

Energy Charter Treaty and its Role in International Energy

By Andrei Konoplyanik* and Thomas Wälde†

The end of the Cold War offered an unprecedented opportunity to overcome the previous economic divisions on the Eurasian continent. Nowhere were the prospects for mutually beneficial cooperation between East and West clearer than in the energy sector. There was therefore a recognised need to ensure that a commonly accepted foundation was established for developing energy cooperation. On the basis of these considerations, the Energy Charter process was born. The Energy Charter Treaty (ECT) and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) were signed in December 1994 and entered into legal force in April 1998. ECT is currently the major multilateral treaty in the energy field around and in terms of investment protection, the multilateral treaty with the largest geographical and country coverage. This article describes its multifaceted role in improving international energy security.

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Why the Energy Charter?

The roots of the Energy Charter date back to a political initiative launched in Europe in the early 1990s. At that time, the end of the Cold War offered an unprecedented opportunity to overcome the previous economic divisions on the Eurasian continent. Nowhere were the prospects for mutually beneficial cooperation between East and West clearer than in the energy sector. Russia and many of the neighbour-states of the Former Soviet Union (FSU) were rich in energy resources but needed major investments to ensure their development, while the states of Western Europe had a strategic interest in diversifying their sources of energy supplies to diminish their dependence on the Middle East. There was therefore a recognised need to ensure that a commonly accepted foundation was established for developing energy cooperation among the states of the Eurasian continent. On the basis of these considerations, the Energy Charter process was born.

Dutch Prime Minister Ruud Lubbers started the process in June 1990 by suggesting a mechanism to help the former Socialist countries in their transition to market economies. Since it was initiated by the European Union, the overall strategy was formulated so as to combine 'Western' European concerns (security of energy supplies) with 'Eastern' assets (abundant oil and gas reserves) by facilitating Western (primarily European) investment in the East and the transit of Eastern energy to Europe. This would help the European Union in several ways, by providing greater diversification of energy flows to the European Union and new opportunities for oil and gas investment in the East for EU investors, but also Eastern economic

Box 1: Key dates in the development of the Energy Charter

25 June 1990 – Dutch Prime Minister Ruud Lubbers launches the proposal for a European Energy Community at a European Council meeting in Dublin.

17 December 1991 – The European Energy Charter is signed in The Hague.

17 December 1994 – The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) are signed in Lisbon.

16 April 1998 – The Energy Charter Treaty enters into full legal force, following completion of the 30th ratification.

23-24 April 1998 – The Trade Amendment to the Treaty's trade provisions is adopted, bringing them into line with present WTO rules.

February 2000 – Negotiations on the Energy Charter Protocol on Transit are started.

December 2002 – The multilateral phase of negotiations on the Energy Charter Protocol on Transit is completed (three outstanding issues are to be primarily finalised in Russia-EU bilateral consultations).

Box 2: Members of and observers to the Energy Charter Conference

The following countries are members of the Energy Charter Conference:

Albania, Armenia, Australia,* Austria, Azerbaijan, Belarus,* ** Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland,* Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Netherlands, Norway,* Poland, Portugal, Romania, Russian Federation,* ** Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan.

* Member states in which ratification of the Energy Charter Treaty is still pending as of September 2006.

** Apply ECT provisionally.

The following are observers to the Energy Charter Conference:

States:

Afghanistan,* Algeria, Bahrain, People's Republic of China, Canada,* Islamic Republic of Iran, Republic of Korea, Kuwait, Morocco, Nigeria, Oman, Qatar, Pakistan,* Saudi Arabia, Serbia and Montenegro,* Tunisia, United Arab Emirates, United States of America,* Venezuela.

* Observer states that have signed the 1991 European Energy Charter.

International Organisations:

ASEAN, EBRD, IEA, OECD, UNECE, World Bank, WTO, CIS Electric Power Council, BSEC, BASREC.

development with the hoped-for consequence of making the eastwards expanding border of the European Union safer by having more prosperous and settled Eastern neighbours. That was expected to further increase interdependence between the East and West in terms of energy and investment flows, which it turn would help to diminish (if not totally eliminate) the residual political confrontation within the European continent, which still existed as a consequence of the Cold War period. And of course there was an aim to improve the competitive position of the European Union in its global competition with the United States.

The Energy Charter Treaty (ECT) and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) were signed in December 1994 and entered into legal force in April 1998 (see Box 1). To date, the ECT has been signed or acceded to by 51 European and Asian states (as well as by the European Communities; the total number of its signatories is therefore 52), 46 of which (plus the European Union) have already ratified the Treaty (see Box 2, Figure 2).¹

The ECT was developed on the basis of the European Energy Charter of 1991. Whereas the latter document was drawn up as a declaration of

¹ The accession of Pakistan to the ECT as its 52nd member state was approved by the Energy Charter Conference (in November 2006).

Table 1: Main content of selected international investment-related agreements**

Organisation (member states/CPs)	Legal status	Scope	Investment	Trade	Transit	Energy efficiency	Dispute settlement
ECT (51/52)	LB	Energy	Yes	Yes	Yes	Yes	Yes
WTO (149)	LB	General	(Yes? Services?)	Yes	Yes/No*	No	Yes
NAFTA (3)	LB	General	Yes	Yes	No	No	Yes
MERCOSUR (4)	LB	General	Yes	Yes	No	No	Yes
OECD (30)	LB	General	Yes	No	No	No	No
APEC (21)	Non-LB	General	Yes	Yes	No	No	No

Plus specialised energy-related organisations: OPEC, IEA, IEF, UNECE (broader than just energy), IAEA, . . .

Plus specialised 'regional' organisations: BSEC, BASREC, . . .

* Application of GATT Art V to grid-bound transport systems is under debate.

** Table prepared with the participation of J Karl, former ECS Senior Expert, now with UNCTAD.

*** LB = legally binding.

Source: A Konoplyanik, Russian Presidency in G-8, energy security and the Energy Charter process. Presentation for the Association of European Business, Energy Committee, Moscow, 15 March 2006.

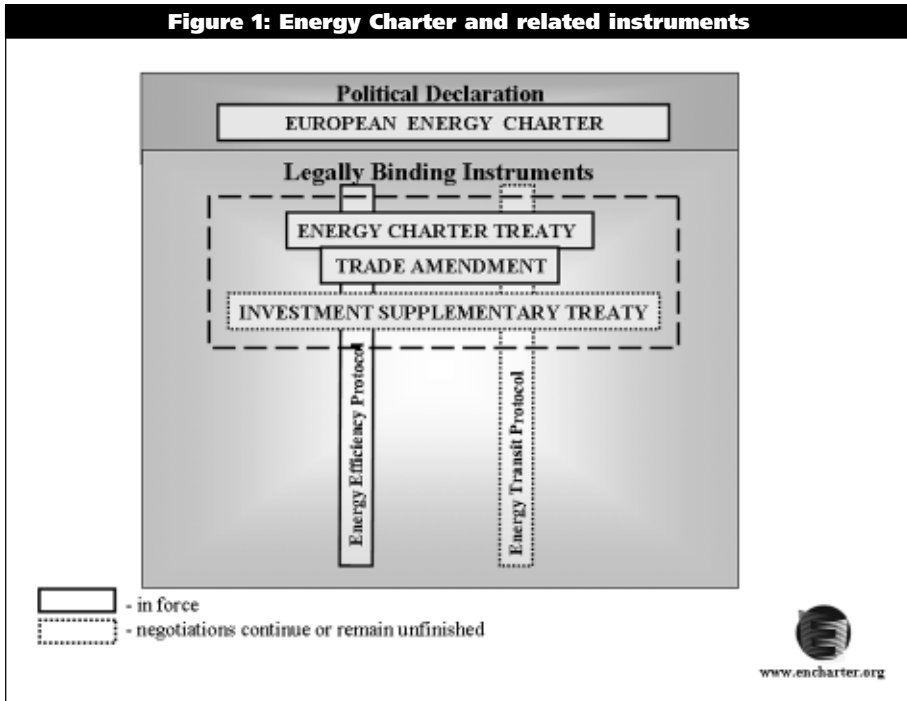


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political intent to promote East–West energy cooperation, the ECT is a legally binding multilateral instrument – the only one of its kind dealing specifically with intergovernmental cooperation in the energy sector.²

Moreover, the ECT is currently the only major multilateral treaty in the energy field and in terms of investment protection, the multilateral treaty with the largest geographical and country coverage (see Table 1). It is emerging as a significant international legal instrument providing protection for investment and the facilitation of trade and transit across a widening community of energy producing and consuming countries. It also constitutes a benchmark for guiding and measuring the internal reforms of the energy industries in its member states and for opening up cross-border investment and trade. It is left to the European Union, the WTO agreements, the North-American Free Trade Agreement (NAFTA) and the network of over 2,500 bilateral investment treaties (BITs) to present the only and a very significant

2 For a comprehensive legal and economic analysis of the Energy Charter Treaty (ECT), its historical roots and negotiation's history, as well as Russia's concerns regarding ECT ratification, see T Wälde, (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996); A Konoplyanik (ed), *Dogovor k Energeticheskoi Khartii: put' k investitsiyam i trgovle dlya Vostoka i Zapada* (Moscow: Mezhdunarodniye Otnosheniya, 2002). See also: Special issue of OGEL 2005 (www.gasandoil.com/ogel) on the ECT.



international investment, trade and transit instrument for the energy industries.³

More than a decade after it was opened for signature, the role of the ECT remains very significant. In a world of increasing globalisation of energy and capital flows, of growing interdependence between net exporters and net importers of energy, between the states placed alongside the increasing number of lengthening routes of cross-border energy value chains, the value of multilateral rules providing a balanced and efficient framework for international cooperation is widely and increasingly recognised.

The ECT and related instruments (see Figure 1) provide a multilateral framework for energy cooperation that is unique under international law, and the strategic value of these rules is likely to increase in the context of efforts to build a legal foundation for global energy security, based on the principles of open, competitive markets and sustainable development.

The fundamental aim of the ECT is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all

³ For a review of most international (bilateral and multilateral) investment instruments see the investment compendium published and maintained by UNCTAD: www.unctad.org. For a large number of investment treaties and investment awards see: www.transnational-dispute-management.com and www.investmentclaims.com.

participating governments, thus minimising the risks associated with energy-related investments and trade.

