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ENERGY CHARTER ROUNDTABLE

INVESTMENT ARBITRATION UNDER THE ENERGY CHARTER TREATY

Reflections on its role and its modernisation

Brussels, Tuesday 15 December 2015

[Energy Charter Secretariat, Boulevard de la Woluwe 56 , 1200 Brussels]

The Energy Charter Secretariat organises a Roundtable addressed to delegations with an interest in the implementation of investor state disputes settlement under the Energy Charter Treaty (ECT).

Participants are encouraged to share their experience with a view to ensure a transparent implementation under the ECT, in a way favourable to both host states and energy investors.

After an introductory update on the public available information on arbitral proceedings and awards under the ECT, the three sessions of the roundtable aims at encouraging an open discussion on:

- *[Session 1]* exploring the interest of EU Member States in a number of improvements to investor state arbitration under the ECT, including: transparency, clarifications of certain provisions such as denial of benefits, mediation/conciliation proposed by the Secretariat between 2014 and 2015 (ref. IN-123; IN-127; IN-130; IN-134);
- *[Session 2]* addressing possible implications for intra-EU investment disputes under the ECT arising from EU law, and identifying instruments to ensure a transparent and favourable investment climate to EU energy investors within the EU internal market;
- *[Session 3]* raising awareness on the ECT as a tool of EU ‘energy and climate diplomacy’ in relation to energy-related provisions in bilateral investment and trade agreements and to a possible instrument on non-discriminatory treatment in the establishment of energy investments.

Programme

9:00 – 10:30 Opening

Welcome by Urban RUSNAK, Secretary General of Energy Charter Secretariat.

Introduction by Matteo BARRA: *Update on proceedings and awards under the ECT.*

10:30 – 10:45 Coffee / Tea break

10:45 – 12:15 First Session

Roundtable discussion.

Erica STEIN: *Procedural and substantial concerns in litigating investment disputes under the ECT.*

Alejandro CARBALLO: *Introducing transparency, benefits, mediation under the ECT.*

12:15 – 13:15 Lunch Break

13:15 – 14:45 Second Session

Roundtable discussion.

Lucia RAIMANOVA: *Implications from the intra-EU BITs infringement proceedings on investment disputes under the ECT.*

Matteo BARRA: *Options for promoting a transparent and favorable climate in favour of intra-EU energy investors.*

14:45 – 15:00 Coffee / Tea break

15:00 – 16:30 Third Session

Roundtable discussion.

Nikos LAVRANOS: *Interactions between energy-related provisions in BITs and the ECT and EU law.*

Alejandro CARBALLO: *Supplementary Treaty or a new protocol on non-discriminatory treatment in the pre-establishment phase.*

Working questions for roundtable discussion

Participants are invited to present their views on the following question in a roundtable discussion.

Session 1

Ref.: IN-123; IN-127; IN-130; IN-134; IN-141; non-paper on second modernisation.

What is the difference between Art. 26 ECT and relevant ISDS provisions in your country's model BIT? Would your country be interested in 'modernising' Art. 26 ECT and to what extent?

In particular, would your country be interested in a statement under Art. 17 ECT denying benefits to companies controlled by non ECT nationals or not having substantial business in the territory of ECT countries?

To date, 16 countries signed the UNCITRAL Convention on Transparency in Treaty-based Investor – State Arbitration, among which 11 members and observers (Belgium, Canada, Finland, France, Germany, Italy, Luxembourg, Sweden, Switzerland, UK, USA). What is the position of your country on promoting transparency in investor state disputes?

What are in your experience the major concerns for the national administration to manage an investor state arbitration and or mediation? What kind of technical assistance would you welcome (training, seminar, guidelines)?

Session 2

Ref.: Factsheet on investment disputes under the ECT.

What is your country's position on relation to intra-EU investment arbitrations under the ECT?

How do you prioritise investment policy objectives and compliance with investment arbitration awards?

What instruments you propose to ensure a transparent and favourable investment climate to EU energy investors within the EU internal market?

Session 3

Ref.: IN-126; IN-136; IN-138; IN-144.

What is your country's practice in negotiating market access with third countries? In particular, does it include the protection of energy investments in the pre-establishment phase? What are your country's views on the possibility to negotiate a protocol on non-discrimination in the pre-establishment of investment?

What is your country's external energy policy? Do you see the ECT as a tool of energy diplomacy towards third countries (signatories of the International Energy Charter and beyond)? What directions would you recommend for modernisation of the ECT?

