Kluwer Arbitration Blog

Interviews with Our Editors: In Conversation with Atsuko Hirose, Acting Secretary-General of the Energy Charter Secretariat, following the Official Adoption of the Modernised ECT

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On 3 December 2024, the Energy Charter Conference ("Conference") officially adopted the modernised version of the Energy Charter Treaty ("ECT" or "Treaty"), following an agreement in principle reached in June 2022. We invited the Acting Secretary-General of the Energy Charter Secretariat ("Secretariat"), Ms. Atsuko Hirose, to share her insights. Ms. Hirose assumed her current position in February 2024, after having served as a Deputy Secretary General since 2021. Prior to joining the Secretariat, Ms. Hirose gained over 30 years of international work experience in the Japanese government, the private sector, and international organisations, with a particular focus on international development financial institutions.

Ms. Hirose, welcome to our Interviews series!

1. You joined the Secretariat amidst the ongoing modernisation process, and you assumed the role of Acting Secretary General at a time when the ECT is at a pivotal moment. How has your experience been so far? What is the sentiment considering that the approval took place two years after the agreement in principle?

I joined the Secretariat in 2021 during the then-ongoing negotiations to modernise the ECT. Despite joining mid-process, I had the privilege of participating in most of the formal discussions and gaining valuable insights into the process. Considering the complexity of the topics, it is remarkable that the Contracting Parties to the ECT were able to find a common ground through the Agreement in Principle on the Modernisation of the ECT in just over two years' time. This is truly the culmination of collaborative efforts on the part of all Contracting Parties, supported by the Secretariat, which played an active role in facilitating the discussions.

Having been involved in the modernisation process and being fully versed in all areas of the work of the Secretariat, I believe, positioned me well to take the helm of the organisation as the Acting Secretary-General. The last couple of years have been quite challenging for the Contracting Parties

and the Secretariat due to the delay in the approval of the modernisation by the Conference. The Secretariat nevertheless continued to support the Contracting Parties in enabling the adoption of the amendments on 3 December 2024, and we are pleased to see the intense work of all parties involved finally reaching fruition.

2. The Secretariat is designated as the Depositary of the Treaty on an interim basis, effective 2 February 2025, pending the amendments' entry into force. What are the potential legal, administrative, and practical implications of this interim designation?

Since the signing of the ECT on 17 December 1994, the Government of the Portuguese Republic has served as the ECT's Depositary in line with Article 49 [(Depositary)] of the Treaty. However, as the Portuguese Republic withdrew from the ECT effective on 2 February 2025, it informed the Contracting Parties that it would no longer serve as the Depositary of the Treaty from that date. To address this, an amendment to Article 49 of the ECT, adopted on 3 December 2024, designates the Secretariat as the successor Depositary.

The transfer of the Depository functions, nevertheless, needs to take effect promptly following the Conference's approval of the amendments to ensure that there is no disruption in the Depositary operations. Therefore, the Conference also approved the decision to designate the Secretariat as the Depositary on an interim basis from 2 February 2025, prior to the amendments' formal entry into force in accordance with Article 42 [(Amendments)].

Under the ECT, the Depositary is entrusted with specific and important functions in administering the Treaty. From 2 February 2025, the Secretariat will perform these and other functions provided in the decisions on the modernisation adopted on 3 December 2024, as well as in the Vienna Convention on the Law of Treaties (VCLT). For example, the Secretariat will handle declarations and notifications on the provisional application of the modernisation amendments.

We will liaise closely with the current Depositary to ensure a smooth transfer and are fully prepared to carry out our new responsibilities effectively.

3. From your perspective, what are the key challenges and opportunities in the modernised ECT to speed up the transition towards more renewable energy production and tackle challenges such as climate change and energy security?

