STOCKHOLM ENERGY CHARTER TREATY FORUM

The ECT to meet the rising demand for energy investments: Removing barriers, risks and resolving disputes

On 8 February 2016, the Stockholm Chamber of Commerce (SCC) hosted the Energy Charter Forum in Stockholm. The event was jointly organised by the Stockholm Chamber of Commerce, the International Center for Settlement of Investment Disputes (ICSID), the Energy Charter Secretariat (ECS) and the Permanent Court of Arbitration (PCA). It was attended by more than 100 participants from the industry, governments, legal circles and academics.

The Forum aimed at illustrating the Energy Charter Treaty (ECT) as an effective international legal instrument to reduce barriers in the establishment of energy investments and as a risk reduction tool for the benefit of investors, financial institutions and host states. In addition, it aimed at raising awareness on amicable dispute settlement under the Energy Charter Treaty, with an initial discussion on the draft investment mediation guidelines. Furthermore, the event helped show the complementarity role of international cooperation among UNCTAD, UNSE4All, MIGA, the World Bank, the IFC and the Energy Charter, while presenting the ECT as an international legal instrument to improve domestic and international policy and legal frameworks.

The Forum was opened by Prof. Kaj Hobér, Chairman of the SCC Board together with Dr. Urban Rusnák, Secretary General of the ECS, Ms. Milanka Kostadinova, Institutional team lead of ICSID and Ms. Sarah Grimmer, Senior Legal Counsel of the PCA.

In his opening remarks, Dr. Rusnák explained the most relevant activities of the Secretariat in relation to investment promotion and protection:

(i) the Investment Climate and Market Structure (ICMS) Reports (which provide a comprehensive presentation of the existing legal framework for foreign investment in the energy sector, as well as identify potential investment opportunities),

(ii) the new flagship publication on Energy Investment Risk Assessment (which will present a comparative analysis of investment risks in the pre- and post-investment phase across all energy sectors in contracting parties, observer and outreach countries),

(iii) the analysis and preparatory work for the ground on the conditions to negotiate a new legal instrument providing the non-discriminatory treatment in the establishment of investments (addressing also less obvious and more complex non-discriminatory barriers specific to the establishment of energy investments),

(iv) the draft guide/handbook on general provisions applicable to investment agreements in the energy sector (including explanatory notes, policy options and model clauses on specific topics),

(v) the Draft Investment Mediation Guidelines to facilitate the use of amicable dispute resolution,

(vi) its facilitating role and good offices. In fact, there is an increased tendency of investors seeking the Secretariat’s facilitating role both at an early stage (through the triggering letter or even before sending it) or even after the arbitration has started. As a recognition of such useful practice, the Energy Charter Conference mandated the Secretariat to provide assistance with good offices, mediation and conciliation.
The first panel, moderated by journalist Thomas Gür, focussed on the promotion of energy investment under the ECT to meet growing energy needs. It gathered government representatives from Latin America, Africa and Asia.

Mr. Guillermo Zúñiga Martinez, Commissioner at the Mexican Energy Regulatory Commission and Vice-President of the Iberoamerican Association of Energy Regulators, explained the potential interest of the International Energy Charter for promoting energy investment in the region and also the point of view of energy regulators.

Ms. Han Wang, from the Chinese National Energy Administration, talked about Asia’s energy investment needs and its potential, as well as the complementarity and usefulness of the Energy Charter and the One Belt One Road policy (OBOR).

Dr. Morlaye Bangoura, Commissioner for Energy and Mines of ECOWAS (Economic Community of West African States) and Mr. Dan Azoumi Maman Laouali, Deputy Secretary-General of the Ministry of Energy and Petroleum of Niger, mentioned the compatibility of the ECT with the legal framework in the region and its relevance for the promotion of energy investment in Africa.

The second panel, moderated by the Chief Economist of the SCC, Andreas Hatzigeorgiou, focussed on the important topic of non-discrimination in the pre-investment phase or market access.

Mr. Markus Burgstaller, Partner at Hogan Lovells, gave an overview on the interpretation by arbitral tribunals of the pre-investment protection.

Mr. Keiji Makino, Senior Fellow at the Japan Coal Energy Center (JACOAL), focussed on the promotion of investment for highly efficient coal power generation, while Mr. Greg Kaser, Senior Project Manager of the World Nuclear Association, explained the pre-investment requirements for nuclear energy projects and the important role of the International Energy Charter for the challenge of mutual recognition of nuclear safety principles and guidelines.

