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PRATT'S ENERGY LAW REPORT

January 2024

Editor's Note The Climate

*Victoria Prussen Spears**

Energy regulation today is primarily concerned about climate change. In this issue of *Pratt's Energy Law Report*, a number of the articles we are publishing explore how governments are seeking to regulate the industry in an effort to address climate change.

U.S. TRADE POLICY

Our lead article, titled, "Navigating United States Trade Policy to Achieve Climate Targets," is by Tatjana Vujic (principal of Novi Strategies LLC) and Arie T. Feltman-Frank and Kate Abendroth (attorneys with Jenner & Block LLP).

In this article, the authors discuss the primary trade restrictions affecting the ability of companies to achieve the nation's climate targets and how they can navigate trade policy to hew with their particular situations.

CALIFORNIA

Then, in "California's Bold Move on Climate Disclosures," Sarah K. Morgan, Jon Solorzano, Matthew Dobbins, Kelly Rondinelli and Chloe Schmergel of Vinson & Elkins LLP examine two new California laws that, the authors explain, signal a new era for sustainability disclosure and presage the overlapping and inconsistent approaches to climate disclosures being demanded of companies by a growing number of jurisdictions.

POWER PLANTS

The next article is titled, "The Drive to Regulate Fossil-Fuel Fired Power Plants." Here, Martha S. Thomsen, Debra J. Jezouit, Kent Mayo, Tiffany

* Victoria Prussen Spears is a writer, editor and law firm marketing consultant for Meyerowitz Communications Inc. A graduate of Sarah Lawrence College and Brooklyn Law School, Ms. Spears was an attorney at a leading New York City law firm before joining Meyerowitz Communications. Ms. Spears, who is Editor of *The Banking Law Journal*, *Pratt's Journal of Bankruptcy Law*, *Pratt's Energy Law Report*, *Pratt's Government Contracting Law Report* and *Pratt's Privacy & Cybersecurity Law Report*, all published by Lexis, can be reached at vpspears@meyerowitzcommunications.com.

Cheung, and Samantha Olson of Baker Botts LLP review recent rulemakings by the U.S. Environmental Protection Agency targeting the electric generating industry.

UTILITY SHARES

Peter K. O'Brien, Steven C. Friend, Patrick C. Jamieson and Michelle G. Chan of Hunton Andrews Kurth LLP follow with their article, titled, "Utility Share Prices Under Pressure."

In this piece, the authors discuss the implications of the depressed stock prices for utility companies traded in the United States.

IN THE UK

"The United Kingdom Issues an Ultimatum on the Energy Charter Treaty. What's Next?" is by Louise Woods, Sophie Freelove, Simon Michau and Max Marshall of Vinson & Elkins LLP. In this article, the authors examine the fate of the Energy Charter Treaty.

Enjoy the issue!

Navigating United States Trade Policy to Achieve Climate Targets

*By Tatjana Vujic, Arie T. Feltman-Frank and Kate Abendroth**

In this article, the authors discuss the primary trade restrictions affecting the ability of companies to achieve the nation's climate targets and how they can navigate trade policy to hew with their particular situations.

Achieving the nation's climate targets will require access to raw materials and components along the clean energy and technology supply chains at competitive costs. Currently in the United States, these supply chains rely heavily on imports, particularly from China, an imbalance which the United States has been working to address through massive incentive programs designed to bolster clean energy and technology development while boosting domestic manufacturing capabilities and the purchase of domestically produced goods. These programs are increasing consumer demand for clean energy and clean technologies such as electric vehicles, as well as key business-to-business demand in areas such as energy storage systems.

While emerging domestic suppliers benefit from favorable trade policy, other companies will need to import raw materials and components to keep up with the pace of demand, at least in the near term while domestic production comes online. Hence, knowing how to navigate trade policy has become an essential part of doing business related to clean energy and technology. This is true whether a company's goal is to strengthen trade restrictions to maintain a competitive domestic advantage or avoid trade restrictions to access or supply raw materials and components needed to meet consumer demand.

This article discusses the primary trade restrictions at play and how potentially affected companies can navigate trade policy to hew with their particular situations. Specifically, this article reviews the tools available to companies that may wish to initiate, adjust, continue, suspend, or seek exclusions from trade restrictions. It concludes with next steps.

PRIMARY TRADE RESTRICTIONS RELEVANT TO CLEAN ENERGY AND TECHNOLOGY SECTORS

U.S. trade policy will influence the effectiveness of the new incentive programs established to bolster clean energy and technology development.

* Tanja Vujic is principal of Novi Strategies LLC and a former special counsel at Jenner & Block LLP. Arie T. Feltman-Frank and Kate Abendroth are associates at Jenner & Block. Kate Cox and Joseph S. Jazwinski, summer associates at the firm, contributed to the preparation of this article.

Therefore, it is essential to know how trade restrictions work. The four main categories of trade restrictions are:

- (1) Antidumping/countervailing (AD/CVD) duties;
- (2) Section 201 restrictions;
- (3) Section 301 restrictions; and
- (4) Section 232 restrictions.¹

The general objective of trade policy is to influence the import of goods into the United States via the different categories of trade restrictions meant to facilitate specific outcomes. For example, AD/CVD duties seek to offset the “material injury” to domestic industry that results from the dumping of goods into the United States at less than their fair value and/or the foreign subsidization of goods imported into the United States.²

Similarly, Section 201 restrictions seek to protect U.S. companies from imports that are or may become a “substantial cause of serious injury” to domestic industry.³

By comparison, Section 301 restrictions seek to protect U.S. rights under trade agreements and/or counteract “unjustifiable” foreign activities that burden or restrict U.S. commerce.⁴ Section 232 restrictions seek to protect national security.⁵

These goals may be accomplished through the imposition of duties, tariff-rate quotas,⁶ or other import restrictions.

Companies can seek to influence trade restrictions in several ways, such as by influencing whether restrictions are initiated, adjusted, or continued, by seeking and participating in the process by which companies are granted exclusions, and by influencing the suspension of restrictions.

¹ AD/CVD duties are provided by the Tariff Act of 1930, as amended. 19 U.S.C. §§1671-1677n; 19 C.F.R. Part 351. Section 201 and 301 restrictions are provided by the Trade Act of 1974. 19 U.S.C. §§2101-2497b. Section 232 restrictions are provided by the Trade Expansion Act of 1972. 19 U.S.C. §1862; 15 C.F.R. Part 705.

² 19 U.S.C. §§1673, 1671.

³ Id. §2251(a).

⁴ Id. §2411(a)(1).

⁵ Id. §1862(c).

⁶ Tariff rate quotas permit a specified quantity of imported merchandise to be entered at a reduced rate of duty during the quota period. Once the tariff-rate quota limit is reached, goods may still be entered but at a higher rate of duty.

Table 1 organizes these trade restrictions by objective, governing body, duration, and tools that can be utilized to strengthen the restriction (Pro-Restriction Tools) or limit the restriction (Anti-Restriction Tools).

Table 1
Primary Elements of Key Trade Restrictions Affecting Products that Advance Climate Goals

	AD/CVD Duties	§ 201	§ 301	§ 232
Objective	Protects domestic industry from (i) “material injury” as a result of imports being sold at < fair value, and (ii) from foreign government subsidies	Protects against imports that are or may become a “substantial cause of serious injury” to domestic industry	Protects the rights of the US under trade agreements and protects the US from the acts, policies, or practices of foreign countries that are “unjustifiable” and burden or restrict US commerce	Protects national security, which may be impaired by “the impact of foreign competition on the economic welfare of individual domestic industries”
Governing Body	Commerce/USITC > Commerce	USITC > President	USTR	Commerce > President
Duration	Sunset review occurs every 5 years	4 years initially, cannot exceed 8 years in aggregate	4 years (subject to continuance, failure to do so results in suspension)	Stays in effect until President determines that threat to national security has ceased
Pro-Restriction Tools	<ul style="list-style-type: none"> Investigation petition Circumvention inquiry request Administrative review request (annual) 	<ul style="list-style-type: none"> Action petition Extension petition “on behalf of” industry concerned 	<ul style="list-style-type: none"> Action petition Continuance request 	<ul style="list-style-type: none"> Investigation application
Anti-Restriction Tools	<ul style="list-style-type: none"> Scope ruling application De minimis exporters/ producers excluded Administrative review request (annual) Changed circumstances review request 	<ul style="list-style-type: none"> Petition to President by “majority of representatives” requesting that restrictions be reduced, modified, or terminated Exclusion request (order may direct USTR to develop procedures) 	<ul style="list-style-type: none"> Exclusion request (USTR develops procedures) 	<ul style="list-style-type: none"> Exclusion request (order may authorize Commerce to grant exclusions at request of directly affected parties)

INITIATION, ADJUSTMENT, CONTINUANCE AND SUSPENSION

Each trade restriction has its own initiation process. For instance, AD/CVD duties are established through a process led cooperatively by the U.S. Department of Commerce (Commerce or Commerce Department) and the

U.S. International Trade Commission (USITC).⁷ By comparison, Section 201 and 232 restrictions are established by the president after preliminary determinations are made by the USITC and Commerce Department, respectively.⁸ The U.S. Trade Representative (USTR) is responsible for establishing Section 301 restrictions.⁹

While the federal government ultimately institutes trade restrictions, the restrictions can be initiated by “interested parties” through the filing of petitions or applications. Other interested parties typically can participate in the initiation process, as well. Interested parties generally must be associated with the targeted industry, such as through the manufacture, production, or sale of the targeted product or by being an industry representative.¹⁰

With respect to AD/CVD duties, if an interested party believes that companies are circumventing an AD/CVD order, the interested party can seek to subject the companies to the order by submitting a request for a circumvention inquiry to the Commerce Department.¹¹ Such a submission could result in the applicable duties being imposed on the circumventing companies should an affirmative determination of circumvention be made. Interested parties other than the requester can participate in this process by submitting factual information and written argument.

