

The Modernized Energy Charter Treaty and Its Provisional Application – and what it means for Japanese and foreign investors –

Dispute Resolution & Competition Law / International Trade Newsletter

September 9, 2025

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I Introduction

On 3 December 2024, after an intense, five-year reform process,¹ the Energy Charter Conference adopted amendments to modernize the Energy Charter Treaty (“**ECT**”).² The treaty, originally adopted in 1994, has long been one of the most frequently relied upon international investment agreements (“**IAs**”) in investor-state dispute settlement (“**ISDS**”) involving energy sector investments. In recent years, a surge of ECT claims against government measures in the renewable energy industry has attracted considerable attention, several of which involved Japanese investors. The question is whether, with the amendments, things are set to change.

The modernized ECT seems to aim to address concerns surrounding the continued protection of fossil fuel investments, states’ rights to regulate, and the EU and its Member States’ decision to abolish intra-EU ISDS. The adoption of the modernized ECT may come as a surprise to many. Since conclusion of the negotiations in June 2022, several EU Member States,³ the United Kingdom, the European Union, and EURATOM have withdrawn from the treaty, citing its incompatibility with the EU’s climate and energy transition policy objectives. For the remaining Contracting Parties (i.e., EU Member States and non-EU states), the modernized ECT will apply provisionally starting on 3 September 2025.⁴ However, a number of states, including Japan, have opted

¹ For a general overview of the topic, please refer to our earlier publications [here](#).

² See, Decision of the Energy Charter Conference titled “Amendments to the Energy Charter Treaty” (“**Amendments**”) (CCDEC 2024 12 GEN, [here](#)), “Modifications and Changes to Annexes to the Energy Charter Treaty” (“**Annexes**”) (CCDEC 2024 13 GEN, [here](#)), and “Entry into Force and Provisional Application of Amendments to the Energy Charter Treaty and Changes and Modifications to its Annexes” (“**Application**”) (CCDEC2024 15 GEN, [here](#)), all dated 3 December 2024.

³ Denmark, France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain. Italy had withdrawn already, in 2014. Except for Denmark, for which the withdrawal became effective on 4 September 2025, all the other states’ withdrawals had become effective previously.

⁴ Considering that the withdrawals of the withdrawing ECT Contracting States (under FN 3) were effective before 3 September 2025, they will not be affected by the provisional application of the modernized ECT. Denmark only will be subject to the provisional application of the modernized ECT for one day (3 September 2025), before its withdrawal becomes effective on 4 September 2025.

out of the provisional application and for the time being will remain subject to the unreformed ECT.

This article examines the potentially significant implications of the modernized ECT on Japanese and other foreign investors, particularly those investing in the EU.

II Key Changes

The modernized ECT largely reflects the Agreement-in-Principle concluded in 2022, albeit with some notable updates to the scope of protected activities and materials, investor protection, and ISDS; more specifically, it:

- Includes an economic substance requirement for protected investments and investors (Art. 2(8)-(9) Amendments) as well as a list of factors constituting fair and equitable treatment or indirect expropriation and express public interest carve-outs, in line with new-generation IIAs (Art. 4(1)-(2),(14) Amendments);
- Recognizes new energy sources and technologies, such as carbon dioxide capture, utilization, and storage (“**CCUS**”) as “Economic Activit[ies] in the Energy Sector” (Art. 2(7) Amendments) and recognizes hydrogen, bio- and other synthetic fuels as “Energy Materials and Products” in Annex EM 1 (II(2) Annexes) (“**New Energy**”);
- Emphasizes the “exceptional” nature of the newly introduced fossil fuel phase-out in Annex NI (I Annexes). Under this mechanism, investments made before 3 September 2025 in the EU/its Member States, Switzerland, and the UK will lose protection ten years after the entry into force of Section C of Annex NI, and by 2040 at the latest (“**new Section C Annex NI**”, I.3 Section C Annexes). Investments in excluded types of investments after 3 September 2025 no longer will enjoy protection (“**new Section B Annex NI**”, I.3 Section B Annexes); and
- Expressly excludes intra-EU ISDS, reflecting the EU’s long-standing policy on this issue (Art. 5(12) Amendments).

In principle, these changes will apply as of 3 September 2025 between Contracting States that have agreed to provisional application of the modernized ECT.

III Start of Application

An added layer of complexity concerns the time at which specific parts of the modernized ECT will begin to apply. Much will depend on whether a Contracting Party has agreed to the treaty’s provisional application as of 3 September 2025, and whether it has requested specific exceptions.

1. Entry into force

The modernized ECT enters into force on the ninetieth day after at least three-fourths of the Contracting States have deposited their instruments of ratification, acceptance, or approval with the ECT Depositary (Art. 42(4) ECT; (1)(a) Application). How quickly this will happen remains to be seen, not least in light of the recent ECT withdrawals by numerous EU Member States, the United Kingdom, the EU, and EURATOM.