The substantive content of the ECT is based, *inter alia*, on three major sources, which presented corresponding broad international experience already accumulated at the time of the negotiations on the ECT:

- (1) The well-established practice of BITs (about 2,500 BITs were in existence as of the end of 2006, although there were only about 500 in the early 1990s when the ECT negotiations started⁴); the investment Chapter (XI) of NAFTA (United States, Canada, Mexico). There was probably also some interaction with the discussions leading to the negotiating text of the then proposed 'Multilateral Agreement for Investment' (MAI) – aborted in 1998.
- (2) The liberalisation impetus from several 'Directives' reforming EU energy law – Directives on 'licensing upstream energy resources,' on utility procurement, on transit, on non-discriminatory access to energy transport infrastructure ('third-party access') initiated in the early 1990s and completed by 1998. The ECT reflects these successful internal EU initiatives, but in a highly diluted form (since the ECT was to be implemented within a community broader than the European Union). In fact, the ECT has served as a kind of 'waiting room' for subsequent EU membership preparation for the accession countries in Eastern Europe.
- (3) GATT: the trade chapter of the ECT is basically a reference to GATT 1994, and ECT Article 7 ('Transit') elaborates on the pre-existing Article V of GATT ('Freedom of transit').

In contrast to the 1991 'European Energy Charter', the ECT (its qualification as 'European' was dropped, itself a significant fact, and one already reflecting the growing Eurasian, and not purely European, dimension of the Charter process) is a proper, legally binding, multilateral treaty. It can be considered as the multilateral investment treaty with the widest scope; it is distinct from all other bilateral treaties by the fact that it is only applicable to energy – defined in a wide way. At the time of its conclusion it did not attract much attention, overshadowed as it was by the WTO and MAI negotiations. But with the collapse in 1998 of the MAI negotiated within the OECD, and the lack of any other promising initiative in this area at that moment, within the

4 Within its current 51 member-states-constituency the ECT creates another 1,275 bilateral legal relationships between countries; there are also a number of new economic cooperation treaties (with the EU and the US), which sometimes, but not always, have an investment protection component – for a survey see Press Release, UNCTAD, 30 August 2005, from www.unctad.org and available on TDM (www.transnational-dispute-management.com).

OECD, the WTO or elsewhere, it has proved to be one of the most significant treaty successes of the 1990s.

The ECT's provisions focus on five broad areas:

- (1) the protection and promotion of foreign energy investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable);
- (2) free trade in energy materials, products and energy-related equipment, based on WTO rules;
- (3) freedom of energy transit through pipelines and grids;
- (4) reducing the negative environmental impact of the energy cycle through improving energy efficiency; and
- (5) mechanisms for the resolution of state-to-state and/or investor-to-state disputes (see Table 1).

Energy Charter and international energy security

The ECT needs to be seen today as one of the best available instruments for improving international energy security.⁵ Energy security is best understood as the continuous assurance of an adequate, reliable supply of energy at a reasonable cost at any given moment of time in the short and long run. This persistence of adequate and reliable supply can only be assured in the context of the right investment decisions. The supply of energy requires the deployment of a system that relies heavily on large-scale and capital-intensive infrastructure with much vulnerability. Any interruption in the flow of energy in many instances will negatively affect consumer and producer, as well as transit states. It is therefore in the best interests of all the countries placed alongside the energy value chain and the economic entities involved in this value chain to develop energy supply systems that are least vulnerable to both short- and long-term disruptions.

The major long-run risk to security of energy supply lies in making the wrong investment choices, in being unable to improve efficiency, to diversify

5 For more details see A Konoplyanik, 'Energy Security and the Development of International Energy Markets' in *Energy Security: Managing Risk in a Dynamic Legal and Regulatory Environment* (B Barton, C Redgwell, A Rønne, D N Zillman, eds, International Bar Association/Oxford University Press, 2004), Chapter 3, pp 47-84; *ibid*, 'Securing the Energy Supply Chain and Infrastructure: How Government and Business Can Cooperate to Most Effectively Face the Challenges' (presentation at the Second Annual Worldwide Security Conference 'Protecting People and Infrastructures: Achievements, Failures and Future Tasks,' Brussels, 7 February 2005); *ibid*, 'Energy Charter: the key to international energy security,' *Petroleum Economist*, February 2006, pp 19-20. The most extensive recent analysis is the EUI/Florence doctoral thesis (about to be published) by Sanam Haghighi. See also the forthcoming OGEL special issue on energy security (planned for mid-2007).

energy supply sources and build invulnerable, diversified and distributed future energy supply systems that can handle local disruptions with ease and therefore offer little return to terrorism or other attempts to block/prevent energy flows. Energy consumers and producers are thus interdependent, linked together not only by energy flows (the flows of energy already produced), but also by investment flows, which are needed to produce this energy, ie to develop energy projects. To secure the supply chain, in this sense, means to provide better security to investors and their investments. From this perspective, the energy cycle, whether at the level of an individual company, country or region, or at a global level, includes a chain of investment projects, of making investment decisions, with their inherent risks and rewards. The security interests of both producers and consumers of energy are vested in this process, as are those of the host states (where energy production and transport systems are located) and of investors in these systems. From this perspective, the right energy policy is the policy in support of the development of an open and competitive global energy market, which the ECT Contracting Parties have agreed to promote (ECT Article 2).

Energy markets have generally been evolving from monopoly to competition.⁶ The driving force in this development is the need to ensure incentives to investments. Both producer and consumer nations are looking at investment protection and stimulation measures, as instruments in improving their energy security. The instruments of investors' protection/stimulation have been evolving over time in line with energy markets developments, as have the instruments used to provide energy security at different times.⁷ Right now, a major instrument used to diminish volume risks is the diversification of energy supply. The latter means, for example, 'multiple supplies' ('multiple pipelines') concepts, or similar tools that give opportunities to consumers to switch between suppliers and (*sic*) vice versa – to give opportunities to suppliers to switch between consumers. Diversification means new investments. That is why international energy security in the long run depends on international energy investment, and on the management and minimisation of risks to such investment, which

6 See, for example, A Konoplyanik, *Rossiya na formiruyuschemsya Evroaziatskom energeticheskom prostranstve: problemy konkurentosposobnosti* (Moscow: Nestor Academic Publishers, 2004); A Konoplyanik, 'Time rules the move from monopoly to competition' (2002) 4(3) *Oil & Capital* 40-42; A Konoplyanik, 'Ot monopolii k konkurentsii. Ob osnovnykh zakonernostyakh razvitiya rynkov nefi i gaza' (2002) 6 *Neft Rossii* 19-22.

7 See, for example, Konoplyanik, 'Energy Security and the Development of International Energy Markets,' n 5 above.

means an adequate, investment-friendly investment climate reflecting the balance of interests between the state and the investor.

There is a need to use tools to minimise the risks related to energy investments (thus minimising financial cost), to provide the right signals at the right time to investors, which in turn pave the way for diversification and thus internationalisation and globalisation of the energy market. Times change: formerly, such signals used to be provided via the concessionary system. Nowadays, we witness a variety of bilateral and multilateral intergovernmental undertakings. International law instruments at this stage of energy market development became one of the most cost-efficient ways of providing the basics of energy security. The development of open and competitive energy markets in our global economy is the key to the stability of international energy flows, and indeed to the assurance of adequate, sustainable supplies of energy at reasonable cost, ie energy security. And that is the major aim of the Energy Charter process (as a political undertaking) and of the ECT (the main legal instrument of this process).

The Energy Charter (both in its political and legal dimensions) supports and helps to develop policies that remove barriers to the flow of international energy investment and promote fair access to markets. The Energy Charter unites among its members and observers both energy producers and consumers representing developed, developing and transition economies. Moreover, as of today, the Energy Charter political declaration is the only document establishing common approaches to providing energy security, signed by all member states of the G8, which include both major energy exporters (Canada, Russia, United Kingdom) and importers (France, Germany, Italy, Japan, United States). For its chairmanship within G8 in 2006, Russia has chosen 'energy security' as a major topic. But without the full incorporation into international cooperation of the legal instruments of the Energy Charter process focused on improving energy security, this aim would not be achieved. That means that ratification of the ECT by Russia (which is among five ECT signatories that have not yet ratified the Treaty, though Russia has been implementing it on a provisional basis)⁸ must be

8 For more on debate on Russia's ratification of the ECT see A Konoplyanik, 'Ratifikatsiya DEH Rossiei: prezhdе vsego neobkhdodimo razveyat dobrosovestnyе zabluzhdeniya opponentov' in *Dogovor k Energeticheskoi Khartii: put' k investitsiyam i tovgovle dlya Vostoka i Zapada* (Moscow: Mezhdunarodniye Otnosheniya, 2002), Chapter 22; A Konoplyanik, *Energeticheskaya Khartiya i ekonomika Rossii: rol protsessа Energeticheskoi Khartii v povyshenii konkurentosposobnosti Rossii na mirovykh rynkakh energii i kapitala* (Moscow: Izdatelstvo Instituta Narodnokhozyaistvennogo Prognozirovaniya RAN, 2003); A Konoplyanik, 'Est' tolko odin put' k ratifikatsii DEH. Chtoby dogovorit'sya, nado ponyat' vozrazheniya protivnoi storony' (2001) 3 *Neft i Kapital* 8-10; A Konoplyanik, 'We must ratify Energy Charter Treaty – but not

considered (and needs to be expected) as a major input by this country into the improvement of international energy security.

The ECT should be seen as an international extension of 'ordo-liberal' economic concepts into the international dimension. It is aimed at strengthening the rule of law, both internationally in relation between member states and investors, but also domestically by signalling 'good governance' in member states. It provides therefore a more legally ordered institutional international environment. The ECT does not, however, provide any particular effect method to compel countries which are not interested in developing such rule of law nor does it, or can it, compel energy flows between reluctant suppliers or consumers. It can facilitate transactions, investment and trade flows which are desired by providing a more favourable legal environment – but it cannot compel or steer such transactions. That essential limitation of the ECT – as of any domestic or international legal instrument – has to be understood. Essentially, it is facilitative for investment and transactions, but no more.

Investment

The main part of the ECT outlines the investment protection regime (part III). It is modelled on Chapter XI of NAFTA and on the modern type of BIT developed in particular by the United States and the United Kingdom. It needs to be seen in combination with ECT Article 26, which allows an investor to litigate directly against a government for breach of one of these obligations before an independent arbitral tribunal.

