

Five Years of Energy Law in Groningen

Academics meet Practice



Securing Energy Supply through Investment Protection: the EU- Russia Relationship

Graham Coop
General Counsel
Graham.Coop@encharter.org
Energy Charter Secretariat
www.encharter.org

Groningen Centre of Energy Law
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Securing Energy Supply through Investment Protection: the EU-Russia Relationship

- The ECT and investment protection
- Russia's obligations under the ECT
- Benefits of the ECT for Russia



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Historical and political background to the ECT

- Common interest in energy cooperation between CIS and western world in post-Cold War era
- Inter-governmental framework was needed to provide legal stability for investments and to secure trade and transit of energy
- Promote energy market reforms (re-structuring and commercialisation, energy price reforms)
- Promote higher energy efficiency



Energy Charter key dates

June 25, 1990	Dutch initiative presented in Dublin
December 17, 1991	European Energy Charter signed
December 17, 1994	Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed
April, 1998	ECT came into force
Currently	<ul style="list-style-type: none">■ ECT signed by 51 states + European Union■ ECT ratified by 46 states. Not yet ratified by: Russia, Belarus, Iceland, Australia, and Norway■ Russia terminated provisional application in August 2009

The four pillars of the ECT



Dispute settlement

**Investment
protection**

Trade

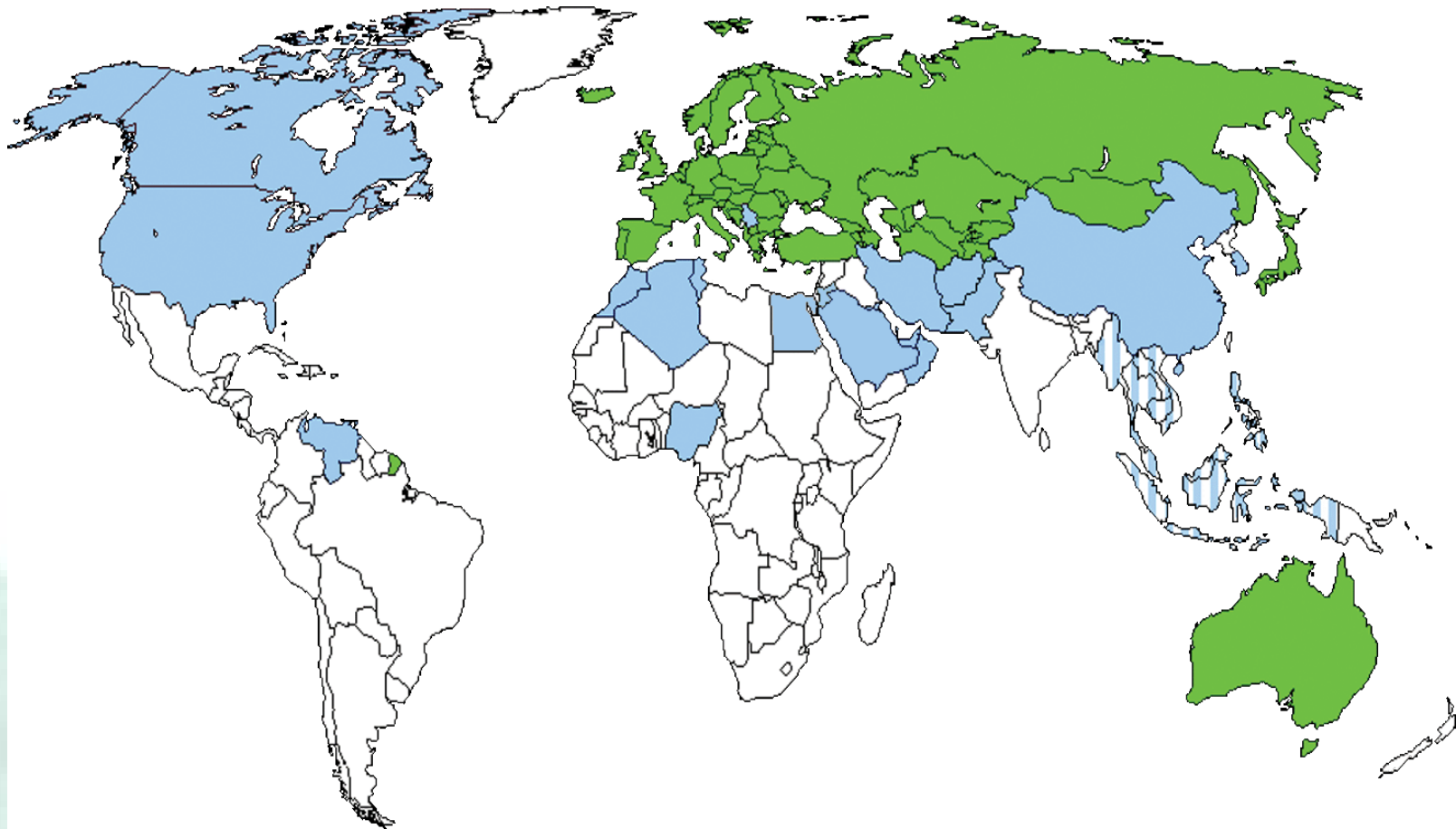
Transit

**Energy
efficiency**

Energy Charter Treaty



Energy Charter Treaty constituency



- Energy Charter Treaty Signatory States (1994)
- Observer States
- Countries of ASEAN (observer status granted to ASEAN, represented by the ASEAN Centre for Energy)

Observers to the Energy Charter



- 1995: Algeria, Bahrain, Canada, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, United States, Venezuela
- 2001: China, Serbia & Montenegro
- 2002: Iran, Korea
- 2003: Nigeria
- 2005: Pakistan
- 2006: Afghanistan
- 2007: Jordan
- 2008: Egypt, Palestinian National Authority
- 2009: Indonesia
- 2010: Syria

Underlined states have signed the European Energy Charter



Investment protection

ECT Part III (Articles 10-17)

Offers protected investors a wide range of guarantees and protections (FET, CPS, non-discrimination, MFN, umbrella clause, key personnel, expropriation, freedom of transfers)



