

**ENERGY CHARTER  
SECRETARIAT**

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CCDEC 2017

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Brussels, 28 November 2017

Related documents: RD 3 (ECC of 28-29 11 2017), CC 615
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**DECISION OF THE ENERGY CHARTER CONFERENCE**

**Subject: Modernisation of the Energy Charter Treaty**

The Energy Charter Conference at its 28th Meeting held on 28-29 November 2017 **approved** the timeline for the discussion on modernisation during 2018 and the document to be used for the open consultation with Observers and the industry (attached hereto). The Conference also **supported** the nomination of Ms Sofia Sanz Estébanez as Chair of the Subgroup of Modernisation.

Based on the internal discussions during 2018, as well as on the result of the consultation with Observers and the industry, the Secretariat would prepare a report identifying a list of potential topics for (i) clarification by a declaration in 2018 (if any) and/or (ii) to be included in a closed list of potential topics, that could be confirmed during the 2019 review under Art. 34.7 of the ECT, for (a) amendment (if any) and/or (b) negotiation of additional legally and/or non-legally binding tools (if any).

Keywords: Modernisation, Energy Charter Treaty, subgroup, amendment, declaration, Sofia Sanz Estebanez, Observers, Industry, Consultation

## **CONSULTATIONS ON THE MODERNISATION OF THE ECT**

1. The first phase of modernisation of the Energy Charter Process was finalised successfully in 2015 with the adoption of the International Energy Charter (which updated the initial political declaration signed in 1991). Today, 87 countries and international organisations have signed it.
2. The next step in the modernisation exercise is to consider the potential need and/or usefulness of updating, clarifying or modernising the Energy Charter Treaty (ECT). In January 2017, several experts from the industry, governments, legal circles and academics (in addition to officials from UNCITRAL and UNCTAD) discussed the investment protection standards under the ECT, concluding that some particular issues could benefit from additional clarification. Later in the year, Contracting Parties and Signatories also analysed and considered current investment policy tendencies incorporated in international investment agreements (IIAs).
3. According to a Contracting Party, the provisions of the ECT were adopted as a comprehensive package in the prudent negotiation of the Treaty as a whole, whose coverage is not limited to investment protection (but includes also transit, trade...). Therefore, any discussion on updating, clarifying or modernising the ECT should take into consideration all the provisions of the ECT and not only the investment protection standards.
4. After some internal discussions on the potential scope of the modernisation exercise, the Contracting Parties and Signatories of the Energy Charter Treaty would like to consult with Observers and the industry on the topics listed below before continuing the discussion on potential clarifications and/or amendments to some provisions of the ECT, as well as the negotiation of additional legally and/or non-legally binding tools (if any). **Such consultation would take place in Brussels on 2 February 2018 (for Observers) and on 18 May 2018 (for the industry).** Comments in writing are welcome in advance of such meetings at [legalaffairs@encharter.org](mailto:legalaffairs@encharter.org).
5. Considering the new approaches included in recent IIAs:
  - ) Preamble: there is a trend in some recent IIAs to provide further context to the disciplines by referring to other public policy interests (such as sustainable development, transparency, environmental and labour standards as well as universal values as human rights).
  - ) Covered investments, Article 1(6): Some recent IIAs require covered investments to fulfil specific characteristics (such as commitment of capital, an effective contribution

to the host State's economy, and a certain duration) and/or include a legality requirement (compliance with domestic laws, including anticorruption/bribery regulations). In addition, ECT annexes on energy products and materials could be updated and the definition of '*economic activity in the energy sector*' (which is relevant to the type of covered investments under the ECT) could be clarified.

