



World Investment Forum 2014: Investing in Sustainable Development

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Your Excellency Ministers, Heads of delegations, Dear Ladies and Gentlemen,

I am very pleased to be at the International Investment Agreement conference today and to contribute to the discussion on *'the reform of investment dispute settlement'*. I will address three points: (i) the experience of investment arbitration under the Energy Charter Treaty; (ii) the proposal of the Secretary General for measures addressing key issues and improving investment dispute settlement; (iii) and finally possible cooperation between UNCTAD and the Energy Charter Secretariat for the promotion of investment as a driver both for development and for energy security.

The relevance of the Energy Charter Treaty as the only multilateral investment agreement binding 54 Contracting Parties is beyond doubt. Since the first case recorded in 2001, the Secretariat has collected public information on 58 investment arbitrations brought by investors against host states under the Energy Charter Treaty. (There was a record 16 cases initiated in 2013). Of those 58 arbitral disputes, 20 cases were concluded with a final arbitral award and 7 cases were settled by an agreement of the parties. Jurisdiction was denied in 4 cases. Only in 8 cases was the host state ordered to pay damages. As of today, 31 arbitral disputes are still pending.

Just two months ago, the final arbitral awards were published in the three investment arbitrations initiated by the former Yukos shareholders against the Russian Federation. Those arbitral cases were launched in 2005 under the Energy Charter Treaty. Three arbitrators unanimously ordered the Russian Federation to compensate the claimants in the total aggregated amount of USD 50 billion for certain measures. Those measures included tax assessments exceeding their purpose, harassment and interference with management decisions. The measures were deemed to have led to Yukos' bankruptcy and to have amounted to an unlawful expropriation of the investments. The decision proves the Energy Charter Treaty to be a powerful instrument for the protection of foreign energy investments against arbitrary discrimination from the host state.

This case vividly reminds the investment community that state measures affecting an investment may be scrutinized under the Energy Charter Treaty according to international standards of legality, non discrimination, and proportionality to the public interests involved. The power of the host state to discriminate to the detriment of foreign investments, even by means of taxation and expropriation measures, is limited. Those limits can be enforced even when the domestic courts are unable to react or to protect the investor. The decisions of the arbitral tribunal restate the relevance of the Energy Charter Treaty for the protection of energy investments.

On the other hand, the magnitude of the damages awarded, amounting to 2.5% of the Russian Federation GDP and 10% of the national budget, together with the threat to challenge the award before

the Dutch domestic courts, raise concerns regarding its enforcement. This will turn the attention to domestic courts, which will be required a special effort in seizing assets owned by the Russian Federation. As a result, we can reasonably expect a renewed questioning of the effectiveness of the investment protection system and of investment arbitration in particular.

The Secretary General made a series of proposals to the Energy Charter Conference at its meeting in 2013. There are two key proposals: the prevention and management of investment disputes, including control of costs; and the balance between the public interest of the host states and investor's rights. The Secretariat has been carefully considering how these questions might be addressed.

The Energy Charter Investment Group is currently discussing mediation and conciliation as an alternative to investment arbitration. One proposal is the establishment of an 'Energy Charter' investment ombudsman, at the domestic or at the international level, with the power to recommend to the host state measures to improve the investment climate and to act as mediator if both parties so agree. There is also a proposal being discussed to integrate transparency in to the proceedings according to the UNCITRAL Transparency Convention (expected to be opened for signature in March 2015). This may bring a substantial improvement to the system in terms of costs and of consistency.

In addition, the Energy Charter Secretariat is encouraging member states to exercise their interpretative powers to clarify some provisions of the Treaty.

The reform of investment dispute settlement within the Energy Charter is a particularly difficult challenge. The uniqueness of the Energy Charter is its multilateral framework for investment protection among 54 Contracting Parties. Creating a consensus between them for the improvement of investment protection is certainly an ambitious task.

For some time, the Energy Charter Secretariat has been paying attention to the criticisms and concerns raised by other international organisations on investment arbitration and on investment dispute settlement more in general. I am referring especially to UNCTAD and OECD. The 2013 UNCTAD IPFSD clearly identified the key issues: the increase in the number of cases, the question of legitimacy, the transparency of proceedings, the consistency of decisions and their correction, the independence of the arbitrators and the costs of the proceedings. Some countries have already started integrating measures that address these concerns.

There is sharing of experience and expertise between international organisations on the promotion and protection of cross border investment and trade. This is of benefit both for governments and for investors. In particular the Energy Charter and UNCTAD share goals for the promotion and the protection of cross border investment as a driver both to development and to energy security.

The objectives for such an enterprise should in particular aim at supporting multilateral and regional cooperation; building capacity at the governmental level; encouraging dialogue with the private sector and financial institutions; disseminating knowledge. I am convinced that a number of joint activities could be launched to reinforce and facilitate the protection of investments in a multilateral framework, and to encourage and strengthen the proposal to reform investment dispute settlement.

The experience of the multilateral investment protection among the 54 members of the Energy Charter Conference is unique. The connection that was established in 1994 by the Energy Charter Treaty between investment protection and energy security is still of relevance. Indeed this represents a successful example for regional cooperation facilitating energy investments and trade. This is open to reach out and include new countries.

Taking this opportunity I wish to say a word on the ongoing negotiations of new political declaration, which is likely to be called the International or World Energy Charter. In spring this year, the Energy Charter Conference provided a mandate to update the European Energy Charter of 1991 to take into account the requirements of potential new members. As of now there are almost 100 negotiating partners.

The International or World Energy Charter, will be in the form of a political declaration to be formally adopted and signed at a high level conference in The Hague in 2015. It is hoped that countries signing the International or World Charter will subsequently join the Energy Charter Treaty. That will be the Energy Charter's latest contribution to energy security and at a global level.

Thank you for your attention.