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ASIL DRIG: The Future of Investor-State Dispute Settlement under the Energy Charter Treaty

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On December 11, 2020, the Dispute Resolution Interest Group ("DRIG") of the American Society of International Law ("ASIL") hosted a webinar on "The Future of Investor-State Dispute Settlement under the Energy Charter Treaty." The event featured Amaia Rivas Kortazar, André von Walter, Crina Baltag, and Yuriy Pochtovyk, and was moderated by DRIG co-chairs Simon Batifort and Diana Tsutieva. This post encapsulates key takeaways from the webinar.

An Overview of ECT Dispute Settlement: The Energy Charter Treaty ("ECT") entered into force 22 years ago, and there is now a considerable body of ECT jurisprudence. Yuriy Pochtovyk noted that the first investor-State arbitral proceeding under the ECT was registered in 2001. Given that the disputing parties are not obliged to notify the Secretariat of the existence or substance of their disputes, some decisions and awards, and the existence of some proceedings, remain confidential. Nevertheless, since 2001 the Secretariat has tracked 135 proceedings instituted under the ECT (as of December 11, 2020). The claimants in ECT cases range from major energy companies, commercial banks and investment funds, to small enterprises and individual business persons. While many cases are still pending, the Energy Charter Secretariat is aware of 67 final awards. States prevailed in half of them. In most cases resulting in an award of damages, investors were awarded less than half of the amount claimed.

Significant Issues Arising in the Interpretation of the ECT: Crina Baltag indicated that there has been some debate with respect to the definition of investment under Article 1(6) of the ECT. An interesting discussion has focused on the question of whether contract debts qualify as investments. For example, in *Energoalians v. Moldova*, the tribunal upheld its jurisdiction over contract debts. Although the decision in *Energoalians* was set aside in 2016 by the Paris Court of Appeal, which found that the acquisition of debt does not contribute to the economic development of the host State, the French Court of Cassation overturned that decision. On the other hand, the tribunal in *Energorynok v. Moldova* rejected the view that a contract debt could be an investment. An answer to this difficult issue may emerge through the ongoing modernisation process. The EU proposal for the modernisation of the ECT, for example, explicitly notes that "claims for money" within the meaning of Article 1(6)(c)

does not include claims to money that arise solely from commercial transactions.

The ECT's denial of benefits clause is another highly debated provision. Starting with the seminal case of *Plama v. Bulgaria*, the debate has centered on whether the respondent State should exercise the right to deny benefits or whether it applies automatically; when to exercise the right, how to exercise it, and what the effects are; and how to define ownership, control, and substantial business activity. Again, these issues may be clarified through the modernisation process. The EU proposal for modernisation of the ECT suggests moving the requirement of substantial business activity to the definition of investor, placing the burden of proof of showing substantial business activity on the investor.

Repeat Respondents in ECT Disputes and the Issue of Consistency: A number of States, including Spain, have been repeat respondents in ISDS cases under the ECT. Amaia Rivas Kortazar shared her experience representing Spain. She explained that one of the most difficult problems for States in arbitrating under the ECT is the lack of consistency in the findings of international tribunals. In particular, she noted that out of the 22 awards and partial decisions on the meaning of FET issued in arbitration proceedings against the Kingdom of Spain as of December 2020, no two decisions offer identical interpretations or applications of the FET standard. The difference in interpretation of the content of the FET provision has significant consequences. On the one hand, the view that FET is comprised of independent obligations tends to be more favourable to investors, detracting from the public interest of the State that would otherwise justify impacting or even undermining the investor's interests. On the other hand, interpretations that balance the investor's interests against the State's public powers tend to take into account the interests of both investors and the State.

There are three trends on the question of legitimate expectations. Under the first trend, exemplified by the *Masdar* award, the existence of a stabilization clause guarantees the freezing of the existing regime over the life of the investment. The second trend recognizes the investor's right to stability and the State's power to change its regulations, as long as those changes are not radical. This was the finding of the *Eiser*, *Novenergia*, *Antin*, *Operafund*, and *Greentech* tribunals. Finally, the third trend is reflected in the awards in *Baywa*, *RREEF*, *Stadtwerke*, and *Isolux*, which considered that the only legitimate expectation an investor should have is to obtain a reasonable rate of return, and that any investor should expect changes in the regulation so long as those changes are reasonable and proportionate. Given the divergence of decisions under the ECT, neither investors nor States are able to determine what rights are protected or to what extent a State's regulatory power is subject to scrutiny.

