Arbitration Committee Meeting

Date: June 28, 2022
Time: 12:30 – 1:30 (ET)
Location: Online (Zoom)

Attendees:

Alexander Leventhal
Andrielly Ziehlsdorff
Carlos Concepcion
Catherine Bratic
Eric Wiechmann
Felipe Nazar Pagani
Helena Erickson
Hinda Rabkin
Jennifer Glasser
John Buckley
John Pinney
Judy Wang
Kevin O'Gorman
Laura DeLuca
Laura Zimmerman
Lio Bocorny
Lisa Love
Mia Levi
Michael Nolan
Orlando Federico Cabrera Colorado
Patrick Kingsley
Richard Mattiaccio
Rose Marie Wong
Surya Gopalan
Sven Volkmer
Tom Cunningham
Vanessa Alarcon Duvanel

Minutes

This was a joint meeting of CPR's Arbitration and Energy, Oil and Gas Committees.

1. Panel discussion on arbitration in the context of the energy transition

Ms. Glasser opened the meeting and introduced the panel: Vikram Balachandar (Frontier Economics); Sven Volkmer (White & Case); Wendy Miles (20 Essex). She explained that the discussion would focus on trends in disputes arising out of the energy transition.

Mr. Leventhal, Secretary of CPR's Energy, Oil and Gas Committee, provided opening remarks on the subject. He explained that the practice of arbitration has benefited significantly from energy disputes and noted that the energy sector is itself going through existential change as it transitions from fossil fuels to wind, water, solar, hydrogen, and other renewables. He noted that this transition has been rapid, led by governments (through the provision of incentives), but led also by the campaigns and votes of activist shareholders in energy companies.

Mr. Volkmer provided an overview of current and future investor-state disputes arising from the energy transition. He addressed three types of state measures that have given rise to claims by investors and may continue to do so in the future. First, measures to phase out fossil fuel production. Mr. Volkmer cited claims brought by Uniper and RWE against the Dutch government as one such example. Second, measures to reduce fossil fuel demand. Mr. Volkmer cited E.U. measures to ban cars reliant on fossil fuels as an example. Third, regulatory regimes that incentivize investments in renewables and/or low carbon energy

sources that are either modified or withdrawn. He cited feed-in tariffs in the renewable energy sector as an example.

Mr. Volkmer also addressed the recent conclusion of party efforts to modernize the Energy Charter Treaty (ECT). He noted that one significant change is the introduction of a flexibility mechanism, which allows State parties to exclude from ECT protection investments in fossil fuel industries. He noted that the E.U. and the U.K. have said already that they would avail of this carve-out. He said that this carve-out could result in State courts handling a relatively greater share of energy disputes.

Ms. Miles explained that current estimates suggest that roughly 32 trillion dollars will need to be invested over the next ten years in order to achieve a 45% reduction in emission rates. She noted that this would include substantial investment to develop alternative energy infrastructure, including in particular the scaling up of low-emitting or no-emitting infrastructure in the wind, solar, and green hydrogen sectors.
Ms. Miles explained that a key element of the energy transition will be phasing out existing long-term carbon-intensive energy infrastructure and how to value that phase-out. She noted that the European Commission recently published guidelines known as the Guidelines on State Aid for Climate, Environmental Protection, and Energy (CEEAG), and that these guidelines contain a chapter addressing how to value the early retirement of power plants so as not to provide illegal state aid.

Ms. Miles also explained that much of the transition would involve substantial cross-border transactional activity, captured in contracts. She noted that investors' preference is likely to be for arbitration of any disputes arising under those contracts. She said that those disputes could generate a significant volume of commercial cases in parallel to investor-state cases (where applicable).

Mr. Balachandar explained that, historically, disputes in the energy sector arose against the backdrop of bubbles created in the renewable energy capacity of countries due to the ebb and flow of state support for the sector. Mr. Balachandar addressed schemes that might be adopted to minimize the risk of disputes including, for example, a "contract for difference" scheme, which provides investors with a stable output price and thereby encourages investment.

Mr. Balachandar also discussed hydrogen and hydrogen-derivatives. He explained that these products have an important role to play in energy storage and, in particular, could do much to help decarbonize the shipping and aviation sectors. He noted, however, that there is currently no liquid traded market for hydrogen, which presents significant offtake risk. Mr. Balachandar proposed some means by which to mitigate that risk including (i) a sliding scale in price where a government pays a higher per-unit subsidy on initial volumes sold, and (ii) end user support (i.e. capital grants) to encourage end-user take-up of hydrogen.

A brief period of Q & A followed the panel discussion. Among the items addressed, Ms. Miles noted that awards arising out of the energy transition have notably tended to find that an investor – when successful in its claim – is entitled only to a reasonable rate of return, not damages based on price expectations formed at the time of investment. Mr. Volkmer and Ms. Miles also noted that recent efforts to modernize the ECT are unlikely to limit substantially the arbitration of energy disputes more generally. Ms. Miles noted that, illustratively, the ICC's recent yearly caseload of energy disputes (more than 500) far outstrip the number of

cases brought under the ECT over the last several years, and would not be impacted by changes to the ECT.

2. CPR Announcements

Ms. Erickson noted that the Award Transparency Task Force would next be meeting on 29 June. She asked that those interested in assisting the work of CPR's Procedures and Challenges Task Force contact the Chair of that Task Force, Marisa Marinelli.

Ms. Erickson concluded the meeting.

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