The fundamental objective of the ECT provisions on investment issues is to ensure the creation of a 'level playing field' for energy sector investments throughout the Charter's constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments.

The ECT ensures the protection of foreign energy investments based on the principle of non-discrimination. By accepting the ECT, a state takes on

yet,' *Oil & Capital. Russia & CIS Energy Magazine*, April 2001, pp 6-8; A Konoplyanik, 'Trudny put' k DEH. Razvitiye energeticheskikh rynkov, Dogovor k Energeticheskoi Hartii i zakonodanelnye priority Prezidenta Vladimira Putina' (2002) 11 *Neft Rossii* 48-51; A Konoplyanik, 'Razvitie rynkov gaza, dolgosrochnye kontrakty i Dogovor k Energeticheskoi Hartii' (2002) 4 *Neftegaz* 25-33; A Konoplyanik, 'Sila argumenta ili argument sily. Chto dayot Rossii Energeticheskaya Hartiya?' *Mirovaya energetika*, June 2004, No 6, pp 50-53; A Konoplyanik, 'Bor'ba s mifami. O mnimyh vygodah i ugrozah Dogovora k Energeticheskoi Hartii,' *Politicheskii Zhurnal*, 13 June 2006, No 21(116), pp 32-36; A Konoplyanik, 'Mnogostoronnyaya Energeticheskaya Hartiya ne dolzhna stanovit'sya zalozhnikom dvustoronnih peregovorov', *Vedomosti*, 24 October 2006.

an obligation to extend national treatment, or most-favoured nation treatment (whichever is more favourable), to nationals and legal entities of other signatory states who have invested in its energy sector. The ECT thus carries the equivalent legal force of a unified network of BITs.

The majority of ECT investment-related provisions, aimed at the creation of the appropriate investment climate, are self-implementing. However, the Energy Charter Conference maintains a constant political focus on investment climate issues, by providing regular assessments, through survey activities and peer reviews, of investment practices among its participating states.

The ECT distinguishes between a *pre-investment phase* (ie access for foreign investors), for which it only contains obligations with a 'softer', ie more flexible and less specific content ('shall endeavour to accord'), mainly non-discrimination (and most-favoured nation treatment), and a *post-investment phase* (ie after investments have been committed) to which the ECT hard-law obligations apply fully. The use of the key legal term 'shall' denotes a 'hard' and legally binding obligation; the use of the following terms 'endeavour to accord' suggests a more supple content of the obligation. The reason for the distinction is that states should be relatively free to make decisions on access for specific investors and areas of investing. But once an investor is admitted, has carried out its investment and is thereby exposed to considerable political risk, the much tougher obligations to behave fairly towards an investor apply. The language of Article 10, however, constitutes a compromise between an approach that preferred completely non-binding exhortation and an approach that desired very specific 'hard-law' obligations. The specific legal value of these obligations has as yet not been adjudicated.⁹

In its present form, the ECT obliges Contracting Parties to accord non-discriminatory treatment primarily to existing investments made by investors of other Contracting Parties. The adoption of a Supplementary Treaty that would extend this obligation to ensure non-discriminatory treatment in the pre-investment phase too (the so-called 'Making of Investments' stage) remains under discussion among the Energy Charter's member states.¹⁰

9 But see T Wälde, 'The Investment Regime of the ECT', in *idem* (ed, 1996). This article takes a position that is different from Elshihabi, *International Lawyer* 35, 147, 148 – though the author relies largely on Wälde's 1996 article. One needs also to bear in mind that from the point a pre-investment activity creates an 'existing investment', widely defined in Art 1 (6) of the ECT, that 'investment' is protected under the post-investment protective obligations of the ECT even if it is an element in the sequence of investor actions.

10 But note the discussion above on the 'shall' obligations with a 'flexible' content for pre-investment activities.

The licensing of oil and gas acreage should be done in an objective and transparent way without discrimination. The EU Licensing Directive is the underlying model. State companies and private companies, foreign or domestic, should compete according to purely technical and commercial criteria, without in-built favouritism. The pre-investment regime does not provide a legally binding, clear-cut obligation to stop such practices, but it does provide a standard of objective, transparent and non-discriminatory licensing.

The post-investment obligations reaffirm customary international law as evidenced by most modern arbitral awards and BITs.¹¹ They are basically about protecting property and treating investors fairly in order to render the host state attractive, reduce any perception of political risk and bring some discipline to bear on bureaucratic excesses and the natural tendencies of domestic protectionism.

Property (it is defined widely¹² and would include upstream oil and gas 'licences' such as concessions or production-sharing contracts) is protected against *expropriation* by the duty to pay full, prompt and effective compensation (ECT Article 13). Such duty also extends to 'regulatory takings', ie government regulatory action that is in its impact equivalent to expropriation.¹³ This obligation does not mean expropriation is prohibited, but that full compensation has to be paid. This is probably the current standard of customary international law (based on the so-called 'Hull formula').¹⁴

The second most relevant obligation here is the obligation to *observe (contractual) obligations* (ECT Article 10(1), last sentence). This needs to be understood as a reaffirmation of the obligation incumbent under international law on governments to respect contracts concluded with

11 For the state of play in early 2004 see T Wälde, 'Energy Charter Treaty-based Investment Arbitration – Controversial Issues' (2004) 5 *J World Investment* 373.

12 On the modern extensive notion of property – protected assets according to ECT Art 1(6) – see the comments by F Yala and N Rubins, in: (TDM): www.transnational-dispute-management.com, 2005. The 2005-rendered *Petrobart v Kirgizstan* award under the ECT (see Table 2) considers a judicially confirmed contractual claim for the sale of oil a protected investment. The border line is sometimes difficult to draw – see the *Joy Mining v Egypt* and *Mihaly v Sri Lanka* cases, available in the TDM archive. The *Nykomb v Latvia* ECT tribunal (see Table 2) had no difficulty in considering a long-term power purchase agreement arranged as part of a foreign co-generation power investment an ECT-covered investment.

13 T Wälde and A Kolo, 'Environmental Regulation, Investment Protection and Regulatory Taking in International Law (2001) 50 *ICLQ* 811-848.

14 For more details on the 'Hull formula', see Patrick M Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in T Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer, 1996), Chapter 16.

foreign investors.¹⁵ This obligation in effect means that a government cannot rely simply on governmental powers to revoke an agreement or, arguably as well, to coerce an investor into a forced-upon renegotiation – a frequent practice in the past as well in the United Kingdom and Norway and in developing countries. It means that governments can only revoke existing agreements by paying full compensation. One could argue that this principle reaffirms the universal ‘sanctity of contract’ obligation, also expressed (as long ago as) in the Qu’ran.

The third significant obligation is *national treatment (non-discrimination)*.¹⁶ It means that a government cannot, with respect to investors, favour some national or other foreign investors over foreign investors from member states. The only cases so far have been within the European Union and in the context of NAFTA Chapter XI arbitrations. These deal mainly with trade regulations which disadvantage a foreign investor to the detriment of its national competitors. One could envisage such practices as a more favourable tax treatment (though there are special rules in ECT Art 21),¹⁷ difficulties for foreign investors to get access to oil and gas pipelines, port facilities, customs clearance which could become the object of a discrimination complaint. Non-discrimination obligation also includes (ECT Art 22, 23) sub-national authorities, state enterprises and private enterprises with exclusive/ special privileges. This means that the government has a responsibility – to the foreign investor – to ensure its instrumentalities, state enterprises and dominant private companies do not engage in discrimination of ECT investors. One needs to bear in mind that ‘discrimination’ is not

15 For an in-depth discussion of this ‘umbrella clause’, see Thomas Wälde, ‘The Umbrella Clause in Investment Arbitration: a Comment on Original Intentions and Recent Cases (2005) 6 *J World Investment & Trade* 183-237, with a brief and updated version to appear in the ICSID journal; also Vlad Zolia, ‘Effect and Purpose of “Umbrella Clauses” in Bilateral Investment Treaties: Unresolved Issues,’ in: TDM November 2005, *op cit*. Also Wälde’s updated and shorter comment in C Ribeiro (Ed) *Investment Arbitration and the Energy Charter Treaty*, 2006. There are at present two approaches – a more narrow approach emphasising that only governmental, and not merely commercial conduct against contracts can constitute a breach (so most recently the *El Paso v Argentina* and *BP et al v Argentina* awards in 2006) or if any breach of a contract concluded by the state (or an entity attributed to the state) constitutes a treaty-justiciable breach of the ECT (so, possibly *Eureko v Poland*, partial award of 2005).

16 T Wälde, ‘National Treatment in International Investment Disputes,’ forthcoming on TDM 2007, *op cit*; Jurgen Kurtz, ‘National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?’, forthcoming in 2006 in *Report on the Seminar on International Investment Law of the Hague Academy of International Law*, 2004; T Weiler, ‘National Treatment’ in T Weiler (ed), *Nafta, Investment Law and Arbitration* (2004).

17 On tax-related investment disputes see, forthcoming, Wälde/Kolo, Report to the ILA Foreign Investment Law Committee (2007).

