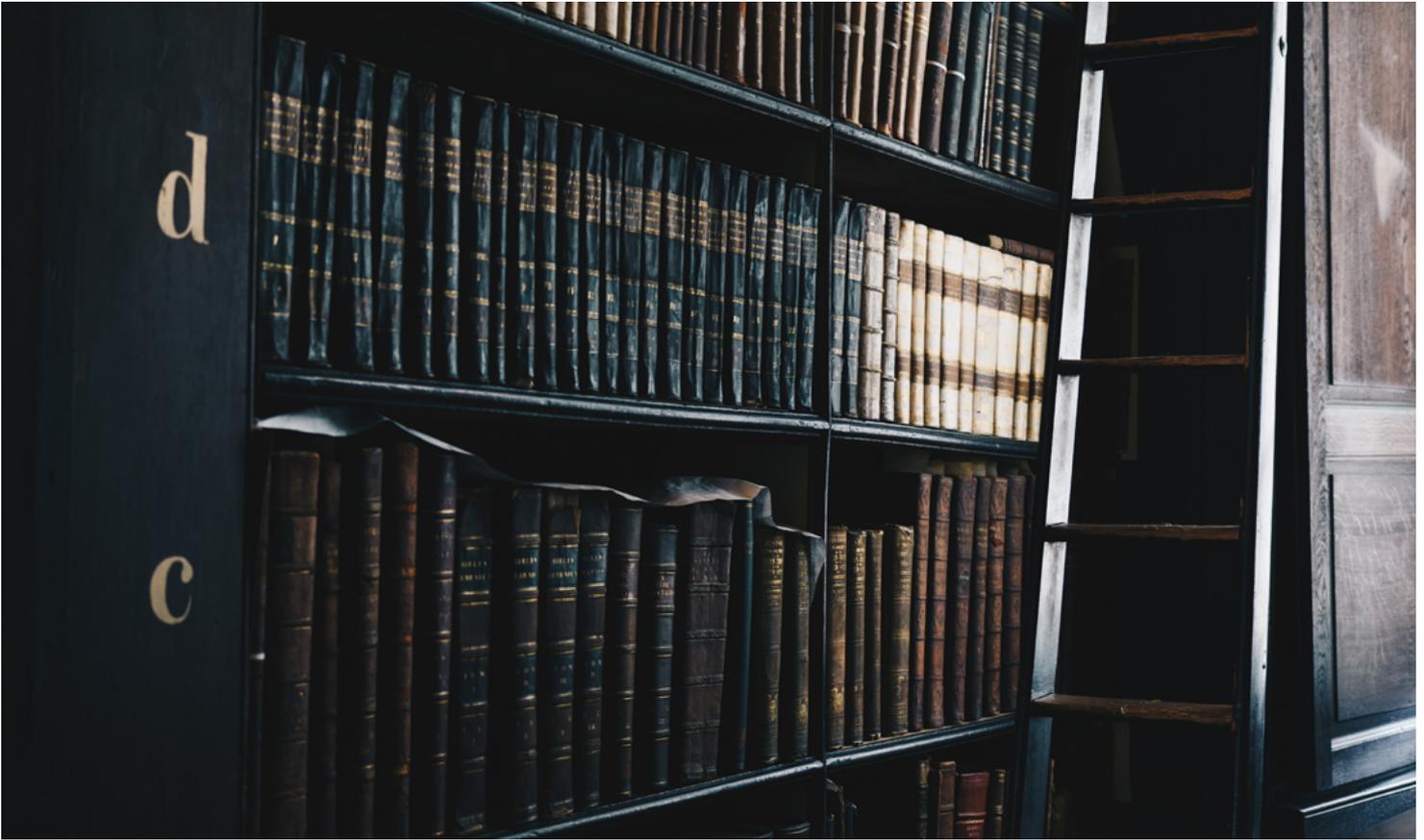




THE FOODMAN FIRM
MEET YOUR EXPECTATIONS

JANUARY 2023



WHO WE ARE

WITH NEARLY **TWENTY YEARS** OF EXPERIENCE HANDLING **COMPLEX, HIGH-STAKES** MATTERS FOR A VARIETY OF CLIENTS - BOTH **INDIVIDUALS** AND **CORPORATIONS**, **DOMESTIC** AND **INTERNATIONAL** - **THE FOODMAN FIRM** **CONSISTENTLY PRODUCES** VALUE-DRIVEN **RESULTS** FOR OUR CLIENTS, WITH AN EMPHASIS ON **QUALITY OVER QUANTITY**.