A recent example of circumvention occurred on December 8, 2022, when Commerce made a preliminary affirmative determination that importers from Cambodia, Malaysia, Thailand, and Vietnam were circumventing an AC/CVD order targeting Chinese imports of crystalline silicon photovoltaic cells (c-Si solar cells) by using parts and components produced in China to produce the c-Si solar cells and then exporting them to the U.S.¹² A final determination was issued on August 18, 2023,¹³ subjecting these imports to the AD/CVD duties that target imports of c-Si solar cells produced in China.¹⁴ However, to keep up with consumer demand for solar cells and modules needed to produce solar energy, President Biden used his emergency authority to establish a two-year

⁷ See generally 19 U.S.C. §§1673-1673i (AD), 1671-1671h (CVD); 19 C.F.R. Part 351, Subpart B.

⁸ 19 U.S.C. §§2251(a) (201), 1862(b) (232).

⁹ Id. §2411.

¹⁰ E.g., id. §§1673a(b) (AD), 1671a(b) (CVD), 1677(9) (defining “interested party”).

¹¹ Id. §1677j; 19 C.F.R. §351.226(c).

¹² 87 Fed. Reg. 75221 (Dec. 8, 2022).

¹³ 88 Fed. Reg. 57419 (Aug. 23, 2023).

¹⁴ 77 Fed. Reg. 73018 (Dec. 7, 2012) (AD order); 77 Fed. Reg. 73017 (Dec. 7, 2012) (CVD order).

suspension on the imposition of duties on c-Si solar cells from Cambodia, Malaysia, Thailand, and Vietnam.¹⁵ Thus, these duties will not go into effect until after June 6, 2024, unless the emergency were to terminate before that time (i.e., domestic solar component manufacturing capacity were to become sufficient to meet solar generation needs).

In addition to initiating the process to establish trade restrictions and submitting a request for a circumvention inquiry (applicable to AD/CVD duties), interested parties can seek to influence the adjustment, continuation, or suspension of trade restrictions.

For AD/CVD duties, this can be accomplished by influencing the initiation of different types of reviews of the duties, as well as participating in these reviews through the submittal of factual information and written argument.

For example, during every year following the issuance of an AD/CVD order, an interested party can submit an “administrative review” request to petition the Commerce Department to reassess the amount of duties that should be imposed on specified individual exporters or producers covered by the order.¹⁶

Interested parties can also participate in a “sunset review” process of AD/CVD orders, which occurs every five years after the establishment of an order at which time the Commerce Department determines whether the order should be continued or suspended.¹⁷ Using the example of c-Si solar cells, the next sunset review for AD/CVD duties targeting solar products assembled in China,¹⁸ as well as AD duties targeting c-Si solar cells produced in Taiwan,¹⁹ will take place in 2025. Notably, 2025 also marks the year in which the Commerce Department will undertake a sunset review of AD duties targeting utility scale wind towers from Canada, Indonesia, South Korea, and Vietnam.²⁰

Finally, an interested party can submit a “changed circumstances” review request and carries the burden of persuading the Commerce Department that changed circumstances are sufficient to warrant revocation of an AD/CVD order.²¹ Ultimately, Commerce can suspend AD/CVD duties if it finds that

¹⁵ The White House, *Declaration of Emergency and Authorization for Temporary Extensions of Time and Duty-Free Importation of Solar Cells and Modules from Southeast Asia* (June 6, 2022).

¹⁶ 19 U.S.C. §1675(a); 19 C.F.R. §351.213.

¹⁷ 19 U.S.C. §1675(c); 19 C.F.R. §351.218.

¹⁸ 80 Fed. Reg. 8592 (Feb. 18, 2015).

¹⁹ 80 Fed. Reg. 8596 (Feb. 18, 2015).

²⁰ 85 Fed. Reg. 52546 (Aug. 26, 2020); see also 86 Fed. Reg. 69014 (Dec. 6, 2021); 86 Fed. Reg. 69012 (Dec. 6, 2021).

²¹ 19 U.S.C. §1675(b); 19 C.F.R. §351.216.

revocation of the order is not likely to lead to the continuation or recurrence of the dumping and/or countervailable subsidy and the resulting material injury.

With respect to Section 201 restrictions, a party can file an extension petition with the USITC “on behalf of the industry concerned,” and interested parties and consumers can then participate in a public hearing associated with the resulting extension proceeding.²² Ultimately, the USITC will continue the restrictions if they continue to be necessary to prevent or remedy serious injury to the affected domestic industry, and there is evidence that the domestic industry is making a positive adjustment to the import competition. However, under no circumstances can the restrictions exceed eight years in the aggregate.²³ Also, if the restrictions are terminated, interested persons can participate in a hearing held on their effectiveness.²⁴

Using the example of c-Si solar cells again, Section 201 duties on imports of c-Si solar cells, originally put into place by President Trump in January of 2018,²⁵ were extended by President Biden for an additional four years in February of 2022.²⁶ Given the eight-year limit, these duties will last no longer than 2026. Prior to 2026, however, “a majority of the representatives of the domestic industry” can submit a petition to the president requesting that the duties be reduced, modified, or terminated, which the president may grant upon a determination that the domestic industry has made a positive adjustment to the import competition.²⁷ The U.S. Court of International Trade has interpreted this provision as allowing a “majority of the representatives” to be based on production volume and as only permitting trade liberalizing modifications.²⁸

For Section 301 restrictions, “industry representatives” that benefit from the restrictions can file a written request for the continuance of the restrictions beyond their general four-year term (indeed, failure to do so results in their termination).²⁹ The USTR may also modify or terminate the restriction on its own initiative prior to the end of the four-year term, and interested persons can

²² 19 U.S.C. §2254(c). Note that the statute does not require a party to be an interested party to file an extension petition.

²³ *Id.* §2253(e)(1).

²⁴ *Id.* §2254(d).

²⁵ 83 Fed. Reg. 3541 (Jan. 25, 2018).

²⁶ 87 Fed. Reg. 7357 (Feb. 9, 2022).

²⁷ 19 U.S.C. §2254(b)(1)(B).

²⁸ *Solar Energy Indus. Ass' v. United States*, 553 F. Supp. 3d 1322 (Ct. Int'l Trade 2021).

²⁹ 19 U.S.C. §2417(c).

participate in this process.³⁰ The USTR is currently in the process of reviewing Section 301 duties targeting various Chinese imports along the clean energy and technology supply chains.³¹

Finally, Section 232 restrictions, which target steel and aluminum imports from most countries,³² were implemented in 2018 pursuant to President Trump's determination that steel and aluminum imports threaten to impair national security. These restrictions can be lifted only after the president declares that steel and aluminum imports no longer pose a national security threat.

Importantly for this discussion, in September of 2022, the Commerce Department found that imports of neodymium-iron-boron (NdFeB) permanent magnets, which are used in electric vehicle motors and offshore wind turbine generators, threaten national security. Commerce nevertheless did not recommend the imposition of Section 232 restrictions given the current "severe lack of domestic production capability."³³ This may change as the rare earth magnet domestic supply chain develops production capacity and provided it can supply enough NdFeB to keep up with demand.

EXCLUSIONS

Companies that may be subject to trade restrictions have the potential to benefit from exclusions that work to prevent the restrictions from reaching their businesses.

While there is not a formal exclusion process for AD/CVD duties, an interested party may submit a "scope ruling application" to request that the Commerce Department conduct a scope inquiry to determine whether a particular product is covered by the scope of an AD/CVD order, a process by which an interested party can participate.³⁴ Notably, when Commerce makes a final determination to institute AD/CVD duties, it is required to exclude any exporter or producer that has a *de minimis* impact.³⁵

³⁰ Id. §2417(a)(2).

³¹ See 83 Fed. Reg. 28710 (June 20, 2018); 83 Fed. Reg. 40823 (Aug. 16, 2018); 83 Fed. Reg. 47974 (Sept. 21, 2018), as modified by 83 Fed. Reg. 49153 (Sept. 28, 2018); and 84 Fed. Reg. 43304 (Aug. 20, 2019), as modified by 84 Fed. Reg. 69447 (Dec. 18, 2019) and 85 Fed. Reg. 3741 (Jan. 22, 2020).

³² 83 Fed. Reg. 11625 (Mar. 15, 2018); 83 Fed. Reg. 11619 (Mar. 15, 2018).

³³ 88 Fed. Reg. 9430 (Feb. 14, 2023).

³⁴ 19 C.F.R. §351.225(c), (f).

³⁵ Id. §351.204(e)(1).

For Section 201, 301, and 232 restrictions, the exclusion process is case-specific. For instance, following a Section 201 order, the president may direct the USTR to develop procedures for the exclusion of certain products.³⁶ Similarly, for Section 301 restrictions, the USTR develops exclusion procedures tailored to particular products.³⁷

For the Section 301 duties that target various Chinese imports along the clean energy and technology supply chains currently subject to review, the USTR excluded certain products, and some of these exclusions were reinstated and extended through September 30, 2023, to allow USTR to consider and align the exclusions with the results of its review.³⁸ Affected parties should be closely following USTR developments which will reveal whether the duties will remain in effect, and if so, whether the exclusions will continue.

