Depoliticization of International Dispute Settlement


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"[T]he treaty is one link in a long chain of efforts to create an international investment and trade regime, starting with the aborted Havana Charter of the late 1940s …"

Thomas Wälde1

"[T]reaty corresponds to contract in domestic law: one does not think of it as law emanating from a vertical government in domestic law but instead as 'private' promises that the law will enforce."

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I. INTRODUCTION

The Energy Charter Treaty (ECT) is a unique legally binding instrument, limited in scope to the energy sector, which establishes multilateral legal rights and obligations with respect to a broad range of international economic activities. Although the ECT covers a broad range of economic subjects, such as competition, transfer of technology and access to capital, it can be said that it has four main “pillars” that are the focus of the current activity of the Energy Charter process, namely: investment, trade, transit and energy efficiency and related environmental aspects. Investment, trade and transit, in particular, have their respective dispute settlement mechanisms—tailor-made mechanisms, so to speak.

The World Trade Organization deals mainly with trade and has an in-house dispute settlement mechanism (the panel process). Although the close relationship between

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trade and investment policy has been recognized, the development of rules on investment alongside those for trade in goods was not completed because the attempt to create an International Trade Organisation in the 1940s failed. After the Uruguay Round Negotiations of the General Agreement on Tariffs and Trade (GATT) which created the WTO, however, the WTO now also deals with the Agreement on Trade-Related Investment Measures (TRIMS), and the General Agreement on Trade in Services (GATS) addresses foreign investment in services as one of four modes of supply of services. However, it can be said that work in the WTO on investment policy issues has so far largely taken the form of specific responses to specific trade policy issues rather than a look at the broad picture.

The ECT focuses attention for the first time on the links between rules on international trade and those on investment and goes some way towards addressing them, although the obvious links have been ignored for many years for largely historical reasons. Ministers from WTO Member countries decided at the 1996 Singapore Ministerial Conference to set up a new Working Group in the WTO to examine the relationship between trade and investment but not to negotiate new rules or commitments. Although the Ministers made clear that no decision has been reached on whether there will be negotiations in the future, there is a possibility that a general multilateral legally binding framework on investment will be developed.

This article compares the dispute settlement mechanisms of the ECT and the WTO and their respective case-laws, and tries to suggest a preferable dispute settlement mechanism for a possible multilateral framework on investment.

II. OVERVIEW AND DISPUTE SETTLEMENT OF THE ECT

A. OVERVIEW OF THE ECT

The European Energy Charter of December 1991, a political commitment for East-West energy co-operation, not legally binding, has been signed by fifty-two States and the European Communities. First proposed by the then Dutch Prime Minister, Mr. Ruud Lubbers, at the June 1990 European Council in Dublin, the European Energy Charter was initially conceived as a means to further the complementary relationship in energy markets between the Union of Soviet Socialist Republics, the countries of Central and Eastern Europe and the West. After only three years of negotiation, in December 1994 the European Energy Charter was given a legally

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5 The United Nations Conference on Trade and Development (UNCTAD) is implementing a possible multilateral framework on investment; see its Website at: http://www.unctad.org/iia/index.htm.