OUR PRIMARY FOCUS AT **THE FOODMAN FIRM** IS TO PROVIDE OUR CLIENTS WITH THE MOST EFFECTIVE COUNSEL, AND TO **FOSTER LONG-TERM RELATIONSHIPS** THAT OUR CLIENTS CAN DEPEND ON.

THE FOODMAN FIRM TAILORS ITS INNOVATIVE FEE STRATEGIES TO MEET THE INDIVIDUAL NEEDS OF EACH CLIENT.

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European Union Countries Withdrawal from The ECT And the Impact of the Sunset Clause on Withdrawing States

Recently, European countries are withdrawing from the Energy Charter Treaty (“ECT”) raising environmental concerns as a reason. Italy withdrew in 2016, while France and Slovenia have declared their official withdrawal. In addition, the Netherlands, Spain, and Poland are preparing for the exit as well, and last month Germany announced its withdrawal decision. It appears a EU withdrawal from the Energy Charter Treaty has become inevitable.

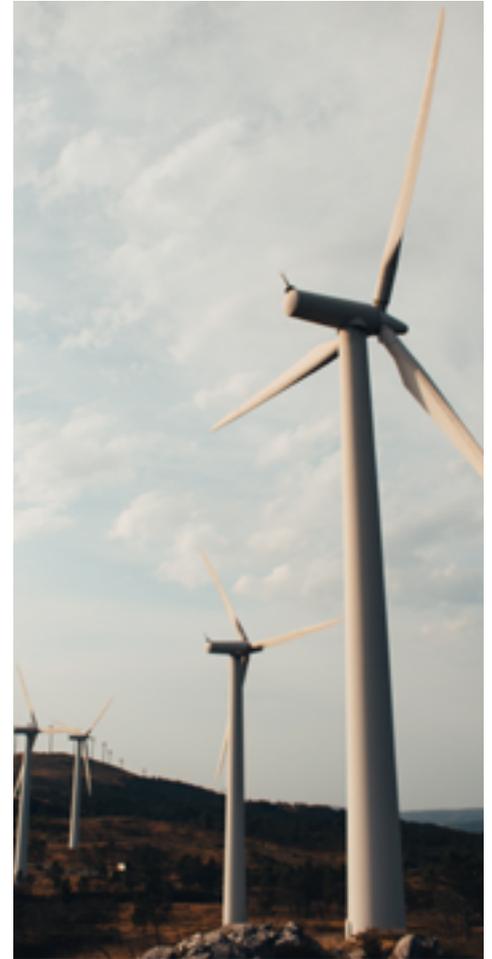
Due to the latest governmental decisions to withdraw, the Energy Charter Conference for voting on the modernized treaty, which was going to be held in November, has been postponed to April 2023. EU Countries are generally not satisfied with the modernized treaty, and there are already concerns regarding the sunset clause provision and protections for fossil fuel investors. In that regard, on November 24, 2022, the European Parliament declared a non-binding resolution to support the EU’s exit from the ECT.

Given the apparent collapse of the ECT in Europe, certain questions arise regarding the consequences of such withdrawal. Although States may quit the treaty, they need to consider the sunset clause in Article 47 (3) of ECT,

which provides a withdrawal mechanism and states:

(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.

In other words, investments will be protected for 20 years in accordance with the sunset clause provision. However, States may attempt to rely on the Vienna Convention on the Law of the Treaties (“VCLT”) Article 62 to prevent the consequences of the sunset clause by reasoning the fundamental change of circumstances requirement. The provision of Article 62 (1) of the Vienna Convention states that “A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an **essential** basis of the consent of the parties to be bound by the treaty, and (b) the effect of the change



is **radically** to transform the extent of obligations still to be performed under the treaty.”

