

Modernised ECT: Narrower Protection, Greater Transparency, Fewer Parties

24 January 2025

On 3 December 2024, the Energy Charter Conference approved amendments to the Energy Charter Treaty (“ECT”).¹ It is the first time that the main body of the ECT is being amended since its adoption in 1994.² This development comes more than two years after the conclusion of an agreement in principle on the modernisation of the ECT in June 2022.³

The modernisation process was more than seven years in the making. It commenced in November 2017, and included 15 rounds of negotiations.⁴ As we reported here, the modernisation process unfolded against a background of calls for reform on the basis that the ECT undermined clean energy transition and sustainable development. The amended text (the “**Modernised ECT**”) places greater emphasis on sustainable development and climate change and transparency and efficiency in investor-State dispute settlement. It also revises protection standards to impose limits on investment protections and excludes intra-EU disputes from its scope. Fossil-fuel related investments are, however, still covered (subject to certain optional carve-outs).

The adoption of the Modernised ECT comes at a time when multiple Contracting Parties hailing from the European Union (“EU”) and elsewhere in Europe have either deposited their notifications of withdrawal from the ECT or have announced their intention to do so.⁵ It remains to be seen whether the Modernised ECT will put a stop to further withdrawals.

¹ See the Energy Charter Secretariat’s press release, dated 3 December 2024 [here](#).

² The Energy Charter Conference adopted the Trade Amendment in 1998, which modified certain of the ECT’s annexes, but not the main body of the treaty.

³ See the Energy Charter Conference’s public communication on the adoption/approval of the modernised ECT, dated 3 December 2024 [here](#).

⁴ See the Energy Charter Conference’s public communication on the adoption/approval of the modernised ECT, dated 3 December 2024 [here](#).

⁵ Russia, Italy, France, Germany, Poland, Luxembourg and Slovenia have officially withdrawn and have entered the sunset clause period. Portugal, Spain, the UK, EU/Euratom and the Netherlands have deposited their notifications and their withdrawal will take effect in 2025. Denmark and Ireland have publicly indicated their intention to withdraw but have yet to deposit their official withdrawal notifications.

The Modernised ECT will enter into force 90 days after three-fourths of the Contracting Parties deposit their instruments of ratification, acceptance or approval, and will only apply as between those Contracting Parties. This process is likely to take several years. However, in the meantime, the Modernised ECT will provisionally apply to Contracting Parties from 3 September 2025, unless a Contracting Party decides to opt-out by 3 March 2025.⁶ Certain modifications and changes will enter into force earlier.⁷

Sustainable Development, Climate Change and Clean Energy Transition in Focus

The Modernised ECT places more emphasis on sustainable energy, climate change and clean transition. Among other things, it emphasises the “*urgent objective*” to combat climate change and its effects, and requires Contracting Parties to commit to enhance mitigation and adaptation efforts in the context of their investment and trade policies, including through the implementation of the climate treaties such as the UN Framework Convention on Climate Change and the Paris Agreement. It also requires Contracting Parties to: (i) maintain a high level of protection in relation to the environment and labour, and imposes a requirement that States are satisfied that an environmental impact assessment has been carried out prior to granting authorisations for energy investment projects;⁸ and (ii) recognise the importance of the UN Sustainable Development Goals. It urges investors to implement these goals voluntarily into their policies and practices as part of principles of responsible business conduct.⁹

The Modernised ECT also includes a dispute resolution mechanism specific to the interpretation of provisions on sustainable development. In particular, if the Contracting Parties do not resolve any disputes amicably within six months, a conciliator appointed by the Secretary-General will seek information and advice from the International Labour Organisation or other relevant organisations established under multilateral environmental agreements before producing a non-legally binding report with recommendations.¹⁰

⁶ Decision on Entry into Force and Provisional Application available [here](#), paragraphs 1(a), 2 and 3.

⁷ Decision on Entry into Force and Provisional Application available [here](#), paragraph 1(b). Modifications to the heading of Annex NI and Sections A and B will enter into force on 3 September 2025. Changes to certain Understandings, Declarations and Decisions entered into force on 3 December 2024 (see Decision on Understandings, Declarations and Decisions [here](#)).

⁸ Amendments to the ECT available [here](#), Article 5(1)-(2).

⁹ Amendments to the ECT available [here](#), Article 5(3).

¹⁰ Amendments to the ECT available [here](#), Article 6(10).

Fossil Fuel-Related Investments Still In

Protection of fossil fuel-related investments has not been excluded from the Modernised ECT, with Contracting Parties noting that doing so would be an “exceptional measure.”¹¹ However, Contracting Parties have been provided with the option to exclude certain categories of fossil fuels (including hydrogen and synthetic fuels) from investment protection in their territories pursuant to Annex NI of the Modernised ECT.¹²

Certain Contracting Parties, such as Switzerland, have already chosen this option and will exclude fossil fuels from investment protection under Part III of the ECT in relation to investments made on or after 3 September 2025, i.e. the date the Modernised ECT will provisionally enter into force. Similarly, the EU and its Member States who are Contracting Parties have also agreed to phase-out fossil fuel investment protection over time, and by 31 December 2040 at the latest.¹³

