Seirbhís Leabharlainne 7 Taighde
Library & Research Service

L&RS Note

Ireland and the Energy Charter Treaty

Kate Walsh, Senior Parliamentary Researcher (Environmental Science)

08 November 2023

The Energy Charter process has generated two key multilateral political declarations, the European Energy Charter (1991) and the International Energy Charter (2015), and developed the binding legal framework now known as the Energy Charter Treaty (ECT). The ECT was first negotiated and agreed in the 1990s and, as stated by the European Commission, it was designed "to create a forum for East-West policy cooperation on energy, investment protection, trade and transit."

Today, it appears at odds with modern climate action objectives, and has been challenged in several jurisdictions. The ECT originally set out to protect investors in energy, yet the risk of litigation under the treaty in recent years has fuelled concerns that it is now a mechanism for push back on decarbonisation plans and climate action in Europe. There are concerns that the ECT limits policy makers' ability to align energy policy with environmental commitments. For the first time in Ireland, a legal challenge is underway relating to granting of petroleum exploration licenses.

This Note provides an overview of the treaty, its history, and how Ireland ratified the ECT. The main provisions and definitions are described and the mechanisms for dispute resolution are explained. The latest statistics on cases brought under the ECT are given. In the concluding section, the latest proposals for modernisation of the treaty are briefly described, and the next steps for the EU's withdrawal are set out.

Tithe an Oireachtais
Houses of the Oireachtas

Introduction

This Note is an overview of the Energy Charter Treaty (ECT) and in particular the ratification process as applicable to Ireland and the EU. The treaty and its evolution is complex, and it is apparent that since the Paris Agreement of 2015 in particular and resulting global acceleration in efforts towards net zero energy emissions, many signatories are reflecting of the aspects of the treaty which leave them open to litigation whilst adopting clean energy policies. This Note describes the history of the ECT, and the investor dispute element of the treaty, and presents summaries of the types of cases that have been brought under the treaty. This paper does not go into detail of the use of the ECT in a very recent legal dispute in Ireland. In the concluding sections, this Note looks at recent work to renegotiate and modernise the ECT, and the apparent initiation of proceedings to withdraw from the ECT by the EU. Despite these proposals for change and 'modernisation', questions remain about whether enough has been done to support states in their clean energy transition.

The Energy Charter Treaty

History

The Energy Charter process has generated two key multilateral political declarations, the European Energy Charter (1991) and the International Energy Charter (2015), and developed the binding legal framework now known as the Energy Charter Treaty (ECT). This treaty was signed in December 1994 and entered into force in December 1998, with over 50 signatories globally. The ECT was negotiated and agreed in the early 1990s and, as stated by the European Commission, it was designed "to create a forum for East-West policy cooperation on energy, investment protection, trade and transit".[1]

In 2018, the law firm, Norton Rose Fulbright published Issue 11 of their International Arbitration Report. It included a comprehensive article on the ECT.[2] In that article, Valasek and O'Gorman noted that the ECT was born from an international effort to facilitate cross-border energy transactions following the end of the Cold War. Konoplyanik and Wälde (2006) explained:

> "Russia and many of the neighbour-states of the Former Soviet Union (FSU) were rich in energy resources but needed major investments to ensure their development, while the states of Western Europe had a strategic interest in diversifying their sources of energy supplies to diminish their dependence on the Middle East. There was therefore a recognised need to ensure that a commonly accepted foundation was established for developing energy cooperation among the states of the Eurasian continent. On the basis of these considerations, the Energy Charter process was born."[3]

---

[1] European Commission, 'Commission presents EU proposal for modernising Energy Charter Treaty', Press Release, 27 May 2020.

[2] Martin J. Valasek and Kevin O'Gorman, 'Energy Charter disputes' in Norton Rose Fulbright's *International Arbitration Report*, issue 11, October 2018.

[3] Andrei Konoplyanik and Thomas Wälde (2006) "Energy Charter Treaty and its Role in International Energy" *Journal of Energy & Natural Resources Law,* Vol 24 No 4 523 – 558, at 524.

A determination to cover these issues took the form of the European Energy Charter declaration which formed part of the Concluding Document of the Hague Conference on the European Energy Charter. In effect the declaration was a political declaration of the agreed principles for international energy cooperation in trade, transit and investment, together with an intention to negotiate a legally binding treaty. The declaration was signed by 48 countries (including Ireland) together with the European Communities and the Interstate Economic Committee in December 1991.

The ECT, together with the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects was signed in Lisbon on 17 December 1994. From that date it provisionally applied to signatories who did not limit its application under Article 45(2) of the treaty. Both the Charter and the Protocol entered into legal force on 16 April 1998.[4] In the same month, the parties to the ECT agreed an amendment to the trade-related provisions proposed by the European Commission, to reflect the movement away from the General Agreement on Tariffs and Trade (GATT) and to bring the ECT into line with the rules and practices of the World Trade Organization (WTO). The amendment also expanded the scope of the ECT to cover trade in energy-related equipment, and it set out a mechanism for introducing legally binding measures on customs duties and charges for energy-related imports and exports. The Trade Amendment entered into force on 21 January 2010, after the thirty-fifth ECT signatory had ratified it in accordance with Articles 42 and 44 of the ECT.[5]

A good summary of the treaty has been provided by Alex Wilson, writing for the European Parliamentary Research Service (2017):

> "The Energy Charter Treaty has significant legal and financial implications for commercial energy relations between member countries, above all concerning investment, trade and transit. It applies to all forms of energy and all stages of production and consumption. Its remit also extends to issues of competition, environment and energy efficiency, but has less binding force in these areas. The Energy Charter Treaty sets out formal mechanisms for dispute resolution, based on international arbitration, which have been widely used in disputes between states and private investors, but rarely used in inter-state disputes. The Energy Charter Treaty also set up bodies to manage the Energy Charter process, in particular a multinational Secretariat and an intergovernmental decision-making body (the Energy Charter Conference)."[6]

The Hague II Conference took place on 20 May 2015 and, at its conclusion, representatives of 72 countries (including Ireland), the EU, the European Atomic Energy Community (Euratom) and Economic Community of West African States (ECOWAS) signed a joint declaration to promote mutually beneficial energy cooperation among nations for the sake of energy security and sustainability. The declaration took the form of the International Energy Charter.

The Energy Charter Secretariat has conducted several reviews of the ECT since it came into force. In 2020, modernisation of the ECT has come into focus and, having been mandated by the Council

---

[4] See The Energy Charter Conference, 'The Energy Charter Treaty' (webpage).

[5] See The Energy Charter Conference, 'The Amendment to the Trade-related Provisions of the Energy Charter Treaty' (webpage).

[6] Alex Wilson, 'Energy Charter: A multilateral process for managing commercial energy relations', European Parliamentary Research Service, PE 607.297, July 2017, at p. 1.

of the European Union the European Commission proposed a number of amendments with a mind to 'modernise' the ECT in 2020. It stated:

> "The ECT's investment protection provisions have not been updated since the 1990s and are now outdated compared to the new standards of the EU's reformed approach on investment policy. Similarly, there is a growing perception that the ECT does not sufficiently meet today's climate policy commitments. The EU's proposal to modernise the ECT has three main aims.
>
> Firstly, to bring the ECT's provisions on investment protection in line with those of agreements recently concluded by the EU and its Member States.
>
> Secondly, to ensure the ECT better reflects climate change and clean energy transition goals and facilitates a transition to a low-carbon, more digital and consumer-centric energy system, thus contributing to the objectives of the Paris Agreement and our decarbonisation ambition.
>
> Thirdly, to reform the ECT's investor-to-state dispute settlement mechanism in line with the EU's work in the ongoing multilateral reform process in the United Nations Commission on International Trade Law (UNCITRAL)."[7]

- Negotiations on the modernisation of the ECT continued and the fifteenth round of renegotiations were concluded in summer 2023; these negotiations are described in the end section of this Note. During that process there was some airing of frustrations over the renegotiations, including publicly raising the possibility of withdrawal from the treaty. Some countries had already mooted the possibility of withdrawal.[8] For example, French ministers involved in ECT negotiations formally stated their frustration with the state of the negotiations by sending a letter to the European Commission in December 2020, stating that the "option of a co-ordinated withdrawal of the European Union and its member states" from the ECT should be raised publicly.[9]

Ratification of the ECT by Ireland

The involvement of Dáil Éireann in the ratification of international agreements is set out in Article 29.5 of Bunreacht na hÉireann. Article 29.5.1 requires that every international agreement to which the State becomes a party shall be laid before Dáil Éireann. However, as per *Hutchinson v Minister for Justice*, an agreement does not have to be laid before Dáil Éireann **until** it is ratified by the government of the day.[10]

Article 29.5.2 of Bunreacht na hÉireann provides:

---

[7] European Commission, 'Commission presents EU proposal for modernising Energy Charter Treaty', Press Release, 27 May 2020.

