

The Energy Charter Treaty and settlement of disputes – current challenges

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Abstract

The Energy Charter Treaty (the “ECT”) is a multilateral agreement aiming to promote energy cooperation and security. This paper focuses on the provisions of the ECT governing the protection of foreign investments and the settlement of disputes between investors and host states. In particular, this paper analyses the recent developments and challenges in the field of dispute settlement under the ECT, such as the increase in arbitrations, the withdrawal of Italy from the ECT, as well as the interplay between EU law and the ECT.

Keywords: *the Energy Charter Treaty, foreign investment protection, dispute settlement, investment arbitration, European Union law*

JEL Classification: K33, K41

1. Introduction

In recent years, energy has become a central topic of debate for the international community³. Energy efficiency⁴, increased collaboration in the field of energy⁵ and strong energy markets have been described as essential factors to achieve sustainable development and economic growth. A priority for numerous countries, development of the energy infrastructure entails complex long-term projects reliant on foreign investments⁶. In search for development opportunities,

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³ Tomasz Bąk, *Potential Impact of the Energy Charter Treaty on FDI Promotion and Protection in view of Global Trends, Energy Governance and Possible Actions towards ECT Non-Members*, Energy Charter Secretariat, Knowledge Centre 2013, p 4, available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/ECT_and_FDI.pdf, last accessed 17 November 2015.

⁴ UN Document “*The Future We Want*” endorsed by the UN Conference on Sustainable Development, June 2012, p 34, available at <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>, last accessed 17 November 2015.

⁵ G20 Leaders’ Communiqué, Brisbane G20 Leaders’ Summit, 15-16 November 2014, available at: https://g20.org/wp-content/uploads/2014/12/brisbane_g20_leaders_summit_communique1.pdf, last accessed 17 November 2015.

⁶ Félix J. Montero and Laura Ruiz, *The concepts of Investor and Investment under the ECT and the legal standing to bring arbitrations under the ECT*, Spain Arbitration Review, Wolters Kluwer España 2015, Volume 2015, Issue 23, pp. 79 – 94.

investors turn towards countries offering a stable regulatory framework and adequate measures of protection for foreign investments. The Energy Charter Treaty (the “ECT”) is a key instrument in ensuring a uniform framework of investment protection and encouraging the flow of investments in the energy sector.

Tracing its origins to the early 1990s, ECT emerged from the need for greater cooperation between Western and Eastern European countries after the end of the Cold War and the collapse of the Soviet Republic. Western European states boasted strong economies, but were poor in energy and sought access to new sources of energy; while former Soviet republics were rich in energy, but needed fresh investments to rebuild their economies and overcome political-economic divisions⁷. The sole legal instrument focused exclusively on the energy sector⁸, since its adoption in December 1994, the ECT counts among its signatories fifty-two countries, the European Union and Euratom⁹ and has acquired an ever-increasing global reach¹⁰.

The past few years brought new developments for the ECT. A notable highlight is the unprecedented number of disputes related to breaches of the investment protection standards provided under the ECT. The causes of this growth in investment arbitration under the ECT and the potential effect on future investments, in particular in the field of renewable energy, have been subject to growing scrutiny. In addition, numerous of these disputes have been brought by EU investors against EU member states. This development comes at a time when the EU Commission attempts to put an end to intra-EU disputes and has led commentators to increasingly address the interplay between EU law and ECT, in particular from the perspective of the provisions concerning dispute settlement.

A significant political debate has also surrounded the ECT. The International Energy Charter signed in May 2015 at the Ministerial Conference in The Hague reaffirmed the political support towards strengthening the authority of the ECT and facilitating its geographical expansion. Casting a shadow on the international commitment towards the ECT process, on 23 April 2015, following months of speculation, Italy formally announced its withdrawal from the ECT. This event is expected to have wide ranging ramifications, in terms of future

⁷ For a detailed description of the origins of the ECT see Thomas Roe, Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty*, Cambridge University Press, 2011, pp. 8-9. See also Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, ‘Journal of International Dispute Settlement’, Vol. I, No. 1, 2010, p. 154.