Substantive Investor Protections Narrowed, Punitive Damages Excluded

The Modernised ECT will also substantially limit substantive investor protections previously available under the ECT. For instance:

- The Modernised ECT now lists specific categories of conduct that would constitute a breach of the fair and equitable treatment standard, which include arbitrariness, fundamental breach of due process, and denial of justice in certain domestic proceedings. The new text removes separate references to stability, equity, favourableness and transparency, the prohibition of impairment of an investment through unreasonable or discriminatory measures, and the so-called “umbrella clause.”¹⁴
- Direct and indirect expropriation are now each defined. Direct expropriation is defined as expropriation occurring where an investment is “*nationalised or otherwise directly expropriated through formal transfer of title or outright seizure*,” whereas indirect expropriation is expropriation that occurs where a measure or series of measures that have an effect equivalent to direct expropriation, without the formal transfer of title or seizure, result in a substantial deprivation to the investor of the value of its investment, or the fundamental attributes of property in its investment.

¹¹ Modifications and Changes to Annexes available [here](#), Annex NI, paragraph (1).

¹² See also Amendments to the ECT available [here](#), Article 2(7).

¹³ Modifications and Changes to Annexes available [here](#), Section B, paragraph (1) and Section C.

¹⁴ Amendments to the ECT available [here](#), Article 4(1)-(2).

The assessment of whether a measure (or a series of measures) is expropriatory necessitates a fact-based inquiry that considers (i) the economic impact of the measure on the economic value of a covered investment and (ii) the measure's character, including its objective and context. The Modernised ECT excludes from the scope of indirect expropriation measures applied to protect legitimate policy objectives such as public health, safety and the environment (including climate change mitigation and adaptation measures).¹⁵

- Full protection and security is now restricted to physical security only,¹⁶ while Article 10(13)—a new addition—addresses specific written commitments entered into between an investor and a Contracting Party, which can be breached only through the exercise of governmental authority.¹⁷

The Modernised ECT also excludes the possibility of punitive damages.¹⁸

Intra-EU Disputes Covered No More

The Modernised ECT now excludes intra-EU investor-State dispute settlement under Article 26 of the ECT, limiting the ability of EU-based investors to bring international claims against EU Member States. This is an unsurprising development, given the stance of the EU on intra-EU investor-State dispute settlement, where the Court of Justice of the EU ruled that intra-EU arbitration—including under the ECT—is incompatible with EU law. We reported on this in further detail [here](#).

Call for Increased Transparency and Efficiency in Investor-State Dispute Settlement Answered

Some of the other key changes to the Modernised ECT include the incorporation of provisions meant to increase transparency and efficiency in investor-State arbitration.

For instance, the Modernised ECT incorporates the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration¹⁹ (the “**UNCITRAL Rules on**

¹⁵ Amendments to the ECT available [here](#), Article 4(14).

¹⁶ Amendments to the ECT available [here](#), Article 4(2).

¹⁷ Amendments to the ECT available [here](#), Article 4(10).

¹⁸ Amendments to the ECT available [here](#), Article 5(10).

¹⁹ See the full text of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 1 April 2014 [here](#).

Transparency”) into Article 26 of the ECT.²⁰ Specifically, the amendments provide that investor-State tribunals may make available to the public various documents—including requests for amicable settlement, agreements to mediate, notices of challenge and decisions on the challenge of tribunal members—subject to the protection of confidential or protected information. This does not require party agreement, but tribunals can adapt the requirements of the provisions following consultation with the disputing parties. Parties do, however, retain the right to refuse disclosure of documents or other information that is considered confidential or protected within the meaning of the UNCITRAL Rules on Transparency, and information the publication of which is restricted under domestic law or is contrary to their essential security interests.²¹ Tribunals are also required to deposit copies of their awards with the ECT Secretariat for publication.

The Modernised ECT also incorporates provisions on: (i) summary dismissal of frivolous claims including claims lodged by investors that acquired ownership or control of an investment just for the purposes of filing a claim under Article 26 of the ECT; (ii) security for costs, explicitly allowing investor-State tribunals to order security for costs where appropriate; and (iii) third-party funding, requiring parties to a dispute under Article 26(4) of the ECT to disclose information on third-party funding.

These additions track amendments to the rules of major arbitral institutions such as the 2022 version of the Arbitration Rules of the International Centre for Settlement of Investment Disputes²² and the 2020 Arbitration Rules of the London Court of International Arbitration.²³

Comment

The Modernised ECT seeks to address recent concerns of certain States related to the environment, climate change and greener investments, as well as calls for increased transparency in international dispute resolution. While many European States as well as the EU and Euratom have chosen to leave the ECT, there remains more than 40 parties that may wish to benefit from the Modernised ECT’s protections, both in relation to

²⁰ Amendments to the ECT available [here](#), Article 6.

²¹ See also UNCITRAL Rules on Transparency available [here](#), Article 7(2). Article 7(2) provides that confidential information consists of “(a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.”

²² See our report [here](#).

²³ Available [here](#).

investor-State arbitration and more generally. That said, its more restricted scope and narrower protections mean that investors need to carefully consider their treaty coverage. It remains to be seen what the long-term impact of the changes will be on cross-border energy investment and trade.

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