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Future legal Implications of the International Energy Charter

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Outline of Presentation

- The legal significance of the Energy Charter Treaty
- Investor protection under the TFEU
- The added value of the International Energy Charter
- Next steps – realising the goals: possible implications for the ECT?

The legal significance of the Energy Charter Treaty

- The ECT 1994 is a unique multilateral international energy treaty
- Cf Regional Energy Treaties: ECSC Treaty (extant)
Euratom and the TFEU
- Cf the Energy Community Treaty (EnCT) -> more limited
in aim and scope

The legal significance of the ECT

- The ECT as a major innovation in 1994
- Main principles:
 - Efficient functioning of energy markets, energy trade and energy transit, investment protection and arbitration
 - Protocol on energy efficiency and related environment aspects
- Concrete dispute rules on transit and investor protection

Legal significance of the ECT – current issues

- Dispute settlement – investor state dispute settlement (ISDS) - effective but also contentious
- More than 43 investment cases under ECT (including 7 against Spain)
- [Note Australia and Norway did not ratify the ECT inter alia due to reluctance to allow ISDS/ bypass of national courts/tribunals]

Legal significance of the ECT

- ECT and EU energy law (esp Third Package of 2007) are distinct legal instruments:
- For example - ECT Transit provisions :
- freedom of transit should be maintained by transit country even in case of dispute with another ECT contracting party

- TEP 2007 -> Third party access - TPA for networks
- ECT v TFEU: Distinct rules on investor protection?

Investor Protection under EU law

- Tribunal in Eureka: *“EU law does not provide substantive rights for investors that extend as far as those provided by the BIT...”*
- Tribunal in Eastern Sugar: *“Free movement of capital and protection of investment are different, but complementary things.”*

The view of the Commission re TFEU v BITs

- **Market access**
- *EU law opens markets to a very high degree*
- **National treatment**
- *Non-discrimination on grounds of nationality is a guiding EU principle*
- **Fair treatment**
- *Extensive jurisprudence on legitimate expectations, state liability, legal certainty, proportionality, due process*
- **Expropriation**
- *Art 17 Charter of Fundamental Rights - Scope?*
- **Dispute settlement**
- *TEU requires MS to provide for sufficient legal remedies*

The EU and the ECT

Tribunal in *Electrabel S.A. v Hungary*,

- *"The fact that the EC Treaty differs from ordinary international agreements is no warrant for presuming that the law it establishes is not part of, and governed by, international law. Consequently, EC law is best viewed as a subsystem of public international law, though a highly developed international legal order with several features, in particular the primacy of EC law over national law and direct effect of EC law."*

The Added Value of the IEC

- An important framework for international energy regulation and governance – providing confidence for investment and trade
- Considerable stress laid on importance of IEC to help secure IEA energy investment target of \$48 trillion up to 2035 to 'green' energy supply
- 80% of this total is needed for investment in energy supply;
- Estimated \$16 trillion needed to increase production capacity (large share for RES production)

Chair's Summary: Ministerial Conference, 20-21 May

- *‘Promotion and protection of investments have been at heart of the ECT from the very beginning. The importance of these issues is precisely why the 1991 European Energy Charter was established and why the modernised International Energy Charter has been adopted and signed at the ministerial conference by countries from five continents’.*

Concluding document: Investor protection

- See also Title II (implementation): joint and co-ordinated action inter alia on promotion and protection of investments in all energy sectors -
Item 4: Signatories
- a) *‘affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes’*
- b) *“affirm the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration .. in relevant BITs etc*

Next Steps – Realising the Goals

- IEC is a declaration of political intention - no legally binding obligations or financial commitment on part of Signatories;
- Signing of IEC may encourage more countries to accede to ECT/participate as observers at EC Conference (only signatories will be admitted as observers in the future)
- IEC will also support the modernisation of the Energy Charter Process
- Signatories of the ECC/ECT can re-assess engagement with the ECT in light of modernisation agenda and ‘benefit from application of common principles .. In view of an enhanced investment climate in target countries for their FDI”

A key question – the EU’s approach to modernisation and ISDS

- Will the EU push for the ECT to be modified in line with other EU-level trade agreements such as the CETA?
- CETA represents ‘a significant break with the past’ , at two different levels’:
 - 1) Clearer and more precise investment protection standards, i.e. the rules, as set out in CETA, that arbitration tribunals will apply;
 - 2) New and clearer rules on the conduct of procedures in arbitration tribunals

Questions?

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