Therefore, after EU Countries’ declared their desire to withdraw, the ECT Secretariat published the requirements to invoke the provision of Article 62(1) of the Vienna Convention and emphasized the words “essential” and “radically,” saying that “[a] Contracting Party to the Energy Charter Treaty (ECT) wishing to invoke Article 62 of the VCLT with respect to the ECT, including the “sunset clause” of Article

47, may need to show that the changed circumstances were essential at the time of the conclusion of the ECT, their change was unforeseen, and that such change radically transforms the extent of obligations under the ECT.”

Notwithstanding the ambiguous general provision for the requirements, considering the environmental factors, the Secretariat cited to the Gabčíkovo–Nagymaros Project, which the International Court of Justice (“ICJ”) found that “new developments in the state of environmental knowledge and of environmental law” were insufficient to invoke Article 62(1) of the VCLT with Article 47 of ECT.

In the *Gabčíkovo–Nagymaros* Project, in accordance with the agreement signed between Hungary and Czechoslovakia

in 1977, it was decided to build three separate dams and additional facilities on the part of the Danube River that also forms the border between these two countries. After the implementation of the project, Hungary first suspended and then stopped the project, by showing ecological reasons. In 1992, they canceled the 1977 Agreement with an *ex parte* declaration. In the Czechoslovakian part of the project, after the completion of the Gabčíkovo dam, the Variant C phase was concluded and started to be operated. Hungary and Slovakia claimed that each other’s approaches and actions were against the law, and the environmental dimension stood out among the concerns expressed by both sides. The tension, which had escalated almost to the point of armed conflict, was reduced because of mediation

of the European Community, and the dispute was brought before the ICJ. The main feature of this case is that the ICJ made a decision that recognized the importance of the concepts and principles of international environmental law, although it was not examined to the extent expected.

Accordingly, it is uncertain whether the sunset clause will apply or whether the VCLT argument will apply. As such, foreign investors still may benefit from the sunset clause of the ECT when States do not meet the conditions to invoke the provision of Article 62 (1) Vienna Convention. Indeed, even if the States show reasonable environmental concerns while leaving the treaty, they still may not avoid the 20-year protection in accordance with Article 47 of ECT.



FLORIDA LEGISLATIVE UPDATE

Disney Is Edging Closer To Losing Control Of Governing Reedy Creek

Following last April's legislative bill abolishing all special districts in Florida by June 2023, including the Reedy Creek special governing district that Disney was operating, there was some hope among Disney supporters that Governor DeSantis and returning CEO Bob Iger might be able to set aside issues between the State of Florida and Disney. While there is still time to avoid an unfavorable outcome for Disney, thus far, that hasn't happened.

In that regard, Governor DeSantis' communications director and other state representatives confirmed last week that the state intends on moving forward with establishing a state-controlled board that will govern Reedy Creek including Disney properties.

While there is litigation regarding the dissolution of the Reedy Creek special

governing district, at this point, it does not look like it is going to impede the Governor's plans. Indeed, to alleviate concerns regarding debts of Reedy Creek being passed off to local neighboring county taxpayers, the State is planning on exercising state control over the district by replacing the Disney appointed Reedy Creek board members with board members appointed by Governor DeSantis. This will result in Disney no longer having its own government or taxing authority, and it will likely result in the state having significant influence over Disney's future endeavors in central Florida.

With so much at stake for Disney's governance and future in Florida, it is likely that Disney will have no choice but to devote more resources to reversing the state's plans via litigation and/or through negotiations between high level officials.



THE FOODMAN FIRM

We encourage all of you to take the necessary steps to ensure that you and your company are safe, compliant and ready to take on new business! Call us today at **(305) 201-3663** or visit our [WEBSITE](#) to schedule a consultation to discuss your business's needs and how The Foodman Firm can assist you! If you want to sign up for our newsletter, please [CLICK HERE](#), and follow us on [LinkedIn](#)