

Kluwer Arbitration Blog

The Completion of the Modernisation of the ECT and the Provisional Application of the Modernised ECT

Johannes Tropper (University of Vienna) · Monday, December 30th, 2024

The modernisation of the Energy Charter Treaty (“ECT”), which essentially started in 2018, resulted in an agreement in principle (“AIP”) on modernising the ECT in June 2022. The modernised ECT should have been adopted by the Energy Charter Conference (“Conference”) in November 2022. However, it was not adopted until 3 December 2024 due to a lack of consensus between EU member States whether to support modernisation. The modernised ECT will be provisionally applied as of 3 September 2025.

This blog post briefly discusses the developments that led to the recent adoption of the modernised ECT (I.) followed by a discussion of the procedure for amending the ECT and the entry into force of the modernised ECT (II.), the provisional application of the modernised ECT (III.) and the effect of provisional application (IV.). It ends with a brief conclusion (V.).

I. A Delayed Modernisation

The adoption of the modernised ECT was delayed by two years. Despite the EU having been the driver of modernisation (see in detail [here](#)), several EU member States were [dissatisfied](#) with the outcome and regarded the AIP as insufficient in light of the need for climate transition. As there was [not enough support for modernisation in the Council of the EU](#), there was no majority in favour of the EU supporting modernisation at the Conference. Thus, the EU asked that voting on modernisation in the Conference be postponed.

Instead of endorsing modernisation, several EU member States have opted for withdrawing from the ECT. The EU, which is also a party to the ECT, also notified its withdrawal in [June 2024](#) (on the legal framework for withdrawal and potential problems, see [here](#)). As there was disagreement between EU member States whether the EU (and member States) should remain party to the ECT, the EU’s withdrawal was linked to unblocking modernisation ([Belgian roadmap](#)). As a result, the Council of the EU adopted a decision in May 2024 that the EU would not exercise its right to vote at the Conference (cf [Article 36\(7\) ECT](#)) and as a result the member States could vote themselves. It further mandated member States not to block modernisation at the Conference (see [Council Decision \(EU\) 2024/1644](#)). Indeed, on 3 December 2024, those EU member States still party to the ECT and non-EU States adopted the [modernised text](#) at the Conference. They also decided to [re-designate](#) the depositary, which will now be the Energy Charter Secretariat (“Secretariat”) since the

previous depositary, [Portugal](#), will withdraw from the ECT as well.

II. Amendment Procedure under the ECT and Annexes

Amendments to the ECT must be adopted by unanimity by the Conference ([Art 34\(3\)\(l\)](#), [Art 36\(1\)](#), [Art 42\(2\) ECT](#)) and are afterwards submitted to the Contracting Parties for ratification, acceptance or approval ([Art 42\(3\) ECT](#)). Amendments only enter into force between Contracting Parties that have ratified them “on the ninetieth day after deposit with the Depositary of instruments of ratification, acceptance or approval by at least threefourths of the Contracting Parties” ([Art 42\(4\) ECT](#)). Accordingly, it will still take time until the amendments on modernisation enter into force.

This is also true for the annex NI ([Annex NI: Non-Applicable Energy Materials and Products for Definitions of “Economic Activity in the Energy Sector”](#)), which now excludes the protection of certain fossil fuel-based investments in the EU, Switzerland and the UK (so-called “[flexibility mechanism](#)”) within a defined timeframe. For EU member States, investments made in their territories before 3 September 2025 will no longer be protected ten years after the date of entry into force of the modifications in Section C and no later than 31 December 2040 (see [Section C\(1\)](#)). New fossil fuel investments made on or after 3 September 2025 are not protected at all (see [Section B\(1\)](#)).

Changes to annex NI normally only need to be approved by the Conference by unanimity ([Art 34\(3\)\(m\)](#), [Art 36\(1\)\(d\) ECT](#)). However, apparently because this technical annex is used to effectively limit scope of investments protected under the ECT, the Contracting Parties explicitly agreed that the same requirements are applied to the exclusion of protection of existing fossil fuel investments in Section C of annex NI as for amendments of the ECT (see [CCDEC 2024 15 GEN, Sec 1\(b\)\(ii\)](#)). For ending protection for new fossil fuel investments (Section B), however, no further ratification is necessary. Only the date specified in the Conference decision ([CCDEC 2024 15 GEN, Sec 1\(b\)\(i\)](#)) counts, *i.e.*, 3 September 2025.

III. Provisional Application of the Modernised ECT

In order to speed up modernisation, the Contracting Parties also agreed to provisional application of the modernised ECT, including Section C of annex NI. A decision ([CCDEC 2024 15 GEN](#)) to that effect was adopted by the Conference. The modernised ECT and Section C of annex NI will provisionally apply as of 3 September 2025. However, a Contracting Party may choose to opt out of such provisional application by notifying the Secretariat of its intention before 3 March 2025.

