

International Arbitration Alert

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Recent ECT Claims - Impact for Energy Investors and Governments

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The last few weeks have seen a raft of new investor-state arbitrations under the Energy Charter Treaty (ECT), including the first known investor-state claim against the European Union (EU) itself. These claims largely arise from policy decisions by governments of signatory states as they seek to move away from fossil fuels and toward renewable sources of energy. Globally, such policy decisions are likely to continue and to go further in the years ahead, which, in turn, may result in more such claims both under the ECT and under other treaties. It is to be expected that many governments worldwide will take account of this in formulating policy and that investors in both traditional energy and renewable assets will have an eye to the protections that treaties may offer.

The most recently filed claim is by a group of German investors (VM Solar Jerez and others) against Spain in relation to the roll back of its renewable energy policies. Spain currently faces over 40 similar claims relating to these reforms. Next is a claim by three Austrian companies (Strabag and two of its subsidiaries, Erste Nordsee-Offshore Holding and Zweite Nordsee-Offshore Holding) against Germany relating to a change to Germany's renewables incentives regime.

A German company called Uniper has put the Netherlands on notice of a possible claim in relation to its coal-fired power plant and recently introduced legislation that would ban coal burning by 2030.

Finally, Nord Stream 2, a Swiss-incorporated entity wholly owned by Gazprom, has commenced proceedings under the ECT against the EU in relation to amendments to the EU's Gas Directive, and the effect that it will have on Nord Stream 2's pipeline which is under construction. This claim is somewhat different to the other ECT claims as it does not relate to renewable energy sources but to changes to the legislation governing natural gas transportation and trade within the EU. Nord Stream 2 alleges that the amendments create discriminatory measures between gas infrastructure projects. Article 36 of the Gas Directive provides certain exemptions for future projects for which the investment risk has not yet been undertaken and Article 49a provides for a derogation to certain EU Rules on third party access, tariff regulation and ownership unbundling for projects completed prior to May 23, 2019. Nord Stream 2 argues that it falls into neither of these categories because the investment risk has already been

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taken, but the project has not been completed, and therefore its exclusion from the exemptions is discriminatory and disproportionate.

The ECT is a multilateral investment agreement, which provides protections to certain investments of investors, including fair and equitable treatment and protection against discriminatory measures and unlawful expropriation. Investors may bring claims under the International Centre for Settlement of Investment Disputes (ICSID) Rules, the United Nations Commission on International Trade Law (UNCITRAL) Rules or the Stockholm Chamber of Commerce (SCC) Rules. The EU is a signatory to the ECT as well as almost all EU member states and several other countries.

The merits of Nord Stream 2's claim against EU must be seen in light of the 2018 decision of the Court of Justice of the EU (CJEU) in *Slovak Republic v Achmea BV*, in which the CJEU held that investor state provisions in bilateral investment treaties as between EU member states are incompatible with EU law and therefore have no effect. EU member states have been quick to bring challenges to bilateral investment treaty (BIT) and ECT cases on this basis, but so far no tribunal has followed the decision in *Achmea*. The EU Commission has published guidance stating that the *Achmea* decision is also relevant for the application of the ECT as between EU member states. Although there is no guidance yet on the application of the ECT as between investors and the EU itself, it is likely that the EU would not consider itself bound by the investor-state dispute resolution provisions of the ECT.

It is interesting to note the different ways in which investors are using the ECT to protect their investments. While the claims against Spain and Germany relate to changes in the renewable energy policies in those countries and have been brought by renewable energy companies, the claim and prospective claim by Uniper and Nord Stream 2 are brought by traditional energy companies, who are challenging legislative efforts to become more green. As more states enact legislation aimed at reducing reliance on fossil fuels and change incentive programs for renewable energy providers, we can expect to see more claims from energy companies in the coming months and years.

Meanwhile, as the number of claims under the ECT increases, the ECT Secretariat has just released a set of policy options for modernization of the ECT. These include comments from the EU as well as other individual members. Amongst other things, the EU called for the ECT to support climate change and clean energy transition goals.

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