Investor-state dispute resolution

ECT Article 26

Offers protected investors, in the event of alleged violation by host state of Part III obligations, investor-state arbitration under (at investor's choice):

- Arbitration Institute of Stockholm Chamber of Commerce
- ICSID or ICSID Additional Facility (subject to nationality requirements)
- UNCITRAL Rules



Investor		State	Registration and procedure	Status
1	AES Summit Generation Ltd. (UK)	Hungary	2001 - ICSID	Settlement agreed to by the parties
2	Nykomb Synergetics AB (Sweden)	Latvia	2001 - Stockholm	Award rendered on 16.12.2003
3	Plama Consortium Ltd. (Cyprus)	Bulgaria	2003 - ICSID	Award rendered on 27.08.2008
4	Petrobart Ltd. (Gibraltar)	Kyrgyzstan	2003 - Stockholm	Award rendered on 29.03.2005
5	Alstom Power Italia SpA (Italy)	Mongolia	2004 - ICSID	Settlement agreed to by the parties
6	Yukos Universal Ltd. (UK – Isle of Man)	Russian Federation	2005 - UNCITRAL	Pending; decision on jurisdiction 30.11.2009
7	Hulley Enterprises Ltd. (Cyprus)	Russian Federation		
8	Veteran Petroleum Trust (Cyprus)	Russian Federation		
9	Ioannis Kardossopoulos (Greece)	Georgia	2005 - ICSID	Award rendered on 03.03.2010

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The information above was compiled from various public sources; while the Secretariat has made every effort to ensure that this information is reliable, its accuracy and completeness cannot be guaranteed. For more details on the cases, please consult www.encharter.org



Investor		State	Registration and procedure	Status
10	Amto (Latvia)	Ukraine	2005 - Stockholm	Award rendered on 26.03.2008
11	Hrvatska Elektroprivreda d.d. (HEP) (Croatia)	Slovenia	2005 - ICSID	Pending; decision on treaty interpretation 12.06.2009
12	Libananco Holdings Co. Ltd. (Cyprus)	Turkey	2006 - ICSID	Award rendered on 02.09.2011
13	Azpetrol (Netherlands)	Azerbaijan	2006 - ICSID	Pending
14	Barmek Holding A.S. (Turkey)	Azerbaijan	2006 - ICSID	Settlement agreed to by the parties
15	Cementownia "Nowa Huta" S.A. (Poland)	Turkey	2006 - ICSID	Award rendered on 17.09.2009
16	Europe Cement S.A. (Poland)	Turkey	2007 - ICSID	Award rendered on 13.08.2009
17	Liman Caspian Oil BV (Netherlands)	Kazakhstan	2007 - ICSID	Award rendered on 22.06.2010
18	Electrabel S.A. (Belgium)	Hungary	2007 - ICSID	Pending
19	AES Summit Generation Limited (UK)	Hungary	2007 - ICSID	Award rendered on 23.09.2010