Speakers

Matteo BARRA is Investment Expert at the Energy Charter Secretariat, acting as project officer for the implementation of the Energy Charter Treaty provisions promoting international energy investments and on investment dispute settlement. His main tasks include raising awareness in relation to investor state dispute settlement, monitoring energy law and policy trends in relation to foreign investment, promoting and facilitating international cooperation on energy investment. Prior to joining the Secretariat, Matteo was an associate with the international arbitration team at a large law firm in Geneva. He acted in investment and commercial arbitrations concerning, among others, the electricity, gas and oil industry. Matteo advised and defended cases under public international law and under EU law in connection to foreign investment, expropriation, energy regulation and competition, sovereignty over natural resources, international trade and transportation, border delimitation. Matteo holds a Ph.D. in International Economic Law (Bocconi) and an LL.M. in International Energy Law and Policy (CEPMLP).

Alejandro CARBALLO (LLB with Economics, Certificate on international conflicts, LLM, European PhD in international law, Harvard Program on Negotiation) is the current Legal Counsel at the Energy Charter Secretariat. Alejandro provides legal advice to the Secretariat, the Charter Conference and its subsidiary bodies. In addition, he is in charge of the ECT dispute settlement mechanisms and the travaux préparatoires. Previously, he was a Senior Associate at Cuatrecasas, Gonçalves Pereira where he advised states and private clients on a wide range of public international law issues, including the ECT. Alejandro has been a Visiting Fellow at the University of Cambridge and lectured in Public International Law. He was a member of the Executive Council of the American Society of International Law, and participated in the working groups of UNIDROIT Principles of International Commercial Contracts and the Hague Conference Principles on Choice of Law in international contracts.

Nikos LAVRANOS is a highly experienced negotiator and policy advisor on Bilateral Investment Treaties (BITs) and expert in European law and public international law. Until August 2014 he was the Senior Trade Policy Advisor responsible for Bilateral Investment Treaties (BITs) and all other investment issues in the Dutch Ministry of Foreign Affairs and previously the Ministry of Economic Affairs. In this capacity he was the Chief Negotiator for the Netherlands and Representative of the Netherlands in the Trade Policy Committee (TPC) of the EU and in the Investment Committee (IC) of the OECD. Nikos is also Secretary-General of the European Federation for Investment Law and Arbitration (EFILA) established in Brussels. Over the past years he has advised many investors on investment law and arbitration issues.

Erica STEIN is Special Counsel – Arbitration with Dechert LLP in Brussels. Erica focuses her practice on international arbitration, including both commercial and investment matters. Named among the Who's Who of Arbitration since 2012, Erica has become a recognized expert in the field through her broad work experience in all aspects of arbitral practice. Prior to joining Dechert, Erica worked for six years at the ICC International Court of Arbitration where, as Counsel, she supervised hundreds of arbitral proceedings before arbitration panels worldwide, spanning nearly all regions and industry sectors. Thereafter, Erica worked for six years at the premier arbitration boutique in Belgium, where she acted as counsel and tribunal assistant (clerk/référéndaire) in numerous international arbitral proceedings conducted under all of the major arbitration rules. Erica has also sat as arbitrator in numerous proceedings, having acted as Chair, Sole Arbitrator or co-arbitrator in proceedings conducted under the arbitration rules of the ICC, LCIA, UNCITRAL, Belgian Centre for Arbitration and Mediation (CEPANI), German Institution for Arbitration (DIS) and Danish Institute of Arbitration. In addition to her arbitration practice, Erica has been appointed Vice President of the Standing Committee of the ICC International Centre for ADR.

Lucia RAIMANOVA, a Slovak national and a University of Vienna law graduate, is a solicitor-advocate (England & Wales) specialising in international arbitration and public international law. She is based at the London offices of Allen & Overy, but has also worked in Allen & Overy's Moscow and Hong Kong offices. She has represented both claimants and respondent States in a number of bilateral investment treaty and Energy Charter Treaty arbitrations under the ICSID and UNCITRAL arbitration rules. Her experience includes representing the Republic of Azerbaijan on the successful conclusion of two separate ICSID claims with a combined value of over USD600m. She is currently representing the Islamic Republic of Pakistan in two investment treaty claims, brought under the UNCITRAL Rules, arising from alleged regulatory interference in gas import operations at a terminal at the country's second-biggest port. Lucia regularly advises, and provides training to, Governments and corporate entities on a range of public international law and arbitration-related issues. Lucia also holds a Post Graduate Diploma in International Arbitration from the Queen Mary University, is a Member of the Chartered Institute of Arbitrators and has been recognised in Thomson Reuters SuperLawyers 2013 and 2014 as a "Rising Star".