- J Covered investors, Article 1(7): Some recent IIAs include additional criteria for the definition of covered investors (a company must have its "seat" and engage in "real/substantial business" activities in the home State, exclusion of individuals with dual nationality –including that of the host State–, exclusion of investors whose ultimate beneficiary is a national of the host State).
- J Protection of pre-investment: currently ECT Article 10(4-6) only provides voluntary soft commitments regarding pre-investment and the obligation to negotiate the supplementary treaty to cover pre-investment. Several recent IIAs include pre-investment with or without being subject to the dispute resolution mechanisms (either investor-State or State-State).
- J Fair and Equitable Treatment (FET), Article 10(1): some IIAs qualify the FET standard by reference to the minimum standard of treatment of aliens under customary international law. There is also a trend either to state the FET standard through an open-ended list of FET obligations or to replace the general FET clause with an exhaustive list of what the Parties would consider as breaching the standard.
- J Most Constant Protection and Security, Article 10(1): the trend is to state that it refers only to physical security.
- J Umbrella clause, Article 10(1): whereas the ECT contains a broad unqualified clause (but providing also the possibility of exclusion from dispute settlement), some new IIAs state that the clause covers only "written commitments" or that the obligations must be "entered into" with respect to specific investments. Other state that the umbrella clause cannot be used to bypass specific contractual dispute settlement mechanisms.
- J Most Favoured Nation (MFN), Article 10(7): Some new IIAs state that the MFN obligation requires comparison of investors/investments that are "in like circumstances" or "like situations" and may include criteria for such comparison.
- J National Treatment (NT), Article 10(7): Some recent IIAs state that the NT standard applies only to investors/investments "in like circumstances" or "like situations", and may set out criteria for comparison.
- J Compensation for Losses, Article 12: Several IIAs contain rules on standard of compensation and calculation of compensation, to be based on fair market value (going as far as suggesting the use of certain valuation criteria).

- J Protection against unlawful expropriation, Article 13: Most of new IIAs establish specific criteria for indirect expropriation, including what does not constitute indirect expropriation. There are some other IIAs that omit a reference to, or explicitly exclude, indirect expropriation from their scope.
  - J Transfers related to investments, Article 14: some IIAs include an exception for serious balance-of-payments difficulties, temporary safeguard measures taken for monetary or exchange rate policy, or prudential measures taken to ensure stability of financial system and situation of economic crises.
  - J Regarding State's rights to regulate: a number of recent IIAs include an operational article on the State's right to regulate to achieve legitimate policy objectives (in some cases such article includes a non-stabilisation clause or other clarifications).
  - J Denial of benefits, Article 17: some IIAs specify that the denial of benefits clause can also be invoked once Investment proceedings have started.
  - J Article 20, transparency: Under article 20 ECT, judicial decisions and administrative rulings of general application made effective by Contracting Parties must be published promptly. Article 27 of the ECT requires states to communicate to the Secretariat the arbitral award in a State-State dispute, but no transparency requirement exists under the ECT regarding investment disputes. On the contrary, many recent IIAs include an obligation to apply UNCITRAL rules on transparency.
  - J Treaty interpretation: Recent IIAs establish mechanisms (eg. Joint Committee) for binding joint interpretations. Some IIAs also allow interpretations by non-disputing Parties.
  - J Prevention of frivolous claims: some IIAs allow the respondent to file a preliminary objection that a claim is manifestly without legal merits (similar to ICSID arbitration rules but inexistent under UNCITRAL or SCC rules); and to address the issue of unfounded claims as a matter of law.
6. The ECT also contains soft commitments that although not included in new IIAs, could be considered for the discussion on modernisation (eg, transfer of technology, access to capital, competition, settlement of environmental disputes –currently can be considered by the Conference aiming at a solution-). In addition, apart from the possibility of considering the inclusion of maritime transport, several major challenges for cross-border transport and transit of energy have been identified by the Implementation Group during 2017: Third party access and denial of access; Principles and methodology of setting transit tariffs; Safety, operational and environmental standards; Cooperation of network operators; Transparency and Reporting procedures for the volumes of energy in transit; Permit granting and authorisation procedures.