Table 2: Investor-to-state disputes under the ECT Article 26 known to the Energy Charter Secretariat (as of November 2006)					
Investor v State Respondent	Case filed	Arbitrators	Subject matter	Status of proceeding	Claim or award
AES Summit Generation Ltd (UK subsidiary of US-based AES Corporation) v Hungary*	25.04.01 ICSID ARB/01/04	Allan Philip (Danish) (chairman); Francisco Orrego Vicuña (Chilean); Prosper Weil (French)	Electricity sale agreement	Settlement agreed by the parties and proceeding discontinued at their request (3 January 2002)	N/A
Nykomb Synergetics Technology Holding AB (Sweden) v Latvia*	11.12.01 Arbitration Institute of the SCC	Bjørn Haug (chairman); Rolf A Schütze; Johan Germandt	Electricity sale agreement	Award rendered on 16.12.03	US\$3.2m plus interest rate of 6% per annum, payment of double tariff for approx four years (+/- US\$10m)
Petrobart Ltd (Gibraltar) v Kyrgyzstan*	01.09.03 Arbitration Institute of the SCC	Prof Ove Bring, Jeroen Smets, former Justice Hans Danielius	Gas delivery contract	Award rendered on 29.03.05	US\$1,130,859
Plama Consortium Ltd (Cyprus) v Bulgaria	19.08.03 ICSID Case No ARB/03/24	Carl F Salans (US) (chairman); Jan van den Berg (Dutch); WV Veeder (British)	Oil refinery investment	Pending 28.10.05 – Decision on jurisdiction 25.05.06 – Tribunal issues Procedural Order No 5 concerning the schedule for the filing of written submissions 28.07.06 – Respondent files a counter-memorial on the merits	US\$300m (Shearman and Sterling website)
Alstom Power Italia Spa, Alston Spa (Italy) v Mongolia*	18.03.04 ICSID Case No ARB/04/10	Marc Lalonde (Canadian) (chairman); Jan Paulsson (French); Anthony Mason (Australian)	Thermal energy project	Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance to Arbitration Rule 43 (1)) issued by the Tribunal on 13.03.2006	N/A
Group Menatep (Gibraltar); Hulley Enterprises Ltd (Cyprus); Yukos Universal Ltd (Cyprus); Veteran Petroleum Trust (Cyprus) v Russian Federation	03.02.05 UNCITRAL Arbitration Rules	Yves Fortier (Canadian) (chairman); Daniel Price (US); Stephen Schwebel (US)	Discriminatory measures and expropriation of investments	Pending Tribunal appointed	US\$33.1 billion Menatep press release 11.04.05

Table 2: Investor-to-state disputes under the ECT Article 26 known to the Energy Charter Secretariat (as of November 2006)					
Investor v State Respondent	Case filed	Arbitrators	Subject matter	Status of proceeding	Claim or award
Ioannis Kardossopoulos (Greece) v Georgia	03.10.05 ICSID Case No ARB/05/18	L Yves Fortier (Canadian) (chairman); Francisco Orrego Vicuña (Chilean); Arthur Watts (British)	Oil and gas distribution enterprise	Pending 27.02.06 – tribunal constituted; 13.07.06 – Claimant files a memorial on the merits 29.09.06 – Respondent files a memorial on jurisdiction	N/A
Amto (Latvia) v Ukraine	[November 2005] Arbitration Institute of the SCC	Bernardo Cremades (Spain) (chairman); Per Runeland (UK); Christer Söderlund (Sweden)	Nuclear power plant (bankruptcy proceeding)	05.06 – Statement of claim expected	N/A
Hrvatska Elektroprivreda dd (HEP) (Croatia) v Republic of Slovenia	28.12.05 ICSID Case No ARB/05/24	David AR Williams (New Zealand) (chairman); Charles N Brower (US); Jan Paulsson (French)	Nuclear power plant	Pending 20.04.06 – tribunal constituted 03.07.06 – the Tribunal held a first session in London	€31.7m statement from Croatia's Ministry of Economy
Libananco Holdings Co Limited (Cyprus) v Turkey	19.04.06 ICSID Case No ARB/06/8	N/A	Electricity generation and distribution concessions (expropriation)	Pending (tribunal not constituted)	US\$10 billion arbitration claim Announced 23.02.06 (www.crowell.com)
Azerpetrol International Holdings BV, Azerpetrol Group BV and Azerpetrol Oil Services Group BV (Netherlands) v Republic of Azerbaijan	30.08.06 ICSID Case No ARB/06/15	N/A	Expropriation Oil and gas distribution, trade, storage and transportation enterprise	Pending (tribunal not constituted)	N/A
Barmek Holding AS v Republic of Azerbaijan	16.10.06 Case No ARB/06/16	N/A	Electricity concession	Pending (tribunal not constituted)	N/A

* Concluded cases

The information contained in this table has been obtained from various public sources (press, ICSID, SCC) and is believed, but cannot be guaranteed, to be reliable.

Source: Energy Charter Secretariat

equivalent to 'different' treatment, but rather a distinction in treatment without legitimate reasons. The case practice now developing in NAFTA Chapter XI arbitral awards, the GATT dispute panel jurisprudence or the law developed by the European Court of Justice provides the best illustration of how the discrimination standard will be applied under the ECT. The first ECT award – *Nykomb v Latvia*, rendered in December 2003 (see Table 2) – made an award in favour of the investor-claimant on the basis of the national treatment obligation. At issue was the non-compliance by the state energy monopoly of an obligation to pay double the normal tariff for a co-generation plant that was established because of a governmental and state enterprise temporary double-tariff commitment. National companies received this double tariff co-generation incentive, but the foreign investor did not, in spite of being able, in the tribunal's view, to rely on a valid contractual commitment.¹⁸

There is also an obligation to offer 'fair and equitable treatment' and 'most constant protection and security' (ECT Article 10(1)).¹⁹ While these seem to be traditional principles of international law, the developments in NAFTA and the World Bank ICSID arbitral awards indicate a re-evaluation of these principles. They may come to mean modern 'good governance,' such as transparency, consultation with affected parties, choice of the least-restrictive means to achieve a legitimate purpose, reliance on sound scientific judgment, freedom of government action from illicit influences and a respect for the values now enshrined in the many international human rights conventions. This principle has been the basis for arbitral tribunals to award compensation for investors affected by non-transparent and excessive governmental interference in legitimate investment-backed expectations.²⁰

18 The award is published in the TDM archive. Comment by T Wälde, 'The First Energy Treaty Arbitral Award' (with K Hober), in (2005) 22 *J Int'l Arbitration* 83-105. For more details of this and other ECT dispute settlement cases see also Stephen Jagusch and Anthony Sinclair, *The Energy Charter Treaty: Settlement of Disputes between an Investor and a Member State* – presentation at the Seminar on the ECT dispute settlement mechanisms, Energy Charter Secretariat, 20 October 2005 (www.encharter.org).

19 I Laird, 'Betrayal, Shock and Outrage – Recent Developments in NAFTA Article 1105' in T Weiler (ed), 2004 *op cit*; C Schreuer, 'Fair and equitable treatment in arbitral practice' in *J World Investment*, 2005, at p 374; B Sabahi, 'Protections of Legitimate Expectations,' TDM 2005 (www.transnational-dispute-management.com), November 2005.

20 There may be a trend emerging for tribunals to make an award for the claimant rather on the fair and equitable standard – which seems to require a lesser standard of proof for the 'taking' rather than a 'regulatory taking,' the contours of which are not easy to establish with great certainty; recent jurisprudence is developing mainly in the context of Art 1105 of NAFTA and equivalent BIT provisions, see: *Metalclad v Mexico*, *Tecmed v Mexico* and *MTD v Chile* – all available from TDM and www.investmentclaims.com. Note here Wälde's Separate Opinion in *Thunderbird v Mexico* (www.naftaclaims.com).

There are other issues in the investment regime one should note: facilitated entry of key personnel (ECT Article 11), compensation for losses in war-like situations (Article 12), right to repatriate revenues and returns from the investment (Article 14), a reduced scope for Treaty controls over taxation (Articles 18(3)²¹ and 21), transparency, in particular for relevant laws and regulations (Article 20) and a mainly programmatic good-practices set of principles on environment (Article 19). These are either more policy-oriented programmatic clauses or they form the by-now standard content of BITs. The main problem area is probably the obligation to convert into foreign exchange and repatriate in the context of a country-wide financial crisis. There is no exception in the Treaty to financial emergencies.²²

It is significant to highlight what the ECT does *not* require. The ECT does not impose a specific system of property ownership of energy resources (Article 18(2)). Contrary to what one hears sometimes of a system of public ownership of oil and gas resources in the ground or after extraction, this system is compatible with the ECT. The same applies to the continued existence of state enterprises. The ECT non-discrimination rule may create obligations should privatisation occur (this is the object – though there are also views that it's a 'by-product' at best – of the not completed Supplementary Treaty), but it does not require the privatisation of state petroleum companies. It does seem to require that if state enterprises operate in the industry, they do not get preferential treatment and operate on a 'commercial basis' and a 'level playing field' with foreign competitors. If a public company or agency is entrusted with a specific public service, this may, however, justify different treatment – discrimination consists in different treatment in 'like' situations without legitimate reason – in analogy to Article 86 of the EC Treaty.

There is no explicit provision in the ECT requiring the opening up of oil and gas acreage to foreign investors. The emphatic reference to 'sovereign rights over energy resources' (ECT Article 18(1)) supports this conclusion. 'Permanent Sovereignty over Natural Resources' (UN GA Resolution 1803

21 A research project led by Thomas Wälde deals with the issue of taxation in international investment treaties, for an introductory comment see Thomas Wälde, 'Renegotiating previous governments' privatization deals: the 1997 UK windfall tax on utilities and international law' (1999) 19 *Northwestern J Int'l Law & Business* 405-424 (with Abba Kolo).

22 For a brief discussion of this surprising lack of a national emergency provision, see T Wälde, *idem*, 'International Investment under the 1994 Energy Charter Treaty,' in (1995) 29 *JWT* 5-72; forthcoming: E Kentin, Report of the Hague Academy of International Law, 2006, *op cit*; for the most recent case discussing the concept of national emergency see *CMS v Chile*, award on the merits, at: www.worldbank.org/icsid. and *LG&E v Argentina*. CMS rejects a notion of economic crisis-triggered *force majeure*, LG&E accepts it.

of 1961 is the authority) is commonly understood as a state's right to dispose of its natural resources as it sees fit. The reference to 'sovereignty over energy resources' must be understood as a confirmation by the ECT of the principle of permanent sovereignty over natural resources.

According to ECT Article 47, each Contracting Party has the right to withdraw from the ECT at any time after five years from the date on which the ECT has entered into force for this Contracting Party. Such withdrawal shall become effective one year after the date of the receipt of the notification of withdrawal by the Depositary. However, the ECT protects existing investments of foreign investors of other Contracting Parties in the territory of the withdrawing Contracting Party and of investors of that withdrawing Contracting Party in the territory of other Contracting Parties for an additional period of 20 years.