[8] Including Spain, the Netherlands, Poland, Slovenia, and most recently Germany and Denmark.

[9] Frédéric Simon, 'France puts EU withdrawal from Energy Charter Treaty on the table', *EURACTIVE*, 3 February 2021.

[10] Hutchinson v Minister for Justice [1993] 3 IR 567 at 571.

> "[t]he State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann".

Article 29.5.3 however stipulates that the section shall not apply to agreements or conventions of a technical and administrative character.

In *State (Gilliland) v Mountjoy Prison*, the Supreme Court identified three classifications of international agreement:

1. An agreement of convention of a technical and administrative character which does not have to be laid before the Dáil and whose terms do not require the approval of Dáil Éireann[11];
2. An international agreement involving a charge upon public funds, by which the State shall not be bound unless the terms of the agreement have been approved by Dáil Éireann; and
3. An international agreement falling into neither of the aforementioned categories, which must be laid before the Dáil, but the terms of which need not be approved by Dáil Éireann.[12]

Ireland signed the ECT in December 1994. However, prior to signing the treaty, on 30 November 1994, the Government brought a motion to the Dáil:

> "That Dáil Éireann approves the terms of the Energy Charter Treaty and the Energy Efficiency Protocol which are open for signature subject to ratification from 17 December, 1994, in Lisbon, Portugal, copies of which were laid before Dáil Éireann on 28 November, 1994."

The question was put and agreed to, it appears to have been done without debate or formal vote. The fact that the Government brought the motion to the Dáil appears to imply that the Government wanted to ensure compliance with Article 29.5.2 of the Constitution.

On 5 March 1998, the Government initiated the Gas (Amendment) Bill 1998 in the Seanad. As noted in the Second Stage debate by, the then Minister of State at the Department of Public Enterprise, Joe Jacob T.D.:

> "This Bill is brought before the House following advice from the Attorney General that section 37 of the *Gas Act 1976*, is anti-competitive and in conflict with the competition provisions of the Energy Charter Treaty, which Ireland signed in December 1994. In order to ratify this treaty, all contracting parties must ensure that their domestic laws and regulations are compatible with its provisions. Section 37 would have to be repealed in any case to bring the Act into line with national and EU competition rules.
>
> The provisions of the Energy Charter Treaty require that all contracting parties work to alleviate market distortions and barriers to competition in the energy sector. The main

---

[11] Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5th ed. Bloomsbury, 2018 at [5.3.120], where the authors note that this is apparently irrespective of whether the agreement or convention involves a charge on public funds. They also note at fn. 264 that the Constitutional Review Group proposed amending Article 29.5.3 to require Dáil approval for such agreements involving public funds, while the Oireachtas All-Party Committee on the Constitution recommended the deletion of Article 29.5.3.

[12] *State (Gilliland) v Mountjoy Prison* [1987] IR 201. See also Gerard Hogan et al, *JM Kelly: The Irish Constitution*, 5th ed. Bloomsbury, 2018 at [5.3.120].

> objective of the treaty is to stimulate investment by the west in the energy sector in eastern Europe and in the states of the former Soviet Union in an effort to aid their transition to market economies. It is expected also to provide for long-term co-operation between western and eastern Europe in the energy field and, by so doing, to improve security of supply, maximise the efficiency of production, conversion, transport, distribution and use of energy, enhance safety and minimise environmental problems for their mutual benefit.
>
> Over 50 countries have now signed the treaty and 33 have ratified it to date. The treaty entered into force on 16 April this year and from that date became a binding instrument of international law. All member states of the European Union have signed the treaty and all but three, including Ireland, have ratified the treaty so far. While the idea for the energy charter which eventually led to the negotiation of the treaty was first mooted in the European Union, other countries of western and eastern Europe, the states of the former Soviet Union and many of the non-European members of the Organisation for Economic Co-operation and Development supported the idea and entered into the negotiations. Ireland has participated in the negotiations on the treaty at EU level and in the wider negotiations. We enthusiastically support the aims of the treaty and I am anxious that we should ratify it as soon as possible."[13]

The debate in both Houses concluded in the Bill being passed without the need for a formal vote. In the debates, any criticism of the Bill and the ECT was kept to the topic of consumer protection – ensuring that opening up the gas market to competition would not result in a worse deal for consumers. There was no challenge to the dispute-resolution provisions of the ECT. The Bill passed through both Houses on 27 May 1998 and was signed into law by the President and came into force on 3 June 1998.

Ireland officially ratified the ECT and the Protocol on 30 March 1999. On 13 July 2001, Ireland ratified the 1998 Amendment to the Trade related provisions of the ECT.[14]

Reservations and exclusions

Although Article 46 of the ECT and Article 19 of the Protocol state that no reservations may be made to the agreements, the Annexes to the ECT do provide some qualifications to the Treaty. Notably, in accordance with Article 26(3)(b)(i) and Annex ID of the ECT, Ireland refuses to allow an investor to submit a dispute to an international arbitration (or conciliation) process set out in Article 26 of the ECT where the same dispute has already been submitted to a different forum. This limitation has been referred to as a 'fork-in-the-road' clause. Where an investor makes a decision to pursue a claim in a particular forum, the investor must stick with that forum and may not start parallel proceedings in a different forum. So, once an investor has chosen to take the claim to an international arbitration tribunal, the investor may not then pursue the matter in a domestic court.[15]

---

[13] Joe Jacob T.D. 'Gas (Amendment) Bill 1998: Second Stage' *Seanad Éireann Debates*, 24 April 1998.

[14] The Amendment was laid before the Dáil in May 2011: See *Dáil Order Paper*, 24 May 2011.

[15] The mere "submission" of the dispute to another forum would result in a forfeiture of an arbitral claim against Ireland: see Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small (ed.)), Oxford University Press: New York, 2010, p. 52.

Main provisions of the Energy Charter Treaty

This Note does not attempt to cover the entirety of the ECT, only its main provisions. Articles 10 (promotion, protection, and treatment of investments) and 13 (expropriation) are the two provisions of the treaty for which breaches have been found to date. Figure 1 displays a breakdown of the provisions under which breaches have been found, in a total of 45 out of 158 cases to date (to May 2023).

This part of the paper focuses on those two 'challenged' provisions, together with parts of Article 1 (definitions), Articles 18 (sovereignty over energy resources), 19 (environmental aspects), 21 (taxation) and 47 (withdrawal). Part V, covering dispute resolution, is discussed separately.

