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MODERNISATION OF THE ENERGY CHARTER TREATY

Evolution and Challenges

Master Thesis

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List of Abbreviations

ARIO – Articles on the Responsibility of International Organisations

BIT – Bilateral Investment Treaty

BP – British Petroleum

CEO – Chief Executive Officer

CJEU – Court of Justice of the European Union

CONEXO – Consolidation, Expansion and Outreach Policy

DTA – Double Taxation Agreement

EC – European Communities

ECC – Energy Charter Conference

ECT – Energy Charter Treaty

EEC – European Energy Charter

EIA – Economic Integration Agreement

EC – Energy Community

EU – European Union

EURATOM – European Atomic Energy Community

FDI – Foreign Direct Investment

FET – Fair and Equitable Treatment

GATT – General Agreement on Tariffs and Trade

ICS – Investment Court System

ICSID – International Centre for Settlement of Investment Disputes

IEA – International Energy Agency

IEC – International Energy Charter

ISDS – Investor State Dispute Settlement

INOGATE – Interstate Oil and Gas Transportation to Europe

MFN – Most Favoured Nation Treatment

MIC – Multilateral Investment Court

NAFTA – North American Free Trade Agreement

NATO – North Atlantic Treaty Organization

OECD – Organization for Economic Co-operation and Development

OPEC – Organization of Petroleum Exporting Countries

PEEREA - Protocol on Energy Efficiency and Related Environmental Aspects

REIO – Regional Economic Integration Organization

ROFR – Right of First Refusal

TRIM – Trade Related Investment Measures

TPA – Third Party Access

TPF – Third Party Funding

TTIP – Transatlantic Trade and Investment Partnership

UK – United Kingdom

UN – United Nations

UNCITRAL – United Nations Commission on International Trade Law

UNCTAD – United Nations Conference on Trade and Development

UNFCC – United Nations Framework Convention on Climate Change

USA – United States of America

USD – United States Dollar

VAT – Value Added Tax

VPL – Veteran Petroleum Limited

WG – Working Group

WTO – World Trade Organization

YNG – Yuganskneftegaz

YUL – Yukos Universal Limited

Preface

The Energy Charter Treaty (ECT) is a multilateral investment and trade treaty governing the landscape of energy policy in many countries across the globe. It delves into many aspects of energy governance, from the investment regime to the definition of energy products and equipment, to the trade and transit system and even to environmental concerns deriving from human activities in the field of energy. Finally, it entails a dispute settlement mechanism for solving disputes emanating from such activities in the energy sector among the contracting parties.

The ECT was first established in 1994 and came into legal force in 1998[1]. From 2009 onwards there has been a concentrated effort from the parties involved to modernize, or else, amend a number of provisions of the treaty that feel outdated and do not reflect the current status quo of energy governance in terms of demand and supply of energy, let alone future concerns like climate change and the need for investments on renewable energy. In addition to this, there has always been a difference of perceptions and needs between producing and consuming countries regarding the segmentation of energy as a commodity, even before the signing of the ECT.

Nevertheless, this asymmetry of opinions continued to persist throughout the twenty-year life span of the treaty before the need to modernize it. This imbalance of different perceptions, however, was first observed early after the end of the Cold War with the formation of two camps, the Organization of Petroleum Countries (OPEC), on one hand, and the International Energy Agency (IEA), which was created by the Western industrial-rich countries, on the other[2]. The declaration of the European Energy Charter in 1991, but mostly, the entry into force of the ECT in 1994, ultimately, bridged the gap between the producing and consuming countries, at a time where

[1] Andrei Belyi, 'The Energy Charter Process in the Face of Uncertainties' (2021) 14 The Journal of World Energy Law & Business 363.
[2] Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law (EYIEL), Vol. 3 (2012)* (Springer Berlin Heidelberg 2012) <http://link.springer.com/10.1007/978-3-642-23309-8> accessed 16 November 2021.

energy policy, still, remained a strict national competence despite the repeated efforts of the European Commission to form an Internal Energy Market.

Still, as stated before, the application of the treaty proved to be problematic with the advent of the new millennium due to many factors. Several of those factors acted, each one independently, as a small catalyst that accelerated the urgency to amend the Treaty in many of its provisions. Among the most noteworthy of those factors were Russia putting a halt on provisionally applying the ECT in 2009, the transit protocol negotiations failure and many more. Ultimately, the modernization of the Energy Charter Process was launched in December 2009. A year later, in November 2010, a road map for the modernization process was developed, as mandated by the decision of the Energy Charter Conference. Consequently, in 2011, the policy on Consolidation, Expansion and Outreach (CONEXO) was developed and adopted, followed by the pivotal adoption of the International Energy Charter in 2015, in the Ministerial Conference in Hague. Lastly, in 2018, a list of 25 topics regarding ECT was approved for amendment. From 2018, till today several negotiation rounds have taken place among the contracting parties, each one recommending certain policy options to either clarify the existing provisions, or to amend the treaty by suggesting modifications to the current provisions.

The present thesis has four distinct parts, and its structure proceeds as follows: the first part is dedicated to the background and origin of the ECT, since its inception, while at the same time examining the key areas where the treaty delves into. The second part is committed on examining the key reasons as to why the treaty needed to be amended, and the chain of events that led to the realization of the need for modernization of the ECT. The third part is focused on the actual negotiation phase itself, with special emphasis on EU's remarks and recommendations on policy options that need to be adopted. At the same time, certain legal issues are also reviewed regarding the interplay of ISDS, EU law and the ECT regime. Finally, the thesis concludes with some final remarks regarding the ECT and its current role in the landscape of international energy governance, as well as some recommendations to further expand its impact on energy policy and decision making in the future.

Energy Charter Treaty - Background

The Energy Charter Treaty is a legal agreement of international status, consisting of various provisions regarding the interplay of its signing members on energy matters. More specifically, it is the legal capstone of international energy policy for more than twenty years, since its first iteration back in 1998. It is an international agreement whose sole purpose is the propulsion of multilateral cooperation on the energy field, based on the fundamentals of open, competitive markets and sustainable development, thereby mitigating any possible risks associated with investments and trade regimes on the energy sector. Before proceeding any further, it is worth overviewing its historical background from its inception, all the way up to its modernization procedure.

The birth of the ECT was the fruit of the persistent efforts of the industrial-rich western countries to capitalize on the downfall of the Soviet Union in 1990 and the subsequent opening of the markets of the energy resource - rich eastern countries, which, however, were lacking technical expertise to exploit their energy resources and were economically depressed[3]. In other words, the western countries (mainly the European ones) leapt at the chance to form an international agreement with those countries in the wake of the Soviet Union partition. Hence, a binary purpose was fulfilled and both sides were benefited. On the one hand, there was a need for inflow of capital through the exploitation of the energy resources and the foreign direct investments (FDI) on the energy sector and on the other hand, there was the long-term vision of the western rich countries which coveted energy security through such exploitation.

[3] 'The Energy Community and the Energy Charter Treaty: Special Legal Regimes, Their Systemic Relationship to the EU, and Their Dispute Settlement Arrangements 22. pdf.