⁸ Craig S. Bamberger, *An Overview of the Energy Charter Treaty* in: Thomas Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, London, The Hague, Boston, Kluwer Law International Ltd, 1996, p. 1.

⁹ <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>, last accessed 17 November 2015.

¹⁰ Yulia Selivanova, *The Energy Charter and the International Energy Governance* in: Christoph Herrmann, Jörg Philipp, *European Yearbook of International Economic Law*, Terhechte Springer Science & Business Media, 2011, p. 309.

investments in Italy's energy market and influence on other signatory states of the ECT.

This paper attempts to provide an overview of these recent developments and their impact on the potential future evolution of the ECT. For the sake of clarity, a brief description of the main provisions governing foreign investments and dispute settlement is set forth below.

2. Protection of foreign investments and dispute settlement under the ECT

As set out in Article 2, the purpose of the ECT is to create “*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*”¹¹. The provisions governing protection of foreign investments are set out in Part III of the ECT¹² and are aimed at establishing a stable environment for investors and reducing non-commercial risks¹³.

As provided under Article 1(6)¹⁴, the notion of investment has a broad scope encompassing “*every kind of asset, owned or controlled directly or indirectly by an Investor*”, including tangible and intangible, and movable and immovable, property rights; a company or business enterprise, shares, stock, or other forms of equity participation, bonds and other debts; claims to money and claims to performance; intellectual property; returns; rights conferred by law or contract or by virtue of licences and permits. The treaty provisions further specify that a change in the form in which assets are invested does not affect their character as investments. The standards of protection afforded to investors resemble the provisions contained in other bilateral investment treaties¹⁵, guaranteeing fair and equitable treatment, constant protection and security, and most favourite nation (MFN) treatment. The ECT also enshrines a so called “umbrella clause”, requiring contracting parties to observe any obligations it has entered into with an Investor or

¹¹ <http://www.energycharter.org>, last accessed 17 November 2015.

¹² Kaj Hobér, *op. cit.*, pp. 156-162.

¹³ *Ibid.*, p. 156. See also <http://www.energycharter.org>, last accessed 17 November 2015.

¹⁴ Article 1 (6) of the ECT states in relevant part that: “*«Investment» means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

(a) *tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;*

(b) *a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;*

(c) *claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*

(d) *Intellectual Property;*

(e) *Returns;*

(f) *any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector”.*

¹⁵ For a comprehensive analysis of the investment protections afforded under the ECT see Kaj Hobér, *op. cit.*, pp 156-162.

an Investment of an Investor of any other Contracting Party; and prohibits discrimination and expropriation of investments.

In the event of a breach of such protections and guarantees, the ECT sets forth detailed provisions governing the settlement of disputes between investors and a contracting party. Pursuant to Article 26, disputes between a contracting party and an investor of another contracting party shall, if possible, be settled amicably. If amicable settlement is not possible, the investor may choose to bring its claim: (a) to the courts or administrative tribunals of the Contracting Party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) to international arbitration or conciliation.

As regards international arbitration –the preferred means of settlement of disputes –Article 26 further provides that the investor may choose to refer its dispute to: (a) the International Centre for Settlement of Investment Disputes (ICSID), (b) the International Centre for Settlement of Investment Disputes, under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (the “Additional Facility Rules”), (c) an ad hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or (d) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The choice of between these various alternatives is not without relevance, being considered to have significant implications on the evolution and outcome of the arbitration proceedings, from the perspective of the particularities of each of the institutional rules in terms of additional jurisdictional requirements, annulment proceedings, or appointment of arbitrators¹⁶.

The existence of a mechanism of settlement of disputes affording investors an effective opportunity to seek redress in the event of a breach of the investment protection provisions in the ECT has been credited with strengthening the resolve of contracting parties to the ECT to uphold their undertakings and provide a stable environment for investments¹⁷.

