CHAPTER 16

Dispute Resolution under the Energy Charter Treaty

Alejandro Carballo

1 Introduction

The Energy Charter Treaty (ECT), as a multilateral treaty addressing primarily investment and trade matters—in addition to transit, competition and other concerns in relation to the energy sector—, needed strong dispute resolution provisions in order to strengthen its implementation. In fact, at the time when the Treaty was negotiated, there were concerns about the neutrality and effective functioning of the domestic juridical systems of some member countries/signatories—in particular countries in transition—. By providing alternative means of dispute resolution outside domestic courts, the ECT increased confidence of investors and traders, thereby promoting investment and trade flows between members.

The ECT contains several dispute resolution mechanisms, each one of which is designed to address in a tailor-made fashion a particular subject matter or aspect of the Treaty. This shows the importance and unique role of the dispute settlement provisions. These dispute resolution mechanisms may be divided into two main groups:

(i) Dispute resolution between Contracting Parties (Article 27 of the ECT)—with the exception (Articles 6.7, 27.2 and 28 of the ECT) of competition disputes (Article 6 of the ECT), environmental disputes (Article 19 of the ECT), trade disputes (Article 29 and Annex D of the ECT) and trade-related investment matters (Article 5 of the ECT). There is an additional conciliation mechanism for transit disputes (Article 7.7 of the ECT).

(ii) Dispute resolution between an investor and a Contracting Party (Article 26 of the ECT).

The starting point for all these mechanisms is the desirability of an amicable agreement between the parties to any dispute. However, in the event that this does not prove possible, then the Treaty opens a number of additional avenues to solve the dispute.
2 Disputes between the Contracting Parties to the Energy Charter Treaty

2.1 Arbitration between Contracting Parties (Article 27 ECT)

According to Article 27 of the ECT, disputes concerning the application or interpretation of the Treaty, if not settled through diplomatic channels within a reasonable time and unless otherwise agreed in writing by the Contracting Parties, can be submitted by either Contracting Party to the dispute to an ad hoc tribunal. The Secretariat knows of one case in which a member state invoked Article 27 of the Treaty, though the dispute was settled through diplomatic channels.

In comparison with investment disputes with an investor under Article 26 of the ECT, the scope of inter-state disputes is wider. Nevertheless, pursuant to Articles 27.2 and 28 of the ECT, the ad hoc international arbitration is not available in the following cases:

- Application or interpretation of competition and environmental issues (Articles 6 and 19 of the ECT);
- Observance of obligations under an individual investment contract (last sentence of Article 10.1 of the ECT) against states listed in Annex IA;
- Application or interpretation of trade-related matters (Article 29 of the ECT) or trade-related investment matters (Article 5 of the ECT) unless both parties to the dispute agree otherwise.

Since the first official draft in September 1991, negotiators opted for international arbitration—by way of a reference to the Hague Convention for the Pacific Settlement of International Disputes as revised in 1907—instead of the jurisdiction of the International Court of Justice (ICJ). It was mentioned as an explanation that ‘the Hague Convention was chosen due to its wide acceptance, its well understood and travelled procedures, and its considerable practice in handling international disputes of the type which may be engendered by the Basic Protocol’. Soon after, the US suggested to change it for the ‘more modern’ UNCITRAL rules (adaptable to state-state disputes) or, alternatively, ICSID.

Article 27 of the ECT contains detailed provisions on the establishment of such ad hoc tribunal. It ensures the establishment of the tribunal—which, unless otherwise agreed, shall sit in The Hague and use the premises and facilities

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1 Australia, Canada, Hungary and Norway.
2 BP 2, of 11 September 1991. In the very first working document, August 1991, the ICJ is only mentioned in order to appoint arbitrators.