Birth of EEC and the establishment of the Energy Charter Process

That vision was first conceived by Ruud Lubbers, the prime minister of the Netherlands. In 1990, during a European Council meeting, Lubbers advocated in favor of a closer relationship between the energy-rich eastern countries and the European ones. Simply put, Lubbers envisaged the establishment of a "European Energy Community" bringing together the European Communities' (EC) member states, Russia and the countries of central and eastern Europe[4]. Later on, this Energy community would pave the way for the advent of the ECT and "Energy Charter Process", an international forum where all participating states exchange best practices with third parties with regard to Energy Charter activities. Lubbers further alluded that, should the Europeans take such initiative, in the wake of the Soviet Union collapse and the opening of the energy markets of the states of the former Soviet block, this would ensure their energy security. There were also other Western States that sought to be involved in this venture, notably the USA and Norway[5]. Hence, a negotiating conference was held under the supervision of the European Commission and, eventually, this endeavor came into fruition one year later, in December 1991 in Hague, with the signing of the European Energy Charter (EEC), a legal document which was not binding at the time but more of a political declaration.

Signing of ECT and its Amendment to the Trade Provisions

The EEC was signed by 52 states and the European Communities (EC). However, the signatories' intention was to ultimately accompany EEC's provisions with another treaty setting out legally binding rules regarding cooperation and energy trade. Consultations took longer than expected with many disagreements and fewer convocations. Ultimately, consensus was finally reached and in December 1994, in

[4] Rafael Leal-Arcas, *Commentary on the Energy Charter Treaty* (Edward Elgar Publishing 2018) 1 <https://www.elgaronline.com/view/edcoll/9781788117487/9781788117487.xml> accessed 16 November 2021.

[5] Mads Andenas and others (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (TMC Asser Press 2020) 253 <http://link.springer.com/10.1007/978-94-6265-391-7> accessed 16 November 2021.

Lisbon, the ECT was signed, along with the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA).

The ECT entered into legal force, four years later, in April 1998. Currently there are 53 signatories including the EU itself, as an autonomous entity, each EU member state, and EURATOM member states. Out of all these states, four have not yet ratified it, namely Iceland, Norway, Belarus and Australia. It is worth noting that superpowers like China and USA have decided not to participate in this institution, thereby, limiting the effectiveness and prestige of ECT's provisions regarding energy security and cooperation on a global scale. On the other hand, Russia, up until 18 October 2009, had followed a middle ground approach, where it had signed the Treaty, but it was applying it provisionally. From 18 October 2009 onwards, after notifying the Energy Charter Secretariat, it has stepped out of the institution all together, probably due to the potential implications that many provisions of ECT (like the provision regarding non-discrimination access) would entail for Russia's vast gas pipeline network and subsequently Russia's geopolitical and economic interests.

During the same time of the signing of the ECT, the Amendment to the Trade Provisions of the Energy Charter was also adopted, in line with the WTO rules. In principle, the trade regime is one of ECT's preliminary focuses, aiming in creating a stable environment and fostering a non – discriminatory trade regime for all energy-related trade issues among ECT parties.

Legal scope of ECT

ECT's existence is predicated on five pillars, essential for the promotion of energy security and cooperation among its parties, with respect to the sovereignty over their natural resources, but, with the main goal being the further encouragement of more open and competitive energy markets.

The first pillar is the protection of foreign investments. This type of protection is achieved with the use of the so-called "National Treatment" rule, where contracting parties are obliged to follow the principles of non – discrimination with regards to

domestic investments over foreign ones. More accurately, these contracting states are bound to treat foreign investments not less – favorably than their domestic counterparts with respect, of course, to all domestic laws and regulations (for example taxation, charges, distribution channels etc.)

The second pillar is the existence of non - discriminatory conditions as far as trade in energy materials, products and energy – related equipment is concerned. This is the prominent "Most – Favored Nation Treatment" rule, which was first established under the WTO umbrella and then transferred to ECT. According to this rule, all imported goods need to be treated equally, with respect to all border measures (like entry points, import and export duties etc.). In the case of the energy sector, special emphasis is given on provisions that can reliably ensure cross – border energy transit flows through pipelines, grids and other means of transportation.

The third and fourth pillar, respectively, are the resolution of investment disputes between the investor and the host – state and the promotion of energy efficiency in an attempt to mitigate the negative environmental impact of energy production and use.

Investment Protection Regime

A. Introduction

The provisions regarding investment protection can be discovered on part III of ECT. Their goal is to establish a level playing field for investments in the energy sector, while at the same time mitigating the non-commercial risks associated with such investments. In general, there are two phases of investment protection within the ECT. The first one is the pre-investment phase. This phase establishes a "soft-law" regime or, simply put, "best endeavor obligations"[6]. The second phase is the post-investment phase. In this phase, the ECT establishes a "hard-law" regime with binding obligations

[6] K Hober, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 Journal of International Dispute Settlement 153.

for the contracting parties, similar to those of NAFTA and BIT's investment protection provisions.

B. Scope of protection

The investment protection provisions regarding the post-investment phase (part III of ECT) are applicable to *Investments of Investors* as defined in Article 1 of ECT.

C. Article 10(1) of ECT – Minimum Standard of Protection

Article 10 (1) outlines several key principles for the treatment of foreign investments that are commonly found in BIT's. These principles are the fair and equitable treatment, the non-discrimination, the umbrella clause, the most-favoured-nation treatment and the expropriation regime of article 13 of ECT

i) Fair and equitable treatment

Fair and equitable treatment is a standard illustrated in Article 10(1). It is a commitment made by the Parties, under the FTA regime, to maintain a favourable investment climate regarding "investments of investors". This standard has its roots in international law, notably via its implementation in BIT and NAFTA arbitrations[7]. Its precise scope and meaning cannot be easily defined, therefore tribunals, when attempting to apply this principle, have found that it encompasses other elements as well, such as the protection of investors' legitimate expectations in relation to the maintenance of a stable and predictable business and legal environment by the host government, the principle of transparency, the principles of good faith and abuse of rights, due process, proportionality and the prohibition of arbitrariness[8].

[7] Clarisse Ribeiro, 'AND THE ENERGY CHARTER TREATY' 21.
[8] Hober (n 6).

ii) Discrimination

Article 10(1), in its third sentence, stipulates that the management, preservation, use, enjoyment or disposal of investments must not be undermined by "unreasonable or discriminatory measures". Usually, discrimination occurs regarding the nationality of an investment[9]. The emphasis given to the term 'discriminatory measures' is akin to the concept of fair and equitable treatment. There is therefore some crossover between the two standards.

iii) Umbrella Clause

Article 10(1) gives special attention to the obligation of all Contracting Parties to honour any obligation they have entered into towards an investor or an investor's investment of another contracting state[10]. In legal Latin terms, this is the so-called "pacta sunt servanda" principle, where all obligations in an agreement must be respected by all parties involved. Therefore, if such a breach of an obligation ever occurs, then there will be a subsequent breach of Article 10(1).