3. The increase of intra-EU arbitrations under the ECT

The past years saw a growth of the number of arbitrations under the ECT, which has become the most often invoked international investment agreement¹⁸. For the most part, the recent arbitrations stem from measures and reforms in the field of renewable energy and new technologies¹⁹. Numerous countries, in

¹⁶ Emmanuel Gaillard and Mark McNeill, *The Energy Charter Treaty* in: Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements A Guide To The Key Issues*, Oxford University Press, 2010, p 50.

¹⁷ <http://www.energycharter.org/what-we-do/dispute-settlement/use-of-the-dispute-settlement-mechanisms/>

¹⁸ UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2014*, Issue 2, May 2015, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf, last accessed 17 November 2015.

¹⁹ *Ibid.*

particular EU member states, considered the development of the renewable energy sector as a strategic priority, displaying numerous benefits, *inter alia* economic growth, protection of the environment, or increase of energy efficiency²⁰. The past decade saw the implementation of a wide range of measures and incentives stimulating investments in the renewable energy sector.

The 2008 global economic crisis, however, caused several countries to amend their regulatory framework and eliminate or reduce the incentives in the renewable energy sector. Criticised for undermining the confidence of foreign investors, these changes have been widely perceived as infringing the protection standards provided under the ECT and gave rise to multiple disputes.²¹ For instance, cutbacks on subsidies for renewable energy and an additional tax on revenues in Spain led to numerous investors commencing arbitration proceedings²² under the ECT. Regulatory changes in Italy regarding the elimination of incentives for photovoltaic generators had a comparable effect²³. Similarly, the Czech Republic is currently fighting claims from investors in connection with a state levy on solar energy²⁴. Following several reforms of green certificates support schemes, Romania also risks facing new investment claims.

The decisions to be rendered in the recent wave of arbitrations are expected to have a significant impact on the evolution of the ECT and energy market, including a greater awareness of the need to provide a stable regulatory framework, and a potential slow-down in investments towards development of renewable energy²⁵. The outcomes, if positive, may trigger further cases against different states that adopted similar measures, and, if negative, may dissuade investors to start further arbitrations under the ECT and look for alternative remedies.

The Arbitral Award issued on 21 January 2016 in *Charanne and Construction Investments v Kingdom of Spain*²⁶ ("*Charanne v. Spain*") marks a first decision in a series of arbitrations commenced under ECT against Spain regarding amendments to Spain's regulatory framework on renewable energy. The Arbitral Tribunal held that Spain's 2010 legislative changes to the regulatory framework on renewable energy did not breach of its obligations under the ECT. In essence, the investors argued *inter alia* that the changes in the legal framework had a "*brutal*

²⁰ Anna de Lucca, *Renewable energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom*, 23 January 2015, OGEL/TDM 3 (2015), Bocconi Legal Studies Research Paper No. 2657395, p 1, available at: <http://ssrn.com/abstract=2657395>, last accessed 17 November 2015.

²¹ *Ibid*, p 5.

²² UNCTAD, *op. cit.* (*Investor-State Dispute Settlement: Review of Developments in 2014*).

²³ Anna de Lucca, *op. cit.*, p 5.

²⁴ Sebastian Perry and Kyriaki Karadelis, *Sun Rises on Czech Energy Claims*, 19 February 2014, available at: <http://globalarbitrationreview.com/news/article/32436/sun-rises-czech-energy-claims>, last accessed 17 November 2015.

²⁵ Benoit Le Bars, *Recent Developments in International Energy Dispute Arbitration*, *Journal of International Arbitration*, Kluwer Law International; Kluwer Law International 2015, Volume 32 Issue 5, pp. 543-550.

²⁶ *Charanne B.V. Construction Investments S.A.R.L. v. The Kingdom of Spain*, arbitration no. 062/2012, Final Award issued on 21 January 2016, available at <http://www.italaw.com/cases/2082>, last accessed 20 April 2016.

economic”²⁷ impact on their activity and profitability, amounting to an indirect expropriation of their investment and to a breach of the fair and equitable treatment standard enshrined under the ECT²⁸.

