

Kluwer Arbitration Blog

Eighth Sarajevo Arbitration Day Recap: ECT Modernization and the Energy Transition in the Western Balkans: What Lies Ahead?

Fahira Brodlija (Arbitrator Intelligence) and Armela Ramić (Association ARBITRI) · Saturday, February 11th, 2023

Amid a push for more decisive action toward energy transition, countries around the world are facing pressure to innovate and adopt sweeping legislative amendments, all while trying to avoid investment claims by foreign investors affected by the changing regulatory frameworks.

Among the countries performing this balancing act, Bosnia and Herzegovina and other Western Balkans countries actively pursuing EU membership, have additional considerations to balance. It is essential that all public and private stakeholders follow all the major developments in the emerging energy and investment protection policies worldwide. The [Eighth Sarajevo Arbitration Day](#) was thus a timely occasion for insightful and thought-provoking discussions aimed towards “*Making Sense of a Changing World: Energy and Construction Dispute Resolution in a Sustainable Future.*”

The conference took place in Sarajevo (Bosnia and Herzegovina) on 23 November 2022, the day after the Energy Charter Conference decided to postpone the [vote](#) on the [Energy Charter Treaty modernization proposal](#) due to a deadlock among European Union (EU) Member States and the EU Commission on the compatibility of the proposed reform with the climate change and energy transition goals of the EU.

With no clear answers on the destiny of the Energy Charter Treaty (ECT) as of the date of the event, the first panel of the conference titled: *ECT Modernization and the Energy Transition in the Western Balkans: What Lies Ahead?* sought to put into perspective the implications of the energy transition process on the ECT backlash and reform efforts, the parallel proliferation of climate change litigation, and the risks and opportunities for the Western Balkans in this context. The panel speakers were [Prof. Crina Baltag](#) (Stockholm University), [Ms. Ana Stanić](#) (E&A Law), [Mr. Ilija Mitrev Penushliski](#) (Three Crowns LLP), and [Mr. Filip Boras](#) (Baker McKenzie), moderated by [Ms. Fahira Brodlija](#) (GIZ). This post summarizes the discussion held during the panel.

The Backlash Against the ECT and the Pursuit of Reform: How Did We Get Here?

Mr. Ilija Mitrev Penushliski illustrated the journey of the ECT from the gate to a more open global energy market in the post-Cold War era, to the “fossil fuel treaty” stifling the adoption of green energy policies and the compliance with [the Paris Agreement](#). Mr. Penushliski traversed the timeline of key jurisprudence, which unfolded in four distinct phases and changed the perception of and attitude towards the ECT and ISDS more broadly:

- first, the early cases against [Hungary](#),
- second, [Micula](#), [Achmea](#), and the following developments regarding the intra-EU ISDS policies,
- third, [Vattenfal](#) and the public outrage against the challenge to the State’s phase-out of nuclear energy, and
- fourth, the over 50 renewable investor claims against [Spain](#) for the withdrawal of the special incentive scheme.

Mr. Penushliski warned that the current debate about the ECT should not be reduced to catchphrases and nicknames, as the situation underpinning the current ECT cases is much more nuanced. It is also notable that a large number of more recent ECT cases relate to investments in renewables. Therefore, Mr. Penushliski noted that, although the nickname “fossil fuel treaty” has stuck to the ECT, it should be viewed as a vessel to foster more investment in the renewable energy sector and not abandoned outright for the sake of publicity.

The ECT Reform Proposal and Response from EU Member States

In the midst of a global energy crisis and calls to terminate or withdraw from the ECT, the five-year ECT modernization efforts culminated with an agreement in principle on proposed reform options, which were brought to the ECT Conference for a vote on 22 November 2022. As mentioned before, the vote was postponed, and the final decision on the future of the ECT will not be known until April 2023.

The consensus on adopting the modernized ECT was severely delayed, since the [agreement in principle](#) was concluded in June 2022. EU Member States started voicing their [dissatisfaction](#) with the degree of reform and its compatibility with the Paris Agreement goals. The ECT reform proposals and the responses of the EU Member States are extensively covered in previous posts [here](#).

However, as Prof. Crina Baltag noted, the EU Commission had already publicly [praised](#) the modernized ECT as aligned with the Paris Agreement and their environmental goals. This tension between the position of the EU and its Member States adds a layer of complexity to the already difficult decisions surrounding ECT reform. In light of these events, Prof. Baltag discussed the main procedural and substantive reform proposals, prompted by the demands for the abandonment of fossil fuels and the increase of renewable energy production.