Finally, following a Section 232 order, the Commerce Department is often authorized by the president to grant exclusions at the request of directly affected parties.³⁹

NEXT STEPS

In addition to taking advantage of tax credits and other incentives, emerging domestic suppliers may find it in their best interest to advocate for the initiation or continuation of trade restrictions or to seek to prevent companies from receiving exclusions. By contrast, companies that rely on targeted imports or companies that export targeted products to the United States may find it in their best interest to counteract these efforts and advocate for the suspension of restrictions. Notably, given the government's significant investments designed to bolster clean energy and technology development, the government is in a position to protect these investments by being even more mindful of applicable trade policy.

Regardless of the objective, companies should ensure that their interests are adequately represented and advocated for in trade restriction proceedings. As a first step, companies along the clean energy and technology supply chains, as well as companies invested in the development of associated projects, should closely evaluate their supply chains and seek to understand how current and future trade developments may impact their business objectives. In certain cases, it may be worth acting in the U.S. Court of International Trade.

³⁶ See, e.g., 83 Fed. Reg. 6670 (Feb. 14, 2018).

³⁷ See, e.g., 84 Fed. Reg. 29576 (June 24, 2019).

³⁸ 87 Fed. Reg. 78187 (Dec. 21, 2022).

³⁹ See, e.g., 15 C.F.R. App. Suppl. No. 1 to Part 705.

California's Bold Move on Climate Disclosures

*By Sarah K. Morgan, Jon Solorzano, Matthew Dobbins,
Kelly Rondinelli and Chloe Schmergel**

In this article, the authors examine two new California laws that, they explain, signal a new era for sustainability disclosure and presage the overlapping and (often) inconsistent approaches to climate disclosures being demanded of companies by a growing number of jurisdictions.

As public companies anticipate the Securities and Exchange Commission's (SEC) final climate disclosure rules, California has beaten the federal government to the punch.

On September 12, 2023, the California State Senate passed the Climate Corporate Data Accountability Act (SB 253) (CCDAA)¹ which could quickly affect many companies based both in California and elsewhere in the United States, and may also ultimately require more disclosure regarding the carbon emissions of those companies. The passage of the bill is just one of many recent moves that demonstrate California's aggressive stance on climate issues.² Alongside the CCDAA, the California Legislature also passed a companion bill – the Climate-Related Financial Risk Act (SB 261) (CRFRA)³ – which would require large companies to publicly disclose their climate-related financial risks on a digital platform.

On October 7, 2023, California Governor Newsom signed the CCDAA and CRFRA into law.

These two bills signal a new era for sustainability disclosure and presage the overlapping and inconsistent approaches to climate disclosures being demanded of companies by a growing number of jurisdictions. In addition to the

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¹ https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253.

² For instance, on September 15, 2023, the state filed a complaint in the San Francisco County Superior Court alleging five of the largest oil and gas companies (Exxon Mobil, Shell, Chevron, ConocoPhillips and BP) had actively engaged in a “decades-long campaign of deception” regarding climate change and the risks posed by fossil fuels. As a result of this purported deception, the California complaint asserts that the state has spent tens of billions of dollars to address the damage caused and to adapt to climate change and would likely have to continue to spend multiple billions of dollars in the future.

³ https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261.

forthcoming SEC rule on climate-related disclosures,⁴ the European Union has also taken drastic steps in the last year with the passage of the Corporate Sustainability Reporting Directive (CSRD) and now, with California's impending new laws, it will be difficult for larger companies to avoid being subject to some, if not all, of these rules. These rules are often at odds with one another and will have different jurisdictional nexus triggers. Moreover, the rules would require differing disclosures regarding levels of greenhouse gas (GHG) emissions and climate change risks.⁵

Some commentators have hypothesized that the California Climate Accountability Package may provide the SEC with some political cover to push more aggressive positions in its own final climate rules, as the California legislation would already provide significant burdens related to Scope 3 GHG emissions reporting for a large swath of publicly listed companies that would be swept under both reporting mandates given their size and California nexus.

CALIFORNIA'S CLIMATE BILLS

In January 2023, California legislators introduced the Climate Accountability Package,⁶ a collection of bills, to include the CCDAA and CRFRA, with the purported intention to “improve transparency, standardize disclosures, align public investments with climate goals, and raise the bar on corporate action to address the climate crisis.”

The Package could have sweeping implications well beyond California's borders. The state is currently the fifth largest economy by gross domestic product (GDP)⁷ and is close to eclipsing Germany and taking the fourth spot globally, behind the United States, China and Japan. And, if history is any guide, when California lawmakers legislate on environmental matters, they can change the de facto standards globally. This is based on both the sheer heft of the state's economy and the fact that many companies would prefer creating one, universally applicable set of products and services that meet California's

⁴ As of the date of publication, the SEC has yet to release its long-awaited rule on climate-related disclosures. On December 6, 2023, the Unified Regulatory Agenda was updated with a final rule scheduled to be released in April 2024.

⁵ There are likely to be some equivalency exemptions within the various reporting frameworks, for example, if such reporting entity already complies with a similarly robust framework elsewhere, but the specific details of such equivalencies remain to be seen.

⁶ <https://sd11.senate.ca.gov/news/20230206-california-senators-announce-climate-accountability-package-raise-bar-corporate>.

⁷ <https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/#:~:text=SACRAMENTO%20%E2%80%93%20According%20to%20Bloomberg%2C%20California,value%2C%20renewable%20energy%20and%20more>.

high bar to providing disparate products and services in separate markets based on various state or international standards.⁸

SB 253: The Climate Corporate Data Accountability Act

The key requirements of SB 253 are:

- Publicly disclose (and verify), on an annual basis, Scope 1, 2 and 3 GHG emissions;
- Applicable to public and private U.S. companies that are “doing business in California” and have total annual revenue of \$1B +; and
- First reporting due 2026 (covering fiscal year 2025).

GHG Emissions Reporting

The CCDAA provides that the California Air Resources Board (CARB) shall develop and adopt regulations on or before January 1, 2025, requiring reporting entities to disclose, annually, their Scope 1, Scope 2, and Scope 3 GHG emissions (in conformance with the GHG Protocol).⁹ Reporting of Scope 1 and Scope 2 GHG emissions will begin in 2026, or on a date to be determined by CARB, while reporting of Scope 3 GHG emissions will begin in 2027 and must be disclosed no later than 180 days after disclosure of a company’s Scope 1 and 2 GHG emissions.

Such emissions disclosures are to be subject to assurance which is to be performed by an independent third-party assurance provider. Assurance for

⁸ For example, in August 2022, CARB approved regulation to phase out new internal combustion cars, requiring that by 2035 100% of new cars and light trucks sold in the state will be zero-emission vehicles. See California moves to accelerate to 100% of new zero-emission vehicle sales by 2035, Cal. Air Res. Bd. (Aug. 25, 2022), <https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035>.

⁹ The GHG Protocol is the globally recognized GHG emissions accounting standard developed and updated by the World Resources Institute and the World Business Council for Sustainable Development. It provides the framework for corporate GHG emissions accounting and reporting and defines and categorizes emissions as scopes 1, 2, and 3 emissions. The CCDAA provides the following applicable definitions:

- (i) Scope 1 emissions are defined as “all direct greenhouse gas emissions that stem from sources that a reporting entity owns or directly controls, regardless of location, including, but not limited to, fuel combustion activities”;
- (ii) Scope 2 emissions are defined as “indirect greenhouse gas emissions from consumed electricity, steam, heating or cooling purchased or acquired by a reporting entity, regardless of location”; and
- (iii) Scope 3 emissions are defined as “indirect upstream and downstream greenhouse gas emissions, other than scope 2 emissions, from sources that the reporting entity does not own or directly control and may include, but are not limited to, purchased goods and services, business travel, employee commutes, and processing and use of sold products.”

Scope 1 and 2 GHG emissions is to be performed at a limited assurance level beginning in 2026 and at a reasonable assurance level beginning in 2030. With respect to Scope 3 GHG emissions, CARB is to “review and evaluate trends” in assurance during 2026 and may establish, on or before January 1, 2027, applicable assurance requirements. Notwithstanding that, however, the CCDAA sets out that assurance for Scope 3 GHG emissions will be performed at a limited assurance level beginning in 2030.¹⁰

Applicability

The CCDAA applies to a “reporting entity” which, per the legislation, is defined as the following:

- A partnership, corporation, limited liability company, or other business entity formed under the laws of California, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States;
- With total annual revenues exceeding \$1 billion;
- That does business in California.

The legislation fails to define what “doing business” in California means. However, according to the legislative history of the assembly discussion, the term intends to cover companies “engaging in any transaction for the purpose of financial gain within California, being organized or commercially domiciled in California, or having California sales, property or payroll exceed specified amounts: as of 2020 being \$610,395, \$61,040, and \$61,040, respectively.”¹¹ Under the tax code, “California sales” is defined to include:

- (i) Sales of tangible personal property if the property is delivered or shipped to a purchaser within California regardless of the f.o.b. point or other conditions of the sale;
- (ii) The purchaser of services received the benefit of the services in California; or
- (iii) Sold, leased, or licensed tangible property is located in California.