Some statistics on ECT cases

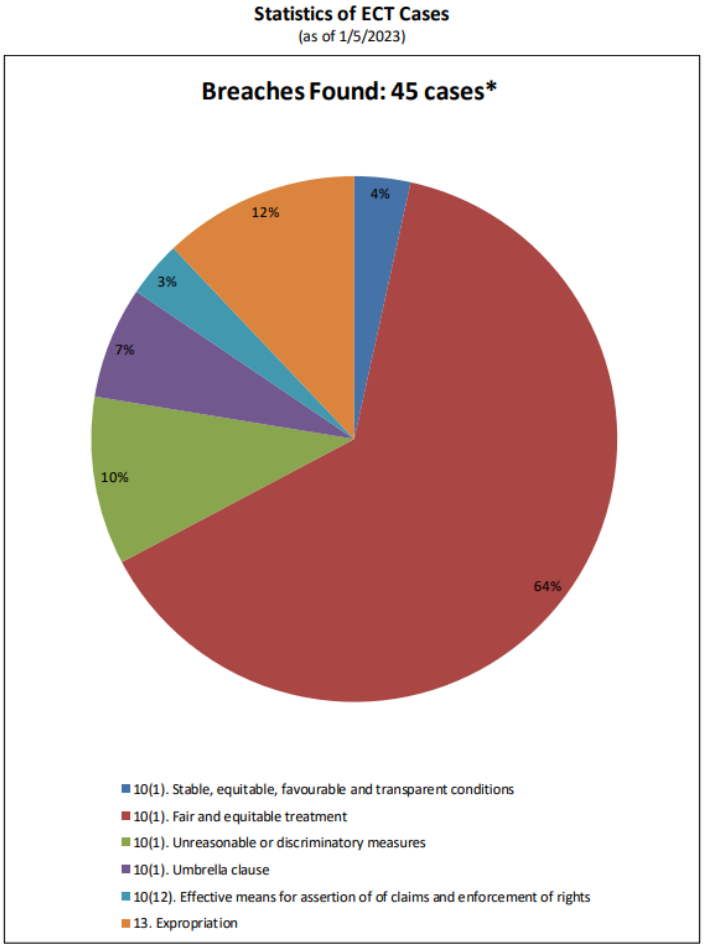
- 45 breaches have been found to date (up from 36 in 2021).
- Spain and Italy together form 41% of all ECT case respondents.
- Since 2013 there has been a notable uptick in the number of arbitration cases (many relating to Spain and its policy change on renewables, see below)

Source: Energy Charter Treaty Secretariat

Despite the numerous signatories of the ECT, a handful of countries have been subject to legal challenge more than others, notably Spain and Italy who between them are respondents to 51 and 14 cases respectively (out of a total of 158, so together comprising 41% of all ECT case respondents). Of the claimants under arbitration, the majority are from Germany, Spain, Italy, The Netherlands, and Luxembourg.[16]

[16] Energy Charter Treaty Secretariat (only covers publicly available information). Statistics compilation, 1 May 2023.

Figure 1 Number and classification (by ECT Article) of breaches found, as of May 2023



Source: Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information)

Main definitions

Article 1(5) of the ECT defines the term 'economic activity in the energy sector' as "economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products except those included in Annex NI, or concerning the distribution of heat to multiple premises." The notes attached to the paragraph acknowledge "[i]t is understood that the Treaty confers no rights to engage in economic activities other than economic activities in the energy sector."

As explained by Valasek and O'Gorman (2018), writing for global law firm Norton Rose Fulbright, the fact that the ECT is a specialised multilateral treaty aimed at protecting investments associated solely with economic activity in the energy sector sets the ECT apart from other bilateral investment treaties (BITs), as BITs do not generally contain industry or subject-matter limitations

on the type of claims that are permissible.[17] That said, the ECT, like most BITs, does include a provision to guarantee 'fair and equitable treatment' (see below).

Article 1(6) provides that the term 'investment' refers to any type of asset that is owned or controlled directly or indirectly by an investor. This definition is very broad and extends to both tangible and intangible rights, intellectual property rights, and any rights conferred by law or contract or by virtue of any licences and permits lawfully granted to undertake any economic activity in the energy sector. The qualifying note to the paragraph specifies that the burden of proving that an investor has direct or indirect control over an investment falls to the investor.

Promotion, protection, and treatment of investments

Article 10 of the ECT enshrines the concept of fair and equitable treatment into the treaty – making it an overarching principle upon which the ECT is based. This concept is tied to requirements that Parties provide constant protection and security, that Parties are prohibited from putting in place unreasonable and discriminatory measures and that Parties must adhere to a standard as set out by international law. The provision also includes an umbrella clause – Parties must act in a manner that is respectful of any obligations that it has entered into, whether with another Party, with an investor or with a person linked to an investment.

Professor Christoph Schreuer (2008) describes the relationship between the concept of fair and equitable treatment and the other requirements of Article 10(1), concluding that 'fair and equitable treatment' is a free-standing standard that may form the basis for an independent claim. While, at the same time, the concept is connected to other standards of protection in a variety of ways:

> "It has points of contact to the standards of 'constant protection and security' and protection against 'unreasonable or discriminatory measures'. … [T]hese standards, though related, are separate and autonomous. In fact, some tribunals have given them their own specific meaning.
>
> The question of whether the [fair and equitable treatment] standard is identical with or additional to the international minimum standard under customary international law has led to intensive debate. The answer ultimately depends on the wording of the respective treaties. Under the NAFTA and under some BITs it is established that they are the same. Under the ECT and under most BITs the better view is that [fair and equitable treatment] is an additional and higher standard.
>
> The violation of contractual commitments by a host State may amount to a violation of the [fair and equitable treatment] standard. But this does not mean that … [would] render an umbrella clause superfluous. … Not every violation by the host State of its own domestic law is at odds with [fair and equitable treatment]. But violations of host State law that affect the stability and transparency of the legal framework under which the investor operates may encroach upon the treaty standard."[18]

---

[17] Martin J. Valasek and Kevin O'Gorman, 'Energy Charter Treaty disputes – Recent statistics and developments', *Publications by Norton Rose Fulbright*, October 2018 (website).

[18] Christoph H. Schreuer, Professor of Law University of Vienna, School of Law, 'Chapter 2, Selected standards of treatment available under the Energy Charter Treaty: Part I – Fair and Equitable Treatment

Further obligations may be found in paragraphs (3) and (12). Under paragraph (3) Parties are required to treat an investor of another Party in a manner that is no less favourable than they would treat their own investors or investors from a third state. Article 10(12) requires Parties to ensure that their domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements, and investment authorisations.

Expropriation

Although there are links between expropriation and fair and equitable treatment, they are two very distinct concepts. As explained by Professor Schreuer (2005) the general process of expropriation (the taking of private property into public use or ownership) is not illegal under international law – in principle, a State retains the power to expropriate private property located within its territorial boundaries. But, as suggested by Professor Schreuer, the legal expropriation of foreign-owned property would be subject to certain conditions – the expropriation would have to be made in the public interest, in the absence of discrimination, with appropriate compensation and in line with due process of law. These conditions, included in Article 13 of the ECT, are also in line with the majority of BITs, protecting investments.[19] Professor Schreuer opines:

> "A legitimate public purpose underlying a regulatory measure does not exclude the existence of an expropriation. The distinction between normal regulatory action and a regulatory expropriation requiring compensation depends on the extent, severity and duration of the deprivation. The government's intention to expropriate is not relevant in this context."[20]

Article 13 covers direct nationalisation and expropriation of the assets of an investor, as well as measures having an effect equivalent to nationalisation or expropriation (indirect expropriation). This would include expropriation of the assets of a domestic company in which a Party's investor holds shares. Any compensation paid must be based on the fair market value of the affected investments.

Sovereignty over energy resources

Article 18 of the ECT affirms the sovereign rights of Parties to deal with energy resources within their geographical boundaries subject to the rules of international law. Paragraph (3) confirms that Parties continue to have the exclusive right to determine the locations from which energy resources may be extracted, any criteria to ensure sustainability, the rate of any applicable taxes, royalties or other financial payments, and any relevant environmental and safety aspects affecting the use of energy resources. However, as per paragraph (4), Parties are expected to facilitate access to energy resources, ensuring allocation of access to energy resources is done in a non-

---

(FET): interactions with other standards', in *Investment Protection and the Energy Charter Treaty*, G. Coop and C. Ribeiro (eds), Jurisnet: Huntington, 2008, pp 99-100.

[19] Christoph H. Schreuer, Professor of Law University of Vienna, School of Law, 'The Concept of Expropriation under the ETC and other Investment Protection Treaties' in *Investor-State Disputes - International Investment Law* and reproduced in (2005) *Transnational Dispute Management*, Vol. 3, pp 109-110.