There are, however, certain exceptions to this rule. These exceptions can be found in Articles 26(3) and 27(2) of the ECT, where the Parties to Annex IA have the possibility to exempt disputes covered by the umbrella clause from ECT dispute settlement under Article 26.

iv) Most favoured Nation Treatment

Article 10(1) in conjunction with Article 10(7) in its entirety establish the 'most favoured nation treatment' principle. Both provisions incorporate the rules and rights embodied in other treaties or regulations or the favourable treatment accorded to other investors into the protection offered to investors by the ECT[11]. In particular, both provisions reiterate ECT's dedication to the non-discrimination principle with regard to

[9] Orsat Miljenić, 'Energy Charter Treaty – Standards of Investment Protection' (2018) 24 Croatian International Relations Review 52.
[10] Elnur Kərimov, 'UMBRELLA CLAUSES WITHIN ENERGY CHARTER TREATY' 4 International Investment law 16.
[11] Ibid.

both domestic investments of investors of the host country and investments of another country to the host state.

v) Expropriation – Article 13

Finally, the cornerstone of the ECT's investment protection regime is Article 13, which deals with expropriation. It stipulates that the investments of investors that take place in the territory of the host state cannot be nationalised, expropriated or subjected to a measure that has the same effect as nationalisation or expropriation. Exceptions to these rules are: a) public interest purposes; (b) the non-discriminative nature of the expropriation; (c) its due process of law and (d) the payment of adequate compensation.

This particular protection against expropriation targets not only direct expropriations on behalf of the host state, but also several kinds of indirect expropriation like exorbitant regulations or confiscatory taxation that hampers the viability of the investment.

The compensation aspect has to do with the lawfulness or lack thereof of the expropriation that took place. In case such expropriation was deemed as lawful, it means that it was carried out according to the conditions set out in Article 13 and, therefore, an appropriate compensation is given. On the contrary, if such expropriation does not meet the aforementioned criteria and is deemed unlawful, compensation is given as a result of this unlawful behavior, meaning compensation equivalent to damages for the loss suffered by the investor.

Trade Regime

ECT trade rules in relation to GATT and WTO

The second major pillar of ECT is its trade regime. During the same time of its signing, the Amendment to the Trade Provisions of the Energy Charter was also adopted, in line with the WTO rules. In principle, the trade regime is one of ECT’s

preliminary focuses, aiming in creating a stable environment and fostering a non – discriminatory trade regime for all energy-related trade issues among ECT parties. Prior to the establishment of World Trade Organization's (WTO) trade rules, the ECT's trade provisions (as negotiated in 1994) were rest upon the rules of the multilateral trading system embodied in the General Agreement on Tariffs and Trade of 1947 (GATT 1947). However, the drafters of the ECT were ultimately pursuing a more revised and up to date trading system for ECT to rely upon, thereby, paving the way for the adoption of the trade provisions of the newly constituted WTO (it was established in 1995) which replaced the obsolete provisions of GATT and were embodying the relevant changes in multilateral trade rules resulting from the Uruguay round[12].

With both the ratifications of GATT' s trade rules, at first, but mainly WTO rules later on, the drafters of ECT were aiming to incorporate the rights and obligations of being a WTO member into the energy sector, with special emphasis on ECT parties who were not yet members of WTO[13]. Practically, with this integration, the trade that would take place between WTO and non – WTO members or among non - WTO members, would be treated as if all were members of WTO[14].

To achieve this, the ECT had incorporated those rules of GATT that are relevant to the energy sector. This can be explained by the fact that GATT rules were, at the time of signing of the ECT, prominent in the spectrum of the global trading system long before the WTO entered into force. This type of integration took place with multiple forms. One of them was the exact adoption of the "Trade Related Investment Measures" (TRIM) agreement of GATT to ECT in the form of article 5 which was named after the very same agreement with the exact same trade related provisions (which are of course energy relevant). In addition to this, there was also the so called "incorporation by reference", a niche legal technique which, essentially, transferred to ECT only those GATT trade rules that were simultaneously applicable to the energy

[12] 'The Trade Amendment (TA) of the Energy Charter Treaty (ECT): Explained to Decision-Makers of Ratifying Countries'.
[13] Anna Marhold, 'The Nexus between the WTO and the Energy Charter Treaty in Sustainable Global Energy Governance' 41.
[14] Lorna Brazell, 'Draft Energy Charter Treaty: Trade, Competition, Investment and Environment' (1994) 12 Journal of Energy & Natural Resources Law 299.

sector. This technique was portrayed in the form of declaration through the embodiment of a dedicated Annex (in particular Annex W) listing all the WTO provisions which are not relevant to ECT and, subsequently, the energy sector[15]. Therefore, this particular Annex was serving as negative list stating the provisions of GATT that are not applicable to the ECT. Lastly, apart from these procedures, there were two additional elements that were introduced to ECT with this Trade Amendment, which, however, are not in the scope of this thesis. The first one was the inclusion of "energy related equipment" in article 31, as an additional list of goods to which ECT applies and the second one was the contingency of ECC to replace the soft law tariff regime in article 26 with a stricter and a more binding one. On 21 January of 2010 the Trade Amendment entered into legal force.

Basic Principles of WTO incorporated in ECT

Upon the advent of the WTO trading system applying to trade in goods, the ECT quickly adopted it and disengaged from its predecessor, the GATT trading rules system. It is noteworthy that the WTO rules do not have dedicated rules for the energy sector. They do, however, include a number of rules that are also applicable to the trade in energy-related products and equipment.

The first key principle of WTO incorporated into the ECT is the non-discrimination regime. This particular regime is further sub-categorized into two principles, the most favoured nation treatment (MFN) and the national treatment. Regarding the former principle, countries are obliged to abstain from any type of discrimination between their trading partners with regard to imports and exports of goods from one another. The latter principle, on the other hand, requires that imports must be treated not less favorably than their domestic counterparts with respect to all domestic regulations (taxes, domestic transportation charges, etc.). The rationale behind this approach is to circumvent any hidden trade barriers or any discriminatory

[15] 'The Trade Amendment (TA) of the Energy Charter Treaty (ECT): Explained to Decision-Makers of Ratifying Countries' (n 12).

regulatory practices that might undermine exporter's legitimate expectations regarding market access.

These principles, however, do not inhibit WTO or ECT trade regime from protecting domestic goods through custom tariffs. WTO applies the system of "ceilings bindings" on custom tariffs, whereas ECT does not. In general, under the ECT regime, there is mainly a soft law principle, meaning there is a commitment in good-will of contracting parties not to raise their tariffs beyond a certain level (article 29 (4)). The same "best-endeavor" principle applies to both categories of ECT parties who are either members of the WTO or not, with the only nuance being the field of its application in each category. If an ECT party is simultaneously a WTO member, then it pledges that it will not raise its import taxes above a certain threshold. Opposite, if an ECT party is not a WTO member then it pledges the same thing with the addition of not raising its export taxes above a certain level as well.