Each U.S. entity with annual revenues over \$1 billion and *clear* California operations is likely to be subsumed under this bill. For those entities that meet

¹⁰ The rules would provide for a safe harbor with regard to Scope 3 GHG emissions disclosures made with a reasonable basis and disclosed in good faith – an approach that aligns with the SEC’s proposed rule establishing a safe harbor for Scope 3 GHG emissions disclosure. Further, between 2027 and 2030, penalties assessed on Scope 3 GHG emissions reporting would only be assessed for failures to disclose.

¹¹ SB 253, Senate Rules Committee, Office of Senate Floor Analyses.

the first two prongs of the definition of a “reporting entity” but otherwise have no obvious regular business operations in California, they will need to take a fact-and-circumstances evaluation of their nexus to the state to determine if they would be subject to the reporting requirements of the CCDAA.¹²

One of the CCDAA’s sponsors, Representative Scott Wiener (D-San Francisco), has indicated that the CCDAA’s revenue threshold would capture approximately 5,400 reporting entities. The CRFRA, with its lower revenues threshold of \$500M, is likely to capture thousands more.

Reporting Requirements

As noted above, the CCDAA would require reporting entities to report their complete carbon inventories – Scope 1, 2 and 3 GHG emissions. Although Scope 3 GHG emissions often account for over 90% of an organization’s overall carbon inventory, such emissions are exceptionally challenging to measure. Companies would also be required to have their emissions data validated by an independent auditor and publicly disclose such reporting via a digital platform, which must be capable of allowing stakeholders, consumers and investors to view the data in an “easily understandable” manner.

With respect to enforcement mechanisms, CARB is to adopt regulations that will authorize it to seek administrative penalties for non-filing, later filing, or any other failure to meet the requirements of the CCDAA. Such administrative penalties are limited to \$500,000 or less and, for Scope 3 GHG emissions reporting, shall only occur for non-filing between 2027 and 2030.

SB 261: The Climate-Related Financial Risk Act

The key requirements of SB 261 are:

- Publicly disclose a climate-related financial risk report every other year (in line with the Task Force on Climate-Related Financial Disclosures (TCFD) recommendations or equivalent disclosure requirements of the International Sustainability Standards Board’s (ISSB) climate-related disclosures standard);
- Applicable to public and private U.S. companies (other than insurers)

¹² CARB may need to clarify whether the \$1 billion total annual revenue test is applied:

- (i) On a gross rather than net basis;
- (ii) With respect to world-wide income, not income generated in California; and
- (iii) On a consolidated basis for all affiliates of a reporting entity.

CARB may also need to clarify whether the California reporting entity reports emissions only for its activities and not those of its world-wide affiliates. As currently drafted, the legislation does not clarify these points.

that are “doing business in California” and have total annual revenue of \$500 million; and

- First reporting due on or before January 1, 2026.

Climate-Related Financial Risk Report

The CRFRA requires that a “covered entity” prepare and make publicly available a climate-related financial risk report on or before January 1, 2026, and biennially thereafter. The report is to be prepared in accordance with the TCFD recommendations or an equivalent reporting requirement, to include any “law, regulation, or listing requirement issued by any regulated exchange, national government, or other governmental entity, including a law or regulation issued by the United States government, incorporating disclosure requirements” (e.g., the forthcoming SEC rule on climate-related disclosures) or the International Financial Reporting Standards Sustainability Disclosure Standards, as issued by the ISSB.

Applicability

Similar to the three prongs of the CCDAA, the CRFRA defines “covered entities” (those subject to the requirements) as the following:

- A corporation, partnership, limited liability company, or other business entity formed under the laws of California, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States;
- With total annual revenues in excess of \$500 million;
- That does business in California.

This does not include a business entity subject to regulation by the Department of Insurance in California or that is in the business of insurance in any other state.

The report may be consolidated at the parent company level.

Reporting Requirements

The report is to include the measures adopted by the reporting entity to “reduce and adapt to climate-related financial risk.” To the extent the report contains the covered entity’s GHG emissions, or voluntary mitigation of the same, those claims will be considered by CARB if verified by a third party. Covered entities are to publish the report on their own websites.

With respect to enforcement, CARB is again to adopt regulations that will authorize it to seek administrative penalties. In this case, covered entities may be subject to administrative penalties of no more than \$50,000 in a reporting

year for failure to make the report publicly available on the company's website or if the report is inadequate or insufficient.

WHY IT MATTERS AND WHAT'S NEXT

Both the CCDAA and the CRFRA promise to shape climate disclosure practices and emissions reporting for thousands of companies, both public and private, with advocates asserting that increased accountability will help reduce the carbon footprint of large corporations that are major greenhouse gas emitters. The legislation is predicated on the position that it would enable consumers and regulators to identify companies lagging behind and encourage them to take climate action, additionally revealing those companies that are significantly exposed to climate-related financial risks. Although the bills are targeted to California-based entities, these regulations could have sweeping impacts on entities of requisite size that have relatively small applicable sales in California and limited – to no – real physical nexus to the state.

As investors increasingly demand consistent, comparable, and reliable climate-related financial information for their investment decisions, many companies are already attempting to meet such demands while also preparing for emerging disclosure regimes, including the SEC climate-related disclosures rule and the E.U.'s CSRD. However, the California legislation could end up being much broader than the SEC's final rule, sweeping in many private companies not accustomed to mandatory disclosures of any kind, leaving them trying to understand the patchwork of climate reporting frameworks they may be subject to (which, taken together, often lack cohesive and consistent applicability and scope of reporting).

The new California regulatory framework will only add further complications to the already challenging task of grappling with quantifying, tracking, and reporting GHG emissions data and risk management – especially now that companies may be subject to reporting Scope 3 GHG emissions data, which is inherently difficult to gather and validate as accurate.

A BRIEF COMPARISON TO THE SEC'S PROPOSED CLIMATE-DISCLOSURE RULE

Although the CCDAA shares some similarities with the SEC's proposed climate-related disclosure rule, it deviates in two crucial respects:

1. *Emissions Reporting*: The SEC's proposed climate-related disclosure rule mandates that all public companies disclose Scope 1 and Scope 2 GHG emissions. A company is only required to report Scope 3 GHG emissions if (a) it has set a climate target which incorporates Scope 3 GHG emissions, or (b) if it has determined that such emissions are "material." By contrast, the CCDAA would require all three types of

emissions for any U.S. company operating in California if it meets the applicable annual revenue threshold and “does business” in the state. This is significant – Scope 3 GHG emissions typically constitute a substantial portion of a company’s carbon inventory and is inherently the most difficult to calculate with any level of accuracy.¹³

2. *Applicability*: The SEC’s proposed climate-related disclosure rule applies exclusively to publicly traded companies, while the CCDAA (and CRFRA) targets both public and private companies.

PREPARING FOR CALIFORNIA’S NEW REGULATIONS

It is very likely that the California legislation will face staunch legal challenges, including with respect to the state’s authority to force companies – both public and private – to report their GHG emissions, especially for those companies with relatively minimal footprints in the state. Regardless of the timing or outcome of any such litigation, however, businesses with a nexus in California should proactively prepare for the Climate Accountability Package. Large companies should initiate an action plan for climate disclosure now, because gathering emissions data and climate risk information for fiscal year 2025 will be subject to disclosure come 2026.

CONCLUSION

When Governor Newsom signed the CCDAA and CRFRA into law, in nearly identical letters¹⁴ to the California Senate, the governor pushed back on the implementation deadlines for each piece of legislation, noting that the deadlines for the CCDAA were “likely infeasible” and that the deadlines for the CRFRA “fall short in providing the California Air Resources Board (CARB) with sufficient time to adequately carry out the requirements” of the legislation. With regard to the CCDAA in particular, the governor noted that the reporting protocol specified in the legislation “could result in inconsistent reporting across businesses subject to the measure.” The governor is therefore directing his administration to work with the authors of the legislation to address these issues. Finally, the governor’s letters signaled his concern with the financial

¹³ The CCDAA provides that reporting of GHG emissions will be “in conformance” with the GHG Protocol, to include the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard. Under that Standard, there are fifteen distinct reporting categories of Scope 3 GHG emissions. Companies will have to wait until CARB’s implementing regulations are released to know how expansive the Scope 3 GHG emissions reporting will be under the CCDAA (i.e., whether all fifteen categories will be utilized), but the fact that the legislation limits reporting to be in conformance with the GHG Protocol indicates this is likely to be the case.

¹⁴ <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf>; <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-261-Signing.pdf>.

impact of the legislation on businesses, noting that he is instructing CARB to closely monitor the cost impacts as it implements the new legislation to make recommendations to streamline the programs.

Given the above, certain aspects of the California climate legislation could be subject to change, including the timeline for reporting under both laws. Nevertheless, despite the governor's concerns, the CCDAA and CRFRA are now law.

The Drive to Regulate Fossil-Fuel Fired Power Plants

*By Martha S. Thomsen, Debra J. Jezouit, Kent Mayo, Tiffany Cheung, and Samantha Olson**

In this article, the authors review recent rulemakings by the U.S. Environmental Protection Agency targeting the electric generating industry.

The U.S. Environmental Protection Agency (EPA) recently issued a flurry of rulemakings targeting the electric generating industry. The rulemakings are part of a broader Biden administration push to transition away from fossil fuel-fired electric generating units (EGUs) to other energy sources.

These rulemakings will likely result in ripple effects across the electric generating industry, increasing the regulatory costs borne by electric generators and potentially their customers, accelerating the retirement of many coal-fired power plants, and putting renewables and novel technologies, like carbon capture and sequestration/storage (CCS) and hydrogen co-firing, to the test.