Article 45 provides for a novel form of 'provisional application'. Five countries have signed, but not yet ratified the Treaty, though two of those (Russia and Belarus) have been applying it on a provisional basis (see Box 2),²³ and Norway has been participating very actively in the Energy Charter

²³ Major objections for Russia's ECT non-ratification were Gasprom-originated concerns such as the following: (a) the ECT, by supporting the development of open and competitive energy markets, votes against long-term supply contracts; (b) the ECT obliges its contracting parties to introduce mandatory third-party access and thus would open Gasprom's gas transport system to competing and cheaper gas from Central Asian states; (c) the ECT demands transit tariffs to be equal to domestic transport tariffs, which, in combination with (b) above, would result in competitive disadvantages for Russian gas supplies to Europe. The fourth argument against the ECT originated from the Russian Ministry of Atomic Energy, which considered it a flaw of the ECT that (d) the ECT does not regulate on a multilateral basis trade in nuclear fuel between Russia and the European Union. All four objections were proved to be incorrect: (1) there are no such demands or clauses in the ECT, moreover the ECT protects the existing contractual structures of the energy markets; (2) ECT Understanding IV.1(b)(ii) states: 'The provisions of the Treaty do not oblige any Contracting Party to introduce mandatory third party access'; (3) such an understanding presents an incorrect interpretation of Art 7.3 of the ECT ('Transit'), which, while dealing with cross-border energy flows, demands that 'each Contracting Party ... shall treat Energy Materials and Products in Transit in no less favourable a manner than ... such materials and products *originating in or destined for its own Area...*' (ie correspondingly, with export and import); necessary clarifications were made available by a letter from the ECS Secretary-General sent to Russia in February 2001 on which basis a special draft Understanding has recently been developed by Russian/EU experts in the course of their informal tasks for the draft Transit Protocol; (4) EU-Russia trade in nuclear materials was excluded from the scope of the ECT through a bilateral declaration (the same was done for EU trade in nuclear materials with Ukraine, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan). The declaration ('Joint Memorandum of the Delegations of the Russian Federation and the European Communities on Nuclear Trade') states that EU-Russia trade in nuclear materials will instead be covered by the bilateral Partnership and Cooperation Agreement (PCA), which in turn foresees a separate bilateral arrangement on this issue. The intention,

process.²⁴ An ongoing arbitration – *Menatep v Russia* (see Table 2) – raises the question to what extent Russia is obligated by Article 45's provisional application and if this application also provides the arbitration agreement that is constructed by Article 26 of the ECT.²⁵

Trade

One of the necessary conditions for forging open and non-discriminatory energy markets through the Energy Charter process has been to create a stable, predictable and non-discriminatory regime for energy and energy-related trade between all ECT Contracting Parties/signatories. Such a framework should naturally follow and be based on the rules of the multilateral trading system as embodied in the General Agreement on Tariffs and Trade (GATT) – when the ECT was negotiated between 1991 and 1994 – and now in the World Trade Organization (WTO). That is why the legal structure of the ECT trade regime consists of two instruments: (1) the relevant provisions of the ECT based on the GATT 1947 rules (in the version of December 1994), and (2) the Amendment to the Trade-Related Provisions of the ECT based on the relevant WTO rules (adopted in April 1998).

The ECT assumes that all its Contracting Parties and signatories will eventually become members of the WTO and any reference to trade issues in the Charter is aimed at filling the gap in the interim period pending accession of the remaining ECT member states that are not yet members of the WTO. On the other hand, the trade provisions of the ECT fill the gap of the WTO agreements being applied to energy trade. Until and unless the WTO member states agree to apply WTO agreements to energy, the ECT (potentially) has a crucial role to play.

specified in Art 22 of the PCA, is to conclude this arrangement by 1 January 1997, but it has not yet been concluded. However, this sovereign bilateral decision of the two Contracting Parties does not provide evidence of the weakness of the Treaty, but rather lack of progress in their bilateral relations on the issue in question.

For more information on the debate with opponents to ECT ratification in Russia, see literature mentioned in n 8, as well as other publications by A Konoplyanik (www.encharter.org/Secretariat/DeputySecretaryGeneral).

24 Norway has talked of a constitutional problem relating to a dispute between the state and investor, but would most probably ratify the ECT after Russia did so.

25 On this issue see U Klaus, 'ECT and provisional application,' in TDM 2005, *op cit*; A Konoplyanik, 'Energy Charter Treaty – and "Yukos case"' (2005) 8 *Petroleum Economist* 35-36; A Konoplyanik, 'DEH i "delo Yukosa"' (2005) 8 *Neft Rossii* 83-86. *Petrobart v Kirgizstan* accepted the ECT's provisional application for investment arbitration (available on TDM), *Plama v Bulgaria* (www.worldbank.org/icsid) discussed it in a jurisdictional award (but without definitive conclusion). It is a key element in the ongoing *Menatep/Hulley et al v Russia ECT* case.

In 1995, of the 50 ECT member states only 22 were WTO members, and of the ten ECT observers, only five were WTO members. In 2006, of the 51 ECT member states 42 were already WTO members, and of the 19 ECT observers, 15 were WTO members and four²⁶ were observers to the WTO. The nine ECT member states that, as of 2006, are not yet WTO members are: Azerbaijan, Belarus, Bosnia and Herzegovina, Kazakhstan, Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

The fact that in the early 1990s more than half of the Charter constituency did not belong to GATT represented a major challenge during the negotiations on the ECT. A formula for dealing with energy trade between GATT and non-GATT ECT members, and to energy trade among non-GATT ECT members was found through making the substantive GATT rules applicable to such transactions ('GATT by reference' – ECT Article 29). As far as trade between GATT ECT members was concerned, GATT provisions applied exclusively, and the ECT did not derogate from these provisions.

Three years after the entry into force of the WTO agreement, the ECT was amended in order to take account of the relevant changes in the multilateral trade rules resulting from the Uruguay Round. The amendment has taken the same approach as the original Treaty: it incorporated all those WTO rules on trade in goods that are relevant from a sector viewpoint ('WTO by reference'). The Trade Amendment (not yet in force) also expands the Treaty's scope to cover trade in energy-related equipment, and sets out a mechanism for introducing, in the future, a legally-binding standstill on customs duties and charges for energy-related imports and exports.

The ECT therefore has the effect of treating those Contracting Parties/signatories, which are not yet members of the WTO, as if they were WTO members – in the framework of energy-related trade. For non-WTO ECT member states, the applicable ECT trade regime is a milestone towards WTO membership. It allows them to familiarise themselves with the practices and disciplines that WTO membership entails, through application of its rules 'by reference' to trade in energy materials and products and energy-related equipment. In this regard, the ECT trade provisions have already played one of their important historical roles. It has facilitated processes of accession to the WTO and the European Union for many ECT member states by bringing in advance their domestic energy legislation into line with GATT/WTO norms and thus accelerating adaptation processes for these countries.

26 Or five, if Serbia and Montenegro are counted separately, since they decided to apply individually for accession to the WTO as two separate customs territories. They are both currently WTO observers.

Transit

One of the most interesting provisions of the ECT is its Article 7 ('Transit'). Based on earlier conventions and on the little-used (to say the least) Article V of the GATT, it creates a rather open-ended obligation to authorise and facilitate energy transit, including a soft obligation to favour the construction of new facilities, to abstain from unwarranted closure of transit facilities (eg for political reasons) and to make sure state and private transit operators do not undermine that obligation.

The existing ECT transit provisions oblige its Contracting Parties to facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit. This is a critical issue for the collective energy security of the Charter's signatory states, since energy resources are increasingly being transported across multiple national boundaries on their way from producer to consumer.

For this reason, the Charter's participating states have looked to enhance the Treaty's provisions on transit through the elaboration of a Transit Protocol, on which formal negotiations commenced in early 2000. The multilateral phase of negotiations was considered to have come to an end in December 2002,²⁷ while three outstanding issues²⁸ have still to be finalised

27 The text of the draft Energy Charter Protocol on Transit is available at www.encharter.org.

28 The issues are: (a) correlation between cost-reflectiveness of transit tariffs and the use of such congestion management instruments as auctions; (b) the mechanisms of avoidance of potential mismatch between long-term supply contracts and corresponding transit agreements, ie granting of long-term access to transport capacities; (c) implementation of the Transit Protocol within the Organisation of Regional Economic Integration (REIO), ie within the EU (the only REIO within the ECT constituency), in which case the development of single internal energy markets demands that (from the EU viewpoint – for the purpose of the Transit Protocol) only those energy flows that cross the whole EU territory and not the territories of individual EU Member States, are considered as transit, as defined in the ECT.

For a debate on the finalisation of the draft Transit Protocol, and in particular on differences between Russia's and the EU's positions on three outstanding issues, see, for example, the following publications of A Konoplyanik: 'Protocol po tranzitu k DEH: problemy, vyzvayuzchiye ozabochennost' Rossii, i vozmozhnyye puti ih resheniya' (2002) 5(47) *Neft, gaz i pravo* 49-62; 'Ne poteryat' litso. Uspeshnoye zaversheniye peregovorov o tranzite energoresursov zavisit ot gotovnosti Rossii prodolzhat' v nikh uchastvovat' i iskat' vzaimopriemlye resheniya s ES,' *Mirovaya energeticheskaya politika*, December 2002, No 10, pp 54-57; 'Protocol po tranzitu k DEH: na puti k soglasiyu. Kakoi rezhim budet predostavljen rossiiskomu gazu na territorii stran ES?' *Mirovaya energeticheskaya politika*, March 2003, No 3, pp 56-60; 'V usloviyah vysokoi konkurentсии. O vozmozhnostyah Rossii po rasshireniyu svoego prisutsviya na evropeiskom gazovom rynke,' *Mirovaya energeticheskaya politika*, May 2003, No 5, pp 62-67; 'Russian Gas to EU Markets – 1: Thorny issues impede progress toward final Transit Protocol' (2003) 101 *Oil & Gas Journal* 60-64; 'Russian Gas to EU Markets – 2: Compromise is best course for Russia, EU in Protocol negotiations' (2003)

Continued overleaf

at first through bilateral consultations between Russia and the European Union. The Transit Protocol's aim is to develop a regime of commonly accepted operative principles covering transit flows of energy resources, both hydrocarbons and electricity, crossing at least two national boundaries, designed to ensure the security and non-interruption of transit.²⁹

In 1998, the Energy Charter Conference approved a set of rules of procedure for the conduct of conciliation during disputes over matters of energy transit. The Conference also took positive note in 2003 of the first edition (and in 2006 – of the second edition) of Model Agreements on Cross-Border Pipelines (including the Host Government and Inter-Government Agreement), prepared on the basis of a mandate from the Conference in 1999.

Energy efficiency and related environmental aspects

PEEREA requires its participating states to formulate clear policy aims for improving energy efficiency and reducing the energy cycle's negative environmental impact. Through the implementation of PEEREA, the Energy Charter provides transition economies with a menu of good practices and a forum in which to share experiences and policy advice on energy efficiency issues with leading OECD states. Within this forum, particular attention is paid to such aspects of a national energy efficiency strategy as taxation, pricing policy in the energy sector, environmentally-related subsidies and other mechanisms for financing energy efficiency objectives.

