

FEBRUARY 2025

## *The modernisation of the Energy Charter Treaty*

○ Dispute Resolution

## 01. The Energy Charter Treaty (“ECT”)

Established in the 1990s, the Energy Charter Treaty (“ECT” or “Treaty”) provides for a multilateral framework for energy cooperation, offering investment protections and providing for recourse to international arbitration in the event of breaches of investment protection obligations.

Since 2017, Contracting Parties have engaged in negotiations to revise the Treaty text to align with the climate goals set forth in the Paris Agreement.

In this context, a preliminary agreement was reached in June 2022, largely based on proposals advanced by the EU to harmonise the ECT with its European Green Deal agenda.

The process encountered delays due to disagreements among EU Member States on whether to continue modernisation or withdraw from the Treaty. This impasse was resolved in early 2024 when the European Commission urged Member States not to block the reform of ECT,<sup>1</sup> which was subsequently approved by the EU Council on May 30, 2024<sup>2</sup>.

**On December 3, 2024, after fifteen rounds of negotiations, the Energy Charter Conference officially approved the “modernised” version of the ETC, marking the conclusion of a multi-year reform process<sup>3</sup>.**

**The new version of the ETC aims to enhance commitments to energy transition and climate action by expanding protections to essential technologies and reaffirming sovereign rights of Contracting Parties to regulate in areas such as climate change mitigation and adaptation.**

The Parties also reaffirmed their commitments under the United Nations Framework Convention on Climate Change (“UNFCCC”) and the 2015 Paris Agreement.

<sup>1</sup> Proposal for a council decision on the position to be taken on behalf of the European Union in the energy charter conference.

<sup>2</sup> Press release - May 30, 2024.

<sup>3</sup> Press release - December 3, 2024.

## 02. The main changes

The modernised text of the ECT introduces significant revisions to its substantive clauses affecting, *inter alia*, its scope, investment protection and related dispute resolution mechanisms<sup>4</sup>.

Below are some of the main changes:

- The definition of “**Economic activity in the energy sector**”- *i.e.*, commercial activities and energy funds covered by the Treaty - has been broadened to include **emerging technologies**, such as carbon capture and storage. At the same time, the list of covered activities has been significantly narrowed, excluding references to the exploration and extraction of certain fossil fuels;
- Likewise, the definition of “**Energy Materials and Products**” has been revised to exclude certain fossil fuels<sup>5</sup> while incorporating hydrogen and specific synthetic fuels;
- **Investments:** To qualify for protection under the Treaty, an investment must be made or acquired in accordance with the applicable laws of the host Contracting Party and exhibit specific characteristics, including

commitment of capital, an expectation of profit, a certain duration and risk-taking;

- Investment in fossil fuels: Investments made within the EU and its Member States before September 3, 2025 will be gradually excluded from the Treaty protection for certain energy materials and activities<sup>6</sup>. This exclusion will take effect ten years after the entry into force of the amendments approved on December 3, 2024, and in any case no later than December 31, 2040;
- Fair and Equitable Treatment ("FET"): To increase legal certainty, the clause now specifies a list of measures that constitute violations of the FET standard, including violation of investors' legitimate expectations and the circumstances under which these expectations are considered relevant for this purpose<sup>7</sup>;
- Direct and Indirect Expropriation: The revised provisions (a) clarify the concept of "Direct Expropriation" and, (b) introduces a definition of "Indirect Expropriation" along with a list of factors that must be considered to determine the existence of indirect expropriation in the specific case. Notably, non-discriminatory measures taken to protect legitimate policy objectives, such as public health, safety and the environment, and climate change mitigation and adaptation, are expressly excluded from constituting indirect expropriation<sup>8</sup>;
- Right to Regulate: A new stand-alone article reaffirms the right of Contracting Parties to regulate within their territories for legitimate public policy objectives, such as environmental protection, as well as climate change mitigation and adaptation, public health, safety, and public morality<sup>9</sup>;
- Sustainable development: New provisions clarify and strengthen the environmental impact assessment requirements for energy investment projects, ensuring alignment with the laws and regulations of Contracting Parties, ensuring a higher level of environmental protection and broader public participation. The Contracting Parties reaffirmed their commitment to the clean energy transition, the promotion of low-carbon technologies in energy trade and investment, and cooperation in the implementation of climate change-related policies where appropriate.

