

GIBSON DUNN

International Arbitration Update

December 10, 2024

## Modernised Energy Charter Treaty Has Finally Been Approved

This update details the key changes to the ECT in the modernised text and considers what the next chapter of the ECT might look like—including for ECT arbitration.

After 15 rounds of negotiations, on 3 December 2024, the Energy Charter Conference officially approved the “modernised” version of the Energy Charter Treaty (**ECT**), marking the end of a multi-year reform process.<sup>[1]</sup> The modernised ECT is considered to be a “greener” treaty than the original text, expanding protections to technologies likely to play a significant role in the energy transition and explicitly affirming the right of Contracting States to regulate—including in the energy transition, climate change mitigation and adaptation contexts. In the modernised ECT, Contracting States also reaffirm their commitments under the United Nations Framework Convention on Climate Change (**UNFCCC**) and the Paris Agreement 2015.

The achievement of modernisation is, however, set against the backdrop of a spate of Contracting Party withdrawals from the ECT in recent years—including by European Union (**EU**) Member States, as well as the EU and Euratom. The UK has also recently notified its withdrawal.

This update (i) sets out a brief background to the ECT as well as recent developments, (ii) details the key changes to the ECT in the modernised text, and (iii) considers what the future of the ECT might hold.

## Background And Recent Developments

The ECT, established in the early 1990s, provides a multilateral framework for energy cooperation. The ECT contains certain protections for investments made by investors of one Contracting Party in another Contracting Party and includes recourse to international arbitration where a Contracting Party acts in breach of its investment protection obligations.

Since November 2017, the ECT Contracting States have been engaged in discussions to “modernise” the ECT text, including by further aligning it to the climate change goals in the 2015 Paris Agreement. An agreement in principle was reached in June 2022,<sup>[2]</sup> which largely reflected proposed changes put forward by the EU to align the ECT with its European Green Deal policy agenda and the Paris Agreement commitments.<sup>[3]</sup>

However, the vote on the amendments—initially scheduled for November 2022—was delayed by the EU and its Member States, which disagreed as to whether to proceed with the modernisation process or withdraw from the ECT entirely. The deadlock was broken when, earlier this year, the European Commission urged EU Member States not to block ECT reform,<sup>[4]</sup> which was then voted on by the EU Council on 30 May 2024.<sup>[5]</sup>

As noted above, there have been a spate of withdrawals from EU Member States in recent years. Italy was the first to submit a notification of withdrawal on 31 December 2014 (effective 1 January 2016)—a decision which followed several arbitrations pursued against it relating to changes to renewable energy regulations. Other EU Member States then followed suit—Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Poland, Portugal, Slovenia and Spain—have each since notified the Energy Charter Secretariat of their withdrawal.

The EU and Euratom formally exited the ECT in June 2024, citing its non-compatibility with the EU’s climate goals under the European Green Deal and the Paris Agreement.<sup>[6]</sup> The UK deposited its withdrawal notification in February 2024 noting, “*the failure of [modernisation] efforts to align it with net zero*”.<sup>[7]</sup>

## What Are The Main Changes In The Modernised ECT?

The principal amendments in the modernised ECT are set out in the “*Amendments to the Energy Charter Treaty*” document and the “*Modifications and Changes to Annexes to the Energy Charter Treaty*” document, both of the 3 December 2024.<sup>[8]</sup> Below are our key takeaways of the modernised text:

### ***Scope Of Protection***

- Extends the definition of “*Economic Activity in the Energy Sector*”—which is included in the definition of a protected “*investment*” under the ECT—to cover the capture, utilisation and storage of carbon dioxide (CCUS) in order to decarbonise energy systems.
- Provides an updated list of the “*Energy Materials and Products*” (referenced in the definition of “*Economic Activity in the Energy Sector*”), which excludes products such as oils and other similar products, and fuel woods—but includes certain types of hydrogen and synthetic fuels. <sup>[9]</sup>

- For investments made before 3 September 2025, the EU and its Member States (which are Contracting Parties), phase out investment protection of fossil fuel investments over time, but in any event by 31 December 2040 at the latest.[\[10\]](#)