For electric generating companies, close scrutiny of these rulemakings is crucial to prepare for compliance and potential enforcement and citizen suits, adapt short-term and long-term business planning, and potentially challenge final rulemakings.

For everyone else, close scrutiny also is warranted to assess the broader impacts of these rulemakings on the future of electricity generation and grid reliability.

EPA'S NEW RULES

EPA's multimedia and multipollutant approach includes a wide variety of proposed and recently finalized air, water, and waste regulations all aimed at reducing greenhouse gas (GHG) emissions and other pollutants from the electric generating sector, including those discussed below.

Proposed Clean Air Act Section 111 GHG Rule for Fossil Fuel-Fired Electric Generating Plants

On May 23, 2023, EPA issued a proposed rule addressing GHG emissions from fossil fuel-fired EGUs under Section 111 of the Clean Air Act (CAA).¹ The rule, if finalized, would most significantly impact the following types of existing EGUs:

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¹ 88 Fed. Reg. 33,240 (May 23, 2023).

- *Existing Natural Gas-Fired Combustion Turbines.* For large, frequently used existing fossil fuel-fired stationary combustion turbines, the rule would require the use of CCS by January 1, 2035, or co-firing 30% low-GHG hydrogen by January 1, 2032, with an increase to 96% low-GHG hydrogen co-firing by January 1, 2038. EPA proposes to define the universe of covered fossil fuel-fired stationary combustion turbines as those as having an electric capacity greater than 300 MW and a capacity factor of greater than 50%, which primarily applies to existing natural gas-fired combustion turbines.
- *Existing Coal-Fired Steam Generating Units.* The rule would subcategorize existing coal-fired EGUs by their planned retirement date: imminent-term; near-term; medium-term; and long-term. The rule would not impose any emission reduction requirements on coal-fired EGUs in the imminent-term subcategory – units that commit to retire by January 1, 2032. Coal-fired EGUs in the near-term subcategory – those that continue operating past December 31, 2031, but commit to retire by January 1, 2035 – would be subject to a 20% annual capacity factor limit. Coal-fired EGUs in both of those subcategories would be subject to GHG standards equivalent to their baseline rate, Coal-fired EGUs in the medium-term subcategory – those units that continue to operate past December 31, 2034, but would retire by January 1, 2040 – would be required to meet a GHG emission limit based on co-firing 40% natural gas beginning January 1, 2030, while coal-fired EGUs in the long-term subcategory-those that do not commit to retirement by January 1, 2040 – would be subject to a GHG emission limit based on 90% CO₂ capture via CCS beginning January 1, 2030.
- *Other Existing Fossil Fuel-Fired Steam Generating Units.* The rule would not impose GHG emission reduction requirements on other existing fossil fuel-fired steam generating units but they would be subject to unit-specific standards based on routine methods of operation and maintenance.

The rule also would impact new and reconstructed fossil fuel-fired stationary combustion turbines. The proposed rule would subcategorize these turbines by load level (low, intermediate, and base) and would most significantly impact turbines in the following subcategories:

- *Intermediate-Load Subcategory.* The rule would impose requirements across two phases. During Phase 1, intermediate-load turbines would be required to achieve an emission limit based on highly efficient generation. During Phase 2, intermediate-load turbines would be

required to co-fire 30% low-GHG hydrogen beginning January 1, 2032.

- *Base-Load Subcategory.* The rule would similarly impose requirements across multiple phases. During Phase 1, base-load turbines would be required to achieve an emission limit based on highly efficient generation. During Phase 2, either 90% CO₂ capture via CCS beginning January 1, 2035, or 30% low-GHG hydrogen co-firing beginning January 1, 2032, would be required. Stationary combustion turbines on the co-firing pathway also would be subject to a Phase 3 – co-firing 90% low-GHG hydrogen beginning January 1, 2038.

Hazardous Air Pollutants from Fossil Fuel-Fired Power Plants

On April 24, 2023, EPA issued a proposed rule to revise the National Emission Standards for Hazardous Air Pollutants for coal- and oil-fired electric generating units – also known as the Mercury and Air Toxics Standards (MATS).² The rule, if finalized, would impact coal-fired EGUs by lowering the emission limit for filterable particulate matter (fPM), which serves as a surrogate for non-mercury (non-Hg) hazardous air pollutant (HAP) metals, from 0.02 lb/MMBtu to 0.01 lb/MMBtu, as well as require the use of a PM continuous emission monitoring system (CEMs) to demonstrate compliance with the fPM limit. The rule also would lower the Hg emission limit from 4.0 lb/TBtu to 1.2 lb/TBtu for lignite-fired EGUs. These EGUs would be required to comply with the revised limits no later than three years after the effective date of the final rule – March 2027, if EPA issues the final rule by March 2024 as intended.

Good Neighbor Plan

On June 5, 2023, EPA published a final Federal Implementation Plan (FIP) addressing interstate transport for the 2015 ozone national ambient air quality standards (NAAQS), dubbed the “Good Neighbor Plan” by EPA.³ The Good Neighbor Plan revised the Cross-State Air Pollution Rule’s (CSAPR) Group 3 ozone season nitrogen oxide (NO_x) trading program for EGUs in 22 states, starting on August 4, 2023,⁴ including three states that were not previously part of any CSAPR ozone season trading program.

States subject to the Good Neighbor Plan are now subject to new and generally more stringent ozone season NO_x budgets reflecting EPA’s identified

² 88 Fed. Reg. 24,854 (Apr. 24, 2023).

³ See Federal “Good Neighbor Plan” for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023).

⁴ Due to judicial stays of several states’ interstate transport State Implementation Plan disapprovals, a necessary prerequisite before EPA can implement a FIP, the Good Neighbor Plan will not go into effect for some of the states included in the rule.

EGU control stringency of optimization of all existing post-combustion controls by the 2023 ozone season, the installation of state-of-the-art NOx combustion controls by the 2024 ozone season, and the addition of new post-combustion controls by 2026 and 2027.

The Good Neighbor FIP also makes several new “enhancements” to the revised Group 3 ozone season trading program, including the annual recalibration of NOx allowances starting in 2024 and the imposition of a daily backstop NOx emissions rate for coal-fired EGUs greater than or equal to 100 MW by the 2024 ozone season for units with existing post-combustion controls or by the 2030 ozone season for units without post-combustion controls, and would implement a dynamic NOx budget in each affected Group 3 state starting in 2030.

Proposed Revisions to the Steam Electric Power Generating Effluent Limitation Guidelines (ELGs)

On March 29, 2023, EPA published a proposed rule to revise and generally make more stringent the ELGs for steam electric power generators.⁵ EPA proposed zero discharge limitations for flue gas desulfurization (FGD) wastewater and bottom ash transport water (BATW), and more stringent numerical limits for direct discharges of combustion residual leachate (CRL) and discharges to groundwater that are the functional equivalent of a direct discharge under the Supreme Court’s test in *County of Maui v. Hawaii Wildlife Fund*. EPA expects to finalize the rule in April 2024.

If finalized, the proposed rule would require compliance with the new ELGs as soon as possible after the rule’s effective date but no later than December 31, 2029. Certain types of units could qualify for one or more subcategories that would exempt them from the new more stringent requirements; among other, the proposed rule would retain the existing subcategory for units committed to retiring or repowering by December 31, 2028. Likewise, the proposal would also create a new subcategory for “early adopters” of the 2015 or 2020 ELGs that plan to retire by December 31, 2032.

Coal Combustion Residuals (CCR)

Several recent CCR-related actions are and will continue to affect electric generation facilities in the coming years. On May 18, 2023, EPA published a proposed rule that would significantly expand the scope of units regulated under the federal CCR regulations (CCR Rule) to include both legacy CCR surface impoundments (inactive surface impoundments at inactive generating

⁵ See Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 88 Fed. Reg. 18,824 (Mar. 29, 2023).

facilities) as well as additional “CCR management units,” or CCRMUs, at facilities otherwise subject to federal CCR regulations.⁶ If finalized, the proposal would bring long-closed units under the scope of the CCR Rule and even potentially past beneficial uses of CCR.

EPA is expected to issue a final rule in April 2024, with the rule going into effect six months later. If finalized as proposed, owners/operators of legacy CCR surface impoundments and CCRMUs would be subject to several requirements, including groundwater monitoring, corrective action, and closure, beginning as early as late 2024.

Key Upcoming Dates

SECTION 111 GHG PROPOSAL	MATS	GOOD NEIGHBOR	CCR	STEAM ELECTRIC ELGS
<ul style="list-style-type: none"> • Expected to be finalized April 2024 • Would impose GHG emission limits on certain existing, coal-fired EGUs starting in 2030 • Would impose various CCS, hydrogen co-firing, and other requirements on coal-fired EGUs and fossil fuel-fired combustion turbines starting in 2032 for existing units 	<ul style="list-style-type: none"> • Expected to be finalized March 2024 • Compliance with revised standards requiring starting 2027 	<ul style="list-style-type: none"> • Finalized June 2023 • Annual allowance bank recalibration begins 2024 • Backstop daily emissions rate implemented for large coal-fired EGUs without post-combustion controls in 2030 • Dynamic budgeting starting in 2030 	<ul style="list-style-type: none"> • Expected to be finalized April 2024 • Would go into effect in late 2024 • Compliance with certain requirements would begin immediately upon effective date 	<ul style="list-style-type: none"> • Expected to be finalized April 2024 • Units in retirement subcategory to retire in 2028 • Outermost compliance deadline December 31, 2029 • Units in early adopter subcategory to retire in 2032

⁶ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982 (May 18, 2023) (Legacy CCR Proposal).