101 *Oil & Gas Journal* 68-75; 'Transit Protocol Finalization,' *Petroleum Economist*, July 2004, p 34; 'Russia-EU Summit: WTO, the Energy Charter Treaty and the Issue of Energy Transit' (2005) 2 *International Energy Law and Taxation Review* 30-35; 'Rossiiski gaz dlya Evropy: ob evolyutsii kontraktnykh struktur (ot dolgosrochnykh kontraktov, prodazh na granites i ogovorok o punktah konechnogo naznacheniya – k inym formam kontraktnykh otoshenii?)' (2005) 3 *Neft, gaz i pravo* 33-44; (2005) 4 *Neft, gaz i pravo* 3-12; 'Russian Gas to Europe: From Long-Term Contracts, On-Border Trade, Destination Clauses and Major Role of Transit to ...?' (2005) 3 *JERL* 282-307; 'EU/Russia must meet half way,' *Petroleum Economist*, September 2006, pp 32-33; 'Russia-EU, G-8, ECT and Transit Protocol' (2006) 3 *Russian/CIS Energy & Mining Law Journal* 9-12, etc.

²⁹ It is sometimes raised – in particular in Russia – that the ECT imposes third-party access. There is no direct reference to third-party access – except in an Understanding IV.1(I) (ii) clearly states that the ECT cannot be read as creating a mandatory third-party access system. However, Wälde has argued – 27 *Neth Ybk Int'l L* 143 (1996) – that the non-discrimination obligations (in Art 10) together with the responsibility of the state for the conduct of its state enterprises and enterprises with special privileges (eg monopoly positions in energy transport) can be interpreted as to provide an obligation of such state enterprises to provide non-discriminatory treatment to foreign investors requesting access. That issue, however, has not as yet been tested. The negotiations on the draft Transit Protocol have been developing the rules of non-discriminatory access to the 'available transit capacity', which fully takes into consideration substantiated concerns of vertically integrated companies' owners of transportation systems.

PEEREA's development is currently focused on a series of in-depth energy efficiency reviews, designed to produce concrete recommendations for individual governments concerning ways of improving their national energy efficiency strategies.

The UNECE 'Environment for Europe' Ministerial Conference held in Kiev, Ukraine, in May 2003, based its findings in the area of energy efficiency on the work carried out on PEEREA's implementation. The next Ministerial Conference is being prepared to take place in Belgrade in autumn 2007. The Energy Charter and the PEEREA group will report to the Ministerial meeting on developments in energy efficiency policies and will be involved in the 'Environment for Europe' process in order to secure the recognition of the importance of energy efficiency for the environment.

Dispute settlement mechanisms

The ECT contains a fully-fledged system of international dispute resolution. These provisions were developed in such an elaborate way because at the time the ECT was negotiated some Contracting Parties/signatories (in particular economies in transition) did not yet have a sufficiently developed domestic juridical system. There was – and still is – concern about the neutrality, professional competence and efficiency of domestic courts in these countries, and respect for the rule of law in business and social life.

By providing an alternative means of dispute resolution before international tribunals, the ECT contributes to the increasing confidence of investors, their countries of origin and host countries to the level of legal protection of international investments and trade. Thus, the ECT ensures a reduction of risks and an increase in investment and trade flows between its members. This is of particular relevance in the energy sector. The capital intensity of investment projects in the energy sector is higher compared to that of the manufacturing industry, services and other sectors of the economy, especially of investment projects in upstream activities and infrastructure (transport and distribution networks), which, in most cases, can only be achieved by consortia of major international companies. That is why disputes related to energy projects and companies may often be very complex and involve huge amounts of money.

The ECT includes several international dispute resolution mechanisms, each of them being designed to address a particular aspect of the Treaty. The two basic forms of binding dispute settlement are: (1) state-to-state arbitration for basically all disputes arising under the ECT (Article 27), except competition (Article 6(7)) and the environment (Article 19(2)), and (2) investor-to-state arbitration for investment disputes (Article 26).

Investment arbitration under Article 26 is a key feature of the ECT³⁰ – and the provision most likely to give many countries an uneasy life. The method is based on Chapter XI of the NAFTA and most modern BITs, in particular those of the United States and the United Kingdom. The novel feature is that foreign investors from member states can sue the host state directly, before an international arbitral tribunal, without the need for a specific arbitral agreement to be concluded. Any government misconduct falling under the – narrow – list of ECT Part III can be adjudicated, on the sole request of the investor, without any possibility of government escape.

Countries with a traditional emphasis on national sovereignty have great problems accepting the authority and jurisdiction of an international tribunal outside its control; these include countries with a current or recent superpower sentiment, such as the United States or Russia. EU countries may be somewhat more accepting, mainly because they are used to having to account to the European Court of Justice and the European Court of Human Rights.

Why would countries accept such external controls on their conduct towards foreign investors? The main reason is that it makes their own promises – by law or contract – more credible. A promise that is only enforceable before a national court has little credibility. Accepting such external discipline therefore lowers political risk rating and gives a country an advantage over countries that are not ready to accept such external discipline.³¹ Investment arbitration is a necessary component of investment protection regimes – without such external authority, the duties assumed mean little in practice.

In addition to investor-state dispute settlement, Article 27 of the ECT provides for inter-state arbitration. Once again, this reflects the practice of BITs. In comparison with investor-to-state disputes under Article 26, the scope of inter-state disputes is wide. It is, in principle, not limited to investment disputes but applies to the application and interpretation of the Treaty as a whole – with very limited exceptions.

30 The comprehensive analysis of investment arbitration under the ECT is presented in a book published on the results of the first international conference, jointly organised by the Energy Charter Secretariat and the Arbitration Institute of the Stockholm Chamber of Commerce on 9-10 June 2005, in Stockholm, which specifically addressed the questions of investment arbitration in relation to the ECT: C Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* (JurisNet LLC, USA, 2006).

31 T Wälde, 'Investment Arbitration as a Discipline of Good Governance' in T Weiler (ed), *NAFTA, Investment Law and Arbitration* (Transnational Publishers, 2004), pp 475-493; *World Bank Development Report* (2005), p 176 *et seq*; also Wälde, OPEC & ECT, published on OGEL 2005 (www.gasandoil.com/ogel)

Special provisions have been developed in the ECT for the resolution of inter-state disputes in the area of trade (Article 29, Annex D) and transit (Article 7). They derogate from the otherwise applicable general provisions on state-to-state dispute settlement. As far as competition (Article 6) and environment (Article 19) are concerned, the ECT does not establish binding arbitration procedures, but provides for 'softer' and less formal dispute resolution mechanisms.

As far as trade and investment disputes are concerned, the ECT provisions are based on the model of the WTO arbitration rules (for trade) and BITs (for investment). By contrast, the ECT dispute resolution rules concerning transit, competition and environment are new features, giving the Treaty a pioneer role in these areas.

In each case, the objective of international dispute settlement is not to favour foreign investors but to ensure an independent and neutral judicial forum. Overall, the ECT offers a dispute settlement system that is unique in the international arena both for the broad scope of covered issues (investment, trade, transit, competition and environmental protection) and the number of countries having subscribed to it. This is where the special strength and the resulting legal attraction of the ECT is – today it has no alternative as to the comprehensive coverage of dispute resolution procedures both state-to-state and especially investor-to-state. A comparison with similar arbitration provisions in BITs suggests that in general the ECT provides more extensive coverage and investment protection; a comparison with direct investor–state arbitration based on national investment law indicates the much greater fragility, limitation and often more controversial legal nature of the consent and submission to international arbitration sometimes inferable under domestic law as compared with the ECT.³²

The comprehensive system of ECT dispute resolution provisions defines their dual role: that of an efficient instrument for both (1) the resolution of disputes that have arisen, as well as (2) the prevention of disputes keeping Contracting Parties from violating ECT provisions. That is why the small number of disputes under the ECT that have been resolved out of tribunals or in the tribunals (see Table 2) cannot be used to measure the efficiency of the ECT dispute resolution system itself, since it is difficult to estimate the number of potential disputes that have been prevented owing to the fact that the Contracting Parties/signatories were well aware of dispute resolution instruments available under the ECT and the corresponding legal

³² It is noteworthy that the *Petrobart v Kirgizstan* claim was rejected at first in an arbitration based on the Kirgiz investment law while it was positively determined in the subsequent ECT-based arbitration (see Table 2).

consequences in case of violation of the ECT provisions. It should also be understood that the history of potential use of ECT dispute resolution mechanisms only starts from 16 April 1998 – the day when the ECT came into force and became an integral part of international law.³³

As of November 2006, the Energy Charter Secretariat was aware of 12 complaints³⁴ lodged under ECT Article 26, ie those filed by ECT member state investors against other ECT member states in which such investors made their investments (see Table 2).

Institutions: the Energy Charter Conference and Secretariat

The Energy Charter Conference, an intergovernmental organisation, is the governing and decision-making body for the Energy Charter process, and was established by the 1994 Energy Charter Treaty. The Conference has political responsibility for the implementations of the Energy Charter, the ECT and related instruments. It also decides on possible amendments to ECT and on the admissions of new members. All states who have signed or acceded to the ECT are members of the Conference, which meets on a regular basis to:

- discuss policy issues affecting energy cooperation among ECT signatories;
- review implementation of the provisions of the ECT and PEEREA; and
- consider possible new instruments and projects on energy issues.

Meetings of the Conference are normally held in Brussels (prior to 2005 – twice a year, since 2005 – once a year, usually at year-end). The Conference is headed by the Chairman (since 1999 and until the end of 2006 – Henning Christophersen from Denmark, a former Vice-President of the European Commission), who has two deputies (currently high-ranking government officials of Russia and Japan). In November 2006 the Energy Charter

³³ Two (*AES v Hungary*, *Alstom v Mongolia*) were settled ‘under the shadow’ of ECT-based arbitration; *Nykomb v Latvia* and *Petrobart v Kirgizstan* led to awards for claimant; *Plama v Bulgaria* has resulted, so far, in a jurisdictional decision. Other cases – including *Hulley*, *Yukos et al v Russia*, *Libananco v Turkey* – are ongoing. While this number appears modest in comparison with over 200 BIT and NAFTA-based investment disputes, one should perhaps also note that the European Court of Justice has probably not rendered more than three judgments in the same period – 1998 to 2006 – in the energy field.