### ***Investor Protection***

- Modifies the definition of “*fair and equitable treatment*”—the provision most commonly relied on in investor-State arbitration cases pursued under the ECT—into a list format “*to increase legal certainty*”.
- Introduces a new standalone State “*right to regulate*” provision “*to reaffirm*” this right “*in the interest of legitimate public policy objectives*” such as protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals.
- Consistent with that theme, includes a definition of “*indirect expropriation*” with a list of factors to be considered. The ECT now provides that unless there are “*rare circumstances*”, non-discriminatory measures that are adopted to protect legitimate policy objectives—including climate change mitigation and adaptation—will not constitute indirect expropriation.
- Introduces a sustainable development provision in which Contracting Parties reaffirm their respective rights and obligations under multilateral environmental and labour agreements, such as the UNFCCC, the Paris Agreement and fundamental ILO conventions. In this provision, Contracting Parties agree that they “*shall encourage*” investors to adopt and implement voluntarily guidelines such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.
- There is also a separate provision (“*Climate Change and Clean Energy Transition*”) in which the Contracting Parties reaffirm their commitments to “*effectively implement*” commitments and obligations under the UNFCCC and the Paris Agreement, as well as promote and facilitate trade and investment of relevance for climate change mitigation and adaptation—including, *inter alia*, “*by removing obstacles to trade and investment concerning low carbon energy technologies and services such as renewable energy production capacity, and by adopting policy frameworks conducive to this objective*”.

### ***Dispute Resolution***

- Provides that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 2014 will apply to arbitral proceedings in disputes between Investors and Contracting States.
- Establishes mechanisms for the dismissal of “*frivolous*” claims; clarifying the limits for valuation of damages suffered by an investor and introducing a costs-follow-the-event presumption.
- Introduces a requirement for disputing parties to disclose third party funding.
- Introduces a provision stating that the investor-state arbitration provision in Article 26 does not apply in intra-EU disputes. This follows legal debate that has been ongoing since the judgments of the Court of Justice of the European Union in *Achmea* in 2018 and *Komstroy* in 2021.[\[11\]](#) The 26 EU Member States signed an “*ECT Inter Se declaration*”[\[12\]](#) and initialled an inter se agreement on 25 June 2024, “*regarding the non-*

*applicability of ECT arbitration provisions intra-EU” “giving effect to the Komstroy judgment”.*[\[13\]](#)

### **When Will The Modernised Text Apply?**

The amendments to the ECT will apply on a provisional basis from 3 September 2025.[\[14\]](#) However, a Contracting Party may choose to opt out of such provisional application by serving a declaration to this effect before 3 March 2025.

The amendments to the ECT enter into force on the ninetieth day after at least three-fourths of the Contracting States have deposited instruments of ratification, acceptance or approval to the ECT Depository.[\[15\]](#) The amendments enter into force between the Contracting States that have ratified, accepted or approved them.[\[16\]](#)

### **The Start Of A New Chapter?**

There has been much discussion over recent years about the potential demise of the ECT, with the spate of withdrawals from EU Member States (as well as the EU and Euratom).

At the same time, with the modernised text there may be renewed support behind the treaty. Whilst many EU Member States have exited, some have chosen not to unilaterally withdraw (such as Greece and Sweden), and the European Commission has signalled previously that it may grant special authorisations for EU Member States to become parties to the modernised ECT.[\[17\]](#)

In any event, under the sunset provision of the ECT, despite a withdrawal, Contracting States remain bound by their obligations under the treaty for a further 20 years following such withdrawal. Although EU Member States have reached agreement to disapply the sunset provision within the intra-EU context so that protections cannot be invoked by EU investors against EU Member States, there exists on-going political discussion as to whether inter se disapplication of the sunset provision should be extended outside of that context. Indeed, the EU Council has called on the EU to work with third States (such as the UK, which has notified the Energy Secretariat of its withdrawal) to disapply the sunset clause.[\[18\]](#) It remains to be seen how this will play out—and how a future ECT tribunal would interpret the validity and effect of such an agreement to terminate the sunset provision as a matter of public international law.

There also remain many other non-EU Member State Contracting Parties to the ECT (including Azerbaijan, Japan, Kazakhstan, Türkiye and Ukraine). Investors of these Contracting Parties may want to continue to rely on the ECT’s investment protections when investing in the energy sector of other Contracting States that are party to the ECT. Investors may also consider structuring or restructuring their corporate operations accordingly.

The treaty remains relevant in other contexts beyond investor-State arbitration too, with a recent State-to-State dispute on-going between Azerbaijan and Armenia relating to an alleged breach by Armenia of Azerbaijan’s sovereign rights over its energy resources under Article 27 as a notable example.

## Conclusion

The approval of the modernised text concludes a multi-year reform process, one which has generated considerable public attention. No doubt there will be further discussion as to whether this is now a treaty that strikes the right balance between protecting energy investments, energy security and the green transition. Further, legal debate will likely remain for some time (including before ECT tribunals) with respect to the proposed disapplication of the 20-year sunset provision. With non-EU Contracting Parties still party to the ECT too, it is clear that we have not yet seen the end of ECT arbitration.