ENERGY OUTLOOK IMPACTS

The rulemakings discussed above strongly incentivize retirement of coal-fired generation and replacement with other types of generating sources. As discussed below, however, certain regulatory and non-regulatory constraints may impact the ability to repower coal-fired sites and, more generally, threaten the ability to obtain full replacement power for the coal-fired units that have either committed to or are now contemplating early retirement. As a result, these rulemakings bear close scrutiny not just from the electric generating industry but from other stakeholders and the broader perspective of protecting grid reliability.

Collection of Retirement Incentives

Read together, the suite of proposed and final rules targeting coal-fired units offer significant incentives for earlier retirement. On the one hand, these rules represent significant increased costs to companies to continue coal-fired generation. On the other, several of these proposed rules offer decreased short-term compliance costs for companies willing to commit to retirement of their coal-fired units in the 2028 to 2034 timeframe. For instance, coal-fired units that retire by 2030 would not be subject to NO_x emission limits under the Good Neighbor Plan based on the installation of post-combustion controls, and coal-fired units that retire by 2032 or 2034, with a capacity factor limit, would not be subject to Section 111 GHG emission reduction requirements. In contrast, units that commit to retiring or repowering by 2028 are subject to less stringent ELGs, and units that commit to retiring by 2032 and have complied with 2015 or 2020 ELGs are not subject to more stringent proposed ELGs.

Impact on Gas/Renewables

For coal-fired electric generating plants that commit to retiring, repowering those facilities with gas or renewable siting (i.e., solar or wind farms) offers compelling potential benefits.

First, the retiring plant already has much of the necessary infrastructure for a new type of source to supply electricity to the grid.

Second, for solar and wind farms that can take up significant acreage, placement on an existing electric generating plant site spares greenfield sites from development into new electric generating facilities.

In effect, repowering is a means of recycling the existing site for a new generating source.

The regulatory incentives for repowering, however, are mixed. In some instances, EPA is clear that retirement incentives also apply to facilities that are repowering. As an example, facilities can take advantage of the 2028 retirement

subcategory in the ELGs, which offers less stringent and lower cost compliance targets, if they are retiring or repowering.

Conversely, however, the proposed changes to the CCR Rule represent a potentially significant disincentive to renewable redevelopment at existing coal-fired electric generating plant sites. The current regulations provide that the CCR Rule applies to EGUs that were actively generating electricity in 2015, “regardless of the fuel currently used at the facility to produce electricity.”⁷ EPA is proposing to find that the rule extends to any active electric generating facility, even those that do not use fossil fuels.⁸ The result is that a facility could have retired in 2014 or earlier but be retroactively subject to the CCR Rule if the facility chooses to repower with wind or solar any time after 2015. As a result, companies looking to place solar or wind farms may decline to reuse existing electric generating plant sites and infrastructure.

Reliability Questions

Many companies and organizations, including electric grid operators, have raised questions about EPA’s suite of regulations and their potential to negatively impact grid reliability. PJM reported in February 2023 that “the combined requirements” for regulations coming from EPA and state agencies “and their coincident compliant periods have the potential to result in a significant amount of generation retirements within a condensed timeframe.”⁹ Going one step further in response to EPA’s proposals to deny extension requests under the CCR Rule to continue operating certain CCR impoundments – which risked possible plant shutdowns – MISO commented that:

MISO has significant concerns that substantial problems could result if all, or even some, of the 3.1 gigawatts of capacity involved . . . is lost as the direct or indirect result of EPA action. Loss of these generators will further tighten supply across the entire MISO region and could exacerbate already dangerously thin coverage of demand in certain subregions in the North and Central Regions of MISO.¹⁰

As a result of these concerns posed by grid operators and others, EPA’s proposed set of regulations targeting coal-fired generation bear close scrutiny individually, but also collectively, to assess the overall impacts and ensure

⁷ 40 C.F.R. § 257.50(c).

⁸ Legacy CCR Proposal, 88 Fed. Reg. at 31,995.

⁹ Energy Transition in PJM: Resource Retirements, Replacements, & Risks, at 7 (Feb. 24, 2023).

¹⁰ Comments of the Midcontinent Independent System Operator, Docket Nos. EPA-HQ-OLEM-2021-0588 et al., at 7-8 (Feb. 23, 2022).

sufficient replacement capacity to balance planned retirements, early retirements, and any temporary outages resulting from the regulatory onslaught.

POTENTIAL ENFORCEMENT RISKS

EPA's new regulatory activity also creates additional enforcement opportunities and emphasis, both for EPA and citizen plaintiffs, and increases companies' risk for potential allegations of non-compliance and litigation.

In a September 28, 2023 memorandum addressing EPA's Climate Enforcement and Compliance Strategy, newly-confirmed Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance David Uhlmann issued a strong directive focusing on climate-related enforcement activities: "I am directing all EPA enforcement and compliance offices to address climate change, whenever appropriate, in every matter within their jurisdiction."¹¹ Uhlmann emphasized that EPA's enforcement and compliance program is required to fairly and vigorously enforce the full array of EPA's climate rules, including, but not limited to, greenhouse gas (GHG) reporting requirements," and also stated that enforcement of new climate rules will be prioritized as well.¹² EPA's enhanced enforcement focus for climate further builds on EPA's first-time inclusion of climate change issues as part of the Agency's National Enforcement and Compliance Initiatives (NECI) for 2024-2027.¹³

EPA also has included "Protecting Communities from Coal Ash Contamination" as a new initiative under the most recent NECI.¹⁴ The Agency has stated that noncompliance with the CCR requirements under the Resource Conservation and Recovery Act appears to be "widespread," and that many utilities are not complying with the current performance standards and monitoring and testing requirements. EPA is seeking additional funding and resources for CCR enforcement and intends to focus on conducting investigations and taking enforcement action as appropriate, particularly at coal ash facilities impacting vulnerable or overburdened communities.¹⁵

¹¹ Memorandum from David M. Uhlmann, EPA, to OECA Office Directors and Deputies et al. regarding EPA's Climate Enforcement and Compliance Strategy at 1 (Sept. 28, 2023), <https://www.epa.gov/system/files/documents/2023-09/epasclimateenforcementandcompliancestrategy.pdf>

¹² *Id.* at 3.

¹³ Memorandum from David M. Uhlmann, EPA, to Regional Administrators et al. regarding FY 2024 – 2027 National Enforcement and Compliance Initiatives at 2–3 (Aug. 17, 2023), <https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf>.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

EPA's increased emphasis on CCR enforcement is creating particular challenges for facilities due to the Agency's evolving interpretations of the underlying regulatory requirements.

In the context of addressing applications (referred to as Part A and Part B applications) by specific facilities for extensions to the closure date for individual CCR impoundments, EPA relied on interpretations of certain CCR regulatory provisions, including groundwater monitoring and closure requirements, that differed from how many facilities had understood these provisions to apply. EPA's interpretations are being challenged in the D.C. Circuit.¹⁶ However, EPA appears to be advancing the same interpretations in the context of specific CCR enforcement actions against individual facilities.

In addition, these same interpretative disputes also create enhanced risk for citizen suit enforcement on CCR issues, with environmental NGOs relying on EPA's recent interpretations to assert that facilities are out of compliance with respect to groundwater monitoring and closure plans, among other issues.¹⁷

CONCLUSION

As discussed above, EPA is the middle of a substantial overhaul of the regulatory structure governing EGUs. These changes are part of a long-term push to diversify energy sources, and bear close scrutiny both by EGUs and consumers.

EGUs need to carefully assess the potential impacts of the final rulemakings and the related effects on company-wide planning, sources, and enforcement risks.

Other stakeholders should pay close attention to the potential incentives created by these proposals and their impact on energy reliability.

EPA's active participation in the energy transition will have real-world impacts for the power generation industry and consumers.

¹⁶ See *Electric Energy v. EPA*, No. 22-1056 (D.C. Cir.); *Electric Energy v. EPA*, No. 23-1035 (D.C. Cir.).

¹⁷ See *Mobile Baykeeper, Inc. v. Alabama Power Company*, No. 1:22-cv-00382-KD-B (S.D. Ala.).

Utility Share Prices Under Pressure

*By Peter K. O'Brien, Steven C. Friend, Patrick C. Jamieson and Michelle G. Chan**

In this article, the authors discuss the implications of the depressed stock prices for utility companies traded in the United States.

Table 1¹ shows the performance of the Dow Jones Utility Average, which tracks the performance of 15 prominent utility companies² traded in the United States, for 2023 to the date this article was prepared. As indicated, the index is down by approximately 17% since the index's high in January 2023.³

Table 1



Depressed stock prices have had a meaningful impact on capital markets activity – and strategic plans – for many in the industry. First and foremost, the drop in share price has put pressure on many utilities' balance sheets.⁴ The low

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¹ Courtesy <https://www.cnbc.com/quotes/.DJU>.

² The DJU is comprised of 15 publicly traded utility companies in the United States: The AES Corporation, American Electric Power Company, Inc., American Water Works Company, Inc., Atmos Energy Corporation, Consolidated Edison, Inc., Dominion Energy, Inc., Duke Energy Corporation, Edison International, Exelon Corporation, FirstEnergy Corp., Public Service Enterprise Group Incorporated, Sempra Energy and Xcel Energy Inc.

³ Good, Allison, US utilities, renewables stock selloff underscores concern over spending plans, Energy Finance Daily (Oct. 9, 2023).