2. Provisional application

To speed up the modernization process, Contracting States may apply the treaty provisionally from 3 September 2025, to the extent they have not opted out of provisional application before 3 March 2025 ((1)(b)(ii), (2)-(3)(a) Application).⁵ The provisional application comprises the amended ECT, the new Section C Annex NI involving the phase-out of existing fossil fuel investments made before 3 September 2025 in the EU, its Member States, and the UK (I.3 Section C Annexes), and the changes to the other Annexes.

Eleven states (Belgium, the Czech Republic, Estonia, Finland, Latvia, Liechtenstein, Lithuania, the Netherlands, Switzerland, the UK in relation to Gibraltar, and Japan) are reported to have declared their opt outs (“**Opt-out States**”).⁶ Despite having voted in favor of the modernized ECT, these states may have reassessed their final positions on the ECT in light of domestic legal constraints, conflicting priorities, or regulatory uncertainty.

As a consequence, investors from Japan and other Opt-Out States will remain subject to the unreformed ECT until the modernized ECT enters fully into force. This may be welcome news to some investors, but will be less so to others.

- The good news is that, for the time being, investors from EU-Opt-Out States will remain able to initiate intra-EU claims. That said, enforcing intra-EU awards is becoming increasingly difficult.⁷ Investors may want to consider (re-)structuring their investments to avoid intra-EU situations for purposes of ISDS claims.
- In principle, investors from Opt-Out States also will be able to invoke the protections of the unreformed ECT for existing fossil fuel investments until the modernized ECT enters into force.
- Even when suing the EU, EU Member States, or the UK that have withdrawn from the ECT,⁸ investors from Opt-Out States will enjoy protection under the ECT’s sunset clause for an additional 20 years (Art. 47(3) ECT).
- On the flip side, whether investors from Opt-Out States will enjoy protection for New Energy investments under the unreformed ECT is unclear, given the absence of express language to that effect. That said, considering that the ECT reform promotes New Energy investments, investors may attempt to argue that such claims also should be allowed under the unreformed ECT.

3. Exclusions

Unlike the other parts of the modernized ECT, new Section B Annex NI, which excludes new fossil fuel investments made in the EU/its Member States, Switzerland, and the UK after 3 September 2025⁹ from the ECT’s protection, enters into force immediately on 3 September 2025 ((1)(b)(i) Application; I.3 Section B

⁵ The Contracting States to which the modernized ECT will apply provisionally are: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Moldova, North Macedonia, Romania, Slovakia, Tajikistan, Turkey, Ukraine, Uzbekistan.

⁶ See, e.g. Opt-out declaration by Japan of 3 March 2025 [here](#).

⁷ See our previous publication [here](#).

⁸ See FN 3 above.

⁹ Considering that by 3 September 2025, the withdrawals by the EU, the EU Member States mentioned under FN 3 above and the UK were already effective, the reference to “the EU, Member States and the UK” should probably be read as “EU Member States which are Contracting Parties”.

Annexes).¹⁰ From then on, Japanese investors will not be able to bring new ISDS claims in those states in relation to such investments.¹¹

Mirroring these exclusions, Japan also has chosen to deny investment protection to fossil fuel investors from the EU/its Member States, Switzerland, and the UK (I.3 Section B(4)(a) Annexes).

IV Outlook

The future of the modernized ECT remains uncertain. For now, it appears that Japanese investors will have some breathing space, as they will continue to be protected under the unreformed ECT and remain unaffected by the provisional application of the modernized treaty starting on 3 September 2025.

At the same time, how questions regarding intra-EU and fossil fuel-related ISDS will be addressed in practice is yet to be tested. In view of the current climate in the EU, awards issued in such disputes may not be recognized or enforced by courts in EU Member States. Equally, EU Member States may revive their efforts to disapply the ECT's sunset clause.¹²

Japanese investors should assess their rights under the ECT and other potentially applicable IIAs carefully,¹³ and take early precautions to mitigate risks, including by (re-)structuring their projects outside the EU. Our bilingual team, which has expertise in ISDS and cross-border disputes, is available to assist you with any inquiries.

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¹⁰ This is because, while the other ECT parts require provisional application pending ratification, new Section B Annex NI concerns new investments made after the 3 September 2025 cut-off date. Hence immediate application is justified to such new investments.

¹¹ Ongoing ISDS disputes submitted before 3 September 2025 will not be affected by new Section B NI ((1)(b)(1) second sentence Application).

¹² The EU Member States, the EU and EURATOM had signed a Declaration and an inter se agreement in June 2024 to disapply intra-EU ISDS and the sunset clause even for past investments. While the agreement is not yet in force, it reflects the EU's intention to minimize EU Member States' legal exposure and to facilitate smooth implementation of its climate policy.

¹³ Energy investments of Japanese and Asian investors may be protected under several IIAs, including the CPTPP and ASEAN-related treaties.