Kluwer Arbitration Blog

Interviews with Our Editors: The Energy Charter Treaty: Discussing Modernisation and Challenges with Dr. Alejandro Carballo, General Counsel, Energy Charter Treaty Secretariat

Maria Fanou (Senior Assistant Editor) · Saturday, January 4th, 2020

Alejandro, thank you for joining us on the Kluwer Arbitration Blog! We are delighted to have the opportunity to interview you at a time when the Energy Charter Treaty (ECT) and its modernisation are on the spotlight. Alejandro is the current General Counsel and Head of the Conflict Resolution Centre at the ECT Secretariat, which he joined in 2013.

1. ***Looking at the ECT statistics, we note that there has been a noticeably increasing number of ECT arbitrations since 2013. How could you explain this and do you foresee any changes in the near future?***

While there has been a structural increase in the number of cases during 2013-2016, mainly related to reforms in the renewable sector, this does not automatically mean an increase of breaches of the ECT. While many ECT cases are still pending, statistics point out that only around 40% of the final awards found a breach of the ECT and awarded damages (which only in eight cases amounted to 50% or more of the initial damages claimed).

Arbitral tribunals constituted under the ECT have confirmed that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. However, those tribunals also considered that subsequent regulatory changes should be made fairly, non-retroactively, consistently and predictably, taking into account the circumstances of the investment. The Energy Charter Conference endorsed in 2017 the best practices in regulatory reform (CCDEC2017 04) and included in 2018 the right to regulate as one of the topics for modernisation.

The 2014 conclusions of the review under Article 34(7) ECT requested to emphasise amicable investment dispute settlement, including the assistance of the Secretariat with good offices, mediation and conciliation. The Conference also asked the Secretariat to provide neutral, independent legal advice and assistance in dispute resolution. As a result, the Secretariat has been actively promoting investment mediation and established the Conflict Resolution Centre to provide such support and good offices. We have experienced an increased interest in good offices, facilitation and supported negotiation; and yes, some of the potential cases brought to our attention did not end up in arbitration.

2. ***In early November 2019, the Energy Charter Conference approved the modernisation of the ECT (mandate, procedural issues, timeline for negotiations). Furthermore, a list of approved topics has come to light as well as a set of suggested policy options. Can you share your insights on the drivers for this reform process?***

As you point out, it is a process, which started quite earlier and had a significant step with the update of the 1991 political declaration in 2015 (which records in its preamble the desire to reflect the new realities of the energy sector and to give a new impulse to enhanced regional and global cooperation).

The conclusions of the 2014 review under Article 34(7) ECT requested the Secretariat to monitor the debates on investment protection and discuss with the relevant experts which provisions of investment protection and dispute settlement could be improved and required further consideration by the Conference. However, the potential tools to be considered were Protocols or Declarations, without changing the wording of the provisions of the ECT.

In January 2017, several stakeholders (including the industry, governments, academics, UNCITRAL and UNCTAD) discussed the investment protection standards under the ECT, concluding that some particular issues could benefit from additional clarification. Later in the year, Contracting Parties and Signatories of the ECT also analysed and considered current investment policy tendencies incorporated in recent international investment agreements.

However, since the provisions of the ECT were adopted as a comprehensive package, whose coverage is not limited to investment protection (but also includes transit, trade…), discussions expanded to take into consideration all the provisions of the ECT.

After consultation with observers and the industry in 2018, the Conference approved a list of topics, which in 2019 was enriched with several suggested proposals on policy options as well as the consideration of some provisions that could be considered obsolete. The process now considers that the output could take the form not only of protocols or declarations but also of potential amendments to the ECT (or keeping the status quo for some of the topics considered).

It has been so far a fast process, driven by the Members of the Conference. As mentioned in the 2018 Bucharest Energy Charter Declaration, members will undertake every effort to reach a conclusion, reflecting the new realities of the energy sector and investment policy.

3. ***The EU has expressly referred (see e.g. the general comments of the EU as well as the Council Negotiating Directives for the Modernisation of the ECT) to the reform discussions under the auspices of UNCITRAL Working Group III (WG III). The view taken is that, if a Multilateral Investment Court (MIC) is established, this shall also apply to the ECT. Could you share your thoughts on this initiative for the establishment of a permanent court and its applicability to the ECT?***

UNCITRAL WG III had already started discussions on Investor-State Dispute Settlement reform in 2017, so the approved list of topics for modernisation did not include Article 26 of the ECT. Nevertheless, according to Article 26.2 (b) of the ECT, the investor party to a dispute may choose

to submit it for resolution under any applicable, previously agreed dispute settlement procedure. So, if a future MIC allows it, parties could agree to refer their dispute under the ECT to such MIC.

Still, the list of topics for modernisation includes some issues closely related to dispute resolution such as third-party funding, valuation of damages, transparency, frivolous claims and security for costs.

