

Securing Energy Supply through Investment Protection

*The Case of Energy Efficiency in the EU-Russia
Dialogue*

Anatole Boute

STRUCTURE OF THE ARGUMENT

- Energy efficiency in the EU external energy policy
- Regulatory risks as obstacle to energy savings in Russia
- Investment protection to promote energy savings
- Assessment and way forward

THE EU EXTERNAL ENERGY EFFICIENCY POLICY

Securing energy supply in a carbon-constrained world

- Security of supply
 - Increasing competitiveness for energy resources: the China – Russia Energy Dialogue
 - Necessity to guarantee the future availability of energy resources: the future of Russian energy?

- Climate change

The “carbon cost” of EU energy security

Russian Energy Strategy aims to replace gas by coal
to increase gas export (medium term)

- Competitiveness

Energy efficiency policy in Russia opens new markets to the EU industry

Eon, Enel and Fortum participate in the modernization of the Russian electricity sector

Important potential for small and medium companies in energy efficiency improvements in Russia

REGULATORY CHALLENGES TO ENERGY SAVINGS IN RUSSIA

- Inadequate regulatory framework
- Declarative nature of regulation
- Insufficient implementation / enforcement
- Instability and unpredictability of the investment climate:
regulatory risks lead to higher cost of capital (risk premium)

Regulatory risks for energy efficiency investments in Russia:

Electricity production:

- Government interference with liberalized prices

Heat production:

- Reneging on tariffs

Renewable energy:

- Change to the amount and duration of support

Carbon reductions:

- Interference with the issuance of ERUs

INVESTMENT PROTECTION TO PROMOTE ENERGY SAVINGS

- Sources:
 - Bilateral Investment Treaties with EU Member States
 - Art. 1 First Additional Protocol to the ECHR
 - The Energy Charter Treaty?

- Substantive protection:

- Indirect expropriation =

Interference with liberalized prices?

Reneging on tariffs?

Change / withdrawal of support schemes?

Interference with ERUs / withdrawal of JI status?

- National treatment / non-discriminatory treatment

Comparator: same business? same sector?

production / transmission / distribution

public / private

Target: foreign investors?

E.g. *Nykomb v. Latvia* case

- Fair and equitable treatment

Legitimate expectations of liberalized prices, adequate tariffs or support schemes?

Right to stability of tariffs, price formation or support?

Respect of “economic equilibrium” / “sound management” of electricity, heat, RES?

ASSESSMENT

- Limited influence of the EU to improve Russian law on energy efficiency / electricity / heat / renewable energy
- Important potential of protecting energy efficiency investments against regulatory risks

Regulatory instability has held modernization back / is at the origin of high energy intensity



- Existing investment law instruments focus on traditional political risks
- Interpretation by certain tribunals offers adequate protection to energy efficiency investments
- But no certainty given absence of doctrine of precedent and diverging interpretations in investment arbitration

WAY FORWARD:

- Opportunities offered by:
 - New EU investment competences;
 - New PCA;
 - Modernization of the Energy Charter Treaty
- to include specific protection for energy efficiency investments

- No need to create new standards, but to formalize existing interpretations in arbitral practice

Definition of investment:

Recognition of individual and specific right to liberalized prices (when decision taken to liberalize), tariffs and support

Expropriation:

Protection against the expropriation of these rights

Fair and equitable treatment

Recognition of legitimate expectations of liberalized prices, tariffs and support

Recognition of the “economic equilibrium” of energy efficiency investments

Thank you for your attention.

Contact: a.boute@abdn.ac.uk