The Arbitral tribunal dismissed the indirect expropriation claim, arguing that “[f]or a measure to be considered as equivalent to an expropriation, its effects must be of such a significance that it could be considered that the investor has been deprived, in whole or in part, of its investment. A simple decrease in the value of the shares constituting the investment cannot constitute an indirect expropriation, unless the loss of value is such that it can be considered equivalent to a deprivation of property”²⁹.

The Arbitral Tribunal, by its majority, also dismissed the violation of the fair and equitable standard arguing that “there are no specific commitments adopted by Spain directed at the Claimants. Such commitments could have been made on the basis of a stabilization clause, or with any kind of statement that the State had directed to the investors, according to which the existing regulatory framework will not change”³⁰.

Furthermore, in the Arbitral Tribunal’s view, the Claimants could have “easily”³¹ foreseen the changes in the regulatory framework, the amendment of “the system of compensation applicable to photovoltaics” being left as a possibility under Spanish law.

In addition the Arbitral Tribunal held that the amendments were reasonable, proportional, and in the public interest, deeming that “it is not arbitrary, irrational or contrary to public interest for the Respondent to have implemented measures to try to limit the deficit and price increases”³². In reaching its decision, the Arbitral Tribunal considered that the Claimants failed to discharge the burden of proving the arbitrary or irrational nature of the measures³³ and confirmed the States’ entitlement to take regulatory measures, in the absence of other specific commitments³⁴.

At this juncture, the impact of the long-awaited Final Award in the *Charanne v. Spain* case on the pending arbitrations concerning renewable energy measures is uncertain. The dispute in *Charanne v. Spain* focused on the legal amendments made in 2010 which did not change the essential features of the existing legal framework on renewable energy, maintaining the profitability of the investments, even if at a reduced rate. The more significant legislative amendments targeted the renewable energy incentives framework after 2010 and form the object of different arbitrations which are not yet finalized. Furthermore, the measures adopted by States in the renewable energy area vary greatly. For instance, the

²⁷ *Charanne v. Spain*, Final Award, paras. 284; 291; 294.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 465.

³⁰ *Ibid.*, para. 490.

³¹ *Ibid.*, para. 505.

³² *Ibid.*, para. 548.

³³ *Ibid.*

³⁴ *Ibid.*, para. 548.

Czech Republic imposed a claw-back tax of 28% that only applied to investors with solar projects, while Spain and Italy adopted various regulatory and/or legislative changes regarding the subsidization of solar projects. Therefore, the outcome of the various arbitrations commenced during recent years will be highly dependent on the severity of the measures adopted by a state, and the particular claims brought by the investors.³⁵

Notably, these new arbitrations have been largely brought by EU investors against other EU member states. Over the past years, intra-EU disputes have continued to grow, reports placing the overall number to approximately sixteen per cent of all worldwide cases³⁶. In 2014 alone, half of the new intra-EU arbitrations were initiated under the ECT. This comes at a time when the EU Commission has sharpened its stance against intra-EU investment cases, which it deems incompatible with EU law following the entry into force of the Lisbon Treaty. Three Member States – the Czech Republic, Italy, and Ireland – complied with the EU Commission’s demands and voluntarily terminated their intra-EU bilateral investment treaties (“intra-EU BITs”)³⁷. Nevertheless, the resistance of other Member States to end their intra-EU BITs open the way for further uncertainty and controversy surrounding intra-EU investment disputes. Most recently, on 18 June 2015, the EU Commission commenced infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden for failure to terminate their intra-EU BITs³⁸.

Intra-EU BITs were generally concluded before the enlargements from 2004, 2007 and 2013, aiming to encourage investments in former communist countries, which at that time were not yet members of the EU. The Commission is of the view that intra-EU BITs are outdated, all member states being currently subject to the rules applicable in the single market, including from the perspective of protection of foreign investments. Furthermore, by affording additional rights only to investors from certain EU member states, the Commission considers intra-EU BITs as incompatible with EU Law, in particular as regards prohibition of discrimination on the basis of nationality. The Commission’s efforts to curtail intra-EU arbitrations intensified in the wake of recent investment arbitrations addressing the interplay between EU law and international investment law. For instance, in announcing its decision to launch infringement proceedings, the Commission recalled also the Arbitral Award rendered by an ICSID Arbitral

³⁵ Daniel Behn, *Spain Wins First PV Solar Arbitration: A Word of Caution in Using this Case to Predict Outcome in the more than Three Dozen Cases to Come*, published on 27 January 2016, available at: <http://www.jus.uio.no/pluricourts/english/blog/daniel-friedrich-behn/2016-01-26-arbitration-spain.html>, last accessed 20 April 2016.