4. ***In May 2015, at a High-Level Ministerial Conference held in The Hague, the International Energy Charter was adopted and signed by 65 countries and organizations (including the EU). Four years after this development, can you share any insights with our readers in relation to the contribution of this initiative? For instance, has it engaged new countries and motivated them to cooperate in the field of energy? And, furthermore, how does this initiative relate to the current amendment process?***

Currently, 100 states and regional international organisations (several of them in Africa) have signed the political declaration, which was the first successful step of modernisation. The International Energy Charter (which similar to the ECT deals not only with investment but also with transit, trade, and environmental issues) has raised the interest in international energy cooperation and the potential usefulness of the ECT beyond Eurasia into Africa, Middle East and Latin America; and not only in relation to investment, but also for having a common international legal framework dealing with transit of energy. While international energy cooperation is quite active these days, many countries are looking for a comprehensive, multilateral legal framework to cover such cooperation (which many countries have identified in the ECT). Apart from the recent accessions of Jordan and Yemen to the ECT, there are several other countries (mainly in Africa) in the accession process. Negotiations on the International Energy Charter also showed the political interest and possibility of moving further into the modernisation of the ECT.

5. ***The CJEU rendered the landmark judgement in the intra-EU BIT case, Achmea. The case has been extensively discussed in scholarship, numerous conferences as well as in the KAB (see here). In the aftermath of the judgement, EU MSs made three separate Political Declarations on the termination of intra-EU BITs (see for a discussion in our Blog here). The apple of discord (that led to the three different texts) was the applicability of the Achmea-judgement to ECT disputes. This issue has already been raised before a number of different arbitral tribunals (see e.g. here). They all have agreed that the ECT applies inter se and there is no bearing of the Achmea judgment to ECT cases. Against this background, how challenging does the task of negotiating the modernisation of the ECT become in your opinion?***

One of the topics of modernisation is REIO (Regional Economic Integration Organization), for which some of the policy options suggested aim at clarifying the legal relationship under the ECT between the members of an REIO. Although negotiations may be challenging, we have the successful precedents of the 2015 International Energy Charter (even though it was a non-binding political declaration) and the 1998 trade-related amendments. Furthermore, the negotiation mandate was approved in November 2019 aiming to conclude negotiations expeditiously, showing a strong political will and commitment; evidence of which is the fact that the first meeting took place one month later, on 11 December 2019.

6. ***A French court recently sent a request for a preliminary reference ruling to the CJEU (the judgment was made available by GAR here) concerning the interpretation of the term "investment" under the ECT. How is the ECT Secretariat monitoring these developments?***

We are aware of such request, which relates to the annulment proceedings instituted by Moldova against the arbitral award rendered under the ECT in Paris in October 2013. We will follow any publicly available information; same as we do with other domestic proceedings challenging the validity or enforcement of an award rendered under the ECT (in particular, because sometimes domestic courts in such proceedings provide their interpretation of some articles of the ECT). We aim to provide a clear and comprehensive picture to the industry and Contracting Parties to the ECT of how its provisions are applied in practice.

7. ***In the past few years, we have witnessed an intensification of the regime clash between EU law and investor-State arbitration. In July 2019, the first case ever that the EU will be the respondent arose (here). This is the first time a REIO is found on the respondent's side. Do you foreshadow any specific challenges in relation to this development?***

Any potential challenge affects more the arbitral institutions and the REIOs themselves since we are not directly involved in arbitration cases. From our side, it may have implications only concerning our facilitation efforts and good offices.

8. ***Does the Secretariat follow the awards and their enforcement? In light of the various developments we discussed, how concerned should one be about the enforceability of ECT awards?***

As part of our responsibility, we try to monitor all cases under the ECT, from the early stages until the implementation of a decision or agreement (see chart and information on cases at energychartertreaty.org). However, there is no obligation to inform the Secretariat, so we have to rely mainly on public information and confirmation from the parties involved.

While several awards are still facing annulment proceedings (and a temporary stay of their enforcement has been granted), according to our information most final awards under the ECT have been implemented. Furthermore, we have not been approached by investors complaining of lack of compliance.

9. ***One last question. In June 2016, the Energy Charter Conference adopted a Guide on Investment Mediation. How often is mediation used as a means of dispute settlement under the ECT? Has the 2016-Guide contributed sufficiently to the promotion of mediation? Are there any future initiatives that the Secretariat is considering to enhance the use of mediation?***

Although mediation is not new, it is increasingly considered both by the industry and states as a useful additional tool to solve investment disputes. Through our consultations, we are aware of

some concerns (mainly the lack of awareness and domestic legal frameworks supporting the use of investment mediation by government officials), which we addressed with the guide on investment mediation, the training of investment mediators (after Washington DC, Paris and Hong Kong, we expect the next editions in 2020 to take place in Kazakhstan and South Africa), several seminars on investment mediation providing capacity building for government officials, and the model instrument. The latter already attracted the interest of several members and observers who sent secondees to the Secretariat to prepare its implementation.

Our approach is always practical and innovative (the Model Instrument was a runner up -highly commended- for the Financial Times Innovative Lawyers in 2019), trying to address actual problems while having in mind the need to adapt to different geographical/cultural approaches. Therefore, we had broad consultation with government officials, the IMI Task Force on Investor-State mediation, CEDR, ICSID, World Bank, UNCITRAL, UNCTAD, AALCO…

On 1 April 2019, we organised as a side event to UNCITRAL WG III (with the participation of ICSID, World Bank, UNCTAD and MIGA) a workshop on the prevention of investment disputes, which confirmed that the existing Model Instrument already contains the most relevant tools for prevention of investment disputes.

Conflict prevention, together with effective dispute management and an early, independent assessment to ascertain the best (most effective) course of action (including the possibility of solving the dispute by negotiation or mediation) are fundamental.

Thank you for your time and perspectives.

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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