[20] Ibid p. 109.

discriminatory manner and, as set out in the notes attached to the Article, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Environmental aspects

Article 19 calls on Parties to protect the principle of sustainable development, stating that, in an economically efficient manner, each Contracting Party must 'strive' to minimise harmful environmental impacts. In addition, this Article reaffirms traditional principles of environmental law, including the precautionary principle and the polluter pays principle. That said, it appears that this article falls short of enshrining a State's right to regulate on environmental matters, as evidenced by the modernisation agenda of the EU.[21]

Article 19 should be read within the context of the Preamble to the ECT, which provides:

> "Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and
>
> Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes".

These preambular paragraphs position environmental concerns alongside the treaty's main purpose – investment protection. However, as highlighted by Gordon and Pohl writing for the OECD (2011), the ECT does not define a hierarchy between its objectives. Furthermore, the preamble itself does not establish any rights and obligations between the Parties, but rather, it provides guidance as to the context of the treaty for the purposes of interpretation. It is noteworthy that the lack of a specific right to regulate on environmental matters appears to diverge from many BITs and other International Investment Agreements.[22]

Article 19 touches on the possibility of disputes on the application or interpretation of the Article. Under paragraph (2), if no other appropriate international fora exist to assist in the resolution of the dispute, it is to be submitted to the Charter Conference to 'aim' for a solution.

Taxation

Article 21 of the ECT provides, except as provided for in the Article, that the treaty does not create any rights or impose any obligations regarding the Parties' taxation measures. The term 'taxation measures' is defined in paragraph (7) as including any provision relating to taxes under domestic law and any applicable international agreement or arrangement, such as double taxation treaties.

Gaillard and McNeill (2010) have commented:

> "Article 21 of the ECT is remarkable, first of all, for its complexity. It runs for two and a half pages and distinguishes between several categories of taxation, including 'Taxation Measures other than those on income or on capital', 'Taxation Measures aimed at ensuring

---

[21] See Frédéric Simon, 'EU asserts 'right to regulate' as part of energy charter treaty reform', *EURACTIVE*, 16 July 2019.

[22] Kathryn Gordon and Joachim Pohl, 'Environmental Concerns in International Investment Agreements', *OECD Working Papers on International Investment, 2011/01*, p. 14.

> the effective collection of taxes', and 'advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement, or arrangement described.'"[23]

They also note that tax exclusions in other treaties tend to be simple affairs. In contrast, other investment treaties accord the term 'taxation measure' a significantly broader definition to cover any 'law, regulation, procedure, requirement, or practice'.[24] The implications are that the complex treatment of taxation measures would appear to narrow the extent to which a Party may excuse behaviour by reference to its domestic taxation policy.

Withdrawal

Under Article 47 of the ECT, after five years from the date the treaty enters into force, a Party may give written notification of its withdrawal from the treaty. The withdrawal takes effect one year after the date of receipt of the notification. However, the treaty continues to apply to existing investments for a further 20 years from the date of withdrawal. This means that a Party may be held liable under the dispute resolution provisions of the ECT for claims made by investors even after the Party has officially withdrawn from the treaty. Italy, for example, withdrew from the ECT as of 1 January 2016 and yet faces numerous legacy claims.[25]

Dispute Resolution in the Energy Charter Treaty

Part V of the ECT deals with dispute resolution. Broadly speaking, there are two main forms of dispute resolution available under the treaty. Article 26 covers the Investor-State Dispute Settlement (ISDS), while Article 27 covers the settlement of disputes between State Parties. The approaches are discussed below.

Investor-State Dispute Settlement

The ECT provides an Investor-State Dispute Settlement (ISDS) mechanism to help settle claims made by a Party's investors that another Party has breached a treaty obligation, resulting in loss to that investor.

Initially, all disputes should, if possible, be settled amicably. However, if the claim cannot be dealt with amicably within three months, Article 26(2) provides that the investor may submit it for resolution to the courts or administrative tribunals of the Party to the dispute, to another means of dispute settlement previously agreed between the parties or to an ISDS procedure provided for in the Article.[26]

---

[23] Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small (ed.)), Oxford University Press: New York, 2010, p. 61.

[24] Ibid pp 61-62.

[25] See Tania Voon, Professor in Law at the University of Melbourne, 'Modernizing the Energy Charter Treaty: What about termination?' in *Investment Treaty News*, published by the International Institute for Sustainable Development, 2 October 2019.

[26] As noted above, Ireland does not allow an investor to submit a dispute to an international arbitration (or conciliation) process set out in Article 26 where the same dispute has already been submitted to a different forum. The mere "submission" of the dispute to another forum would result in a forfeiture of an arbitral claim against Ireland: see Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in *Arbitration under*

Under paragraph (4), the investor is afforded a wide choice of ISDS frameworks. An investor may submit a dispute to:

- the International Centre for Settlement of Investment Disputes (ICSID),
- the ICSID Additional Facility,
- an ad hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or
- an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

The investor's choice of rule framework will govern the proceedings of the claim and may have a significant impact on the outcome and costs.

Article 26(8) provides that awards that result from arbitration processes may include interest. Awards are final and binding upon the parties to the dispute. A Party is obliged to satisfy any award, without delay.

The four dispute avenues are further described below.

ICSID Convention

The International Centre for Settlement of Investment Disputes (ICSID) is one of the five constituent organisations of the World Bank Group, with the function of providing facilities for the conciliation and arbitration of international investment disputes.[27] The European Union is not a member of ICSID (as a bloc) and is not a party to the ICSID Convention.

The Department of Finance describes the ICSID as follows:

> "ICSID is an international institution sponsored by the World Bank and founded in 1966. It was designed to facilitate the settlement of investment disputes between foreign investors and host states. It encourages foreign investment by providing neutral international facilities for conciliation and arbitration of investment disputes, thereby helping foster an atmosphere of mutual confidence between states and foreign investors."[28]

The ICSID is an institution that provides a facility for *ad-hoc* arbitration and investor-state dispute settlement (ISDS), including the convening of arbitration panels and tribunals. It is a framework that may be used to settle investor-state disputes.[29] Most notably, the **respondent must consent** to arbitration[30] and there must be agreement on the choice of law.[31]

As noted by Gaillard and McNeill:

International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small (ed.)), Oxford University Press: New York, 2010, p. 52.

[27] ICSID, About ICSID – Member States (webpage). Ireland is listed as a contracting state to ICSID on its website.

[28] Department of Finance, 2019 Annual Report on Ireland's Participation in the International Monetary Fund and the World Bank at pp 38-39.

[29] Ireland has no active BITs in place with any other state. Ireland's only BIT was concluded with the Czech Republic in 1996 and terminated in 1997.

[30] Article 25(1), ICSID Convention.

[31] Article 42, ICSID Convention.

> "… an investor that chooses ICSID arbitration must satisfy the requirements of the Washington Convention (including the requirement under Article 25 that there exists a legal dispute arising directly out of an investment), and any challenge to the arbitral award must be made before an ad hoc committee and cannot be made before the local courts of the state in which the arbitration takes place."[32]

The 2019 Department of Finance Annual Report on Ireland's participation in the International Monetary Fund and World Bank outlines Ireland's position on the ICSID Convention, stating Ireland signed the Convention in 1966 and ratified it in 1980.[33] The ratifying legislation was originally the *Arbitration Act 1980* and the current legislation giving force of law to the ICSID Convention in Ireland is the *Arbitration Act 2010*. The ICSID Convention entered into force for Ireland on 7 May 1981.[34]

Section 25 of the *Arbitration Act 2010* expressly provides that the Act shall not apply to proceedings under the ICSID Convention, save in certain circumstances.

The Department of Finance further states that:

> "ICSID maintains a Panel of Conciliators and a Panel of Arbitrators to service proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Ireland, as a member of ICSID, designates four persons to each Panel."[35]

ICSID Additional Facility

ICSID normally has jurisdiction over disputes between member parties to the ICSID. However, the ICSID Additional Facility rules may still allow for the ICSID to have jurisdiction in disputes where only one of the parties is a signatory or an investor from a signatory. Arbitration under the mechanism is voluntary. Again, once a party consents to arbitration under the jurisdiction of the ICSID, it cannot withdraw that consent.[36]

The Additional Facility was created as a means of offering arbitration, conciliation and fact-finding services for certain disputes that fall outside the scope of the ICSID Convention. These services apply as follows:

- Arbitration or conciliation of investment disputes between a State and a foreign national, one of which is not a member state of ICSID or a national of a member state of ICSID;
- Arbitration or conciliation of disputes that do not directly arise out of an investment between a State and a foreign national, at least one of which is a member state of ICSID or a national of a member state of ICSID; and
- Fact-finding proceedings instituted by any state or a national of any state.[37]

---

[32] Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small (ed.)), Oxford University Press: New York, 2010, p. 50.