³⁴ See also A Konoplyanik, ‘Dogovor k Energeticheskoi Hartii: mehanizmy razresheniya sporov’ (2005) 1 *Neft, Gaz i Pravo* 35-41; *ibid*, ‘The Energy Charter Treaty: Dispute Resolution Mechanisms – and the Yukos Case’ (2005) III *Russian/CIS Energy & Mining Law Journal* 27-33; *ibid*, ‘Energy Charter Treaty – and “Yukos case”’ (2005) 8 *Petroleum Economist* 35-36; *ibid*, ‘DEH i “delo Yukosa”’ (2005) 8 *Neft Rossii* 83-86; Stephen Jagusch and Anthony Sinclair, *The Energy Charter Treaty: Settlement of Disputes between an Investor and a Member State – Presentation at the Seminar on the ECT dispute settlement mechanisms*, Energy Charter Secretariat, 20 October 2005 (www.encharter.org).

Conference elected its new Chairman – Takekazu Kawamura, Ambassador of Japan to the EU.

The Conference has created several working groups (three as of today: on investment, trade and transit and energy efficiency), ad hoc committees (one on the budget, a Legal Advisory Committee and an Industry Advisory Panel) and ad hoc expert groups (on the Secretariat's programme of work and a Legal Advisory Task Force) that operate under its supervision. Regular meetings of the Conference's working groups are held in between Conference meetings twice a year (usually in spring and autumn).

The Energy Charter Conference is served by a small permanent Secretariat established in Brussels in 1996 to serve the Conference and its member states. The Secretariat is staffed by energy sector experts from various countries of the Conference's constituency (now from 15 member states), and is headed by a Secretary General (in 2000-2005 – Dr Ria Kemper from Germany; since 2006 – Andre Mernier from Belgium).

The Secretariat's functions are to:

- monitor implementation of the obligations of the ECT and PEEREA;
- organise and administer meetings of the Conference and its subsidiary bodies;
- provide analytical support and advice to the Conference and its subsidiary bodies on all aspects of the Energy Charter process;
- represent the Energy Charter Conference in the development of its relations with non-member states and other relevant international organisations and institutions;
- support negotiations on new instruments mandated by the Conference; and
- facilitate dispute resolution/conciliation procedures.

Energy Charter process

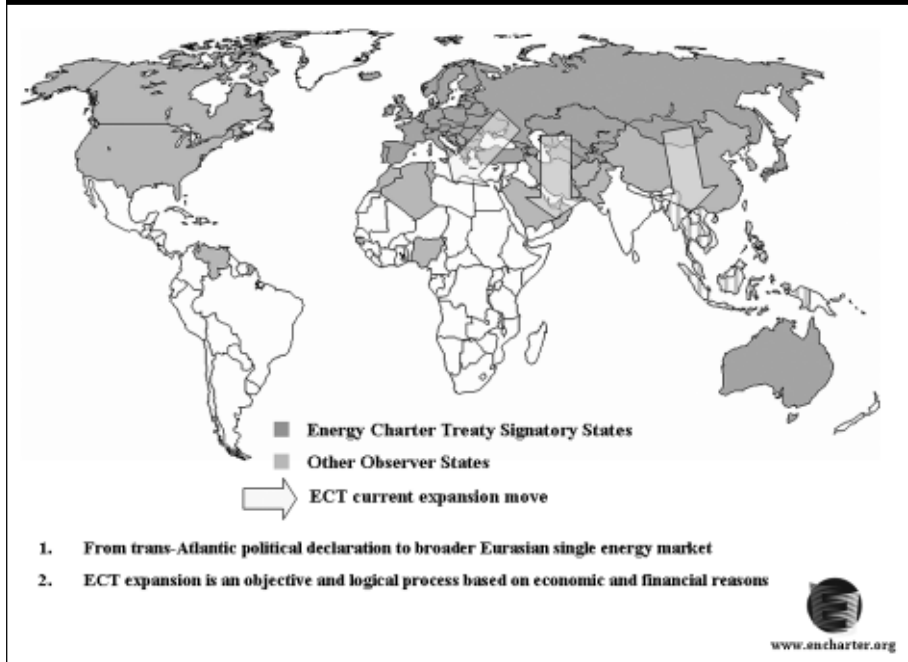
Participation in the Energy Charter process is not limited merely to the act of signing the ECT. The Energy Charter represents not only a legal framework, but also a multilateral policy forum where governments from across Eurasia participate in a dialogue on issues affecting cooperation in the energy sector.

Under the Charter's auspices, a programme of work is carried out aimed both at ensuring that the provisions of the ECT are observed at national levels, and also at encouraging dialogue between member countries on such issues as energy market restructuring, promoting energy efficiency and reducing barriers to energy investments and trade regionally and globally.

The Energy Charter is an open process. Interested non-member countries are welcome to join, subject to the approval of the Energy Charter Conference and to a demonstration by the country concerned of its readiness to take on the obligations contained in the ECT.

Although the Charter began its life as a European initiative (in the post-1975 Helsinki meaning of 'Trans-Atlantic Europe'), it has long since taken on a wider geographical dimension, reflecting the objective tendency towards a broader unified Eurasian energy market (see Figure 2). Japan, Australia and the states of Central Asia, which were among initial signatories of the ECT, were subsequently joined by Mongolia, which acceded to the ECT in 1999. The Asian dimension of the Charter was further strengthened when observer status was granted to China in 2001, Korea and Iran in 2002, to ASEAN in 2003, Pakistan in 2005 (Energy Charter Conference at its 17th session in November 2006 approved the accession of Pakistan to the ECT and PEEREA) and Afghanistan in 2006. A broader unified Eurasian energy market has been (and would be further) linked through energy infrastructure with other neighbouring regions. In the Mediterranean region (including North Africa, which has for a long time acted as an integral part of the European Union's energy supply system), discussions have been held with Algeria, Morocco and Tunisia on their possible accession to the ECT. Nigeria became an observer in 2003.

Figure 2: Energy Charter process: geographical development



Participation in the Energy Charter process represents a strategic opportunity for a state to signal its readiness: for improved international cooperation; to stimulate investor interest in its energy sector; and to build confidence and energy security with and among its neighbouring states through the whole length of the energy supply value chains.

According to ECT Article 34(7), at intervals of not more than five years, the Charter Conference reviews the functions provided for in the ECT in the light of the extent to which the provisions of the ECT and Protocols have been implemented. In 2004, the Energy Charter community passed through its second policy review process, which was the first one after the ECT came into force in 1998 and thus it was *de facto* the first substantive Energy Charter policy review process (since the review that was held in 1999 was not in a position to make a detailed examination of the ECT's functioning). All ECT member states reconfirmed their commitment to the Energy Charter process and their continuing interest in its further development. ECT member states recognised the continuing value of a broad cooperative framework for promoting energy investments, facilitating cross-border flows of energy and improving energy efficiency across Eurasia.

The review looked at ways in which the process should evolve in order to respond to changes in the energy markets, such as further liberalisation of European energy markets, and also in view of broader developments such as the accession of member countries to the WTO, which means that the role of the Charter process in the trade area has been changing. Moreover, the Charter's activities should reflect the fact that the enlarged European Union of 25 member countries makes up almost half of the entire Charter constituency, and that the rules of the Union's internal energy market already extend to non-EU countries in the European Economic Area (Norway, Iceland and Liechtenstein) and are also being extended into South-East Europe, further to the signing of the Energy Community Treaty between the European Union and the eight SEE states in October 2005.³⁵

A key objective of the review was to ensure the efficiency of the Charter process by concentrating its activities in areas where the Charter's legal basis and broad constituency provide it with clear advantages. In the first instance, this means a focus on the implementation of the ECT legal instruments. The review emphasised the utmost importance of full ratification of the ECT and its related documents, and also the need to place compliance with

35 A vision of correlation between the Energy Charter's and EU's expansion processes is briefly described in A Konoplyanik, 'Russia-EU Summit: WTO, the Energy Charter Treaty and the Issue of Energy Transit' (2005) 2 *International Energy Law and Taxation Review* 30-35.

these legal instruments at the heart of the Charter process. At the same time, the review confirmed the value of the Charter as a forum for a targeted policy debate on measures that can promote the development of open and competitive energy markets. The review called for continued – and where appropriate, strengthened – cooperation with other relevant international organisations.³⁶

Such an approach presents, on the one hand, an opportunity for the Energy Charter to improve its competitive niche among other energy-related international organisations based on their mutual complementarity, and, on the other hand, to support a balanced and objectively determined life-cycle for the Energy Charter process.

Within the investment protection chain of activities, the following natural competitive niche for the Energy Charter can be seen:

- International Energy Forum (IEF) – the first element in this chain – provides opportunities for the Energy Ministers of its member states (both energy producers and consumers) to indicate their vision of the long-term prospects and problems of energy developments at IEF biannual meetings.
- The International Energy Agency (IEA) – the second element in this chain – would most effectively quantify those visions in terms both of energy demand and supply projections (biannual IEA World Energy Outlooks) and investments needed to implement these projections (the first IEA World Energy Investment Outlook was published in 2003).
- The Energy Charter – the third element in this chain – would develop corresponding multilateral legal instruments that will enable it to minimise the risks related to such investments and thus would promote their implementation.
- International financial institutions – the fourth element in the chain – would play their role of being a catalyst for bringing private capital to finance capital-intensive energy projects.
- Bilateral and regional organisations would provide incremental support (including political support) to the projects of their mutual interest.³⁷

³⁶ The complete conclusions of the review of the Energy Charter process, as adopted by the Energy Charter Conference in December 2004, are presented in Energy Charter 'Annual Report 2004' and are available at www.encharter.org.

³⁷ See A Konoplyanik, 'Energy and Security: The Role of the Institutional Structures Within the OSCE Region (with particular emphasis on the Energy Charter Process),' presentation at the OSCE Economic and Environmental Sub-Committee Meeting, Vienna, 26 November 2004; *ibid.*, 'Energy Charter: the key to international energy security,' *Petroleum Economist*, February 2006, pp 19-20.