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	Investor	State	Registration and procedure	Status
20	Mohammad Ammar Al-Bahloul	Tajikistan	2008 - Stockholm	Award rendered on 08.06.2010
21	Mercuria Energy Group Ltd. (Cyprus)	Poland	2008 - Stockholm	Pending
22	Alapli Elektrik B.V. (Netherlands)	Turkey	2008 - ICSID	Pending
23	Remington Worldwide Limited	Ukraine	2008 - SCC	Award rendered on 28.04.2011
24	Vattenfall AB (Sweden)	Germany	2009 - ICSID	Consent award rendered on 11.03.2011
25	EDF International S.A. (France)	Hungary	2009 - UNCITRAL	Pending
26	EVN A.G. (Austria)	Macedonia (FYROM)	2009 - ICSID	Settlement agreed to by the parties
27	AES Corporation	Kazakhstan	2010 - ICSID	Pending
28	Ascom S.A. (Moldova)	Kazakhstan	2010 - Stockholm	Pending
29	Khan Resources R.V.	Mongolia	2011 - UNCITRAL	Pending

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Applicable definitions of “Investment” and “Investor”

ECT Articles 1 (6) and 1 (7)

Investment: Every kind of asset (e.g. shares, claims to money, intellectual property, licences, concessions) owned or controlled directly or indirectly by an Investor

Investor: natural persons of a CP (including permanent residents), and companies/organisations organised in accordance with the laws of a CP



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Provisional application

ECT Article 45 (1)

(emphasis added; emphasised language referred to as “limitation clause”)

Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.



Provisional application

ECT Article 45 (2) (a)

Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application....

Provisional application



Kardassopoulos v. Republic of Georgia

(extracts from Decision on Jurisdiction dated 6 July 2007)

... [P]rovisional application imports the application of all [a treaty's] provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred (p. 58).

... [S]ome of the treaty's language, which will have been drafted with the intention of providing for ... the treaty's definitive entry into force, may not fit precisely with the situation created by its provisional application.... The ... remedy is to leave the treaty as it stands and to rely on an implicit acceptance of the need to apply it (provisionally) on a *mutatis mutandis* basis (p. 58).



Provisional application

Kardassopoulos v. Republic of Georgia

(extracts from Decision on Jurisdiction dated 6 July 2007)

... [T]he language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so...(p. 59).



Provisional application

Hulley Enterprises Limited v. Russian Federation

(issues considered in Interim Award on Jurisdiction and Admissibility dated 30 November 2009)

- Are Article 45(1) and 45(2) rights linked?
- Is Article 45(1) right subject to a notice or transparency requirement?
- Should Article 45(1) limitation clause be approached on an all-or- nothing or on a piecemeal basis?
- Is provisional application of international treaties *per se* inconsistent with Russia's constitution, laws or regulations?



Provisional application

ECT Article 45 (3) (a)

Any signatory may terminate its provisional application ... by written notification to the Depository of its intention not to become a Contracting Party.... Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.



Provisional application

ECT Article 45 (3) (b)

... [T]he obligation of the signatory ... to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination....



Provisional application

Communication by the Russian Federation to the Depository dated 20 August 2009

In accordance with Article 45(3)(a) of the Energy Charter Treaty ... the Russian Federation declares that it does not intend to become a participant of the said Treaty.

Russia's status vis-à-vis the ECT today



- No continuing obligation to apply the ECT provisionally (subject to possible “participant”/“Contracting Party” distinction)
- Continuing obligation under ECT Article 45(3)(b) to protect pre-withdrawal investments for 20 years
- No benefits for Russia or Russian investors as from effective date
- No basis for assuming that Russia continues to be bound (or entitled) under ECT institutional provisions
- Is Russia still an ECT signatory?
- How could Russia return to the ECT?



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Investment arbitration and the EU – intra-EU BITs

Eastern Sugar BV v. Czech Republic

(extract from Partial Award dated 27 March 2007)

[T]he Arbitral Tribunal is of the view that the BIT and the EU Treaty are not *incompatible*.