Provisional application of a treaty allows the application of that treaty prior to its entry into force (see [Article 25 VCLT](#)). In principle, provisional application implies that the treaty is treated as if it were already in force and it thus creates binding obligations for the Contracting Parties already (cf [Guideline 6 ILC Guide to Provisional Application of Treaties](#)). Evidently, this only applies between States that have agreed to apply the modernised ECT provisionally.

Provisional application was a feature of the original ECT, as foreseen in [Article 45 ECT](#). It was also used for the [amendment to the trade-related provisions of the ECT](#). In fact, after the adoption of that amendment in 1998, it took around 11 years to enter into force but was provisionally

applied by most Contracting Parties.

IV. The Effects of Provisional Application

As provisional application implies that the modernised ECT is treated as if it were in force between the Contracting Parties applying it provisionally, it seems that all new provisions apply between Contracting Parties that are not opting out from provisional application. This also applies for the exclusion of intra-EU arbitration ([Article 24\(3\) modernised ECT](#)) and the exclusion of protection of fossil fuel investments. However, provisional application only starts on 3 September 2025.

It also remains to be seen whether tribunals will accept that provisional application effectively excludes the protection of certain investors and investments, but the prospective removal of consent for certain investment disputes is in principle not problematic. In contrast, pending proceedings are generally unaffected by the provisional application. There is a presumption against retroactivity in treaty law ([Article 28 VCLT](#)) and it is generally accepted that jurisdiction is determined at the date of institution of proceedings (see e.g. *Muszynianka v. Slovakia* [2020] para. 263). In addition, for ICSID arbitrations, [Article 25\(1\) ICSID Convention](#) specifically stipulates that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.” Thus, consent “becomes irrevocable, and no posterior event can annul such consent retroactively.” (*Eskosol v. Italy* [2019] para. 201) (on these issues see in detail [Kehl & Wuschka ZEUS 1/2024 p. 60, 79 et seq.](#)).

Even with respect to the prospective provisional application, it is possible that some arbitral tribunals might be reluctant to reach the conclusion that investors lose access to intra-EU arbitration or that their rights are diminished prior to the actual entry into force of the modernised ECT. However, in that respect, one could also argue that the approval of the amendments by the Conference may already qualify as a subsequent agreement under [Article 31\(3\)\(a\) VCLT](#), in particular with respect to provisions, which merely seek to provide clarifications. This encompasses, for instance, the amendment excluding intra-EU arbitration, which starts with the terms “For greater certainty” ([Article 24\(3\) modernised ECT](#)). Unlike declarations made only by EU member States (see, e.g., [here](#)), the approval by the whole Conference, reflects the opinion of all Contracting Parties (cf *Eskosol v. Italy* [2019] para. 125) and could thus be plausibly understood as a subsequent agreement in that respect. However, such a subsequent agreement (with respect to intra-EU arbitration) could also only operate prospectively and not retroactively (cf also [Kehl & Wuschka ZEUS 1/2024 p. 60, 85-86](#)).

V. Conclusion

The adoption of the modernised ECT on 3 December 2024 marks a significant milestone in the lengthy and contentious process of ECT reform. While the modernisation introduces important changes, its impact will depend on whether and when Contracting Parties ratify the amendments. The envisaged provisional application of the modernised ECT will allow a “coalition of willing” States to apply the modernised ECT as of 3 September 2025. While this should generally imply that the modernised ECT is treated as if it were in force between those States, provisional application of the ECT can only operate prospectively and not affect pending or concluded proceedings. For the modernised ECT to be truly effective, it will still take several years until the

required ratifications are reached and it enters into force.

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](#).

The image is a promotional graphic for a survey report. It features a dark background with a circular inset showing a gavel resting on a glowing digital circuit board. The text is white and blue. At the top left, it says '2024 Future Ready Lawyer Survey Report'. Below that is the main title 'Legal innovation: Seizing the future or falling behind?'. A blue button with white text says 'Download your free copy →'. At the bottom left is the Wolters Kluwer logo. At the bottom right is the 'Future Ready' logo and the word 'LAWYER' in a white box.

2024 Future Ready Lawyer Survey Report

Legal innovation: Seizing the future or falling behind?

Download your free copy →

 Wolters Kluwer

 Future Ready

LAWYER

This entry was posted on Monday, December 30th, 2024 at 8:14 am and is filed under [ECT Modernisation](#), [Energy Charter Treaty](#), [modernisation process](#), [Provisional Application](#). You can follow any responses to this entry through the [Comments \(RSS\) feed](#). You can leave a response, or [trackback](#) from your own site.