[33] Department of Finance, 2019 Annual Report on Ireland's Participation in the International Monetary Fund and the World Bank at p. 39.

[34] Country Detail | ICSID (worldbank.org)

[35] Ibid.

[36] Article 25(1), ICSID Convention and Articles 2(a) and 4(2), ICSID Additional Facility Rules.

[37] ICSID, Resources – ICSID Additional Facility Rules (webpage).

United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law (UNCITRAL) has also adopted Arbitration Rules which set out procedural rules for arbitration proceedings upon which parties to a dispute may agree. In force since 1976, these rules were revised in 2010 and incorporated further UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration in 2013. The transparency rules apply to arbitration proceedings initiated pursuant to an investment treaty concluded on or after 1 April 2014, unless the Parties to the treaty agree otherwise.

The ECT does not designate an appointing authority in the event the claimant opts for ad hoc arbitration under the UNCITRAL rules. As a result, pursuant to the UNCITRAL rules themselves, the secretary-general of the Permanent Court of Arbitration must nominate the appointing authority.[38]

Stockholm Chamber of Commerce

According to its website, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) was established in 1917 and forming part of, but remaining independent from, the Stockholm Chamber of Commerce. It consists of a Board and a Secretariat and provides dispute resolution services for domestic and international parties. The Secretariat handles the daily case management, organisation of events, producing publications etc. while the Board makes decisions as required under the SCC Rules.

The SCC was recognised in the 1970's by the United States and the Soviet Union as a neutral centre for the resolution of East-West trade disputes. Also, at around the same time, China recognised the SCC as a forum for resolving international disputes. The SCC has since expanded its services into international commercial arbitration.[39]

The composition of the arbitral tribunal is covered by Articles 16-18 of the SCC Arbitration Rules and the standards for impartiality and independence of arbitrators are discussed in the SCC Practice Notes on Arbitrator Challenges 2016-2018.[40]

From September 2019, all new SCC arbitrations are administered on the SCC Platform – a secure digital platform for communication and file sharing between the SCC, the parties and the tribunal.[41]

Disputes between State Parties

Article 27 of the ECT sets out the applicable state-to-state dispute resolution mechanism. Initially, States are expected to attempt to resolve all disputes through diplomacy. Where diplomacy does not result in a satisfactory outcome, within a reasonable period of time a Party may bring the dispute to an ad hoc Tribunal. In the absence of an agreement to the contrary the UNCITRAL framework rules would apply. This Article does not apply to any dispute concerning the

---

[38] Emmanuel Gaillard and Mark McNeill, 'The Energy Charter Treaty' in *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small (ed.)), Oxford University Press: New York, 2010, p. 50.

[39] The Arbitration Institute of the Stockholm Chamber of Commerce, About the SCC (webpage).

[40] The Arbitration Institute of the Stockholm Chamber of Commerce, Appointment of Arbitrators (webpage)

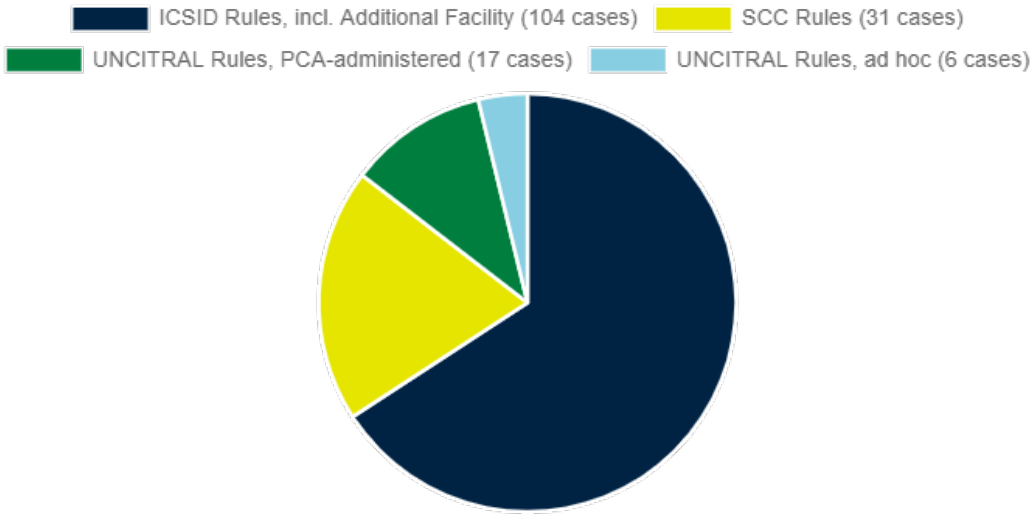
[41] The Arbitration Institute of the Stockholm Chamber of Commerce, SCC Platform (webpage).

interpretation or application of Article 6 (Competition) or Article 19 (Environmental Aspects), nor to trade-related disputes.[42]

Statistics on Dispute Resolution

The Energy Charter Secretariat tracks investment arbitration cases where the ECT has been invoked. As arbitrations may be confidential, the Secretariat only tracks cases that are conducted in public, and these are published and updated at Statistics - Energy Charter Treaty. As of November 2023, there have been 158 investment arbitration cases instituted under the ECT (based on date compiled to 1 May 2023). Figure 2 shows which of the four ISDS procedural rules avenues were taken for these 158 cases.

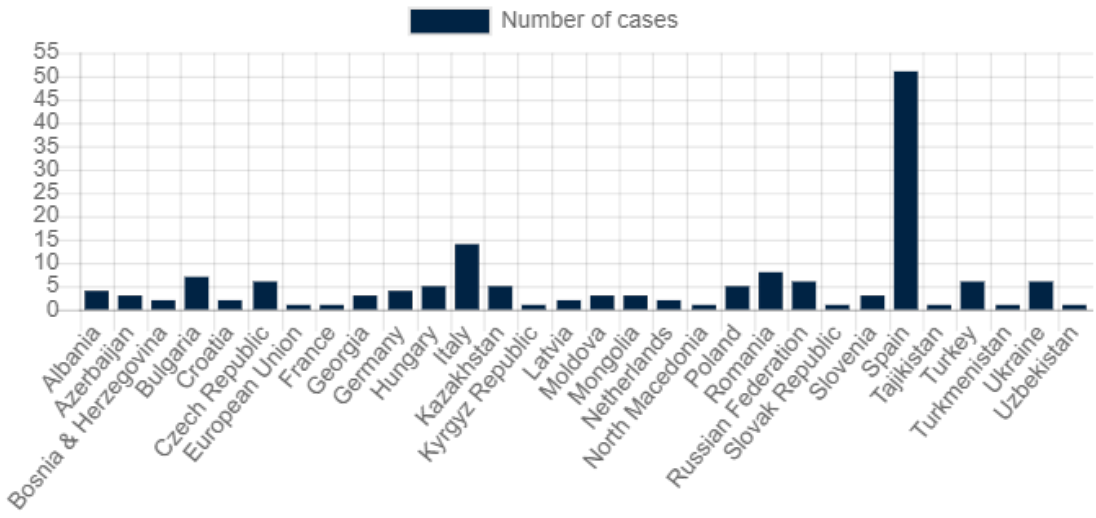
Figure 2 Procedural Rules Applied in 158 cases taken to date.



Source: Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information)

[42] See Articles 5, 28 and 29 of the ECT.