With respect to the dispute resolution mechanism, the following amendments are noteworthy:

- Transparency: Enhanced transparency in State-to-State disputes is mandated by ensuring public availability of procedural documents and enabling public access to hearings. Investor-State disputes will apply the UNCITRAL Rules on Transparency in treaty-based arbitration, with additional transparency measures provided under the ECT;
- Frivolous Claims: To improve the efficiency of arbitration proceedings and reduce litigation costs, mechanisms have been introduced to summarily dismiss (i) claims manifestly lacking legal or jurisdictional merit and (ii) claims that are legally unfounded on the merits. A specific provision also addresses the dismissal of claims arising from the restructuring of investments for instrumental purposes<sup>10</sup>;
- Third-Party Funding: Both disputing parties are now required to disclose the existence of any third-party funding for arbitration proceedings;
- Security for Costs: A new provision enables a Contracting Party to require claimants to provide security for costs in certain circumstances, such as when there is a risk of non-compliance with an adverse costs order<sup>11</sup>;
- Intra-EU Disputes: Arbitration between EU Member States is excluded, in alignment with the case law of Court of Justice of the European Union<sup>12</sup>;

- **Sustainable Development Disputes:** A dedicated mechanism is established for disputes between Contracting Parties concerning the interpretation and application of the new sustainable development provisions. This mechanism includes the possibility of referring the matter to a conciliator<sup>13</sup>.

<sup>4</sup> For a deeper look at the changes made to the original text of the Treaty, see the documents titled "Amendments to the ECT as set out in Conference decision CCDEC202412" and "Amendments and changes to the Annexes to the ECT as set out in the Conference decision CCDEC202413," both published on December 3, 2024 (see [Press Release-December 3, 2024](#)).

<sup>5</sup> Sec. A, amendments to Annex ni.

<sup>6</sup> Sec. B, para. 1(a), Amendments to Annex NI.

<sup>7</sup> Article 10.

<sup>8</sup> Article 13.

<sup>9</sup> Article 16.

<sup>10</sup> Article 27.

<sup>11</sup> Article 28.

<sup>12</sup> [Inter se declaration - june 26, 2024](#).

<sup>13</sup> Articles 19 and 19a.

### 03. *The entry into force and sunset clause*

The amendments to the Treaty will provisionally enter into force on September 3, 2025, unless Contracting Parties decide otherwise. Formal ratification will, however, require the approval of at least three-fourths of the signatory States.

The modernisation process unfolds against the backdrop of several withdrawals by Contracting Parties, including EU Member States (notably Italy), the EU itself and Euratom. The United Kingdom has also recently notified its intent to withdraw.

Italy denounced the Treaty in 2016. However, by virtue of the so-called "sunset clause" of Article 47 of the ETC, which provides for the survival of Treaty protections for investments made prior to the withdrawal for a period of twenty years, it can be argued that Italy might remain obligated to provide protection for investments made before that date until January 1, 2036.

As a non-Contracting Party, Italy no longer participates in the Treaty's interpretation and revision. The ECT does not explicitly determine whether the "old" or the "modernised" version will apply to withdrawn states under the sunset clause.

Despite this backsliding, the ECT continues to have a significant importance, particularly for investors from non-EU States, including Azerbaijan, Japan, Kazakhstan, Turkey and Ukraine.

### 04. *Conclusion*

The modernisation of the Treaty represents a significant development, albeit questions persist about the future application of its provisions, particularly in relation to the sunset clause. Its implementation will undoubtedly continue to spark legal and arbitral discourse, especially in the context of energy transition and investment security in the energy sector.

## *The Dispute Resolution Department*

For further information:



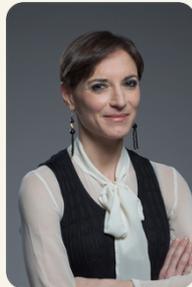
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