

What's New with the Energy Charter Treaty?

Kluwer Arbitration Blog

June 13, 2015

Crina Baltag (Editor) (Stockholm University)

Please refer to this post as: Crina Baltag (Editor), 'What's New with the Energy Charter Treaty?', Kluwer Arbitration Blog, June 13 2015, <http://arbitrationblog.kluwerarbitration.com/2015/06/13/whats-new-with-the-energy-charter-treaty/>

No doubt that the last three years have been quite busy for the Energy Charter Treaty (ECT) and for the Energy Charter Conference.

The number of investor-state arbitration cases under Article 26 of the ECT doubled in this time span, going from thirty known cases to sixty-eight (as reported on the website of the Energy Charter Secretariat). Thanks to the “solar claims” against Spain and the Czech Republic. The “solar claims” relate to a series of measures taken by these states which retrospectively reduced the tariffs in the solar energy sector (the “feed-in tariffs”) and withdrew other incentives and benefits. Other states which adopted similar measures, such as Italy (already facing one “solar claim”), Romania and Bulgaria are expected to have the fate of Spain and the Czech Republic. The “solar claims” also brought an interesting development – much discussed under the provisions of the ICSID Convention -, which is the number of claimants in a single procedure. In *PV Investors v. Spain* (UNCITRAL Rules), a group of 16 investors commenced arbitration against Spain.

At the very end of 2014, rumors circulated that Italy was considering withdrawing from the ECT. Time has passed and although there is no official confirmation with the Energy Charter Secretariat, numerous sources confirm that, indeed, on 31 December 2014, Italy notified the ECT Depository (the Government of Portugal, according to Article 49 of the ECT) of its intention to withdraw from the ECT. Although there we voices claiming that such action was motivated by the potential

high number of “solar claims”, apparently, the real reason was Italy’s budgetary constraints and, in particular, the substantial contribution to the budget of the Energy Charter Secretariat of EUR 450,000 starting with 2016 (see [Law no. 190 of 23 December 2014](#)). What are the consequences of such withdrawal? It is worth mentioning here that the ECT faced a similar situation in August 2009 when Russia, at that time applying the ECT on a provisional basis, notified the Depository that it did not intend to become a Contracting Party to the ECT. In that case, the provisions of Article 45 applied. Since Italy is a Contracting Party to the ECT, the provisions of Article 47 of the ECT are relevant. Under this Article, the withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification by the Depository, i.e. 1 January 2016. Nevertheless, the provisions of the ECT shall continue to apply to investments made in Italy by investors of other Contracting Parties and to investments made by Italian investors in other Contracting Parties to the ECT for a period of twenty years as of the effect of the withdrawal (the so-called “sunset clause”). Given this provision, it is unlikely that Italy decided to leave the ECT because of the threat of the “solar claims”. (Especially since Italy also has a large number of BITs which would offer similar protection to the investments in the solar energy sector.) Perhaps the real concern following Italy’s withdrawal is the prospect that other states, in particular EU Member States, would follow Italy’s example and leave the ECT.

But looking at the bright side of the Energy Charter Treaty and Process, on 21 May 2015, over 65 states and organizations, including the EU and EURATOM, signed the International Energy Charter. The International Energy Charter is a political declaration aiming at strengthening the energy cooperation between the signatories, having as objectives (a) to facilitate the expansion of the Energy Charter Treaty and Process; (b) to modernize the European Energy Charter (which currently has sixty-six signatories) (c) to support political cooperation and early accession of observer states to the ECT etc. The International Energy Charter reflects the geopolitical realities and the challenges of the 21st century (remembering that the European Energy Charter was adopted in 1991, when, just to give an example, the renewable energies were not among the priorities of the signatories), such as the need of diversification of energy sources and routes, the role of energy trade for sustainable development, the role of the developing countries in the global energy security etc. As to the promotion and protection of investments, the International Energy Charter provides, in line with the provisions of the European Charter, that the signatories will make every effort to remove all

barriers to investment in the energy sector and provide for transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. In addition to the European Charter, the International Charter affirms the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration.

After Russia's farewell, many rushed to place the bets on the end of the ECT and of the Energy Charter Process. Even with the withdrawal of Italy from the ECT, facts show that the agenda of the Energy Charter Secretariat is busy and perhaps the best is yet to come for the ECT.