Free movement of capital and protection of the investment are different, but complementary things (p. 36).



Investment arbitration and the EU – extra-EU BITs

Commission v. Austria (Case C-205/06)

Commission v. Sweden (Case C-249/06)

OJ 2009 C 102/2

Extra-EU BITs held incompatible with respondent states' obligations under EC Treaty Article 307 on the basis of exceptions to freedom of movement of capital provided in EC Treaty Articles 57(2), 59 and 60(1).



Investment arbitration and the EU – the 2007 Lisbon Convention

- Treaty on the Functioning of the European Union (TFEU) (Article 207 (1)):

The common commercial policy shall be based on uniform principles, particularly with regard to ... foreign direct investment....

- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (7 July 2010): Towards a comprehensive European international investment policy
- Proposal for a Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries (7 July 2010)



The relationship between international and European law

A fundamental difference in perception (or conflict of systems)?

For the ECJ, the EC Treaty has “created its own legal system” which “constitutes a new legal order of international law”.
(Case 6/64, *Costa v ENEL* [1964] ECR 585, 593; Case 26/62, *Van Gend en Loos* [1963] ECR 1, 12).

From the viewpoint of public international law, European law remains (like national or municipal legal systems) a subsystem of international law, albeit a highly developed international legal order.



The special status of the ECT (and particularly its investment protection regime)

The ECT:

- is a mixed agreement to which the European Union and Euratom and their 27 member states, and 24 third states, are parties;
- covers trade, transit, investment protection, and energy efficiency and related environmental aspects, in relation to Energy Materials and Products (EMP).



Legal basis on which the EU and Euratom (in addition to their member states) became parties to the ECT

For signature:

- is set out in Council Decision 94/998/EC.

For approval (the EU's equivalent of ratification):

- is set out in Council and Commission Decision 98/181/EC, ECSC, Euratom.

Certain matters covered by the ECT involve the competence of the EU and Euratom...

... while others involve mixed competence or the competence of the EU member states.



In relation to investment protection, the ECT is:

- an intra-EU MIT as among the 27 EU member states;
- an extra-EU MIT as among the 27 EU member states and the 24 other ECT member states; and
- an MIT wholly external to the EU as among the 24 non-EU ECT member states.

In addition, the EU and Euratom are themselves Contracting Parties to the ECT and have thereby assumed (inter alia) investment protection obligations under the ECT.



When approving the ECT, the European Communities submitted a statement pursuant to ECT Article 26(3)(b)(ii):

The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.

The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party... within a period of 30 days [without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States].



When approving the ECT, the European Communities submitted a statement pursuant to ECT Article 26(3)(b)(ii):

(continued)

As far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it.... Any arbitral award against the European Communities will be implemented by the Communities' institutions, in accordance with their obligation under Article 27(8) of the Energy Charter Treaty.



BITs, the ECT and the EU

Commission v. Slovak Republic (Case C-264/09)

Switzerland-Czechoslovakia BIT of 1990 – predating Czech accession to EU in 2004 and containing no termination clause – held to be protected by EC Treaty Article 307 (1).

CJEU preferred to base its decision on Switzerland-Czechoslovakia BIT rather than ECT “since the [BIT] relates directly to investment protection”.



The status of the ECT today

- Intra-EU BITs continue in force until terminated by their parties (*Eastern Sugar*).
- A fortiori, an intra-EU BIT to which the EU is also a party remains in force (EC Treaty Article 300(7)).
- Same logic applies to the ECT as an extra-EU BIT.
- The ECT as an extra-EU BIT is not open to attack on the basis invoked by the Commission in the *Austria, Finland* and *Sweden* cases.
- EU institutions (including the CJEU in its recent *Slovakia* decision) have been silent with respect to the issue.



Benefits for Russia of returning to the ECT

- Russia would regain full rights as a Contracting Party.
- Russian investors would enjoy full protection against other ECT Contracting Parties, including the EU.
- Russia and its investors could potentially challenge EU Third Energy Package.



EU Third Energy Package

- Only certificated entities may own or control TSOs within EU.
- To gain certification, an entity must demonstrate that its country operates EU-type mandatory TPA or that it is unbundled.
- Gazprom (and other Russian vertically integrated operators) cannot gain certification.
- Non-certificated entities must apparently divest TSOs within EU.
- Potential investment protection claim?

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