The Trade Amendment

The trade amendment was adopted in 1998 by the Energy Charter Conference and entered into force in 2010 after being ratified by 35 contracting parties. It mainly signifies the transition from a GATT to a WTO-based trade regime for the ECT. It entailed the exact same legal technique used in the original Treaty, the incorporation by reference of all those WTO rules that are energy relevant. The change that took place was the replacement of the previous negative list regarding the non-applicable GATT provisions (Annex G) with a new one concerning WTO provisions (Annex W). Apart from these changes, the material scope of ECT did not change at all.

Two new elements introduced with the Trade Amendment

With the trade amendment two new elements were introduced: a) the inclusion of energy related equipment in the list of goods to which the ECT applies (ECT article 31) and b) the prospect of the Energy Charter Conference to constantly replace the soft law customs tariffs pledges by a binding customs duty standstill regime (ECT article 29 (6)).

As far as the former element is concerned, this addition reflects the extension of ECT's product coverage, which now includes not only "Energy Materials and Products" but also items of "energy-related" equipment as well. These items are exhaustively described in a new dedicated Annex, the Annex EQ I. Such items include pipelines, cables, drilling platforms, nuclear reactors, heating boilers, refrigerators etc. The goal of including Annex EQ I to the treaty was to appease investors by enlarging ECT's field of application in the energy sector.

As far as the latter element is concerned, the introduction of the gradual replacement of soft-law customs tariffs pledges with a stricter regime encountered various implementation difficulties during the negotiation phase of the Trade Amendment. However, a middle ground was found where it was permitted for items to gradually be moved from Annexes EM I and EQ I to EM II and EQ II respectively. These new annexes encompassed a legally binding regime on tariff customs rates on both imports and exports.

Energy Transit Regime under the ECT

Introduction

Another crucial pillar of ECT is its transit regime. It is thoroughly analyzed in article 7 of ECT. The "raison d'etre" of this regime within the ECT is its great importance as a means of facilitation regarding the transfer of energy goods (materials and products) among ECT's contractual parties. When it comes to flow of energy as a commodity among countries and even among whole continents, transit regime is the crucial catalyst, without which, many less privileged parts of the world (in terms of oil, gas and electricity reserves) would not have been able to meet their energy demands, with all the negative repercussions that this situation would entail in areas like energy supply, energy security and even the very nature of the product itself[16].

ECT and Energy Transit

[16] 'Leal-Arcas and Peykova Intergovernmental Agreements on Energy Transit' 61.

ECT considers freedom of transit as an important aspect of energy security due to the many different countries involved in the process of energy transfer, from the production point to the end-consumer. Hence, ECT dedicates an extensive list of rules and provisions regarding transit in article 7, which has many similarities with article 5 of GATT, but is more energy oriented[17]. In particular, article 7 (1) and 7 (3) prohibit discrimination of how freedom of transit is extended between ECT parties. In addition to this, article 7 sets out rules and guidelines on dispute resolution and explicitly includes oil and gas as the two forms of energy where freedom of transit applies.

The transit regime under Article 7 can be described as a "transit through" regime, meaning that the energy product originates in one state, passes through the territory of another state and exits from that State or a third one. This is a three-state involvement process in the realization of energy transit. However, article 7 can also be applied with even two states being involved, meaning there is only a commencing state (or destination) and a transit state[18]. The divergence between two and three or more States is clearly shown in Annex N of the ECT, which means that Contracting Parties may require two or more States of transit between the State of origin and the State of destination for the application of the transit provision.

Moreover, Article 7(1) concedes the freedom of transit, the prohibition of discrimination as to origin, destination or ownership, as well as the right to non-discriminatory transit. In particular, freedom of transit means striking an appropriate balance between the international community's need for uninterrupted energy supplies and the right of sovereign States to protect their interests[19]. This balance between sovereign states and investors is addressed in Articles 7(4) and 7(5) of the ECT. Article 7(4) states that where existing infrastructure is not economically sustainable, there shall be no obstacles to the creation of new infrastructure, with the exception of a non-

[17] 'Energy Charter Treaty and Its Role in International Energy - Transit.Pdf'.
[18] Volkan Özdemir, 'Geostrategic Importance of Energy Trade and Transit and a New Transit Regime Under the International Energy Charter' in André B Dorsman, Volkan Ş Ediger and Mehmet Baha Karan (eds), *Energy Economy, Finance and Geostrategy* (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-76867-0_11> accessed 16 November 2021.
[19] Danae Azaria, 'Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade' (2009) 27 Journal of Energy & Natural Resources Law 559.

discriminatory national legislation impeding the creation of new infrastructure. Nevertheless, if such legislation is non-existent, Article 7(5) stipulates that the host State may not impose any restrictions on new infrastructure, unless this would jeopardise the security and efficiency of its own energy systems[20].

Another novel provision included in the ECT transit regime is the measure regarding uninterrupted transit during pending disputes among contracting parties. This provision is introduced in article 7 (6) of ECT and is further reinforced with the guidelines of article 7 (7). These guidelines must be observed by all contracting parties involved in the dispute.

Environmental aspects

In addition to the provisions on investment protection, energy trade and transit, the ECT also incorporates provisions specifically tailored to energy efficiency and environmental aspects. These provisions can be found in article 19 of ECT. Article 19 recognizes that energy activities can potentially endanger the environment, especially through pollution. It lays down the responsibility of the state to mitigate those harmful environmental impacts with the inclusion of specific obligations that also exist under international agreements. However, it does not force such obligations on foreign investors, but rather it embraces the concepts of precautionary principle and the polluter pays principle.

Article 19 (1) prompts contracting parties to mitigate the harmful environmental impact arising from their energy activities in an economically efficient manner. This type of rule requires from contracting parties to find an equilibrium between energy security, economic benefit and environmental law. Article 19 (1) assists parties by laying down several actions to be considered. These actions are: a) environmental considerations regarding energy policies, b) reform of market oriented price, c) fostering of cooperation for achieving environmental goals of the Energy Charter, d) having regard to always improve energy efficiency, e) the promotion information

[20] Karl Petter Waern, 'Transit Provisions of the Energy Charter Treaty and the Energy Charter Protocol on Transit' (2002) 20 Journal of Energy & Natural Resources Law 172.

collection and sharing e) the promotion of public awareness of environmental impacts of energy systems, g) the promotion and cooperation in research and development (R&D), h) the encouragement of favorable conditions for transfer and dissemination of such technologies, i) the promotion of transparency, j) the promotion of international awareness and information exchange and k) the participation in the development of adequate environmental programmes where appropriate.

Article 19 (2) deals with state disputes regarding the environment (with the exception of all the other disputes that are covered exclusively on article 27 of ECT). These disputes can be resolved in the charter conference if no other appropriate international forum is available.

Dispute resolution under ECT

The ECT contains a multitude of investment dispute resolution mechanisms, depending on which aspect of the treaty needs to be addressed[21]. The most important dispute resolution mechanism, and the one where great emphasis is given, is the investor-to-state arbitration mechanism established in article 26. All the rest dispute resolution mechanisms within the ECT regime have to do with competition aspects (article 6 (7)), environmental aspects of the treaty (article 19 (2)) and, finally, state-to-state arbitration mechanisms (article 27). It should be stressed that the right to arbitration or alternative dispute settlement methods, in accordance with Article 26, derives exclusively from the ECT and is not subject to any requirement to exhaust local remedies or to any contractual dispute settlement mechanism[22].

