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ECT Modernisation Perspectives: “Can the EU Make the ECT the Greenest Investment Treaty of them All?”

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The signatories of the Energy Charter Treaty (“ECT”) have begun the process of the Treaty’s modernisation. This is by no means a small task given the complexity of the Treaty’s scope which covers energy trading, efficiency, transit, investment protection and dispute resolution. Additionally, in order to amend it, all the signatories need to be on board.

Among other things, the signatories have declared that they want to make the ECT greener. Recently, the Energy Charter Secretary Urban Rusnák has [stated](#) that the ECT can play a key role in the implementation of the Paris Agreement and UN Sustainable Development Goals. But he warned that if the modernisation process fails, he does not see a future for the Treaty, effectively making the process a ‘make-or-break’ kind of situation.

Only a handful of the signatories have revealed their positions. Based on the ECT Secretariat’s document titled ‘[Policy Options for Modernisation of the ECT](#)’, the parties in favour of ‘greening’ the ECT are: Azerbaijan, the European Union (‘EU’), Georgia, Luxembourg, Switzerland and Turkey. Some parties generally support the incorporation of sustainable development into ECT. But others do not necessarily share this view. Japan, the second most influential signatory, holds the position that “it is not necessary to amend the current ECT provisions.” Further, some signatories heavily rely on fossil fuel export and instead wish to focus the modernisation on transit issues.

The most vocal proponent of this ‘greening’ approach is the EU. The EU is politically the strongest block in the ongoing negotiations and the biggest driving force behind the process of modernisation. Demonstratively, the EU has been the only ECT signatory to have made its [draft modernisation proposal](#) public.

The stakes are really high and the EU will not have it easy. Can it achieve such an ambitious project as greening the ECT? In our post, we will introduce and briefly analyse the most important green provisions in the EU’s proposal, while at the same time assessing the context and wider consequences of introducing sustainable development principles into the Treaty.

The Current State of Law in Terms of Sustainable Development

The ECT is an ‘old’ investment protection treaty. Having been signed in 1994 it doesn’t have any of the modern bells and whistles. The Treaty regulates sustainable development in Article 19 (titled ‘Environmental aspects’), which rather vaguely states that “each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts (...)”. In addition, the provision reaffirms the traditional principles of environmental law; that is, the precautionary principle and the polluter pays principle. Article 19 addresses possible environmental disputes as well, but again, very vaguely: If no other appropriate international fora exist, such disputes are to be submitted to the Charter Conference “to aim at a solution.”

This is currently all the green the ECT can offer, because in practice most of the environmental initiatives take place outside of the Treaty. For example, the Energy Charter Secretariat pushes for energy efficiency as one of its [main priorities](#). Further, the signatories [agreed](#) to minimise harmful environmental impacts from energy use. And finally, most recently, the signatories signed the [2015 International Energy Charter](#) which is a political declaration calling on all countries to achieve sustainable development.

Still, the ECT is [criticised](#) for its alleged adverse impact on the environment. The need for the ECT to catch up with [the trends to make treaties greener](#) peaked in November 2018 at the Energy Charter Conference meeting in Bucharest. The meeting’s final [Declaration](#) recognised the importance of moving towards a sustainable energy future and to meet the [UN Sustainable Development Goal 7](#), which stipulates access to sustainable energy for all.

EU Sees Green

The ECT modernisation takes place in challenging times for the energy sector, particularly in Europe. The European Commission has launched its much-anticipated [Green Deal](#) to address climate change. In addition, several EU Member states push for [the Paris Agreement to be an essential clause](#) in all international agreements negotiated by the EU. And in June 2020, France and the Netherlands issued [a joint call](#) for tougher enforcement of environmental standards in EU agreements as part of the fight against climate change.

The EU’s [draft proposal](#) on the ECT modernisation contains amendments of all important parts of the ECT and significantly expands the scope of its sustainable development provisions. The EU’s proposal contains altogether eight new and ‘greener’ provisions. The most notable ones implement the Paris Agreement and State-to-State arbitration concerning that treaty into the ECT, which we will introduce in the next part below. Here, we describe a few other examples of the proposed green provisions:

First, the EU’s proposal explicitly links the development of international trade and investment in energy-related sectors to sustainable development. It does that by adding substantive provisions on the host state’s right to regulate based on similar language proposed by the EU in different investment negotiations.¹⁾

Second, the proposal aims to improve transparency. As is the EU’s practice in trade negotiations, any measure that may affect the environment is made subject to comments by stakeholders. Substantively, the signatories must carry out a transparent environmental impact assessment of all energy projects potentially harmful to the environment. This may present an important preventive

and monitoring tool.

Third, regarding arbitration, the EU proposes that arbitrators be required to have expertise in labour or environmental law. This is an interesting change in its treaty-making because the EU usually requires specialised knowledge of, or experience in international investment law, international trade law, or dispute resolution.²⁾

EU Adds Articles Implementing Paris Agreement and State-to-State Arbitration

The most notable element of the EU's proposal, however, is a completely new article to be added in Part IV of the Treaty. Under this proposed article, each signatory would have to "effectively implement" the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. The signatories would further be required to cooperate on climate change mitigation and adaptation to accelerate the transition towards a low emission, clean energy and resource efficient economy, as well as to climate resilient development.

