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VOLTERRA FIETTA

The public international law firm

**The modernised Energy Charter Treaty:
is the better the enemy of the good?**

The modernised Energy Charter Treaty: is the better the enemy of the good?

- I. The ECT - a well-matured trigenarian
- II. Bringing the ECT up to date
- III. Options for moving forward

The ECT - a well-matured trigenarian

- Agnostic regarding different forms of energy; protects most renewables
- No blank cheque for investors
- No protection for mere future investment opportunities, hopes or prospects
- As with all legal systems, possibility of making bad claims (and bad defences)
- Claimants and respondents participate equally in tribunal selection
- Renewable and other investors need protection more than ever today

Bringing the ECT up to date

Sectoral coverage

- Additional Energy Materials and Products covered, e.g., hydrogen, anhydrous ammonia, biomass, biogas and synthetic fuels
- Definition of Economic Activity in the Energy Sector extended to cover capture, utilisation and storage of carbon dioxide
- Protection of fossil fuel investments withdrawn under a flexible, time-scaled mechanism

Bringing the ECT up to date

Substantive protection standard

- Right to regulate, change legal framework, discontinue subsidies
- Priority to REIO State aid rules
- Reduction of language of Art 10(1)
- Fair and equitable treatment (FET) defined by way of example
- Constant protection and security (CPS) covers physical security only
- Expropriation and right to regulate
- Exceptional transfer restrictions permitted
- Sustainable development

Bringing the ECT up to date Jurisdiction and procedure

- MFN clause restricted
- Denial of benefits made easier
- Investments must have duration, capital commitment, expectation of profit, assumption of risk
- Frivolous claims
- Third party interventions permitted
- Third party funding to be disclosed

Options for moving forward

- Modernisation takes the form of an amendment to the ECT
- Amendments must be adopted by the Conference, then ratified by ECT parties
- The Conference must adopt an amendment unanimously (no ECT party voting against)
- An amendment must be supported by a simple majority of ECT parties
- ECT parties then decide individually whether to ratify
- An amendment enters into force when $\frac{3}{4}$ of ECT parties have ratified it (and then only between those ECT parties which have ratified it)

Article 36: Voting

(1) Unanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions by the Charter Conference to:

(a) adopt amendments to this Treaty other than amendments to Articles 34 and 35 and Annex T....

(5) For purposes of this Article, “Contracting Parties Present and Voting” means Contracting Parties present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.

(6) Except as provided in paragraph (2), no decision referred to in this Article shall be valid unless it has the support of a simple majority of the Contracting Parties.

Article 42: Amendments

- (1) Any Contracting Party may propose amendments to this Treaty.
- (2) The text of any proposed amendment to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.
- (3) Amendments to this Treaty, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depositary which shall submit them to all Contracting Parties for ratification, acceptance or approval.
- (4) Instruments of ratification, acceptance or approval of amendments to this Treaty shall be deposited with the Depositary. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after deposit with the Depositary of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

Article 47: Withdrawal

- (1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty.
- (2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.
- (3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

Graham Coop

- Graham is qualified as a barrister and solicitor in New Zealand and as a solicitor with higher audience rights in England and Wales. He advises and represents companies, governments and international organisations on international dispute resolution and public international law, with a particular focus on the energy, natural resources and infrastructure sectors. His work on contentious matters has focused on the Energy Charter Treaty, investment treaties, price revisions under long-term energy sale contracts, and maritime boundary delimitation. He has appeared as counsel, advocate and expert before a wide range of international courts and tribunals, including the International Court of Justice, ICSID, the PCA and the ICC.
- Before joining Volterra Fietta, Graham served for 7 years as General Counsel to the Energy Charter Secretariat. Prior to taking up his post at the ECT, Graham was an international dispute resolution partner in the energy department of the London office of a major international law firm. He has also worked as in-house counsel at a major European gas company and as head of the energy & natural resources department of the Paris office of a major international firm.
- Graham is recognised globally as one of the world's leading experts on international energy law, the Energy Charter Treaty and international investment arbitration. Graham has written and edited a wide range of publications, including *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*. Graham is an Honorary Associate of the Graduate School of Natural Resources Law, Policy & Management of the University of Dundee's Centre for Energy, Petroleum and Mineral Law and Policy. He is an honorary member of the Investment Treaty Forum of the British Institute of International and Comparative Law. He is a member of the Editorial Committee of the *International Energy Law Review* and of the *Journal of Energy & Natural Resources Law*. He has lectured at numerous universities around Europe and is listed in the *Who's Who in Public International Law*.