Investor-to-state arbitration (article 26)

Article 26 (1) introduces the regime of amicable settlement, if such course of action is possible, as a means to resolve disputes between a contracting party and an investor. Article 26 (2) states that if the pathway of amicable settlement cannot bear fruits until three months after one of the two parties involved in the dispute has requested this approach, then the dispute shall be resolved in a forum elected by the investor. Such types of fora are either national courts and administrative tribunals of the contracting party where the investment was made or international arbitration.

In the case of the latter, according to article 26 (4), investors may elect any of the following forms of international arbitration, meaning either the International Centre for settlement of Investment Disputes (ICSID), arbitration under the ICSID Additional Facility Rules, a sole arbitrator or ad hoc arbitral tribunal based on UNCITRAL arbitration rules, or arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce[23].

[21] 'Energy Charter Treaty and Its Role in International Energy - Dispute Settlement.Pdf'.
[22] Richard Happ, 'Dispute Settlement Under the Energy Charter Treaty' 33.
[23] K Hober, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 Journal of International Dispute Settlement 153.

Pursuant to article 26 (3) (a) and taking into account the aforementioned provisions of article 26, each of the contracting parties gives “unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this article”. This type of unconditional consent means that a state cannot simply withdraw from the ECT, in case an investor makes an official request to commence arbitral proceedings. In other words, the state’s consent is binding for itself, it cannot be revoked and any attempt at withdrawing from the ECT regime is not legally effective. If such withdrawal from the ECT would ever occur, then the contracting party is still obliged to honor its contractual obligations for a period of at least 20 years following the effective date of its withdrawal, according to article 47 of ECT.

On the contrary, article 26 (3) (b) stipulates that the issue of consent to international arbitration of the contracting parties listed in Annex ID, can be subjected to some limitations, the most important of which is the prohibition of bringing the dispute before an international arbitration forum, if the same dispute has already been submitted (by the investor) to the national courts of the host state or under another previously agreed dispute settlement.

Other key principles of the ECT

Sovereignty over Natural Resources

The ECT is one of the very few international treaties that expressly recognizes each state's sovereignty over its natural resources. Nonetheless, this favourable treatment the states enjoy, balances out with relevant obligations deriving from international law and its provisions. One of the states' liberties, in the context of their right to sovereignty over their natural resources, is the option to select the type of ownership with regard to the property of its energy resources[24]. Another liberty the states enjoy is the option to delineate the territorial area upon which the exploration will take place. Moreover, each state has the right to ascertain whether these energy resources have been exhausted and even stipulate the exact amount of taxes, royalties and other forms of payment for the fulfillment of such activities. In addition to this, the states have the right to monitor all the necessary environmental aspects concerning a potential exploration before its commencement. Meanwhile, the same states are obliged to always allow access to third parties to their energy facilities, with the purpose of exploration, on the basis of non-discrimination and with full compliance with specific regulatory rules like certain licenses, contracts regarding exploration or exploitation and many more.

Expropriation

As a general principle, all investments are insulated against expropriation from the host state. There are specific prerequisites, according to which an investment can be expropriated, and these can be found on article 13 of ECT. On the other hand, expropriation is almost always justified in instances where the public interest is being served. In this case, an appropriate compensation for losses has to be given to the party negatively affected by this expropriation. Also, this compensation must reflect

[24] Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law (EYIEL), Vol. 3 (2012)* (Springer Berlin Heidelberg 2012) <http://link.springer.com/10.1007/978-3-642-23309-8> accessed 16 November 2021.

the fair market value of the investment right before the expropriation actually takes place, so that this value won't be diminished.

The forms, under which, the expropriation of an investment is carried out, vary a lot from case to case and is proportionate to the purpose intended. For example, an expropriation can take the form of a switch in the tax regime, or take the form of a new environmental-friendly legislation introduced in the parliament, or even take the form of punitive taxation[25].

Compensation for losses

Apart from the compensation deriving from acts of expropriation, there is also another form of compensation that originates from unpredictable events such as war between the host state and another state, or civil war, or any other event that sets the host state on national emergency. This kind of events constitute and explain the lack of political and, subsequently, investment stability occurring within the state, a drawback that a potential investor needs to be aware of before deciding to invest in this state or not. If such events ever take place, then the host state is compelled to give an appropriate compensation, this time taking into account both the national and MFN treatment. In other words, only if the domestic investors are adequately compensated for their losses, the foreign ones shall be compensated as well. This rule however, can be overridden and must be overridden in cases were the host state intentionally inflicts serious damages to the investment or dispossesses that particular investment.

[25] Ibid.

Reasons for the Modernisation of the ECT

(2000's) Disputes as a precursor to the Modernisation Roadmap

With the advent of the new millennium, new developments took place in the energy governance worldwide. On the first decade of the 2000's, ECT was struggling to keep up with the rapid changes occurring at the time. On the one hand, there was the condensing of several energy markets due to a growing energy demand by new emerging economies. In just that decade alone the world witnessed the most volatile trends in oil prices, from historical lows (14 USD/barrel in 1998) to record highs (146 USD/barrel in 2008). This development propelled the countries that were energy producers to apply leverage on bilateral and international level and to further their geopolitical and economic position in the energy sector, on a global scale. However, this type of approach was hindering and even reversing most of the liberalization reforms launched in the 1990's. This was especially the case with Russia and its newly elected president Vladimir Putin who embarked on a campaign to recapture the oil and gas sectors after a decade of privatizations and investment friendly measures.

On the other hand, during the same period, European Union was making its first steps towards a more liberalized energy market with the adoption of the second and third energy package in 2003 and 2009 respectively, as well as the development of an external energy policy[26]. These two opposite trends had a dramatic impact on the development of the ECT, mainly witnessed in the failure of the "Transit Protocol" negotiations in the early 2000's, the Ukrainian gas crises in 2006 and 2009 and the subsequent departure of Russia from the ECT in 2009.

[26] Anna Herranz-Surrallés, 'The Energy Charter Treaty: Old and New Dilemmas in Global Energy Governance' in Michèle Knodt and Jörg Kemmerzell (eds), *Handbook of Energy Governance in Europe* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-319-73526-9_65-1> accessed 16 November 2021.

Transit Protocol Negotiations failure

In the post-Soviet Union era, in late 1990's and early 2000's, there were constant disputes between the newly formed eastern European States (mainly Ukraine) and Russia with regard to the lack of transparency in gas pricing and transit fees, the obsolete and, in many cases, poor condition of the pipeline systems and the political tensions in the region. Hence, an initiative was launched in order to impede the further deterioration of the transit governance in the area. This initiative was the so called "Transit Protocol". However, the negotiations on the Transit Protocol took a troublesome turn, as they eventually turned out to be the start of a conflict between the EU as a whole and Russia, placing their mutual geopolitical and economic relations to the test. The different point of views of these two players are evident in all aspects of those negotiations that took place between 2003 and 2007.