A significant focus in the negotiations on the modernisation of the ECT was dedicated to the economic activities, as well as energy materials and products covered by the Treaty. As part of the modernisation, the Treaty's coverage has been extended to capture, utilisation, and storage of carbon dioxide (CCUS), as well as new energy materials and products, such as hydrogen, anhydrous ammonia, biogas, biomethane, and synthetic fuels, alongside renewable energy sources for power generation already covered under the Treaty. Such novelties may boost investor confidence and serve as a de-risking tool for investments in energy transition projects.

One notable update is the introduction of a new "flexibility mechanism". This allows individual Contracting Parties to determine which energy sources, materials, or products will be protected under the ECT based on their energy security and climate goals. Additionally, the new "review

mechanism" under Article 34 [(Energy Charter Conference)] enables the Conference to periodically review the list of energy materials and products, ensuring that the Treaty stays up-to-date with evolving energy technologies and policies. Implementing this will, of course, require close collaboration among the Contracting Parties.

Another key update in this regard is the substantive revision of investment protection provisions, which now better balance investor rights with the right of Contracting Parties to regulate within their territories. These changes are expected to offer greater legal certainty and predictability for investors while supporting the Contracting Parties' public policy objectives, such as environmental protection and climate change mitigation and adaptation.

It is also important to note that the ECT is not merely an international investment agreement. The Treaty includes a set of provisions on the transit of energy materials and products, which have been updated with new definitions and principles. The ECT's modernised transit provisions aim to strengthen energy cooperation among the Contracting Parties, enhance energy security, accelerate the integration of renewable energy in the energy mix, scale up financing for energy infrastructure projects, and foster regional cooperation and economic growth within our constituency.

4. Article 30-*bis* of the modernised ECT states that the dispute resolution procedures for settling disputes between Contracting Parties will not apply to the resolution of disputes related to sustainable development provisions. They will, instead, be addressed through diplomatic channels or, if those efforts fail, referred to conciliation. Could you explain the reasons behind this decision? Is it an advantage for promoting sustainable development through the ECT, or a shortcoming that could hinder its pursuit?

Previously, Article 19 [(Environmental Aspects)] stipulated that disputes concerning environmental matters should be resolved through mechanisms available in other international agreements. The ECT allowed for the Conference to "review" such disputes only as an alternative option in the absence of other international fora, without specifying a formal procedure for such a review.

The new Article 30-*bis* improves on this by providing a concrete mechanism, which is an advantage of the modernised text. In case of disputes between Contracting Parties concerning the revised Article 19 [(Sustainable Development)] or the new Article 19-*bis* [(Climate Change and Clean Energy Transition)], the Treaty encourages the Contracting Parties to first seek an amicable resolution through diplomatic channels, akin to the general disputes concerning the application and interpretation of the Treaty under Article 30 [(Settlement of Disputes between Contracting Parties, Ex Article 27)].

If diplomatic efforts fail, the disputing parties are directed to seek resolution through mechanisms available in other international fora, mirroring the original approach under Article 19.

If these avenues are also unsuccessful, the disputing parties can resort to a specific conciliation mechanism similar to the one established for transit disputes under Article 7 [(Transit)].

5. The approved list of topics for modernisation did not include Article 26 of the ECT.

Following several rulings of the Court of Justice of the European Union ("CJEU") (notably in *Achmea* and *Komstroy*, but also Opinion 1/20), the modernised ECT provides that the investor-State dispute settlement ("ISDS") provisions will not apply among Contracting Parties that are members of the same regional economic integration organisation, such as the EU. Does this significant limitation of the scope of ISDS present a risk for the potential of the modernised ECT and the accession of new countries?

On 27 November 2018, the Conference approved a list of topics for the negotiations on the modernisation of the ECT. This list included the topic of a "Regional Economic Integration Organisation" ("REIO"), reflecting the Contracting Parties' wish to consider which provisions of the Treaty should or should not apply among REIO members that are also Contracting Parties to the ECT.

