

ELGAR COMMENTARIES

# COMMENTARY ON THE ENERGY CHARTER TREATY

Second Edition



Edited by  
**Rafael Leal-Arcas**



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SECOND EDITION

*Edited by*

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## ARTICLE 15

### SUBROGATION

**Apurva Mudliar and Tanya Shaar**

- (1) If a Contracting Party or its designated agency (hereinafter referred to as the ‘Indemnifying Party’) makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the ‘Party Indemnified’) in the Area of another Contracting Party (hereinafter referred to as the ‘Host Party’), the Host Party shall recognize:
  - (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and
  - (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.
- (2) the Indemnifying Party shall be entitled in all circumstances to:
  - (a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and
  - (b) the same payments due pursuant to those rights and claims, as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.
- (3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

#### COMMENTARY

15.01 Subrogation is a term originating in insurance law, wherein the insurer steps into the insured shoes, thereby allowing an insurer to recover the amount it has paid for a loss by suing the party that caused the loss. Most the BITs contain a subrogation clause, obliging the host State of the investment to recognise assignment of the rights of an investor to a party or its agency which make a payment to the investors pursuant to an investment insurance scheme. The basic rationale behind having this clause is providing mechanisms for insurers to recover the money they expended under an

investment guarantee. These clauses empower the investment insurer (or the home State) to enforce claims against the host State in its own right.

Article 15 of the ECT contains the subrogation clause, which provides for the transfer of rights that foreign investors might have vis-à-vis the host country if they receive compensation from their home country under an investment insurance or guarantee.<sup>1</sup> It provides that the insurance agency of the home State (or the home State itself) is subrogated and then entitled to exercise and enforce the rights of the investor. By the virtue of Article 15(1) the host party shall recognise assignment of all the rights and claims to a Contracting Party or its designated agency which indemnifies an investor under an indemnity or guarantee given in respect of an Investment in the area of another Contracting Party. This allows the indemnifying party to exercise all the rights the investor had in respect to its investment in another Contracting Party. 15.02

According to Article 15(1) the indemnifying party can either be the host State or its designated agency. The ECT does not provide any guidance on the term ‘designated agency’, hence it leaves the question open whether the designated agency has to be the same nationality as the investor to pursue the claims. In a plain textual interpretation of Article 15(1), if the indemnifying party qualifies as a designated agency of the Contracting Party then it should be allowed to pursue the arbitration against the host State of the investment. 15.03

Article 15(2) entitles the indemnifying party to receive the same treatment in respect of the rights and claims acquired by virtue of the assignment, and the same payments due pursuant to those rights and claims as the investor (party indemnified) was entitled to receive by the ECT in respect of the investment concerned under all the circumstances. 15.04

Finally, by virtue of Article 15(3) a Contracting Party is not allowed to assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract in any proceeding under Article 26. 15.05

It is important to note that the ECT is continuously undergoing a modernisation process in an attempt to ensure its contents reflect the current global energy landscape and 15.06

<sup>1</sup> The Energy Charter Treaty: A Reader's Guide, available at- [https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT\\_Guide\\_ENG.pdf](https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT_Guide_ENG.pdf), Pg. 27.

address concerns that have arisen since its creation in 1994.<sup>2</sup> This process is accomplished via negotiation rounds that occur among ECT member states, with the most recent modernisation conference happening as recently as April 2023.<sup>3</sup> As such, whilst the above commentary reflects the current state of the ECT, it is important to remain vigilant about any potential changes that may affect the interpretation or application of the treaty.

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2 <[www.europarl.europa.eu/RegData/etudes/ATAG/2022/729379/EPRS\\_AT\(A\)\(2022\)729379\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729379/EPRS_AT(A)(2022)729379_EN.pdf)> accessed 7 May 2023.

3 'Modernisation of the Treaty' (Energy Charter Treaty) <[www.energychartertreaty.org/modernisation-of-the-treaty/](http://www.energychartertreaty.org/modernisation-of-the-treaty/)> accessed 7 May 2023.