The first impediment towards reaching a consensus was the different approach of the players regarding the very principles of transit. For Russia it was a matter of ensuring long-term supply stability[27]. This could only be achieved with the adoption, or better put, continuation of the vertical integration model regarding energy companies' structure. This was, however, in direct opposition to the model proposed by EU, the so-called "unbundling" of activities in the energy sector, mandated by the competition-oriented policy rules of the emerging EU internal energy market, which required third party access (TPA). Furthermore, another impediment towards reaching the coveted consensus in these negotiations was Russia's request to include a Right of First Refusal (ROFR) clause, namely the right of exporters to prolong an existing transit contract before the pipeline capacity is offered to other competitors. On the contrary, the EU did not wish such a clause to be included, as it was considered incompatible with TPA rules, as well as with the principle of non-discrimination in the internal energy market. In fact, the EU even suggested to Russia that it should, instead, follow the TPA model and open its infrastructure to third party producers. Nevertheless, Russia's point of view on the matter was that its obligation was merely ensuring the supply of Russian gas to Europe and not liberalizing its oil and gas transit networks under the ECT regime.

[27] ibid.

Another setback in the Transit Protocol Negotiations was the growing discrepancy between the ECT minimum standards and EU's deep liberalization rules introduced with the establishment of the second and third energy packages. In addition to this, the EU, being aware of Russia's probable reluctance in following the liberal unbundling model, proposed the inclusion of a Regional Economic Integration Organization (REIO) clause in the Transit Protocol[28]. The thought process behind this request was that the Gas Directive, introduced in 2003, assimilated the operations of transit and distribution within the EU. Therefore, the Transit Protocol should only apply between the EU as a whole and third states, and not between EU's member states separately. In turn, Russia, during the consultations that took place between 2003 and 2007, declined such a request with the belief that, had this REIO clause been included, this would hinder its companies' access to the EU market and, subsequently, damage Russia's economy.

Finally, a large part of these negotiations was overshadowed by a parallel "chess" game on the geopolitical arena played by both EU and Russia. EU's ambitious and, sometimes, aggressive approach in its expansive energy policies was perceived as a short and long-term threat to Russia's interests. Examples of this EU's approach were the "Interstate Oil and Gas Transportation to Europe" (INOGATE) programs in the former Soviet Union States, later on with the gradual development of the EU external energy policy, then with the creation of the Energy Community (EC) in 2005 and, finally, with the adoption of EU's internal energy market rules.

[28] Irina Kustova, 'A Treaty à La Carte? Some Reflections on the Modernization of the Energy Charter Process: Table 1.' (2016) 9 The Journal of World Energy Law & Business 357.

Ukrainian Gas Crises (2006 and 2009) and ECT's role

The post-Soviet Union era, with the liberation of its "former soviet democracies", did not manage to tend all wounds among the newly formed independent states, mainly Ukraine and Russia. Developments in the aftermath of the "orange revolution" in Ukraine, after a series of protests and the run-off of the presidential elections, were not well received from Russia's administration, as Ukraine was electing a pro-NATO and EU-friendly president in Viktor Yushchenko.

Both in 2006 and in 2009 there were two major gas disputes between the two states resulting in the temporary halt of gas supply from Russia to Ukraine. Also, in both these crises the gas dispute was involved around gas transit and import fees, where no agreement between the two sides could be reached on a reasonable timetable with accusations of delays and impediments towards a consensus being heaved from one side to the other.

There are two school of thoughts among academia and international relation experts regarding Russia's treatment of Ukraine in terms of the reasoning behind the gas pricing policy imposed from the former to the latter. The first school of thought is advocate of the notion that Russia was merely seeking to secure its energy and economic interests by reminding Ukraine of its legal obligations in the energy sector and, more specifically, its contractual obligations under the supply agreement signed between each other's state-owned natural gas company, Gazprom from Russia and Naftogaz from Ukraine. In other words, Russia was strongly endorsing the saying "pacta sunt servanda", however with a special emphasis on former Ukrainian debts that needed to be paid to Russia.

The second school of thought is having a broader geopolitical perspective stating that Russia's response, in fear of NATO countries and the EU expanding their influence in the former Soviet area, was to leverage its position by excessively charging Ukraine more for gas supply.

Eventually, a consensus was reached between the two sides, however, both those crises highlighted another important element, the lack of proactive

involvement of ECT in this dispute. In other words, this dual conflict brought to the forefront certain weaknesses of the ECT regarding proactive intervention in such disputes with the adoption of an adequate transit dispute settlement mechanism. The reason, however, for this void was caused from Russia itself and other similar oil and gas producing countries who could not accept to set aside a small portion of their dominance in the supply sector, in exchange for the greater benefit of energy governance worldwide. Simply put, Russia was not keen on adapting to the various rules, norms and values of economic transactions that an organization such as EEC would entail and, by extension, the global energy governance regime that EEC represents.

Yukos vs Russian Federation case

Introduction

The final blow on Russia's commitment on the ECT regime (albeit at a provisional level), and the Energy Charter Process in general, was the proceedings that followed Yukos' decision to file a complaint with the arbitral tribunal regarding Russia's aggressive policy towards it with the seizure of its assets. The Tribunal observed an extensive legal and factual list of misconducts of the Russian Federation against Yukos and adjudicated a final award of 60 billion dollars and almost 70 million dollars in arbitration and legal costs[29]. Right on the heels of the Tribunal's final award, the European Court of Human Rights condemned Russia to pay 1.8 billion euros to former Yukos' shareholders on the basis that Russia had breached rights to a fair hearing in article 6 of the European Convention on Human Rights, as well as article 1 protecting the right to property in Additional Protocol 1[30].

Background.

Yukos was an oil company located in Russia, that emerged as the biggest company in the country in 1993 after the fall of the Soviet Union. Had its plans to merge with Sibneft, another oil company, been accomplished, Yukos-Sibneft would have been the fourth largest private oil producer worldwide behind BP, Exxon and Shell. The main antagonists in the dispute between Russia and Yukos were Russia's President, Vladimir Putin and Yukos' main shareholder and Chief Executive Officer (CEO) Mikhail Khodorkovsky. The claimants in the Yukos proceedings alleged that Russia took a series of hostile measures leading to Yukos being bankrupt in August 2006[31]. In its claims, Yukos perceived Russia's behavior as being politically driven due to Khodorkovsky's favor from Putin's opposition parties. On the contrary, Russia claimed that it was merely enforcing its laws against a rogue company, characterizing

[29] Martin Dietrich Brauch, 'Yukos v. Russia: Issues and Legal Reasoning behind US$50 Billion Awards' 8.
[30] 'INTRODUCTORY NOTE TO OAO NEFTYANAYA KOMPANIYA YUKOS V. RUSSIA (EUR. CT. H.R.) BY ERIC DE BRABANDERE* 475.Pdf'.
[31] ibid.

Yukos as a “criminal enterprise”, engaged in a multitude of tax evasion schemes and other fraudulent activities[32].

