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LIDW 2023: Report on the Future of Major Energy Project Crisis, Challenges, and Opportunities

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The Panel “The Future of Major Energy Projects Crises, Challenges, and Opportunities” took place on the penultimate day of the London International Disputes Week 2023 (“LIDW 2023”) on 18th May 2023 in the London office of McDermott Will & Emergy with panellist Armando Neris from McDermott Will & Emery, Lucian Ilie from Outer Temple Chambers, Stuart Amor from FTI Consulting, Professor Crina Baltag from Stockholm University and Chloe Carswell from Reed Smith.

Moderator Professor Loukas Mistelis opened the panel and noted that five topics would form the focus of the discussions.

1. Public Perception of ISDS

The first speaker, Armando Neris, noted that the public perception may be that investor-State dispute resolution (ISDS) protects the fossil fuel industry and therefore inhibits the green energy transition. Increasingly, States across Europe – including France, Spain, and Belgium – have noted their intentions to withdraw from the Energy Charter Treaty ("*ECT*"). He stressed that, however, according to the statistics published by the Secretariat of the ECT, the damages claimed concerning renewable energy far exceed those concerning fossil fuels under the ECT. Furthermore, he emphasized that the crucial point in *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. the Italian Republic* ("*Rockhopper*") is that Italy based its claim on environmental impacts. However, he noted that the necessary environmental impact assesment had already been obtained in accordance with Italian law, and that this particular example demonstrates how ISDS actually upholds the fundamental principles of state sovereignty rather than undermining them.

2. ECT Modernisation

Lucian Ilie noted that the origin of the ECT modernisation process was the European Union ("EU"), although now they want to put an end to this process. He stated that 158 cases have run since 2001. He stressed that when examining the statistics and numbers of the industries involved, most of the cases under the ECT concern renewable energies. Lucian explained that after 15 rounds of negotiations, the parties agreed to an agreement in principle on June 2022. However, the approach changed significantly between June 2022 and December, largely due to the EU's political agenda. He pointed out that because of the ECT's sunset clause in Article 47, even if states withdraw from the ECT, they will still be bound for 20 years, where the proposed modernisation of ECT offers exclusion regarding fossil fuel investments and a "phase-out" period of 10 years. Lucian noted the analogy of the Hotel California: States can check out but never leave. In terms of jurisdictional matters, he also stated that there are many discussions concerning the definition of "investor," and that the proposed clause adopted through the modernisation process provides that to be qualified as an investor, there should be substantial business activities such as employment or, for example payment of taxes. Lucian further noted that potential issues regarding enforcement may arise depending on an arbitral tribunals' approach to intra-EU disputes.In his closing remarks, he proposed that if modernization were to take place, it would lead to widespread satisfaction and significant progress.

3. Climate Change and Energy Disputes

Professor Crina Baltag stated that according to Queen Mary University of London's 2022 Energy Arbitration Survey, climate change is a key cause of international energy disputes. She also pointed out that in these past years, regulatory changes in response to climate change have been introduced at an unprecedented rate, and that this regulatory inflation is expected to accelerate in the short to medium term. She stressed that states have negative obligations to refrain from violating human rights and positive obligations to fulfil and protect human rights according to public international law. This is particularly relevant since July 2022, when the United Nations General Assembly

(UNGA) declared the right to a clean, healthy, and sustainable environment as a universal human right. Furthermore, she stated that in March 2023, the United Nations General Assembly requested the International Court of Justice (ICJ) to render an advisory opinion concerning the obligations of states under international law regarding anthropogenic climate change. She mentioned that states have two significant obligations concerning climate change: Mitigation and adaptation. Moreover, she pointed out that Chile and Colombia have also submitted a similar request to the Inter American Court of Human Rights (IACtHR) to render an advisory opinion on state's human rights obligations concerning the current climate change emergency. Additionally, three cases are pending before the European Court of Human Rights (ECtHR), where the ECtHR will be addressing the obligations of states regarding climate change with respect to the Paris Agreement. Professor Baltag further noted that in *Urgenda Foundation v. State of the Netherlands*, the Supreme Court of the Netherlands specifically stated that the rights to life and to private family imply an obligation to reduce greenhouse gas emissions. In a recent case, the German Federal Constitutional Court stated that governments also have an obligation to implement measures related to climate change in a timely manner. She emphasized that regarding the state's right to regulate, the proposed Modernisation of the ECT includes an expropriation provision stating that a measure would not be considered as expropriation if it is taken in the interest of the public and in a proportionate manner. She stressed that states are bound by both international obligations under human rights law and international investment law, specifically treaty obligations, and should equally uphold both. Lastly, she highlighted that there are conflicting approaches between countries, such as Finland inaugurating the largest nuclear power plant while Germany shuts down its nuclear power plants.

4. Political Risks and Energy Disputes

Stuart Amor stated that there are multiple forms of energy disputes, and there is also a certain degree of political risk to consider. This risk has increased since Russia invaded Ukraine. Furthermore, he noted that the energy sector is heavily regulated, and that these regulations may change rapidly giving rise to disputes. He also mentioned that joint projects may include parties from different jurisdictions, which can also contribute to the occurrence of disputes. He stressed that as companies transition to green energy, existing energy companies have started investing in this sector as well. Lastly, he mentioned that ESG factors were entirely absent 20 years ago, but now they have gained significant importance, particularly in the last 5 years, and are occasionally integrated as well.

5. The Changing Dynamics of Energy Disputes and Arbitration.

Chloe Carswell stated that the international energy industries are the largest users of international arbitration and that energy disputes are dominating caseloads of the main arbitration centres. She emphasized that the economic viability of certain projects has dramatically changed due to the influence of geopolitics. Moreover, she highlighted that according to the Queen Mary University of London's 2022 Energy Arbitration Survey, 60% of the respondents noted that easier enforcement is one the main reasons for opting for arbitration, although arbitrating energy disputes is not without its complications. She mentioned that the New York Convention provides limited grounds for challenging arbitral awards, including awards being contrary to public policy. She then

explained that there was a successful attempt to resist enforcement of an award in a Dutch court this year, where it was proved that Moldavian officials committed procedural fraud, clearly acting against public policy. When enforcing awards against shielded assets protected by state immunity, she noted that there is no international treaty regime regarding foreign state immunity, and that the application of the immunity regime is left primarily to the domestic law. Accordingly, to enforce an award against state assets, it is necessary to first identify those assets in different jurisdictions and then prove that such property is commercial rather than sovereign. She finally mentioned that the jurisdictional landscape has changed rapidly after *the Slovak Republic v. Achmea B.V.* ("*Achmea*") and the *République de Moldavie v Komstroy LLC* ("*Komstroy*") decisions, and that the EU has forbidden EU countries from voluntarily paying intra-EU awards.

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