

## Assessment and Proposals for investment disputes under the ECT

Ministers, Deputy-Ministers, Ambassadors and Government officials of the fifty four Members and thirty five Observers to the Energy Charter Conference gathered in Nicosia (Cyprus) on 5 December to discuss ‘15 Years (1998-2013) of Energy Investment Promotion and Protection under the Energy Charter Treaty.’ The event took place the day before the 24<sup>th</sup> Statutory Session of the Energy Charter Conference.

The Director of the Energy Charter Secretariat, Mr. **Steivan Defilla**, launched the discussion on how to best promote energy investments and how to increase transparency in investment dispute settlement in relation to recent trends such as the regionalisation of international investment agreements.

Secretary General Amb. **Urban Rusnák** gave a presentation which was considered by some delegates as ‘the most far-reaching, critical and open’ assessment of the last fifteen years of energy investment protection under the Energy Charter Treaty (ECT). Starting from the record of *nine new cases filed in 2013 (raising the number of known ECT cases to forty two)*, the Secretary General reviewed statistics on cases which have been concluded and on which information is available to the public. Out of sixteen awards the arbitral tribunal denied jurisdiction (including cases where the claim was found to be fraudulent) in four cases. In only a further four cases was the claimant awarded some compensation (not exceeding 30% of the claim). In the remaining eight awards either the state was not held liable (mainly due to the lack of evidence), or the claim for damages was considered premature or unfounded. Although there is no uniform practice in awarding costs, in general the awards did not follow the rule of ‘loser pays all.’

Despite some public criticism on the interference by investment arbitration on public choices, it was acknowledged that arbitral tribunals have been mindful of host state discretion in setting and implementing public policy goals. Nevertheless, arbitral tribunals did grant relief to investors when they were able to prove failure to exercise due process, unjustified non performance of obligations or unreasonable conduct of a Contracting Party. The Secretary General also referred to the growing consistency and convergence in arbitral awards on (i) the application of investment protections standards under the ECT (against indirect expropriation, legitimate expectations, most constant protection and security), (ii) the allocation of the burden of proof and (iii) the application of Art. 17 (denial of benefits).

The Secretary General examined some weaknesses in the investment protection system evidenced in the previous 15 years experience of the ECT: the lack of transparency, the lack of cooperation among Contracting Parties, and the lack of resort to conciliation as an alternative method for the resolution of investment disputes. More effective cooperation among Contracting Parties and greater transparency would benefit both investors and Contracting Parties since it will help them to have a better understanding of their rights and obligations, adopt informed public policy choices in conformity with the obligations under the ECT, and reduce the increasing number of arbitrations.

**Specific proposals**, which would benefit both investors and Contracting Parties, were put forward by the Secretary General including: (i) the incorporation of the UNCITRAL Rules on Transparency into the framework of ECT arbitrations, (ii) a forum for informal exchange of information among the Governmental Legal services of the Contracting Parties, (iii) the promotion of conciliation as an alternative dispute resolution mechanism (clarifying the possibility of the investor to resort to arbitration if conciliation fails), (iv) the clarification of some provisions of the ECT and (v) the possible establishment of a permanent tribunal for investment disputes under the ECT as an *additional* option to which the investor could resort.

These proposals were generally welcomed both by delegations and speakers. They will be the object of further discussion in 2014 within the Energy Charter Conference. Discussion will also involve the Legal Advisory Task Force (consisting of senior lawyers from energy companies and internationally recognised law firms) and the Industry Advisory Panel (which includes amongst others ENEL, Mitsubishi, BP, Botas, Dow Europe, Shell International, ACS, EDP, Kazenergy or Gazprom – CNPC has recently applied for membership).

Additionally, the Energy Charter Secretariat (ECS) is already working on some new initiatives: (i) the preparation of summaries of ECT cases, (ii) reorganising, cataloguing and making accessible the *travaux préparatoires* of the ECT, (iii) the publication of the Decisions adopted by the Energy Charter Conference since 1994, (iv) the publication of a consolidated text of the ECT (as modified by the Trade Amendment and including the technical changes to Annexes EM I, NI and EQ I approved in December 2013) and (v) a complete commentary to the ECT.

The discussion was enriched by the contributions of UNECE Executive Secretary H.E. Sven Alkalaj, UNCTAD Deputy Secretary General Dr. Petko Draganov, UNCITRAL Principal Legal Officer Mr. Timothy Lemay and OECD Senior Legal Adviser Mr. David Gaukrodger. They supported the Secretary General's proposals and referred to the complementary character of their respective activities in the domain of investor state dispute settlement.

Finally, a respected panel of academics presented materials for further reflection on recent trends of international investment agreements, regionalisation and the integration of sustainable development concerns: Mr. **Jansen Calamita**, Director of the Investment Treaty Forum (BIICL), Prof. **Koji Nishimoto** from the University of Senshu, Dr. **Stephan Schill** from the Max Planck Institut in Heidelberg, Dr. **Anatole Boute** from the University of Aberdeen, Prof. **Steffen Hindelang** from the Freie Universitaet Berlin, Prof. **Wenhua Shan** from the Xi'an Jiaotong University and Prof. **Kim Talus** from the University of Eastern Finland.

The experience of the ECT and a vision of its future will again be addressed on 7 March 2014 at the 4th Joint Conference of the ECS, ICSID and SCC, which will take place at the World Bank Conference Center in Paris

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS27>).

For any additional information, requests can be addressed to the Energy Charter Secretariat's Legal Counsel, Alejandro Carballo ([alejandro.carballo@encharter.org](mailto:alejandro.carballo@encharter.org)), or Investment Expert, Matteo Barra. ([matteo.barra@encharter.org](mailto:matteo.barra@encharter.org)).