⁴ While the drop in share price alone does not immediately impact an issuer's balance sheet, the decline in stock price will pressure the balance sheet going forward nonetheless.

stock price makes it more expensive to add equity to the balance sheet by selling shares into the market. At the same time, from a credit metrics perspective, a significant share price decline will also gain the attention of the ratings agencies. One important question, then, for many issuers, will be how to “manage the balance sheet” going forward.

SELLING EQUITY

With depressed share prices, utility issuers are going to be reticent to execute large equity deals in this market. With a few notable exceptions – including a ONE Gas, Inc., forward in September 2023 and a Spire Inc. forward under its ATM in June 2023 – the equity markets in the electric and gas utility space have (not surprisingly) been very quiet in 2023.

While most industry participants have existing ATMs, the question is whether such issuers will use them when stock prices are so low. Table 2 shows electric and gas utility issuers which have filed ATMs since October 1, 2020.

Table 2

Issuer	Most Recent Filing Date	Amount Registered	Forward Component
Ameren Corporation	November 10, 2022	\$1,000,199,028	Yes
American Electric Power Company, Inc.	November 6, 2020	\$1,000,000,000	Yes
Alliant Energy Corporation	December 14, 2022	\$225,000,000	No
Atmos Energy Corporation	March 31, 2023	\$1,000,000,000	Yes
Avista Corporation	August 2, 2023	4,844,787 shares	No
Black Hills Corporation	June 16, 2023	\$400,000,000	Yes
Duke Energy Corporation	November 10, 2022	\$1,500,000,000	Yes
Edison International	August 4, 2022	\$500,000,000	Yes
Entergy Corporation	August 9, 2022	\$1,116,396,318	Yes
Eversource Energy	May 11, 2022	\$1,200,000,000	No
Exelon Corporation	August 4, 2022	\$1,000,000,000	Yes
NextEra Energy Partners, LP	April 26, 2022	\$300,000,000	No

UTILITY SHARE PRICES UNDER PRESSURE

NiSource Inc.	February 22, 2021	\$750,000,000	Yes
Northwest Natural Holding Company	August 13, 2021	\$200,000,000	No
NorthWestern Corporation	April 23, 2021	\$200,000,000	Yes
PNM Resources, Inc.	November 10, 2022	\$200,000,000	Yes
PG&E Corporation	April 30, 2021	\$400,000,000	Yes
Portland General Electric Company	April 28, 2023	\$300,000,000	Yes
Spire Inc.	May 9, 2022	\$200,000,000	Yes
The Southern Company	November 5, 2021	50,000,000 shares	No
Xcel Energy Inc.	November 5, 2021	\$800,000,000	No

With respect to the ratings agencies, one way to get “equity credit” without selling equity is to issue “hybrid” securities with equity-like features. Table 3 provides examples of certain hybrid securities. The examples on the left side of the chart are more “debt like.” And on the right side of the chart, the securities are more “equity like.”

Table 3

	Convertible Debt	Junior Subordinated Debt	Perpetual Convertible Preferred	Mandatory Units	Mandatory Equity (Tangible) Units	Mandatory Convertible Preferred
Description	<ul style="list-style-type: none"> Debt security with investor option to convert into a fixed number of shares in the future 	<ul style="list-style-type: none"> Long dated subordinated debt with Company option to defer interest payments 	<ul style="list-style-type: none"> Preferred stock that the Company can force into a fixed number of shares in the future 	<ul style="list-style-type: none"> Debt security plus a forward purchase contract to issue a variable number of shares in the future (typically 3 years or less) 	<ul style="list-style-type: none"> Amortizing note plus a pre-paid forward purchase contract to issue a variable number of shares in the future (typically 3 years or less) 	<ul style="list-style-type: none"> Preferred stock that will mandatorily convert into a variable number of shares in the future (typically 3 years or less)
Rating Agency Equity Treatment ¹	<ul style="list-style-type: none"> 100% debt 	<ul style="list-style-type: none"> Moody's: 25% Likely increases to 50% as Basket M S&P: Up to 50% Fitch: Up to 50% 	<ul style="list-style-type: none"> Moody's: IG - Basket C (50%) Likely stays 50% as Basket L Non-IG - Basket E (100%) S&P: Up to 50% Fitch: Up to 50% 	<ul style="list-style-type: none"> Moody's: IG - up to Basket B (25%) Likely increased to 50% as Basket M if debt host has at least a 30 year maturity, otherwise drops to 0% as Basket L Non-IG: 0% S&P: Up to 100% (must convert within 1-2 years for Non-IG) Fitch: 0% 	<ul style="list-style-type: none"> Moody's: 80% Likely reduced under new Moody's methodology S&P: 80% Fitch: 80% 	<ul style="list-style-type: none"> Moody's: Up to Basket E (100%) Likely unchanged under new Moody's methodology S&P: Up to 100% (must convert within 1-2 years for Non-IG) Fitch: Up to 100%

1. Issuer rating could impact the amount of equity credit received. S&P's methodology also requires a maximum of 2 years to conversion for BB rated issuers and 1 year to conversion for B rated issuers. This represents the agencies' stated methodologies, but there can be variability depending on several factors, including the analyst, etc.

One trend from 2022 was convertible debt. With the recent runup in interest rates, the coupon rates on converts are lower than on plain vanilla debt because investors in the convert have exposure to equity upside. But, as indicated in Table 3, the rating agencies typically do not award any equity credit at the time of a convertible debt issuance.

Also, as noted in Table 3, Moody's has proposed an update to its hybrid methodology for investment-grade issuers in September 2023. Moody's previously maintained a "five basket" scale, attributing equity content in 25% increments from 0% to 100%. The proposed methodology at Moody's would shift to a three basket scale: Basket L (0% equity credit), Basket M (50% equity credit) and Basket H (100% equity credit). (High yield issuers will remain on a binary scale at Moody's, with only Basket L and Basket H.)

One item to note among the changes at Moody's is that junior subordinated debt would likely receive 50% equity credit at Moody's, rather than 25%

previously. This would bring Moody's in line with the other two agencies with respect to junior subordinated debt. That said, even with higher equity credit expectations from Moody's, issuers will need to also consider the higher coupons of subordinated debt (versus senior debt).

ASSET SALES

One trend in this volatile environment has been to raise proceeds through sales of minority interests as a substitute for accessing the capital markets. Several in the industry have recently explored the sale of minority interests:

- Duke Energy Corp. agreed to sell a 19.9% interest in its Duke Energy Indiana subsidiary to an affiliate of GIC Private Limited, Singapore's sovereign wealth fund;
- FirstEnergy Corp. sold a 19.9% stake in FirstEnergy Transmission, LLC (FET), the holding company for FirstEnergy's three regulated transmission subsidiaries, to Brookfield Super-Core Infrastructure Partners (Brookfield) for \$2.4 billion; and in February 2023, FirstEnergy Corp. announced that it entered into an agreement to sell an additional 30% ownership interest in FET to Brookfield;
- NiSource Inc. announced it would sell a 19.9% interest in Northern Indiana Public Service Co. to a Blackstone Infrastructure Partners affiliate; and
- Sempra Energy sold a 10% non-controlling interest in Sempra Infrastructure Partners for \$1.73 billion in cash to a subsidiary of the Abu Dhabi Investment Authority.

But the pace of these minority interest sales has slowed. Outside of the sale of "minority interests," some utilities have turned to selling certain assets in order to raise proceeds. See, for example, the recent news regarding American Electric Power Company, Inc.'s strategic review of (1) AEP Energy retail business, (2) AEP OnSite Partners, which is AEP's unregulated distributed resources business; and (3) certain non-core transmission joint ventures.

In March 2023, RWE, a German energy company, announced that it had closed its \$6.8 billion acquisition of Con Edison's clean energy businesses.

More recently, NextEra Energy, Inc. announced Florida Power & Light Company entered into a definitive agreement to sell Florida City Gas to Chesapeake Utilities Corporation. In addition, Dominion Energy has announced that it had concluded a sale process and executed three separate definitive agreements to sell Dominion's three natural gas distribution compa-

nies to Enbridge.⁵ The transactions are valued at \$14.0 billion – all cash consideration of \$9.4 billion plus the assumption of debt.⁶

And, on October 4, Duke Energy Corporation announced it had completed the sale of its commercial distributed generation portfolio to an investment fund managed by ArcLight Capital Partners, LLC.

But the above activity aside, and despite consolidation in the energy space more broadly, M&A activity in the electric and gas utilities sector may be muted given the current state of share prices.

REDUCE CAPEX

Many utilities were providing updated capex numbers at the Edison Electric Institute financial conference in Phoenix. Investor-owned North America regulated utilities (electric, gas, and water) have increased their spending exponentially over the past two decades at a compounded annual growth rate of about 9%.⁷ And S&P Global Ratings expects that the industry's capital spending for 2023 will reach a record at about \$200 billion.⁸

According to S&P Global, over half of medium-term spending from electric utilities is expected to be focused on transmission and distribution (T&D) infrastructure.⁹ Outside of T&D, spending in the renewable generation and storage segments collectively accounts for approximately 15% of expected capital investment. Some companies have indicated increased appetite for spending in this segment following last year's passage of the Inflation Reduction Act (IRA).

Recent share price pressure may be, in part, a concern about companies' abilities to attractively raise the capital needed to finance spending.¹⁰ But while one "lever" to manage the balance sheet is presumably a reduction in planned capex – for a regulated utility, capital expenditures are central to the business.