Prof. Baltag outlined two tracks of ECT reform:

1. Reforms aimed at affirming the state’s international obligations, the definition of economic activity in the energy sector and the mechanisms for the fossil fuel phase out;
2. Reforms addressing the necessary substantive changes based on the lessons learned from the over 150 ECT cases (adjusting the definition of investment in accordance with the [Salini](#) test, definition of investor, the carve out of REIOs from the dispute resolution provision, protecting

the State's right to regulate, exceptions in case of war, etc.).

Prof. Baltag noted that the ECT reform should be designed to provide a lasting framework, and it should not be reactionary.

The World Beyond Energy Transition and the ECT: The Rise of Climate Change Litigation

Looking outside of the framework of energy transition and the ECT reform, Ms. Ana Stani? reflected on the proliferating body of climate change litigation cases and how they are shaping the conduct of public and private entities in relation to the pursuit of climate change mitigation measures. Ms. Stani? noted the large number of cases brought before [US courts](#), mostly against large corporations in class action suits. The most prominent cases are probably the ones raised against [Exxon Mobile](#) for the concealment of information about their CO² emissions from investors and the US Security Exchange Commission.

Other interesting cases included instances of private entities and states being sued for their failure to implement any or sufficient measures to mitigate climate change. For example, a [Peruvian farmer](#) sued RWE for decades of CO² emissions, which contributed to climate change and the potential collapse of two ice glaciers threatening to flood his village. Given the estimates that RWE has contributed to 0.47% of total global emissions over time, they are accused of violating their duty of care. Other interesting cases include the [claim against the EU](#) for failing to adopt sufficient regulations and directives related to renewables targets and CO² emissions. This case is currently on appeal, having been rejected in the first instance by the European Court of Justice (ECJ) for lack of standing.

[Client Earth](#) sued Shell as a shareholder of the company, arguing that their failure to adopt a climate strategy aligned with the Paris agreement violated their duty of care, skill and diligence under [the UK Companies Act](#). Ms. Stani? noted that there is clearly growing pressure on EU member states to comply with their international obligations to mitigate climate change from private persons and companies, even with the shifting attitude toward coal considering the energy crisis in Europe prompted by the war in Ukraine.

Finding the Silver Lining: Opportunities for the Western Balkans in the Energy Transition Process

Bosnia and Herzegovina and other countries in the Western Balkans that are aspiring for EU membership are also facing high expectations to do their part in transitioning to clean energy, both in line with the Paris Agreement and [the Western Balkans Green Agenda](#). At the same time, these efforts are in tension with attracting foreign investment and fending off investor claims in pursuit of greener policies. This landscape is ridden with risks and challenges, but also opportunities, as highlighted by Mr. Filip Boras.

As a starting point, Mr. Boras noted that the region can create a market for renewable investment opportunities, particularly in the generation and export of green hydropower to Europe. In addition, to prevent and manage likely disputes in this field, it will be important to develop the

capacities of public and private actors, educate them on the risks and opportunities of the energy transition, and invest time into drafting robust contracts and dispute resolution clauses.

Mr. Boras also identified the potential to attract renewable investors, access EU resources to fund the energy transition, and build the relevant infrastructure for the production and exportation of renewable energy.

Some of the key steps will include: 1. the adoption and implementation of a stable regulatory framework for an integrated energy market, 2. the transposition of the EU policies, 3. market liberalization and, 4. a stronger advocacy for the adoption of the necessary legal framework which will ensure the security of supply. However, the necessary changes will not come overnight, and there is a long road ahead of the policy makers and private sector.

Instead of a Conclusion: Watch This Space

While many questions remain open in the context of energy transition policies, the reform of the ECT, and the disputes emerging in this context, the Eighth Sarajevo Arbitration Day panelists have highlighted the nuanced nature of the most pressing issues policy-makers and the private sector are facing. In this context, there will be a need for intensified dialogue among all the relevant stakeholders and a commitment to creating a stable regulatory framework for sustainable development. The Sarajevo Arbitration Day conference will remain a forum for exchange on these crucial issues of regional and international importance.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Saturday, February 11th, 2023 at 8:37 am and is filed under [Achmea](#), [Balkans](#), [Climate change](#), [Energy](#), [Energy Charter Treaty](#), [Paris Agreement](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.