³⁶ UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2014*, Issue 2, May 2015, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf, last accessed at 17 November 2015.

³⁷ Tania S.L. Voon; Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (February 21, 2016). ICSID Review, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2735974>, last accessed 20 April 2016.

³⁸ http://europa.eu/rapid/press-release_IP-15-5198_en.htm#_ftnref1, last accessed 20 April 2016.

Tribunal in the case of *Micula v Romania*³⁹ at the end of 2013, ordering Romania to pay damages to a Swedish investor based on a breach of the Romania-Sweden BIT. In the Commission's view, compliance with the Arbitral Award would essentially circumscribe to incompatible aid, subject to the EU rules on state aid⁴⁰.

While unlike the BITs concluded between the EU member states, it includes the EU among its signatories, the ECT has also been affected by the debate surrounding intra-EU disputes⁴¹. The ECT does not contain express provisions or restrictions as regards its applicability intra-EU member states⁴² and reports have emerged that, similar to the case of disputes brought under intra-EU BITs, the Commission views intra-EU arbitrations based on the ECT as incompatible with EU law⁴³. At this juncture, the Commission faces legal and political obstacles in preventing intra-EU arbitrations under the ECT. However, while no impediments currently exist, the future of intra-EU disputes under the ECT is not certain. Possible courses of action debated by commentators include a carve-out under the ECT, or a separate agreement between the member states excluding intra-EU disputes from the scope of the dispute settlement provisions in the ECT⁴⁴. Considering the numerous political ramifications it entails, such an agreement may be difficult to be reached and risks undermining the confidence of other ECT contracting parties, outside of the EU⁴⁵, in the effectiveness of the dispute settlement provisions.

4. What does the future hold for the ECT?

In the past year, much has been speculated about the role and evolution of the ECT. The adoption of the International Energy Charter in May 2015 counts among the most relevant developments. Aimed at strengthening energy cooperation, the International Energy Charter highlights the energy challenges of the 21st century, such as the need to promote access to modern energy services, energy poverty reduction, clean technology and capacity building, or the need for diversification of energy sources and routes⁴⁶. Among the core principles for

³⁹ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20.

⁴⁰ Letter of the European Commission, Directorate-General for Competition, C(2014) 6848, 1 October 2014, available at: http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf, last accessed 17 November 2015.

⁴¹ Jan Kleinheisterkamp, *The Next 10 Year ECT Investment Arbitration*, LSE Law, Society and Economy Working Papers 7/2011, p 3, available at: <http://ssrn.com/abstract=1888201>, last accessed 17 November 2015.

⁴² *Ibid*, p 14.

⁴³ Iana Dreyer, *Brussels Moves Against Bilateral Investment Treaties Within EU, Undermines Energy Charter*, available at: <http://www.energypost.eu/brussels-moves-intra-eu-investor-state-arbitration-puts-pressure-energy-charter/>, last accessed at 17 November 2015.

⁴⁴ Jan Kleinheisterkamp, *op. cit.*, p 15.

⁴⁵ Iana Dreyer, *op. cit.*

⁴⁶ International Energy Charter, p 9, available at: <http://www.energycharter.org>, last accessed 17 November 2015.

international cooperation in the energy sector, the International Energy Charter includes the facilitation of the expansion of the geographic scope of the Energy Charter Treaty and Process and the support of early accession of observer countries to the ECT⁴⁷.

The International Energy Charter also addresses the promotion and protection of investments, providing that the signatories will make every effort to remove all barriers to investment in the energy sector and provide for a stable, transparent legal framework for foreign investments. The International Energy Charter further reaffirms the importance of full access to adequate dispute settlement mechanisms, among which national mechanisms and international arbitration⁴⁸.

