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# EU publishes proposals for modernising ECT

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Flags in front of the Berlaymont building, headquarters of the European Commission in Brussels (Credit: Shutterstock/jorisvo)

The European Commission has published its proposals for modernising the Energy Charter Treaty, which include a strengthening of states' right to regulate, a new fair and equitable treatment standard and a ban on punitive damages.

The Commission published the [draft amendments](#) yesterday, along with a press release confirming it had sent the proposals to the Energy Charter Secretariat.

The Council of the European Union [authorised](#) the Commission to negotiate a modernisation of the treaty on the EU's behalf in May last year, with the aim of ensuring that the ECT takes account of "sustainable development and climate goals", as well as modern standards of investment protection and investor-state dispute settlement. Negotiations [began in December](#).

In its latest press release, the Commission said its proposals for reform aimed to bring the ECT's provisions on investment protection "in line with those of agreements recently concluded by the EU and its Member States."

In recent years the EU has signed agreements with [Canada](#), [Vietnam](#) and [Singapore](#) which all include provisions for a type of standing investment court.

Although the amended ECT text does not abolish the right under article 26 to file for investor-state arbitration, it also allows for claims to be brought in any multilateral investment court or other investment court system that may

be established.

However, the Commission clarified that those proposals were without prejudice to the EU's work in the "ongoing multilateral reform process" with UNCITRAL.

The amendments redefine what would constitute a breach of the ECT's fair and equitable treatment standard. The new standard for a breach would require a denial of justice; fundamental breach of due process; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds; or abusive treatment such as harassment, duress or coercion.

There is also a proposed ban on punitive damages, with compensation awarded by tribunals not allowed to exceed losses suffered by an investor.

The text proposes a mechanism for dealing with "frivolous claims". This would allow states to file an objection within 30 days of a tribunal being that a claim is manifestly without legal merit. A tribunal would have a maximum of 120 days to issue a decision on this objection.

UNCITRAL Transparency Rules would apply to all investment disputes and documents – meaning that among other things trigger letters, requests for arbitration, decisions on challenges to arbitrators would all be made public.

Third-party funders must also be identified when a claim is submitted or when a financing agreement is concluded.

The proposals also aim to ensure the ECT "better reflects climate change and clean energy transition goals," to help meet the objectives of the Paris Agreement and ambitions for decarbonisation.

The ECT has been criticised by environmental groups for stymying states' ability to move away from fossil fuels to cleaner energy for fear of reprisals from investors. GAR [reported yesterday](#) on German energy company Uniper threatening a reported €1 billion ECT claim against the Netherlands over a law it passed that would eventually ban the use of coal-fired power plants.

The proposed amendments include language that reaffirms contracting states "right to regulate within their territories to achieve legitimate policy objectives," including environmental preservation and combatting climate change. This also extends to the protection of public health, social services and education.

"For greater certainty," the amendments state that provisions of the ECT's article on investment protection shall not be interpreted as a commitment from contracting states to maintain legal and regulatory frameworks, "including in a manner that may negatively affect the operation of investments or the investor's expectations of profits."

It also includes specific language on subsidies – with Spain having faced dozens of ECT claims based on its changes to its renewable subsidy regime.

The only EU member state that isn't an ECT signatory, Italy, was said to have withdrawn from the treaty in 2016 so it could enact changes to its renewables regime. Every one of the nine ICSID claims the state has faced has been brought under the treaty.

The amended ECT text states that a member states' decision not to issue, renew or maintain a subsidy shall not constitute a breach of the treaty.

It further specifies that the treaty should not be construed as presenting a contracting state from discontinuing a subsidy "or requesting its reimbursement" where such action is necessary to comply with obligations imposed through an international agreement or ordered by a competent authority.

The Commission clarifies that the amendments do not affect its view that the current ECT does not allow it to be used for intra-EU investment claims.

Fietta principal **Stephen Fietta QC** says that on preliminary review the reforms "provide a welcome clarification of the right to regulate and police powers doctrine."

"Such principles form an inherent part of international investment law, but have occasionally been overlooked in recent cases arising out of bona fide, non-discriminatory and proportionate regulatory activity. The additional details provided by the text around climate change and protection of public health will be particularly welcome in cases arising out of the global climate crisis and, potentially, the covid-19 pandemic."

**Maria Chiara Malaguti**, an academic and of counsel at Gattai Minoli Agostinelli & Partners who supports the Italian state legal team in investment disputes as a pro bono consultant, says that the “upgrading” of the ECT reflects a wider trend of investment treaties being updated amid a developing understanding of investment law.

While investors may fear this could reduce the scope for them bringing claims, she says it would be more productive to try and understand how to achieve the objectives of investment protection under the “new circumstances” so that “we could all be better off.”

The Commission said it has sent the proposal to the Energy Charter’s Secretariat and that the first formal round of talks between the ECT’s over 50 contracting parties is scheduled for July, with the next due in October.

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