⁵ Dominion Energy, Inc., Dominion Energy Advances Business Review; Announces Agreements to Sell Gas Distribution Companies to Enbridge (Sept. 5, 2023).

⁶ *Id.*

⁷ Gosberg, Gabe, The Outlook For North American Regulated Utilities Turns Stable, S&P Global Ratings (May 15, 2023). The S&P report notes several risks confronting regulated utilities including, among others, (1) inflation risk, (2) record levels of capital spending, and (3) physical risks such as exposure to wildfires, storms, extreme temperature events and hurricanes.

⁸ *Id.*

⁹ DeLucia, Chris, North American power: Electric utility capex growth is expected to remain robust, but where is the investment going?, S&P Global Commodity Insights (July 17, 2023).

¹⁰ Good, Allison, US utilities, renewables stock selloff underscores concern over spending plans, Energy Finance Daily (Oct. 9, 2023).

A utility's rate base is essentially the company's "prudent" capital investment, as determined by the applicable regulatory authority net of accumulated depreciation.¹¹ Stated differently, it is the net asset base from which the utility provides electric, gas or water service, and upon which the utility is allowed to earn a rate of return. Thus, the rate base value is a key variable in the determination of a utility's revenue requirement. For vertically integrated electric utilities, rate base generally includes generation, transmission and distribution infrastructure.

Given the importance of future capex to a regulated utility – especially with the ongoing transition from fossil fuels to clean energy – we expect issuers will be hard pressed to downsize existing plans to any great extent.

REDUCE DIVIDEND GROWTH

Electric utilities tend to have high dividend payout ratios – often 65% or more.¹² And historically, U.S. regulated utility dividend cuts have been infrequent, only occurring¹³ during times of significant distress.¹⁴ While any reduction in dividend levels or dividend growth estimates is bound to be unpopular with investors, in some scenarios, conserving cash may be necessary to manage credit metrics at a particular level.

TAKE THE DOWNGRADE?

While a reduction in share price may not necessarily affect certain of the standard credit metrics used by the rating agencies in order to rate the issuer and its debt securities, any significant pressure on share price is nonetheless going to gain the attention of the rating agencies. After all, the share price presumably captures the market's expectations of the issuer's expected future earnings prospects.

To the extent a company's credit metrics remain under pressure, one (likely unpopular) option would be to accept that a downgrade from the ratings agencies may be in the cards. While this will surely increase a utility's borrowing costs going forward, some utilities may decide that a potential downgrade is a more palatable option than:

¹¹ Ernst, Russell, Rate Base: Understanding A Frequently Misunderstood Concept, S&P Global Market Intelligence (Mar. 3, 2017).

¹² Bary, Andrew, Utility Stocks Have Been Big Winners This Year. Why It's Time to Lighten Up, Barron's (Sept. 21, 2022).

¹³ Cox, Charlotte, US utility dividends stay the course despite pandemic, S&P Global Market Intelligence (Sept. 9, 2020).

¹⁴ Singh, Arshreet, Hawaiian Electric suspends dividend after Maui wildfires, shares fall, Reuters (Aug. 24, 2023); Kilgore, Tomi, Algonquin Power to cut dividend by 40%, provides downbeat profit outlook, MarketWatch (Jan. 12, 2023); NextEra Energy Partners (NEP) Cuts Distribution Rate, Units Drop, Yahoo Finance (Sept. 28, 2023).

- (1) Selling equity at depressed prices;
- (2) Selling off assets;
- (3) Reducing planning capital spending; or
- (4) Reducing future dividend growth.

CONCLUSION

The first nine months of 2023 were challenging for utility share prices. A historical runup in interest rates has created challenges throughout the business model, among others:

- (1) Refinancing risk and expense;
- (2) The additional costs of capital spending; and
- (3) Working with regulators to approve such higher expenses.

Likely, some difficult decisions lie ahead. And in some cases, the decision may be to choose among a series of unappealing options.

The United Kingdom Issues an Ultimatum on the Energy Charter Treaty. What's Next?

*By Louise Woods, Sophie Freelove, Simon Michau and Max Marshall**

In this article, the authors examine the fate of the Energy Charter Treaty.

The United Kingdom has announced¹ that it would review its membership of the Energy Charter Treaty (the ECT or Treaty) if there was no agreement on modernization by November 2023. (The UK has, as of December 8, not made any further announcement.) This announcement came after a second vote on modernization, previously scheduled for April 2023, was postponed. The UK and EU had been key drivers in the modernization of the ECT, which was agreed in principle (the Agreement in Principle, or AIP) in June 2022.

The proposed amendments to the ECT included:

- A “flexibility” mechanism that would allow States to phase out existing and future fossil fuel investment protections after 10 years;
- An updated list of energy materials and products to be covered by the provisions of the Treaty (such as biogas and hydrogen); and
- Amendments to certain definitions, including investor and investment and the introduction of a definition for “indirect expropriation.”

However, the modernization of the Treaty became uncertain last year following announcements from a number of EU Member States of their intentions to withdraw.

EU WITHDRAWAL UPDATE

Previously, the European Commission (EC) had targeted a coordinated, EU-wide approach to the ECT, in an attempt to use the block’s bargaining power to achieve the modernization. However, a number of EU countries indicated their intention to leave on the eve of the first planned vote on modernization. To date Denmark, Spain, Slovenia and Portugal have announced their intention to leave the ECT, with France, Germany, Poland and Luxembourg having already formally notified their withdrawal to the ECT Secretariat. France, Germany and Poland will formally withdraw in December 2023, while Luxembourg will withdraw in June 2024. Italy also previously withdrew from the ECT in 2016.

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¹ <https://www.gov.uk/government/news/uk-reviewing-membership-of-energy-treaty>.

Relatedly, in July 2023 the EC announced² its proposal for a coordinated withdrawal from the Treaty by the EU block, abandoning the AIP it had been negotiating since 2019.

OPERATION OF SUNSET CLAUSE

Despite the pending withdrawals, the Treaty's 20-year "sunset clause" means that States may still face claims for 20 years after they withdraw.

Proposed Neutralization of the Sunset Clause

However, withdrawing EU countries previously indicated their intention to "neutralize" the sunset clause. While there have been suggestions of agreements between EU Member States and other ECT signatories, it remains unclear whether any ECT signatories would agree to sign such agreements and what the effect of such agreements might be.

The Energy Charter Secretariat issued a statement³ in November 2022 setting out the high bar that would be required if parties intended to rely on Article 62(1) of the Vienna Convention on the Law of Treaties to terminate the sunset clause for a "fundamental change of circumstances." This issue will likely be tested in claims following any State's withdrawal from the ECT.

The Intra-EU Question and a Proposed Subsequent EU Agreement

Separately, EU countries will likely argue that the ECT should not apply to intra-EU disputes. The Court of Justice of the European Union (CJEU), in its well-known decisions in *Achmea* and *Komstroy*, ruled that intra-EU Investor-State arbitrations are incompatible with EU law.

In October 2022, the EC proposed⁴ a "subsequent agreement on the interpretation of the ECT" for EU Member States, which purports to confirm that the ECT and its sunset clause never applied to intra-EU relations, and as such that no claims can be brought under the ECT as between Member States (mirroring the CJEU's decision in *Komstroy*). This agreement would purport to make any intra-EU ECT dispute invalid (including existing ones provided the award had not been executed before March 6, 2018).

The proposed subsequent agreement also invited "the secretariat of ICSID and the secretariat of the SCC not to register any new intra-EU arbitration proceedings based on the ECT."

² https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en.

³ <https://www.energycharter.org/media/news/article/sunset-clause-article-47-of-the-ect-in-relation-to-article-62-of-the-vienna-convention-on-the-law/>.

⁴ <https://data.consilium.europa.eu/doc/document/ST-13227-2022-ADD-1/en/pdf>.

However, this line of argument has generally been rejected by arbitral tribunals ruling on ECT claims, as well as by the courts of States outside the EU when seized with enforcement proceedings for ECT awards.

By way of example, the recent English High Court judgment in *Infrastructure Services v. Spain* upheld the joint Luxembourgish and Dutch claimants' ICSID award against Spain under the ECT, finding that there were "no proper grounds" for setting it aside.

This notably contrasts with the 2022 decision in *Green Power v. Spain* where a Stockholm-seated arbitral tribunal, applying Swedish law (as the law of the seat) on jurisdictional issues, followed the CJEU's *Achmea* and *Komstroy* rulings on the incompatibility of EU law with intra-EU ECT disputes, and found that the ECT does not include a valid arbitration offer when applied intra-EU.

This indicates a clear distinction arising depending on whether arbitrations under the ECT are seated, or enforcement of ECT arbitral awards takes place, inside or outside the EU.

DISCUSSION: WHAT ABOUT THE UK?

Much of the discussion regarding the sunset clause arises in the context of the EU, and how Member States may purport to neutralize it as between themselves. Whether any of these methods would be successful remains unknown.

However, while arguments may arise, it is even less clear whether the UK would have any option but to see out the 20-year sunset provision. In such case, this would mean remaining bound by the terms of the ECT as it currently stands (in its unmodernized form) for much longer than might have been achieved if the modernization were to be approved.

Nevertheless, the protections available may still change in the intervening period for other reasons, as recently seen by the UK denying benefits to legal entities (without substantial business activities) owned and controlled by Russian nationals, as well as Russian investors included in the UK's sanctions list.

In light of the changing environment, careful treaty – and dispute-forum planning – will likely remain critical.