The growing international commitment to the expansion of the ECT has been affected by the announcement of Italy's withdrawal from the ECT⁴⁹. The reasons behind this decision were subject to considerable speculation. While official reports attributed it to budget constraints, indicating that Italy was unwilling to shoulder its contribution to the ECT estimated at approximately EUR 450,000⁵⁰, some voices have linked it with the recent wave of ECT arbitrations⁵¹.

Regardless of the reason, Italy's exit is not expected to have immediate detrimental effects on the protection of foreign investment. Pursuant to Article 47 of the ECT, withdrawal of a contracting party from the ECT takes effect upon the expiry of one year after receipt of the notification. Furthermore, the provisions of the ECT shall continue to apply to investments made before this date for a subsequent period of 20 years. The use of "sunset" clauses is widespread in investment protection treaties in order to safeguard investors in the event of any sudden change of the investment climate, given the long timespan in which an investment may begin to generate profits⁵². The ECT contains a similar form of survival clause regarding termination of provisional application.⁵³

⁴⁷ *Ibid*, p 8.

⁴⁸ *Ibid*, p 14.

⁴⁹ Italy withdrew from the Energy Charter Treaty by a notice given on 31 December 2014, with effect from 1 January 2016, pursuant to Article 47(2) of the ECT and subject to the 20 year survival period under Article 47(3). See <http://www.energycharter.org/who-we-are/members-observers/countries/italy/>, last accessed 20 April 2016.

⁵⁰ Anna de Lucca, *op. cit.*, p 9.

⁵¹ Kyriaki Karadelis, *Italy to quit Energy Charter Treaty*, 23 April 2015, available at: <http://globalarbitrationreview.com/news/article/33745/italy-quit-energy-charter-treaty/> See, last accessed 17 November 2015.

⁵² Voon, Tania S.L. and Mitchell, Andrew D., *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (February 21, 2016). ICSID Review, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2735974>, last accessed 20 April 2016.

⁵³ See for example *Yukos Universal Limited (Isle of Man) v. The Russian Federation* ("Yukos"), UNCITRAL, PCA Case No. AA 227. In the Yukos case, Russia signed the ECT without ratifying it, which entailed a provisional application of the ECT, and in 2009 gave notice under Article 45(3)(a) of its intention not to become a party to the ECT. Considering the sunset clause enshrined in Article 45(3)(b) of ECT, the Arbitral Tribunal decided that Russia was still under an obligation to afford the investment protection under Part III of the ECT to investments made before 19 October 2009 for 20 years, until 19 October 2029. It should be noted that, on 20 April 2016, the

Nevertheless, Italy's withdrawal from the ECT has been a source of recent uncertainty. In the future, investors may be unwilling to invest in the energy sector in Italy, or may attempt to restructure their investments in other jurisdictions. There have also been concerns that other countries, particularly the EU member states hit by the recent wave of renewable energy claims, will follow Italy's lead and withdraw from the ECT⁵⁴.

Another recent development regards the application of the 2013 UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration⁵⁵ (the "UNCITRAL Rules on Transparency") in future ECT disputes. The UNCITRAL Rules on Transparency mainly provide for decisions of the tribunal and submissions of the parties to be made public, hearings to be open to the public, and facilitate the submissions by a third person (*amicus curiae*) and by non-disputing State parties to the Treaty (*intervention*), while providing also for several exceptions to transparency relating to confidential or protected information and the integrity of the arbitral process.

The UNCITRAL Rules on Transparency will apply "to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise", and, as regards arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, the Transparency Rules will apply only when "a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or (b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application."

Considering these limitations and the high number of existing investment protection treaties concluded before 1 April 2014, including also the ECT, a further step was needed in order to extend the application of the UNCITRAL Transparency Rules, specifically the adoption of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the "Mauritius Convention on Transparency")⁵⁶, by means of which States express

Hague District Court rendered its decision setting aside the Arbitral Award in the *Yukos* Case on the ground that Russia was not bound by the provisional application of Article 26 of the ECT, and therefore the arbitral tribunal was not competent to hear the dispute since there was no valid arbitration agreement. The Court deemed that during the provisional application of ECT Russia was only bound by treaty provisions reconcilable with Russian law, specifically the 1993 Russian Convention.