If you would like to discuss the above further with Gibson Dunn lawyers, please do not hesitate to reach out to the following members of our team.

[1] Press Release, The Energy Charter Conference Adopts Decisions on the Modernisation of the Energy Charter Treaty, 3 December 2024, [here](#).

[2] See Decision of the Energy Charter Conference, Public Communication explaining the main changes contained in the agreement in principle, 24 June 2022, [here](#).

[3] See European Commission, Agreement in principle reached on Modernised Energy Charter Treaty, 24 June 2022, [here](#).

[4] See Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Energy Charter Conference, 1 March 2024, <https://data.consilium.europa.eu/doc/document/ST-7234-2024-INIT/en/pdf>.

[5] See Press release, Energy Charter Treaty: Council gives final green light to EU's withdrawal, 30 May 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/>.

[6] See Press Release, Energy Charter Treaty: EU notifies its withdrawal, 27 June 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/>.

[7] Press release, UK Departs Energy Charter Treaty, 22 February 2024, <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>.

[8] See Decision of the Energy Charter Conference, 3 December 2024, [here](#), and Decision of the Energy Charter Conference, Modifications and Changes to Annexes to the Energy Charter Treaty, 3 December 2024, [here](#).

[9] See Decision of the Energy Charter Conference, Modifications and Changes to Annexes to the Energy Charter Treaty, [here](#). (“**Modifications and Changes to Annexes**”). Note that for investments made on or after 3 September 2025, the EU and its Member States (which are Contracting Parties) have agreed—for hydrogen—that only low carbon and renewable hydrogen will be captured within the definition of “*Economic Activity in the Energy Sector*”, and only low

carbon synthetic fuels. For the UK, it is low carbon hydrogen which meets its “*Low Carbon Hydrogen Standard*”.

[10] Modifications and Changes to Annexes, Section C(1), cross-referring to Annex EM I 27.01 to 27.15.

[11] See Gibson Dunn Client Alert, Intra-EU Arbitration Under the ECT Is Incompatible with EU Law According to the CJEU in *Republic of Moldova v Komstroy*, 7 September 2021, <https://www.gibsondunn.com/intra-eu-arbitration-under-the-ect-is-incompatible-with-eu-law-according-to-the-cjeu-in-republic-of-moldova-v-komstroy/>.

[12] Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings, June 26, 2024, [https://energy.ec.europa.eu/publications/declaration-legal-consequences-judgment-court-justice-komstroy-and-common-understanding-non\\_en](https://energy.ec.europa.eu/publications/declaration-legal-consequences-judgment-court-justice-komstroy-and-common-understanding-non_en).

[13] Press release, Energy Charter Treaty: Member States sign declaration and initial Inter Se agreement clarifying non-applicability of ECT arbitration provisions intra-EU, 26 June 2024, <https://diplomatie.belgium.be/en/news/energy-charter-treaty-member-states-sign-declaration-and-initial-inter-se-agreement-clarifying-non-applicability-ect-arbitration-provisions-intra-eu>.

[14] This also includes the modifications in Section C of Annex NI and the changes and modifications to other Annexes.

[15] As do the modifications in Section C of Annex NI and the changes and modifications to other Annexes. The modifications in Sections A and B of Annex NI enter into force on 3 September 2025.

[16] See Press release, Energy Charter Treaty: Council gives final green light to EU's withdrawal, 30 May 2024, <https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/>.

[17] Non-paper from the European Commission Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty, [https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper\\_ECT\\_nextsteps.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf).

[18] Declaration on the Legal Consequences of the Judgment of the Court Of Justice In *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis For Intra-Eu Arbitration Proceedings, [here](#).

The following Gibson Dunn lawyers prepared this update: Penny Madden, Charline Yim, Ceyda Knoebel, and Stephanie Collins.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's International Arbitration practice group, or the following authors:

Penny Madden KC – London (+44 20 7071 4226, [pmadden@gibsondunn.com](mailto:pmadden@gibsondunn.com))

Charline Yim – New York (+1 212.351.2316, [cyim@gibsondunn.com](mailto:cyim@gibsondunn.com))

Ceyda Knoebel – London (+44 20 7071 4243, [cknoebel@gibsondunn.com](mailto:cknoebel@gibsondunn.com))

Stephanie Collins – London (+44 20 7071 4216, [scollins@gibsondunn.com](mailto:scollins@gibsondunn.com))

Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

If you would prefer NOT to receive future emailings such as this from the firm, please reply to this email with "Unsubscribe" in the subject line.

If you would prefer to be removed from ALL of our email lists, please reply to this email with "Unsubscribe All" in the subject line. Thank you.

© 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit our [website](#).