From the period of July till October 2003, three crucial Yukos officers were arrested, including Khodorkovsky, under the charge of fraud, tax evasion and forgery. Moreover, in the period between October 2003 and December 2004, Yukos and its subsidiaries witnessed a series of major impediments towards its growth and corporate stability. Such impediments included hefty tax reassessments, fines, VAT exactions, the freezing of shares of assets, the threatened revocation of licenses and, finally, the forced of Yukos’ subsidiary, Yuganskneftegaz (YNG), in 2004. Two years later, in 2006, Yukos declared bankruptcy and was struck off the registry of companies in 2007 with its assets being nationalized[33].

The proceedings

Three companies claimed that Russia had breached its obligations under the ECT regime. These companies were, Hulley Enterprise Limited (Hulley), Veteran Petroleum Limited (VPL) and Yukos Universal Limited (YUL). Each one of these companies – claimants initiated, at an individual level, an investor-state arbitration against Russia in February 2005 under article 26 of ECT and 1976 UNCITRAL Arbitration Rules. The claimants alleged that Russia, by expropriating their investments, had violated article 13 of ECT regarding the prohibition of expropriation and nationalization of investments[34]. They also claimed that Russia not only did it not accord fair and equitable treatment to their investment, but also it did not treat them on a non-discriminatory basis as article 10 (1) of ECT requires[35]. All three cases were examined by the Permanent Court of Arbitration located in Hague, Netherlands. Despite the different nature of their claims, the three arbitrations were held in parallel, resulting essentially in almost identical awards.

[32] A Newcombe, ‘Yukos Universal Limited (Isle of Man) v The Russian Federation: An Introduction to the Agora’ (2015) 30 ICSID Review 283.
[33] ibid.
[34] CS Gibson, ‘Yukos Universal Limited (Isle of Man) v The Russian Federation: A Classic Case of Indirect Expropriation’ (2015) 30 ICSID Review 303.
[35] E De Brabandere, ‘Yukos Universal Limited (Isle of Man) v The Russian Federation: Complementarity or Conflict? Contrasting the Yukos Case before the European Court of Human Rights and Investment Tribunals’ (2015) 30 ICSID Review 345.

Interim Awards

Regarding its temporal Awards on Jurisdiction and Admissibility, the Tribunal rejected Russia's four challenges to the arguments of the claimants, mainly: i) their position to bring claims, ii) denial of benefits, iii) fork-on-the-road provision and, finally, iv) Russia's conditional exercise of the provisions of the ECT. As far the last issue is concerned, the Tribunal concluded that Russia was obliged to abide by the ECT, even on a provisional level, unless such compliance proved to come in direct opposition to Russia's domestic legislation[36].

Preliminary Objections

The Tribunal examined three preliminary objections brought before it by Russia. The first one was ECT's "Fork-on-the-road provision" (article 26 (3) (b) (i) of ECT). The second one was that the Claimants had been involved in illegal activities and, therefore, should be deprived of ECT's protection regime. Finally, the third one was the applicability of the preclusion for taxation measures as it is currently referred in article 21 of ECT.

All three objections were rejected by the Tribunal for different reasons each. The first objection was dismissed on the basis that it was indistinguishable with the same objection it had previously rejected in its Interim Awards. The second objection proved to be an area upon which the Tribunal had to examine three issues: i) the manner with which Yukos was first acquired and later controlled along with its subsidiaries, ii) the adoption of a Double Taxation Agreement (DTA), a tax regime being applied between Russia and Cyprus, and iii) the claimants benefit from adopting the low tax regime being established in certain countries, in order to alleviate tax strains. According to Russia's point of view, all claimants had proceeded in unlawful actions and should not be granted protection under the ECT regime. However, Russia failed to prove that the alleged illegal activities were related to the last deal where the investment of the claimants was based upon. Hence, the Tribunal rejected their

[36] Peter C Laidlaw, 'Provisional Application of the Energy Charter As Seen in the Yukos Dispute' 52 SANTA CLARA LAW REVIEW 31.

second objection. Lastly, the third objection posed by Russia was dismissed, by the Tribunal as it observed that its jurisdiction was incidental and was grounded on the "claw back provision" of article 21 (5) of ECT.

Merits

Both the provisions of article 10 (1) and 13 were thoroughly examined by the Tribunal, in order to ascertain whether they had been breached or not by the Russian government. This assessment was made possible through the concentrated efforts of the Tribunal to focus on Yukos' practices concerning the arrangement and implementation of its tax circumvention practices, in particular the convenience of trading companies in countries with low tax regime. The Tribunal came to the conclusion that, although Yukos should have been expecting Russia's discontent regarding its tax avoidance practices, nevertheless the latter should not have imposed such "extreme actions" on the former. There were two incidents in particular that affected Tribunal's thinking and decision. The first was the enforcement of a 13 million dollar fine in terms of VAT due to the oil that had been exported by the trading companies. In any other case, this oil would not have been charged with VAT. The second one was the bidding of YNG at a significantly less price than its value. Hence, taking all these into consideration, the Tribunal decided that the actions taken by Russia against Yukos could be characterized as a form of nationalization or expropriation and far from a lawful expropriation, leading to violation of article 13 of ECT[37].

Further difficulties of ECT's regime and criticism

There has also been discontent regarding ECT's investor-state dispute settlement mechanism granting investors the right to be compensated directly against the host state. The critics against this tactic state that, with this approach, the ECT empowers the fossil fuel industry, in its entirety, to turn against states who promote an environmental – friendly legislation that acts as an impediment towards oil and gas

[37] Gibson (n 34).

investments[38]. Undeniably, there has been a readily available platform under the ECT umbrella, which favors such types of lawsuits deriving from fossil fuel companies. An example of this is the Rockhopper's case against the Italian government, where Italy imposed a restriction on new fossil fuel investments on the country's coastline. Another example is the Uniper's case against the Dutch government, where the latter's objective was to discontinue the use of coal power by 2030. Finally, there was "Ascent Resources LtD" against Slovenia where the former claimed 50 million dollars as compensation from the latter due to impediments with regard to issuing a license of operation. The reason for this behavior had to do with Slovenia's environmental concerns deriving from hydraulic fracturing activities.

With regard to trade in energy materials and products, the obligations assumed by both importers and exporters are almost the same, with the latter ones being favored by the ECT's regime due to the energy dependence of the former ones. This is evident by the fact that energy exporters were favored from clauses such as the MFN and the national treatment clause, even before becoming members of the WTO[39]. The exporting activities were even further rewarded due to the stable tax regime their products were enjoying. Moreover, a case has been made about the lack of balance of ECT's regime that benefits the states over the energy producers, mainly due to the emphasis given on investment protection. In particular, the states enjoy a certain type of immunity in terms of legal penalties, since they are only obliged to follow the best endeavor principle regarding access to their energy resources for the investors to explore and develop.

In addition, the ECT has been criticized for its ambiguity with regard to a portion of its provisions. Examples of this are articles 7 and 7(3) regarding the conciliation mechanism and non-discriminatory treatment respectively. Also, another example of its ambiguity is evident on the obligations that the ECT imposes, such as the ambient misconception regarding compulsory third-party access or lack thereof.

[38] Kyla Tienhaara and Christian Downie, 'Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes' (2018) 24 Global Governance 451.
[39] Herrmann and Terhechte (n 2) 328.

