

From: Art. 4.1(b) (TRADE)
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 Subject: 27/01 expert meeting - Investment Protection Standards under ECT
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 summary report
 Attachments: Presentation responsibility of business to respect human
 rights.pdf

Last Friday I participated at the ECT investment expert meeting on 'Investment Protection Standards under ECT' attended by the delegates (JPN, EU, EU MS), UNCTAD, UNCITRAL, academia, law firms and energy companies. The first session consisted of presentations made by UNCTAD on the recent trends and developments of IP standards in IIAs, UNCITRAL on transparency and EU on its new approach to substantive rules.

Art. 4.1(b) (Volterra Fietta) made a presentation on investors' obligations (BHR) under international law, concluding there were none and debating pros and cons of creating such rules (suggesting this was not desirable - in general and under ECT). Instead, she argued that the existing gap in investors 'responsibilities' under international law should rather be bridged through reinforced national rules, their improved enforcement by the states and soft law instruments (RBC due diligence). I attach her presentation which features some interesting case law, including Urbaser ICSID award suggesting to the opposite.

The second part of the meeting turned into a 'free style' discussion of different ECT standards (mostly FET, umbrella clause and indirect expro) with some useful take-aways listed below. Considerable part of the meeting was initially dedicated to the discussion on the very purpose of this exercise, where EU argued that the objective should be not be to look solely into consistency in application and interpretation of the existing disciplines under ECT (initial pitch suggested by the ECT Secretariat) but also at the benchmarking of the existing ECT disciplines to their 'modernised' form.

* academics and practitioners seem to agree that there is no inconsistency in interpretation or application of the ECT investment protection standards by the tribunals; some perceived inconsistencies in application (rare though) are linked to the quality of the pleadings and the facts of the case;

* no conclusive result in discussion whether there would be a case for bringing more clarity and predictability to ECT text by codifying the existing trends in tribunal interpretation of ECT standards - with the practitioners in general opposing such idea ('the rules are made by the tribunal'), while some academics recognising value added in such approach;

* areas where some interpretative guidance could be useful: methodology for assessment of indirect expropriation and calculation of compensation; lot of opposition to any 'CETA style' clarification of FET; reaffirming right to regulate not needed legally but may be considered as a policy choice;

* difficulty to draw a line between 'clarification' and actual 'revision of the content' of the disciplines, with prevailing view around the table that a codification of the existing tribunal interpretation would probably qualify as clarification but any departure from it would probably be viewed as a revision of the discipline (with a clear consequence for an appropriate instrument to be used)

* in terms of concrete proposals:

- suggestion to publish a digest of ECT awards
- explore possibility of interpretative statements by the Charter

Conference
 - Protocol/Treaty amendment not realistic; rather empower Contracting Parties to issue binding interpretation of ECT (reference to NAFTA FTC)

As a next step, ECT Secretariat will prepare a summary of the meeting on the basis of which it will elaborate a discussion paper to be submitted to the next IMPL Group in March.

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European Commission

DG TRADE

Unit B2 Investment

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