Energy Charter life-cycle: within the Energy Charter activities, targeted policy debate would continue to be aimed at discussing commonly understood challenges and risks related to energy markets developments (still existing and not yet effectively mitigated old risks – the question for continuous monitoring of ECT implementation – and new ones that have appeared at new stages of the development of energy markets) in order to define the amount of incremental level of investment protection that can be achieved by improving ECT implementation and what might demand the drafting of new instruments. Negotiations of new instruments will demand their posterior implementation and monitoring, and the Energy Charter cycle (policy debate – negotiations of legal instruments – their implementation and monitoring – policy debate) will continue at the new level.³⁸

The ECT has been held up as a model for either accession – or negotiation of separate regional agreements – in Asia, Latin America and Africa. The difficulties of negotiating such a complex treaty, though, suggest that simple accession is probably a much easier and more efficient solution than starting the ball rolling towards regional energy charter agreements.³⁹

Energy Charter as a business-oriented treaty

Originally, the ECT was slanted towards the interests of the European Union – as a major energy importer and energy foreign investor. This reflected its political and financial influence over the Treaty negotiations, and the relative inexperience of the former Communist countries with economic liberalisation. But this has been changing as the energy producing countries in the East now have more experience and a stronger voice in the ECT process, which is even stronger with the high oil and gas prices.

The position of the resource-rich net-exporting countries in the East has been represented in the ECT mainly by Russia, but also by Kazakhstan and Azerbaijan as ‘emerging’ significant petroleum producers, and by Turkmenistan and Uzbekistan – as gas producers, but also by Ukraine as a major transit state. For them, as for most other Eastern countries, the main appeal of the ECT was to appear attractive to investors, to be seen to play the rules of the global economy, reduce their political risk perception and

38 See A Konoplyanik, ‘The future of the Energy Charter Process: to find a competitive niche,’ presentation at the internal ECS Seminar, Brussels, 28 May 2004 (www.encharter.org).

39 One should note that most OPEC countries – including Saudi Arabia, Iran and Algeria – are ECT observers; Algeria has also an economic cooperation agreement with the EU which might suggest the possibility of a closer relationship with the ECT. Mongolia and most recently Pakistan acceded. China – and other Asian energy consuming countries – are observers.

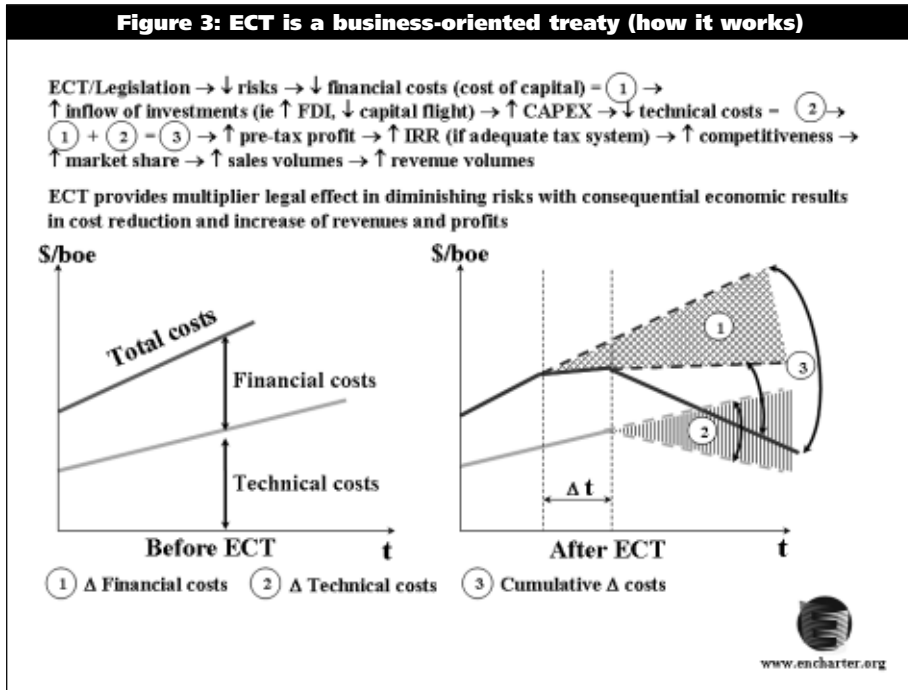
not to be left out of a possibly significant energy policy dialogue(s). This was and is the more important aspect as most of the Eastern countries have problems in attracting (and keeping) foreign investment (which are needed both in order to bring innovations as well as for risk-mitigation and risk-sharing in raising new projects), mainly in terms of legal and political instability and insecurity.⁴⁰ Refusing to join the ECT would have felt like a sort of 'self-black-listing' with the risk of ostracism by the markets. It is noteworthy that most of the ambitious 'emerging oil and gas producers' with significant success in attracting foreign investment are now part of the ECT community. As countries mature, they often acquire energy investment abroad – which is protected by the ECT (principle of reciprocity). Also, countries with transit problems – in oil, gas and electricity – will acquire an additional instrument to solve such problems in a more legalistic, depoliticised and technical forum than available elsewhere.

The ECT is not, and does not have the potential, directly to influence the oil and gas markets. It is not about controlling production or prices, but about bringing the good-governance instruments of free markets to bear: respect for property, contract, a level playing field and transparency. Its principal function for the oil and gas industry is to depoliticise commercial transactions. It gives priority to the '*logic of commerce*' over the '*logic of politics*'. Its intention and effect are to facilitate commercial transactions and free trade flows. This is particularly relevant for the emerging oil and in particular gas producers in the FSU. In the competition for capital ECT provides them with an advantage. This advantage will often not be the key one, but it adds to natural strengths or it – to a degree – lowers the impact of institutional barriers to investment. And from this point of view, the ECT has the potential to add to the effect on oil and gas markets by influencing, to some extent, investment flows that have been and would be establishing and further developing these markets.

The ECT is aimed at improving the competitiveness of energy investors from the ECT member states and of the ECT member states in energy and capital markets.⁴¹ As long as the ECT remains unratified, say, by

40 A Konoplyanik, 'Mnogostoronnie mezhdunarodno-pravovye instrumenty kak put' snizheniya riskov proektnogo finansirovaniya i stoimosti privlecheniya zaemnyh sredstv' (2003) 5 *Neftyanoye hozyaistvo* 24-30 (part I); (2003) 6 *Neftyanoye hozyaistvo* 18-22 (part II); A Konoplyanik, 'Financing Russian Oil and Gas Sector: The Effects of International Law Instruments' (2003) 4(6) *Journal of World Investment* 941-962.

41 See A Konoplyanik, 'Projects to finance,' *Petroleum Economist*, May 2005, pp 29-30.



Russia,⁴² this country will be at a disadvantage when it comes to attracting capital and to cross-border energy trade.

Russia needs to bring down costs in the oil and gas industry more than other similarly resource-rich countries. Distances to markets are long, production at major fields is falling, geology is complex and natural conditions are harsh. Cutting technical costs can help to achieve this, as can reducing financial costs. The ECT when ratified would diminish investment risks, increase credit ratings (both sovereign, corporate and project ratings), driving down the financial component of production costs. Lower costs of raising capital would expand capital supply, through foreign direct investments and by raising capital by domestic companies at international markets and by stemming capital flight. In turn, that will enable technical costs to decline (innovations are usually brought in with investments) (see Figure 3).

⁴² One needs to take into account the following: the US – one of the major players in the ECT negotiations and another major energy producer – did not sign the Treaty (mostly considering that the level of investment protection of US investors abroad would be at best provided by the corresponding US BITs with other countries, than by the multilateral ECT) as well as Canada. Russia and Norway have not yet ratified the Treaty. Key OPEC member states of the Gulf area are observers to the ECT.

The ECT and its instruments provide a legal framework for investments, reducing risk by lowering technical and financial costs and maximising the economic potential of projects. Its ratification by Russia will enable multi-billion investment projects (especially in underdeveloped areas of Russia's Western and Eastern Siberia and Far East) to go ahead by making them more attractive to capital markets and acceptable to project financiers. That will improve Russia's competitiveness in global energy markets and predominantly in the fast-growing Asian energy market where Russia seeks to obtain market share for its Eastern Siberian hydrocarbons. That will also stimulate economic development in new regions through the multiplier effects of those projects and increase taxable revenue for the host state from those projects, etc.

Model for energy liberalisation?

The ECT reflects the particular context of the modernisation of the energy industries, the emergence of the more integrated regional and perhaps global energy markets and the pervasive influence of economic liberalisation now dominant in the European Union and in many other parts of the world. It constitutes a proto-constitutional order for a future (possible) global energy market. In terms of economic treaty-making, it constitutes the most modern benchmark for such treaties, with an emphasis on opening-up, non-discrimination and creation of competitive energy markets, with international disciplines enforceable by arbitral procedures countering the natural and instinctive protectionist tendencies within countries and their well-established, often monopoly-based and publicly owned, energy companies. Part of the attraction of the ECT is its role in establishing external, reasonably well legitimated disciplines on the excesses of domestic politics – and it has been used quite intentionally by the liberalising elites in Russia and other former Socialist countries for that purpose. It is closely related to the much larger WTO/GATT system on its way slowly to establishing a liberalised world trading system, including for energy products and services, to the very successful 50 years of EU economic, and now ten years of EU energy, integration. There are elements of geopolitical rivalry – the European Union, the United States, Russia, China and the energy producing countries are all players in the game. The ECT certainly has a relevance to the Middle East⁴³: first, it is not a US-initiated and promoted

⁴³ See the study by Thomas Wälde on the implications of the ECT for OPEC countries, published in OGEI 2004 – at www.gasandoil.com/ogel.

model and thus, perhaps and possibly, lacks some of the political sensitivity of US involvement in Middle East energy matters – the ECT is rather based on ‘commercial logic’ than on ‘political and imperial logic’. Secondly, it may come handy to those advocating modernisation and economic liberalisation – without having to associate themselves with the United States. It constitutes a model of ‘good governance,’ which has worked for those countries following it.

There is currently no better alternative to the ECT in today’s global and interdependent energy world.

Energy Charter publications and additional information

The Secretariat has been issuing reviews, papers and other publications relating to various aspects of the Energy Charter process.⁴⁴ These are all available online through the website of the Energy Charter at www.encharter.org. The Secretariat also publishes a regular newsletter, *Charter News*, on current developments in the Charter process. Those wishing to subscribe can do so by contacting the Secretariat at info@encharter.org.

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44 See also the special issue on the ECT edited by the Energy Charter Secretariat in 2005 and published on *OGEL* (www.gasandoil.com/ogel).

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