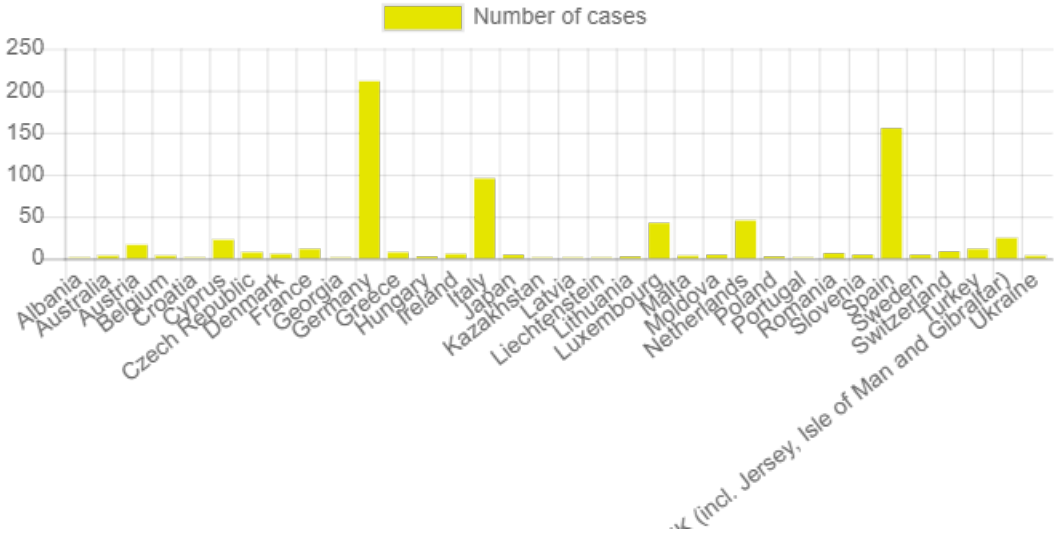
Figure 3 Nationality of respondents of 158 arbitration cases to date



Source: Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information)

Spain has been the most prolific respondent, appearing in 51 of the 158 cases; many of which arose since 2013 and have been attributed to the Spanish Government's decision to cut government subsidies in the renewable energy sector.[43]

Figure 4 Nationality of claimants of 158 arbitration cases to date



Source: Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information)

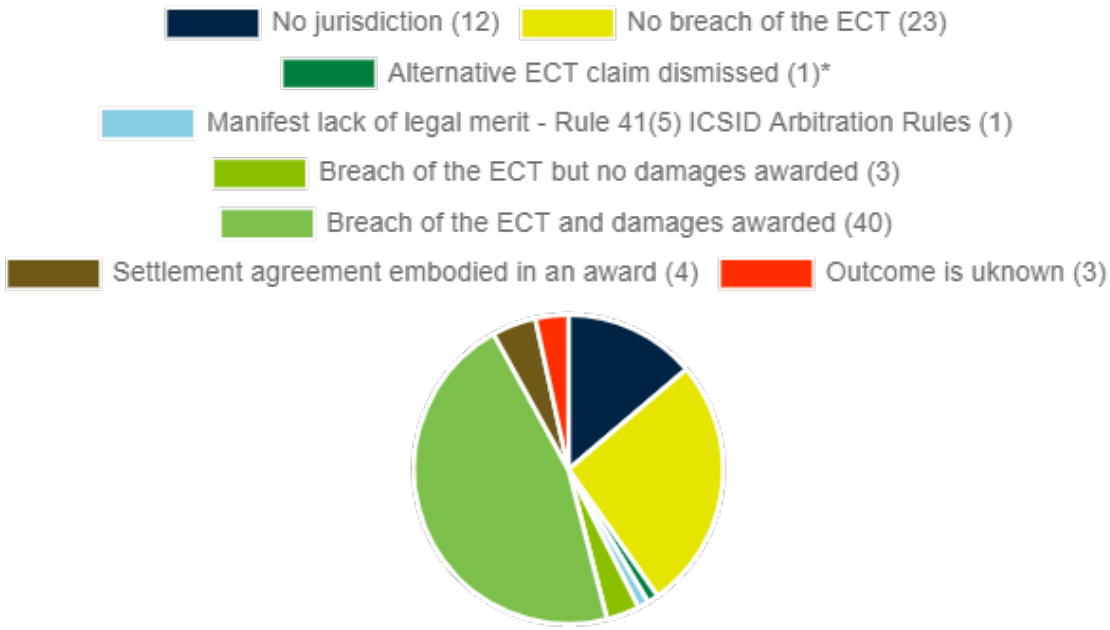
---

[43] See Fabian Flues, Pia Eberhardt & Cecilia Olivet, representing PowerShift, Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) (and 25 other groups), *Busting the myths around the Energy Charter Treaty: A guide for concerned citizens, activists, journalists and policymakers*, December 2020, p. 21.

The vast majority of claimants have been based in Member States of the European Union, with the top three being Germany (211), Spain (155) and Italy (95). It should be noted however that in some cases there is double nationality of a claimant, and both nationalities are taken into account, and a case may be instituted by more than one claimant. Further, there are doubts cast that the very broad definitions of investment and investor used in the ECT have allowed 'letter-box companies' (essentially, a company registered in one jurisdiction, but with substantial economic activity carried out in another) to make claims against Parties, making it difficult to determine the geographic base of the actual investor.[44]

In the May 2023 statistics, the following award outcomes are described in Figure 5:

Figure 5 Outcome of Final Awards (87), including (4) Settlement Agreements Embodied in Awards*



Source: Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information). *Having found the State liable under another international agreement, the tribunal dismissed an alternative claim under the ECT.

No breach of the ECT was found in 23 cases, breach of the ECT was found in 43 cases (but in three of those cases no damages were awarded), four involved a settlement agreement which was embodied in an award, three outcomes are unknown. Fourteen cases involved the case being dismissed for one of three reasons: for want of jurisdiction (12); manifest lack of legal merit (1); and an alternative claim being pursued (1).[45]

In the 40 cases that were found to have been breaches of the ECT and damages were awarded, approximately €40 billion in total has been awarded to date.

---

[44] Ibid p. 22.

[45] Energy Charter Secretariat, Energy Charter Treaty Secretariat Statistics, updated 1 May 2023 (only covers publicly available information). The Energy Charter Secretariat website also includes a list of all (publicly known) arbitration cases on the ECT.

Whilst the statistics on cases under the ECT do provide insights, the picture is not complete and one 2020 article setting out some of the controversies of the ECT presents a raft of reasons why such presentations on the cases brought under the ECT are problematic.[46]

For example, the Energy Charter Secretariat also tracks the type of claimants under the ECT. The majority are defined as SMEs, as the authors of the article[47] have claimed that these published statistics may be misleading, arguing that the figures are sometimes based on skewed premises. For example, they suggest that many large corporations are actually classified as SMEs because the Secretariat defines an SME as any company that is not one of the world's 250 largest energy companies.[48]

Possible Regulatory Chilling Effects

In a paper examining international investment protection agreements (IPAs) and EU law, Dr Ingolf Pernice (2014) notes that tensions often arise between IPAs and the concept of national sovereignty in international law. In order to ensure protection of investments, an investor protected by an agreement is often given the power to assess and (through an arbitral tribunal) challenge the acts of the sovereign state. A Party to an investment protection agreement may:

> "…therefore be limited by such chilling effects in the democratic choice of its policies; the more foreign investment it has accepted, the more costly certain political choices may become…Such financial risks may even amount to reach a prohibitive size.
>
> As a result, IPAs with ISDS clauses must be drafted so as to ensure the legitimate rights of foreign investors and establish the level of trust necessary for economically meaningful investment, but at the same time strike a balance with the protection of the democratic and legal autonomy of each party, so to leave enough leeway to articulate and implement policies pursuing in the name of national public interest."[49]

Civil society groups have pointed to instances where the ISDS clauses of the ECT could be said to have had a chilling effect on the regulatory powers of Parties:

> "Sometimes, investors do not even need to file a claim to get what they want. In 2017, for example, Canadian oil and gas company Vermilion threatened to sue France under the ECT over a proposed law to end fossil fuel extraction on French territory by 2040. The threat likely contributed to watering down the law, the final version of which allows exploitation permits to be renewed after that deadline. Another example is the German coal

---

[46] Fabian Flues, Pia Eberhardt & Cecilia Olivet, representing PowerShift, Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) (and 25 other groups), *Busting the myths around the Energy Charter Treaty: A guide for concerned citizens, activists, journalists and policymakers*, December 2020, p. 14.