⁵⁴ Crina Baltag, *What's New with the Energy Charter Treaty?*, 13 June 2015, available at: <http://kluwerarbitrationblog.com/2015/06/13/whats-new-with-the-energy-charter-treaty/>, last accessed 17 November 2015 .

⁵⁵ UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration were adopted on 10 July 2013 and became effective on 1 April 2014, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html, last accessed 20 April 2016.

⁵⁶ The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was adopted by the United Nations General Assembly on 10 December 2014 and opened for signature in Port Louis, Mauritius, on 17 March 2015, and thereafter at the United Nations Headquarters in

their consent to apply the UNCITRAL Rules on Transparency to investment treaties concluded before 1 April 2014, irrespective whether the arbitration is initiated under the UNCITRAL Arbitration Rules or not. Article 2 of the Mauritius Convention on Transparency provides that “[t]he *UNCITRAL Rules on Transparency shall apply to any investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a relevant reservation under article 3(1)(a) or (b), and the claimant is of a State that is a Party that has not made a relevant reservation under article 3(1)(a)*”⁵⁷.

The Mauritius Convention on Transparency permits both States and regional economic integration organizations to adhere to it, therefore opening the way for the European Union itself to be a party to it in respect of the ECT in order to extend the scope of the application of the Transparency Rules to investor-State disputes under the ECT in which the European Union is a respondent and the claimant is a non-EU State that has not excluded the application of the convention to disputes arising under the ECT⁵⁸.

To date, the Mauritius Convention on Transparency counts 16 signatory countries, two more ratifications, acceptances, approvals or accessions being required to come into force⁵⁹. The adoption of the Mauritius Convention on Transparency is expected to facilitate collecting statistics on non-ICSID arbitrations, and it will increase predictability, systemic coherence, and improve public perceptions on investment arbitration⁶⁰.

5. Conclusions

Viewed collectively, the recent developments reveal certain ambivalence with regard to the role of the ECT. On the one hand, awareness of the ECT has grown significantly, on an international level, numerous countries pledging their political support for the future expansion of the ECT and the observance of its principles. Similarly, numerous arbitrations have been brought under the ECT, more claims being expected in the near future. On the other hand, the ongoing debate surrounding the fate of intra-EU arbitrations and Italy’s withdrawal

New York. The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.

⁵⁷ See http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html, last accessed 20 April 2016.

⁵⁸ Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the United Nations Convention on transparency in treaty-based investor-State arbitration /* COM/2015/021 final - 2015/0013 (NLE) */ available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0021>, last accessed 20 April 2016. European Commission Press release: http://europa.eu/rapid/press-release_MEMO-15-3882_en.htm.

⁵⁹ United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en, last accessed 20 April 2016.

⁶⁰ Esme Shirlow, *A Step toward Greater Transparency: The UN Transparency Convention*, published on 30 March 2015, available at <http://kluwerarbitrationblog.com/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/>, last accessed 20 April 2016.

expected to become effective at the beginning of 2016 gave rise to uncertainty among investors and questions as regards the future of the ECT.

The Arbitral Awards that shall be rendered in the numerous ongoing arbitrations under the ECT are expected to provide valuable interpretations and have a significant impact on the energy sector, increasing the awareness of Governments of the need to carefully assess regulatory reforms and strategies, particularly with regard to renewable energy, mindful of the guarantees and protections granted to foreign direct investments.

In addition, much will hang on the manner in which the matter of intra-EU disputes shall be resolved. In light of the Commission's recent focus on investment disputes, the subject of intra-EU arbitrations under the ECT is expected to intensify in the near future. The ECT is the key instrument ensuring a stable and transparent environment to EU energy investors within the EU energy market and the access to the mechanisms of settlement of disputes shall have a significant impact on the development of the energy sector.

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