Mr. Daniel Radov, Associate Director of Nera Economic Consulting, talked about governmental design of domestic and international energy investment policy.

Dr. Alejandro Carballo, the Legal Counsel of the Energy Charter Secretariat, concluded with a presentation on current trends and the work of the Secretariat concerning the principle of non-discrimination in the establishment of energy investments.

Mr. Joakim Reiter, Deputy Secretary-General of the UN Conference on Trade and Development (UNCTAD), gave a keynote speech highlighting two basic twin imperatives (one for greater investment in sustainable energy and another for higher demands on that investment), and three main broad policy lessons (there are limits to what agreements can achieve; investment agreements cannot be seen in isolation; and investment agreements must balance the rights of investors with the rights of states to regulate in a better way). Mr. Reiter had a bilateral meeting with Dr. Rusnák to consolidate the existing cooperation between UNCTAD and the ECS.
"As the only multilateral agreement providing a legal framework for energy governance and investment, the ECT can play an important role in fostering a sustainable energy future. [...]"

Last September, world leaders gathered in New York to articulate an ambitious vision: We must mobilize all available resources to eradicate poverty while decarbonizing the global economy – all within the next 15 years.

In this respect, the ECT and other investment treaties have immense potential to meet the rising demand for sustainable energy. If we incorporate lessons for policymaking derived from past experience, I’m confident that we can foster sustainable investments for our common future.”

Mr. Joakim Reiter

The third panel, moderated by Mr. David Kramer, Senior Policy Advisor International Energy Markets of the Dutch Ministry of Economic Affairs, addressed the role of the ECT in the financing of energy investments. Regrettably, Mr. Raghveer Sharma, Chief Investment Officer of the International Finance Corporation (IFC) and Mr. Roberto Echandi, Lead Specialist Investment Practice the World Bank, had to cancel their participation last minute. Nevertheless, Mrs. Shamali F De Silva, Senior Counsel at the Multilateral Investment Guarantee Agency (MIGA) and Mr. Andrew T. Clarke, General Counsel of ExxonMobil International Limited provided important input regarding the assessment of investment risks and the relevance of investment agreements (including the ECT) as risk mitigating instruments.

Finally, Dr. Matteo Barra, Investment Expert at the Energy Charter Secretariat, introduced the Secretariat’s Investment Climate and Market Structure (ICMS) Reports. He also illustrated the groundwork towards the new Energy Charter flagship publication on Energy Investment Risk Assessment which will present a comparative analysis of investment risks in the pre- and post-investment phase across all energy sectors in Contracting Parties, Observer and Outreach Countries.

The last panel, moderated by Ms. Annette Magnusson, Secretary General of the SCC Arbitration Institute, dealt with issues related to the resolution of energy investment disputes under the ECT.

Prof. Tomoko Ishikawa (University of Tsukuba, Japan) outlined the different types of remedies available to investors under the ECT and the recent arbitral practice regarding indemnities to investors.

Mr. Wolf Von Kumberg, member of the Board of Directors of the International Mediation Institute (IMI), introduced the ongoing joint efforts of the IMI, the Energy Charter Secretariat and several arbitral institutions to produce useful investment mediation guidelines.
Ms. Maribel Rodriguez, Senior Associate at Cuatrecasas, Gonçalves Pereira, gave an overview of the recent arbitral approach to the relation between EU law and the ECT, as well as the applicability of the ECT in intra-EU disputes.

Ms. Masako Takahata, General Counsel of Eurus Energy Holdings Corporation, provided the point of view of renewable energy investors regarding dispute resolution and the support for an effective mediation mechanism.

Finally, Mr. Christer Söderlund, Senior Counsel at Magnusson, addressed the potential impact of the proposed EU investment court.

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**About the Energy Charter**

The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law. It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources.

The global climate and energy objectives are to benefit from the Energy Charter’s unique framework in the areas of investment, trade and transit within the respect and protection of national sovereignty. The concepts of stability, transparency and predictability which underpin the Energy Charter Process provide the basis that investors, businesses and policy-makers need to confidently accelerate investment decisions in cleaner technologies and energy efficiency. By adopting the 2015 International Energy Charter, more than 75 countries from all continents have already expressed their commitment to create a level playing field and reinforce the rule of law. All countries across the world are invited to accede and participate in the Energy Charter integration process, which will build trust and confidence in energy businesses and therefore will help to achieve the objectives of the Paris Agreement.

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