[47] Published by PowerShift, Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) and representing a range of civil society groups.

[48] Ibid pp 15-16. In contrast, the definition used by the European Commission considers SMEs to include enterprises with either fewer than 250 employees or turnover of **less than** €50 million: European Commission, What is an SME? (webpage).

[49] Dr Ingolf Pernice 'International Investment Protection Agreements and EU law' in *Investor-State Dispute Settlement (ISDS) provisions in the EU's international investment agreements – Workshop*, Directorate-General for External Policies of the Union, Policy Department, PE 534.979, September 2014, p. 19.

> phaseout, for which the German government is promising coal companies €4.35 billion in compensation. Experts say one reason for this excessive sum could be that the companies waived their rights to challenge the coal exit under the ECT in return. As a specialised arbitration lawyer told a reporter: 'I do a ton of work that involves threatened claims that never go to arbitration...That's much more common... It's much better to get things done quietly.'"[50]

A recent study by Tarald Bergeaand and Axel Bergerb (2020) investigated the question of whether ISDS cases have an influence on domestic environmental regulation. They claimed that the study represented the first systematic test of this relationship using a cross-country, large sample size analysis. Two key findings emerged from the study.

First, there was robust evidence to suggest that the relationship between pending ISDS cases and respondent-state regulation is contingent upon regulatory (bureaucratic) capacity – a regulatory chilling effect brought on by pending ISDS cases affected states with a high regulatory capacity more than those that were less bureaucratic. The modelling in the study also suggests (to the surprise of the authors) that states with medium-to-low levels of state bureaucracy would be more likely to regulate as the ISDS case load increases.[51]

The authors argue that these results may be explained by the fact that:

> "… in high-capacity bureaucracies with good intragovernmental coordination systems, the part of the government that deals with defence of the state in international legal matters, and the ministries and agencies responsible for drafting and implementing regulations are more likely to be coordinated than in states with low-capacity bureaucracies."[52]

Secondly, the study included some limited evidence that suggested that the link between losing ISDS cases and subsequent regulation is contingent upon respondent-state's economic capacity. The study found (again, to the surprise of the authors) that, losing ISDS cases has more of a negative effect on subsequent regulation in countries with a higher economic capacity. As noted by the authors:

> "This is in many ways a statement contrary to the conventional wisdom that developing states are most at risk of ISDS-related scare and abuse tactics from foreign investors."[53]

Both findings seem to suggest that the regulatory chilling effect is a real phenomenon that affects highly bureaucratic states and wealthy states more than less bureaucratic states and developing states. In fact, there is evidence to suggest that a regulatory warming effect may result when states with medium to low regulatory capacity are faced with an increased ISDS case load.

---

[50] Fabian Flues, Pia Eberhardt & Cecilia Olivet, representing PowerShift, Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) (and 25 other groups), *Busting the myths around the Energy Charter Treaty: A guide for concerned citizens, activists, journalists and policymakers*, December 2020, p. 14.

[51] Tarald Berge and Axel Berger (2010), 'Do investor–state dispute settlement cases influence domestic environmental regulation? The role of respondent-state capacity' also published in *Journal of International Dispute Settlement*, Volume 12, Issue 1, March 2021, pp 1, 3.

[52] Ibid pp 9-10.

[53] Ibid pp 4, 9.

Legality of the dispute resolution mechanisms in the ECT

On 3 December 2020, Belgium announced that it had submitted a request to the Court of Justice of the European Union for an opinion on the compatibility of the intra-European application of the arbitration provisions of the future modernised ECT with the European Treaties. As noted in the announcement, Belgium sought legal clarification from the Court on the compatibility with EU law of the ISDS mechanism in the draft modernised Energy Charter Treaty, because this mechanism could be interpreted as allowing an investor who is a national of an EU Member State to bring an action against another EU Member State in an ad hoc tribunal that is not subject to EU law. In lodging its submission Belgium cited the Court's decision in *The Slovak Republic v Achmea BV*[54] and sought the opinion of the Court to provide clarity and legal certainty.[55]

Case C-284/16: The Slovak Republic v Achmea BV

The 6 March 2018 Court of Justice judgment in the case of *The Slovak Republic v Achmea BV*[56] followed a request for a preliminary ruling on the interpretation of Articles 18, 267 and 344 TFEU with regard to a bilateral investment treaty (BIT) concluded in 1991, between the Netherlands and the then Czech and Slovak Federative Republic, prior to the accession of the latter two states to the EU. Article 8(2) of the BIT provided for disputes that could not be resolved amicably to be submitted to an arbitral tribunal.

The specific dispute arose because of Slovak reforms to its health insurance sector. Achmea BV, a Dutch health insurance provider, relying on the provisions of the BIT, claimed that the company sustained damages because of the reforms. Frankfurt am Main (Germany) was chosen as the place of arbitration and the proceedings were taken to be governed by German law.

In the arbitration proceedings, the Slovak Republic raised an objection. It claimed that the arbitration tribunal could not determine the dispute for want of jurisdiction, as Article 8(2) of the BIT was incompatible with EU law (Articles 18 (prohibition of discrimination on grounds of nationality within the EU), 267 (the CJEU has jurisdiction to interpret treaties) and 344 TFEU (prohibition on submitting a dispute concerning the interpretation or application of treaties to any other judicial body).

The Court found that Article 8(2) of the BIT was incompatible with Articles 267 and 344 TFEU (departing from the opinion of Advocate General Wathelet).In its judgment, it cited long standing case law that an international agreement cannot affect the allocation of powers under the EU Treaties and the autonomy of the EU legal system, arguing that there was a need to ensure the autonomy of EU law.

The Court concluded that the arbitral tribunal was neither:

- an EU body;
- a national court or tribunal of a Member State; nor
- a court common to several Member States, such as the Benelux Court of Justice.

---

[54] *The Slovak Republic v Achmea BV* (Case C-284/16) ECLI:EU:C:2018:158.

[55] Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, 'Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty', *Press Release*, 3 December 2020.

[56] *Slovak Republic v Achmea BV* (Case C-284/16) ECLI:EU:C:2018:158 (last accessed 26 April 2021).

Furthermore, a determination of the arbitral tribunal was not subject to review by a court of a Member State to an extent that may allow a reference to the CJEU on issues of EU law. Therefore, the arbitral tribunal established by the BIT could not ensure that disputes were solved in a manner that safeguarded the full effectiveness of EU law. This also called into question the principle of mutual trust between Member States, making it incompatible with Articles 267 and 344 TFEU.

Application of Achmea to the ECT

As noted by Guillaume Croisant and Hannes Ingwersen (2020), the European Commission has taken the position that the legality of ISDS under the ECT as it currently applies would be subject to the *Achmea* judgment.[57] The Commission's position is given extra weight when considered alongside a footnote in the Opinion of Advocate General Saugmandsgaard Øe in the Joined Cases C-798/18 and C-799/18 *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie)* and *Athesia Energy Srl v Ministero dello Sviluppo Economico*,[58] which noted that the CJEU's decision in *Achmea* applies to the ECT and that the treaty may thus be "entirely inapplicable" to intra-EU investment disputes.

Croisant and Ingwersen highlight that while most EU Member States have terminated their intra-EU BITs in the wake of the *Achmea* judgment, they have not yet agreed on an approach regarding the ECT. This fractured approach to the ECT appears to be reflected in the fact that arbitration tribunals have not applied the Commission's position, rendering awards on the merits in intra-EU cases under the ECT.[59]

Nikos Lavranos (2021) goes further in his analysis, stating:

> "… following the Achmea judgment, the EU and most of its Member States have indicated an objective of excluding the application of the ECT for intra-EU ECT disputes. While it is too early to predict when the ECT modernization process will be concluded, the most recent developments demonstrate that it might actually be the Court of Justice of the EU (CJEU) which – sooner rather than later – will prejudge the outcome by declaring the investor-State dispute settlement (ISDS) provisions of the ECT to be inapplicable in intra-EU ECT disputes.
>
> Indeed, in a recent opinion [not yet available in English] in the *République de Moldavie* case, Advocate General Szpunar opined that the investor-state arbitration system under the ECT is incompatible with EU law. Some months before, another Advocate General in a different case also noted in passing that the ECT arbitration provisions are incompatible with EU law. Clearly, these opinions illustrate that the prevailing view within the CJEU seems to be that the *Achmea* judgment is also applicable to intra-EU ECT disputes. Considering the fact that in the vast majority of cases, the Court follows the opinions of its Advocate Generals, it seems likely that the Court will indeed decide that the investment

[57] See, for example, European Commission, 'Commission provides guidance on protection of cross-border EU investments – Questions and Answers', *Press Release*, 19 July 2018.