This provision would be [enforceable through a State-to-State dispute mechanism](#). Notably, the Paris Agreement has no enforcement mechanism. If the EU succeeds with its proposal, then the obligations under the Paris Agreement would be given an international enforcement mechanism via the ECT. Of course, this would still apply only to the ECT signatories and would not affect some of the world's biggest polluters (including China, the US, and India). It would nevertheless be a huge step forward especially if China [joins the ECT](#) in the future.

From past practice, we know that inter-state arbitration involving human rights or environmental law issues can be [wide-ranging](#). In order to be [effective](#), the proposed dispute resolution provision gives tribunals the right to use external experts from the International Labour Organisation or relevant bodies established under multilateral environmental agreements.

And to demonstrate that the EU means business, we have to point out the EU's willingness to initiate State-to-State disputes with its partners under various FTAs. In December 2019, the EU alleged that Korea failed to comply with its labour rights commitments under the EU-Korea FTA and both parties entered into dispute settlement proceedings by [selecting the members of the panel](#). In July 2019, the EU started a [dispute with Ukraine](#) regarding Ukraine's export prohibition of unprocessed timber under the EU-Ukraine Association Agreement. One can therefore imagine the EU being vigilant over other states' complying with the Paris Agreement.

Concluding Remarks and Future Talking Points

By amending the ECT, the EU has a unique opportunity to significantly influence the development of global standards for investment protection in relation to climate change law. As we have demonstrated above, we are seeing very ambitious language proposed by the EU on sustainable development in the context of trade and investment negotiations. As such, it confirms the firm intention of the EU to go further than simply aligning the ECT with its other policies and its current international treaty negotiations.

One thing to watch closely is the proposed State-to-State dispute mechanism. It may very well

provide an enforcement instrument for the Paris Agreement as well as the newly introduced sustainable development commitments in the ECT and in effect accelerate the ongoing transition to clean energy. If the EU succeeds with its ambitious proposal, the ECT could be the greenest investment treaty ever negotiated. On the other hand, one must ask how realistic it is to expect that the EU's proposal will be accepted in the context of multilateral negotiations which require unanimity.

If we zoom out from the different negotiating positions, we observe that including sustainable development into the ECT may bring greater confidence in the agenda of investment liberalisation, investment promotion and protection needed to encourage business' contribution to greening the world economy and support green growth through FDI. It may also help legitimise the ECT in the eyes of the public since the organisation is currently under immense pressure from **civil society** and is facing **reports** of internal dysfunction of its Secretariat. A question remains whether a greener ECT would help or hinder its territorial expansion with new countries including China joining.

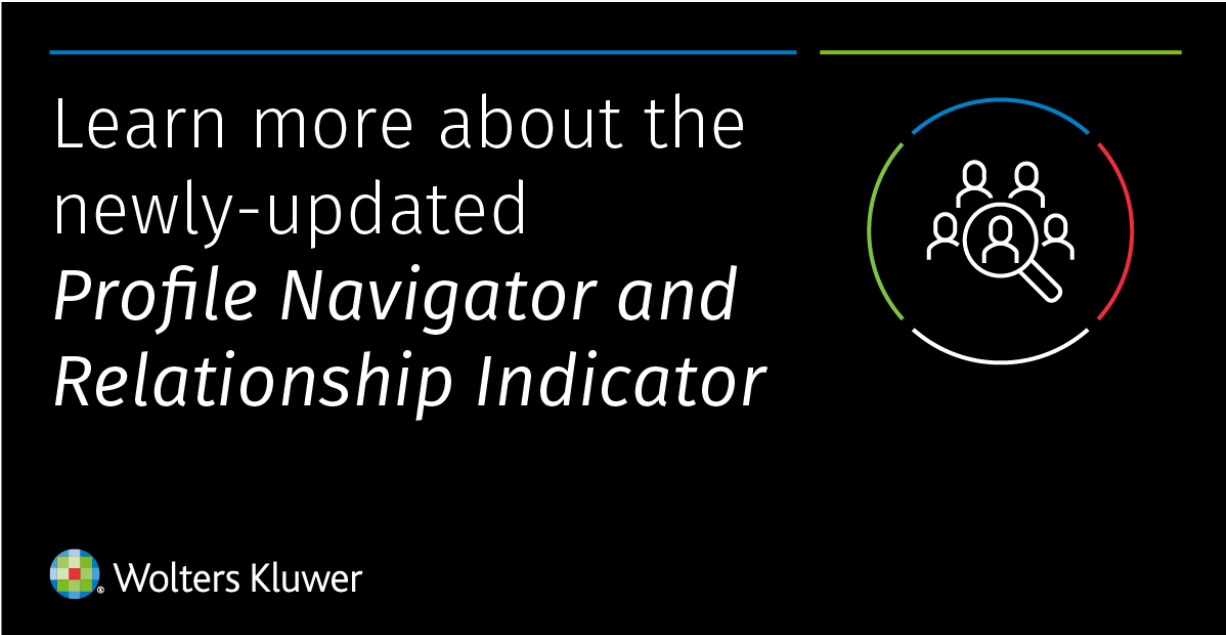
To read our coverage of the ECT Modernisation process to date, [click here](#).

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References

?1 See e.g. CETA, Art. 8.9.; EU-Singapore IPA, Art. 2.2.

?2 See e.g. CETA, Art. 8.27.; EU-Vietnam IPA, Art. 3.38.

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