The Modernisation of the ECT: In 2018, the ECT Secretariat and the contracting States initiated a modernisation process. Yuriy Pochtovyk spoke about what prompted the modernisation process, what is the scope of the discussions, and where we are now in the process. In January 2017, representatives of industry, academia, governments, UNCTAD and UNCITRAL met to discuss the protection standards under the ECT and concluded that some matters could benefit from additional clarification. In 2019, the Energy Charter Conference approved a list of policy options for modernisation submitted by some of the Contracting Parties. On 6 November 2019,

the Conference established and mandated the Modernisation Group to start negotiations on the modernisation of the ECT, with a view to concluding negotiations expeditiously. Three rounds of negotiations were held virtually over the course of 2020.

The ECT and the EU: The EU has been a leading proponent of reform both at UNCITRAL Working Group III and in the ECT modernisation process. André von Walter addressed the main reforms that the EU would like to achieve with respect to the substantive provisions of the ECT. He explained that, pursuant to the negotiation directives for the ECT modernisation process, the main goal of the EU's text proposal is to bring the investment provisions of the ECT closer to the more modern approaches to investment protection and dispute settlement, similar to what has been done in the EU's latest investment agreements. The EU aims to ensure that the ECT takes into account states' right to regulate while maintaining a high level of investment protection. The EU proposals for modernisation also bring into the ECT provisions on sustainable development, including on climate change. The EU proposes to include references to international environmental and labor agreements in an effort to ensure that the ECT can be an instrument that supports the transition to clean energies and that core labour rights are respected. The EU also proposes to reform the investment dispute settlement provisions, including by ensuring full transparency of the proceedings, while the ultimate goal is to make a future multilateral investment court applicable to disputes under the ECT.

The ECT and Other Contracting States: A number of other States have made public their positions regarding desirable reforms of the ECT. Crina Baltag discussed what those positions have been and what are the main debates that are likely to emerge as the reform process continues. She noted that there is a lack of transparency in the reforms, and most of what we know comes from a paper issued by the Energy Charter Secretariat on 6 October 2019. Most Contracting States to the ECT are in favor of modernisation. The disagreement, if any, will be on the wording of the provisions. Thus far, Japan has indicated that it is not necessary to amend the ECT. Luxembourg proposed that the Contracting States and the ECT Secretariat conduct a sound impact assessment on any and all major changes that will be proposed in the modernised ECT. With respect to the MFN provision, Georgia and Turkey proposed specific wording that would prevent investors from invoking more favourable dispute resolution provisions from other treaties. Switzerland agreed with those proposals, but limited only to treaties concluded before the ECT. Finally, while there are different proposals on the definition of economic activity in the energy sector, all proposals favour the transition to a low carbon consumption society.

The ECT and Achmea: On the question of whether the reasoning in *Achmea* may be expanded to intra-EU cases under the ECT, Crina Baltag pointed out that the Advocate General in *Achmea* noted that the ECT was concluded as an ordinary multilateral agreement between Contracting Parties participating on equal footing. Some Contracting Parties in 2019 made declarations with respect to the applicability of *Achmea* to the ECT; Hungary submitted that *Achmea* does not concern the ECT, while Sweden, Finland, Luxembourg, Malta, and Slovenia declared that *Achmea* is silent on the ECT. With respect to the treatment of *Achmea* in ECT cases, it generally appears that tribunals have concluded that *Achmea* does not apply to multilateral treaties. This

was the conclusion in *Masdar v. Spain*, the first tribunal to address *Achmea* in the context of the ECT. The tribunal in *Vattenfall v. Germany* reached a similar conclusion, finding that there is no disconnection clause in the ECT that would justify the application of *Achmea*. The tribunal in *Eskosol v. Italy* had the opportunity to address the 2019 declarations, and concluded that they do not qualify as subsequent agreements regarding the interpretation of the Treaty. Notably, the Svea Court of Appeal in Sweden recently refused, for the third time, a request by Spain that it consult the CJEU before the set aside of an ECT award. André von Walter recalled the longstanding position of the EU Commission that the ECT does not apply to intra-EU disputes, which it has made known in multiple interventions before arbitral tribunals and courts. The EU expects that this view will soon be confirmed by the Court of Justice of the EU where several proceedings relating to this question are pending.

Conclusions: In closing, Crina Baltag noted that the modernisation should address specific concerns, including climate change, and to that end should include conversations with investors, NGOs, and interested members of society. André von Walter explained that there is a future for investment dispute settlement under the ECT if we can manage to find agreement on the substantive rules, including the rules for investment protection as well as sustainable development, the environment, and climate change, and if we manage to apply the result of the work on structural ISDS reform to disputes brought under the ECT.

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