[58] ECLI:EU:C:2020:876.

[59] Guillaume Croisant and Hannes Ingwersen, 'Belgium Seeks CJEU's Opinion on the Future Interaction between a Modernised ECT and EU law', *Kluwer Arbitration Blog*, 10 December 2020.

> treaty arbitration provisions cannot be relied upon by European investors against EU Member States or the EU."[60]

The Belgium submission to the Court of Justice of the European Union may not fully clarify this matter as it focussed on the attempts at ECT modernisation. However, even if that Opinion does not clarify the situation with the existing ISDS clauses, a recent Swedish Court decision to request a preliminary ruling from the Court of Justice of the European Union exactly on the issue of possible incompatibility of the ECT with EU law will definitely provide more clarity.[61]

While Member States await the decisions of the Court, the question of whether Part V of the ECT is compatible with the doctrine of autonomy of EU law, and whether it must be considered illegal under EU law, will continue to be the subject of much scrutiny and legal debate.

Renegotiation and modernisation

There have been fifteen years and rounds of negotiations and proposals for modernisation of the ECT, culminating in June 2022 Finalisation of the negotiations on the Modernisation of the Energy Charter Treaty. The renegotiated proposals are numerous and varied in nature, and there was recently a tentative agreement to modernise the ECT and bring it in line with the climate and clean energy transition goals of its parties. The need to revise and modernise the ECT is growing as climate action and energy decarbonisation ambitions are accelerated globally. The main takeaways from the latest round of revisions are set out in the Decision of the Energy Charter Conference (June 2022). It sets out three pillars for modernisation, summarised below. The first expands the definitions of materials considered as energy. The second is about options for cherry-picking aspects of the ECT, and some of these are expanded on below. The third pillar sets a clear structure for review.

Within these three pillars of modernisation, the key revisions that are set out are briefly described below:[62]

1. A 'carve-out' for fossil fuels. Under a new "flexibility mechanism", parties can exclude fossil fuels investment protections. This is a critical revision for the EU. In particular, the revision proposal is to effect new investments made after 15 August 2023. (It is noted with this revision in mind that Ireland has seen the first ever legal proceedings brought against the State under the ECT, in 2023.[63])
2. Fair and Equitable Treatment (FET). The current broad definition of FET protections for investors will be replaced with a narrow, closed list of specific FET breaches.
3. Indirect Expropriation. The definition of indirect expropriation, which investors have used in ISDS arbitrations to claim that the devaluation of their investments because of new climate change policies is equivalent to states taking their property, will be narrowed to carve-out measures that are taken for the protection of the environment and health.

---

[60] Nikos Lavranos, 'Is the Court of Justice of the EU the Ultimate Judge of the ECT?', *Kluwer Arbitration Blog*, 9 April 2021.

[61] Ibid.

[62] Reference to article Climate Change: The Future of the Energy Charter Treaty (dacbeachcroft.com)

[63] Barryroe partner plans to chase State for over $100m as Ryan pulls plug on oil and gas prospect – The Irish Times

4. Right to Regulate. A new specific provision guaranteeing states the "right to regulate", specifically to determine its sustainable development policies and levels of domestic environmental and labour protection.

Pillar 1: Updated list of Energy Materials and Products

Some Energy Materials and Products are introduced and covered by the investment protection provisions, such as:

- Hydrogen
- Anhydrous Ammonia
- Biomass
- Biogas
- Synthetic fuels.

Pillar 2: Flexibility

A novel "flexibility mechanism" allows Contracting Parties, based on a Conference decision, to exclude investment protection for fossil fuels in their territories, considering their individual energy security and climate goals. For example, the EU and the UK have opted to carve-out fossil fuel related investments from investment protection under the ECT, including for existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15 August 2023 as of that date with limited exceptions.

Pillar 3: Review mechanism

Five years after the entry into force of the modernised ECT and thereafter at intervals of five years, or on an earlier date as determined by the Charter Conference, the list of Energy Materials and Products covered under the ECT as well as the application of the Flexibility Mechanism will be reviewed. This will give Contracting Parties the possibility to react to technological as well as political developments.

Status of withdrawal by the EU

The modernisation measures in renegotiating the ECT attempted to balance climate action policies with energy investor protections, and in some ways attempted to reprioritise green energy policies over the ECT. Just a year after the modernisation negotiations, on 7 July 2023 the announcement that the European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty was made, citing that the ECT "is no longer compatible with the EU's enhanced climate ambition under the European Green Deal and the Paris Agreement." This suggests that the modernisation efforts are unsatisfactory. One key measure, the exclusion of fossil fuels protection, would require at least a ten-year period to come into effect. The majority of climate action targets are set with a 2030 to 2050 horizon with the urgent need to cease petroleum production soon for the greatest impact on limiting the energy sector's contribution to climate change. Currently, parties to the ECT can withdraw with notice of one year, but the treaty continues to apply to *existing investments* for a further 20 years from the date of withdrawal. The crossroads between modernisation and withdrawal will pivot on these choices and timeframes.

During negotiations, Ireland maintained a position of wait-and-see for what the outcome of the modernisation proposals will be. In a Parliamentary Question written response on 25 July 2023 (following the EU announcement on withdrawal), the Minister for Environment, Climate and Communications, Eamon Ryan TD stated:

> "…the Energy Charter Treaty (ECT) is not fit for purpose and needs to have fossil fuels removed. The ECT modernisation has not progressed adequately so far. Europe has, as a

> whole, signalled a full exit now that modernisation was not possible. The removal of fossil fuels and elimination or reduction of the sunset clause were key asks for Ireland as part of the modernisation process.
>
> Ireland has signalled its intent to leave but wants to do so in a coordinated way with European colleagues. Ireland has expressed strong views within the EU on the compatibility of the Paris Climate Agreement and the Energy Charter Treaty's dispute resolution mechanism. We continue to express our strong views within the EU on these issues and we believe that our views carry more weight in international negotiations by advocating them as part of the European Union."

Concluding summary

As explored in this Note, the ECT is not only complex in its own right but has a legacy of agreements that were of their time in terms of the energy investor priorities around the globe. Energy interests are at the nexus of economic and environmental issues. In its current form, the ECT is a tool used to bring costly challenges against countries which are accelerating their own greener energy agenda, in answer to both legal commitments to reduce the environmental impact of the energy they source, and to ensure security of energy supply. There are a number of avenues for dispute resolution, and it is perhaps inevitable that further cases will be brought. The energy-investor interests are not 'going away', and although energy decarbonisation, growth of renewables and emergence of green energy storage technologies is rapidly growing, there is still a requirement (globally) in the short to medium term at least for the exploration and production of a mix of traditional fuels. The recent renegotiations of the ECT might satisfy some signatories that enough options are left. It is apparent that the latest signal from Ireland and a number of other countries is that an EU-led withdrawal from the ECT is preferred. France, Germany and Poland have moved ahead of a co-ordinated withdrawal and are set to withdraw from the ECT in December 2023,[64] yet all the investments covered by the treaty will continue enjoying protection for 20 years.

[64] Written notifications of withdrawal from the Energy Charter Treaty - Energy Charter

Contact:

Houses of the Oireachtas
Leinster House
Kildare Street
Dublin 2
D02 XR20

www.oireachtas.ie
Tel: +353 (0)1 6183000
Twitter: @OireachtasNews

Library & Research Service
Tel: +353 (0)1 6184701
Email: library.and.research@oireachtas.ie