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## ECT Modernisation Perspectives: Unpacking the Impact of the Revised ECT Text on Dispute Resolution

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The Energy Charter Treaty (ECT) has long been subject to debate focusing on its perceived chilling effect on energy transition, the compatibility of intra-EU disputes under the ECT with EU law, and the cost-efficiency of investment arbitration.

On 24 June 2022, after five years of negotiations, the Energy Charter Conference Member States reached an [agreement in principle](#) regarding revisions to the ECT. The [amended text](#) is expected to be adopted (subject to legal revision required to finalise it) by the Energy Charter Conference on 22 November 2022.

This article focuses on the implications of the [revised text](#) for dispute resolution under the ECT (see further coverage on the Blog [here](#)). We address the environmental focus of the anticipated reforms and conciliation of State-to-State disputes relating to sustainable development and climate change. We also comment on the amended definitions of Investors and Investments, the intra-EU application of the ECT, and a new procedure for early dismissal of frivolous claims. In concluding, we briefly consider the possible future of the ECT following the withdrawal plans recently announced by a number of EU Member States.

### The Greening of the ECT

Some of the most significant changes to the ECT seek to address the ECT Contracting Parties' desire to promote sustainable development and combat climate change.

First, the modernised ECT will apply to new types of fuels, including hydrogen, anhydrous ammonia, biomass, biogas, and synthetic fuels. The ECT will also apply to the capture, utilisation and storage of carbon dioxide conducted to decarbonise the energy system. However, the ECT will allow for a gradual phase out of fossil fuels by individual Contracting Parties. For example, it is anticipated that the ECT will not apply to any new investments made in the EU and UK after 15 August 2023 in the fossil fuel industry and electricity produced from fossil fuels (subject to certain exceptions for low carbon investments) and potentially excluding protection for existing fossil fuel investments by or before 31 December 2040.

Second, the Contracting Parties agreed to clarify and amend relevant substantive provisions.

- The modernised ECT will “reaffirm” the right of the Contracting Parties to regulate to achieve legitimate policy objectives, including the protection of the environment, climate, health, safety and public morals.
- Article 10 will confirm that fair and equitable treatment includes, among other things, frustration of investor’s legitimate expectations.
- Article 13 will provide that non-discriminatory measures designed and applied to protect legitimate policy objectives will not constitute expropriation unless such measures are “manifestly excessive”.

Third, the Contracting Parties also agreed to significantly expand Article 19 on Sustainable Development and add a new provision on Climate Change and Clean Energy Transition.

- Article 19 will, among other things, reaffirm each Contracting Party’s rights and obligations under environmental treaties. Importantly, the Contracting Parties will require that an impact assessment of new energy investment projects is carried out and made public. Such assessments shall address the effects of the project on population and human health, biodiversity, environment and climate, and cultural heritage.
- The new article on climate change will reaffirm each Contracting Party’s commitments to promote climate policies and investment of relevance for climate change mitigation and adaption.

### **State-to-State Dispute Resolution**

Article 27 of the ECT, which sets out dispute resolution procedures applicable to settlement of disputes between Contracting Parties, will not apply to Article 19 or to the new article on climate change. Instead, Article 28 bis will provide that disputing Contracting Parties will resolve disputes through diplomatic channels or, if such attempts fail, refer their dispute to conciliation. Notably, the [proposal](#) by the EU countries to refer State-to-State disputes related to sustainable development and climate change to arbitration appears to have been rejected. The conciliator will be appointed by the Secretary General of the Charter Conference Secretariat and will issue a non-binding but public report. The Charter Conference will monitor the implementation of any measures recommended by the conciliator. While a similar conciliation procedure has been in place for some time for disputes arising under Article 7 of the ECT (Transit), we are not aware that it has ever been used in practice.

### **Investors and Investments**

In addition to modifying the scope of the ECT, the revised text also narrows the concepts of both “investor” and “investment” by:

- Requiring that an “investor” satisfies a “substantial business activities” test based on indicia, such as “physical presence, employment of staff, turnover generation or payment of taxes” in the host state, and excluding from the definition those who are nationals or “permanent residents” of the host state at the time of making an investment (including dual nationals); and
- Defining “investment” by reference to an “indicative list of characteristics” similar to the Salini criteria, including commitment of capital, expectation of gain, duration and risk, and also include specific exclusions, such as “judicial and administrative decisions”.

In addition, the revised ECT will require tribunals to decline jurisdiction where (i) the dispute was very likely to arise when the claimant acquired ownership or control of the investment, and (ii) such acquisition of ownership or control was for the main purpose of submitting a claim under the ECT. This provision appears to be an attempt to reflect existing authorities finding that a restructuring may affect the jurisdiction or admissibility of a claim where the dispute had arisen or was reasonably foreseeable at the time of the restructuring.

### **Intra-EU Application of the ECT**

A further restriction to the dispute resolution provisions arises from the fact that, following the Court of Justice of the European Union (CJEU) judgments in *Achmea* and *Komstroy*, the Contracting Parties have agreed to amend Article 24(3) of the ECT to provide that the investor-State dispute settlement (ISDS) provisions (Article 26 of the ECT) will not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation, such as the European Union. Further to this amendment, “to prevent tribunals from continuing to accept jurisdiction” in intra-EU disputes, the EU *expects* to conclude an agreement with EU Member States within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (“subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”). The EU expects that such agreement will include “a confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for intra-EU arbitration proceedings, and that the sunset clause does not apply intra-EU”. This will formalise the EU’s existing position that the ECT’s ISDS provisions do not apply where an EU investor seeks to bring a claim against an EU member state.

### **Frivolous Claims**

Finally, a new Article will also allow tribunals, upon the respondent’s request, to dismiss “frivolous claims” in two scenarios.

- First, before the first case management meeting, a respondent may raise an objection that a claim or any part thereof is “manifestly without legal merit”. The objection may relate to jurisdiction and the substance of the claims. Unless the tribunal considers the objection “manifestly unfounded,” it will suspend any proceedings, give the parties an opportunity to comment, and – assuming the facts alleged by the claimant to be true – issue an award or decision on the objections within 120 days. This provision appears similar to the [ICSID Arbitration Rule 41](#), which also allows for early dismissal of claims where the claim is found to be “manifestly without legal merit”.
- Second, no later than with its reply to the claim, a respondent can object that, “as a matter of law, the claim or any part thereof, is not a claim in respect of which an award in favour of the Investor may be made, even if the facts alleged by the Investor were assumed to be true”. Notably, the tribunal is also required to suspend proceedings on the merits while it determines such an application, unless it finds the respondent’s objections “manifestly unfounded”. We are not aware of a similar provision in other treaties or arbitral rules, so there is little guidance as to how this provision may be applied in practice.

The new article makes it clear that these two mechanisms are not exhaustive and that tribunals may

have the authority to address other objections as a preliminary question.

## Conclusion

The revisions to the ECT demonstrate that climate goals can be advanced in a legal framework that continues to encourage the legitimate exercise of non-discriminatory public interest regulation. However, that has not stopped multiple EU Member States (such as [The Netherlands](#), [Spain](#), [Poland](#) and [France](#)) announcing their intention nevertheless to withdraw from the ECT (see also [here](#)).

According to Article 47(3) of the ECT, where a State withdraws from the ECT, it will continue to apply to investments made before the withdrawal for a period of twenty years. States that withdraw from the ECT may therefore find themselves in the position of continuing to extend investment protection to fossil fuels, while denying it to the very energy transition technologies the amendments to the ECT were designed to encompass

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