The modernised text clarifies in Article 24 [(General Exceptions)] that certain provisions—Article 7 [(Transit)], Article 26 [(Investor-State Dispute Settlement)], Article 30, Article 30-*bis*, and Article 32 [(Interim Provisions on Trade-Related Matters, Ex Article 29)]— shall not apply among Contracting Parties that are members of the same REIO.

These changes provide greater certainty for investors regarding the applicability of Article 26 and ensure compatibility between the ECT and the legal frameworks of individual Contracting Parties and REIOs in areas such as investment dispute resolution and transit. As a result, the modernised text strengthens the Treaty's potential rather than posing risks.

6. In recent years, several countries have withdrawn from the ECT. This applies to several key parties, and notably the EU and many of its member states. How do you react to this wave of exit and how may it impact the modernised ECT?

Whether or not to stay in any treaty, including the ECT, is the prerogative of a sovereign State. The Secretariat and the Contracting Parties to the ECT will make necessary adjustments, for example, as referred to in the response to Question 2, with respect to the withdrawal of the Portuguese Republic and the associated change in the Depositary of the ECT.

7. Looking at the ECT statistics, since 2021, the number of ECT arbitrations involving fossil fuels has surpassed the number of arbitrations involving renewables, reversing a trend that lasted nearly a decade. How would you explain this shift, and do you anticipate any changes in the near future?

The ECT does not require disputing parties to notify the Secretariat about disputes. While the Secretariat makes every effort to compile comprehensive statistics of arbitration proceedings under Article 26 of the ECT, our data may not always be complete.

In the past, we observed a clear trend of investment disputes related to national incentive programmes for renewable power generation. This trend is thoroughly analysed in the joint report by the World Bank Group and the Secretariat, "Enabling Foreign Direct Investment in the Renewable Energy Sector: Reducing Regulatory Risks and Preventing Investor-State Conflicts" (the "Joint Report").

At present, with the information available, it is challenging to identify specific trends. However, future technological and policy developments in the energy sector may influence the landscape of investment disputes.

8. Relatedly, the recent failure of the United Nations summit on reducing plastic pollution in Busan (an initiative that could have also reduced fossil fuel production) revealed the ongoing resistance of many fuel-producing countries to the energy transition required to meet climate targets. Could this resistance further hinder the impact of the modernised ECT?

I would not draw any inference from the failure to reach an agreement on the reduction of plastic pollution and the impact of the modernised ECT. The negotiations on the modernisation of the ECT have successfully concluded, incorporating several key reforms. These changes are expected to support our constituency in achieving their energy security and climate goals. In fact, the successful modernisation of the ECT demonstrates the continued relevance of multilateralism and the willingness of States to find consensus on issues of global concern.

9. In 2023, in the context of its dispute prevention and resolution work, the Secretariat published, together with the World Bank Group, the aforementioned Joint Report. Does the Secretariat aim to engage further in dispute prevention and resolution, including with respect to the works of the UNCITRAL Working Group III ("WG-III"), following the official adoption of the modernised version of the ECT?

Since 2013, the Secretariat has been actively working to promote the prevention and amicable resolution of investment disputes. It has developed tools that are widely recognised and referenced in international forums, such as the WG-III.

The Joint Report with the World Bank Group further highlights the importance of avoiding and mitigating disputes in renewable energy projects to encourage more foreign direct investment in this critical sector for the energy transition. By analysing investor-State disputes and reviewing existing mechanisms at international, national, and contractual levels, the report offers practical solutions to manage investor conflicts and prevent investment disputes in the renewable energy sector.

Given the vital role of foreign direct investment in financing renewable energy projects, the suggested mechanisms and policy options can help governments attract and retain investment more effectively.

The Secretariat remains actively engaged in this area and invites governments and international organisations to collaborate in promoting and developing robust and coherent legal frameworks to facilitate dispute avoidance and mitigation, including specifically in renewable power generation.

Ms. Hirose, thank you for your time and perspectives!

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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