State of ECT 2009 onwards and the Modernisation Process

Even before Russia's withdrawal from the ECT and the Energy Charter Process in general, it became apparent to ECT' s signatories and, subsequently, to the Energy Charter Conference, the official instrument for the implementation of ECT, *"that the Energy Charter Process must reflect new developments and challenges in international energy markets and respond to broader changes across its energy constituency"*[40]. For this reason, a special Strategy Group was formed and was mandated by the Energy Charter Conference to conduct "*consultations and negotiations on other Energy Charter Instruments required to deal with aspects of the Energy Charter Process, which may attract further expansion of its geographical scope*"[41]. At the same time, the Energy Charter Conference aimed, unsuccessfully, at mitigating Russia's concerns regarding the divergence of ECT on the matters of energy stability and security[42]. Hence, the Modernization of the Energy Charter Process was launched in December 2009.

The implementation of this modernization procedure went through different phases, first of which, was the establishment of the "Modernization Roadmap" in November 2010, as the key subject of the decision of the Energy Charter Conference. This roadmap was explicitly acknowledging Russia's remarks regarding the possibility for enhanced legal frameworks on the field of energy cooperation. These remarks were first presented by Russian's Federation President Dmitry Medvedev and were later included in the so-called "Draft Convention" which was issued merely 2 months earlier in September 2010[43]. In addition to this, the Road Map was affirming the Energy Charter Conferences' recognition of the tectonic changes that have taken place in the energy sector since the 1990s with particular emphasis on the growing share of non-OECD countries in global demand, the need for energy investments to meet global

[40] 'Energy Charter Secretariat, (2009), CCDEC 2009, 14 GEN, Decision of the Energy Charter Conference, Rome Joint Statement 2.Pdf'.
[41] ibid.
[42] Andrei Belyi, Sophie Nappert and Vitaliy Pogoretskyy, 'Modernising the Energy Charter Process? The Energy Charter Conference Road Map and the Russian Draft Convention on Energy Security' (2011) 29 Journal of Energy & Natural Resources Law 383.
[43] Irina Kustova, 'A Treaty à La Carte? Some Reflections on the Modernization of the Energy Charter Process: Table 1.' (2016) 9 The Journal of World Energy Law & Business 357.

demand, the mitigation of climate change and many more. Finally, the Road Map was endorsing the promotion of ECT regarding energy transit, trade and investment, the resolution of energy disputes and the development of energy efficiency among other things. More particular, the Road Map's main focus was to strengthen or further develop seven key areas, namely i) the promotion of ECT, ii) transit/cross border trade, iii) emergency response, iv) investment promotion and protection, v) energy efficiency, vi) policy forum, interdependence and energy security and lastly, vii) management, finance and legal affairs[44].

Later, in 2012 the Energy Charter policy on consolidation, expansion and outreach (CONEXO) was adopted with its main goal being the consolidation of the countries that had not yet ratified the treaty, mainly Norway, Belarus, Iceland, Australia and Russia. Another purpose that CONEXO aimed to fulfill was the attraction of those countries which, at the time, were merely observers to the Energy Charter Conference and "*whose involvement would be beneficial for the existing constituency, to accede to the Treaty*"[45]. Lastly, CONEXO strived towards intergovernmental cooperation, activities and reports produced for targeted countries while also promoting the ECT and Process at a global scale[46].

Soon thereafter, in 2015 a high - level Ministerial Conference was held in Hague (The Hague II) where the International Energy Charter (IEC) Declaration was endorsed, despite the brief shock in the energy community caused by Italy's departure from ECT at the same time. The IEC is a political declaration that compliments the 1991 European Energy Charter, reflecting modern energy challenges while reaffirming the 1994 ECT. It does not bear any legal or financial obligations to its signatories while also confirming and reinforcing already established principles of energy cooperation. Its main objective is to *"support the Charter's policy of Consolidation, Expansion and Outreach with the aim to facilitate the expansion of the geographical scope of the*

[44] 'Energy Charter Secretariat, (2010), CCDEC 2010, 10 GEN, Decision of the Energy Charter Conference, Road Map for the Modernisation of the Energy Charter Process.Pdf'.
[45] 'Energy Charter Secretariat, (2011), CCDEC 2011, 2 NOT, Decision of the Energy Charter Conference, Policy on Outreach, Expansion and Consolidation - Report by the Secretary General 2.Pdf'.
[46] ibid.

Energy Charter Treaty and Process"[47] as well as *"to support active observership in the Energy Charter Conference, aiming at close political cooperation and early accession of observer countries to the Energy Charter Treaty"*[48].

Finally, and most importantly, the last step for the modernization exercise was for the signatories to evaluate the potential need and/or usefulness of updating, clarifying, or amending the ECT. As stated in the decision of the energy charter conference in November 2017, *"several experts from the industry, governments, legal circles, and academics (in addition to officials from UNCITRAL and UNCTAD) discussed the investment protection standards under the ECT, concluding that some particular issues could benefit from additional clarification"*[49]. Subsequently, the commencement of this discussion stimulated the very same officials to dwell, not only on investment protection issues, but also on other topics of the ECT that were in dire need of change, like trade, transit etc.

Therefore, the modernization of ECT took into consideration all of aspects of the treaty and not only the provisions regarding the investment protection standards. One year later, after the holding of this ECC's meeting, on 27 November 2018, the Conference finally approved the list of topics for the modernization of ECT[50]. This list consisted of 25 topics in total and are as follows: *Pre-Investment, definition of "Charter", definition of "economic activity in the energy sector", definition of investment, definition of investor, right to regulate, definition of fair and equitable treatment (FET), MFN clause, definition of "most constant protection and security", definition of indirect expropriation, compensation for losses, umbrella clause, denial of benefits, transfers related to investments, frivolous claims, transparency, security of costs, valuation of damages, third party funding, sustainable development and corporate social responsibility, definition of "transit", access to infrastructure (including denial of access and available capacities), definitions and principles of tariff setting, REIO (regional*

[47] 'Concluding Document of the Ministerial ("The Hague II") Conference on the International Energy Charter 1.Pdf'.
[48] ibid.
[49] 'Energy Charter Secretariat, (2017), CCDEC 2017, 23 STR, Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty 2.Pdf'.
[50] 'Energy Charter Secretariat, (2018), CCDEC 2018, 21 NOT, Decision of the Energy Charter Conference, Report by the Chair of the Subgroup on Modernisation 2.Pdf'.

economic integration organization) clause and obsolete provisions[51]*.* The selection of these topics was based on recent decisions from the arbitral tribunals and was endorsed as an attempt to impede various interpretations given by the arbitral tribunals to some of the ECT provisions.

Afterwards, on 6 October 2019, the Conference approved some suggested policy options from each signatory for modernizing the ECT, while the following month, it established and mandated the commencement of negotiations for this modernization to be concluded expeditiously[52]. Until today, five negotiation rounds have taken place starting from July 2020 and three more are set to unfold until November 2021.

[51] ibid.

[52] 'Energy Charter Secretariat, (2019), CCDEC 2019, 10 STR, Decision of the Energy Charter Conference, Adoption by Correspondence - Modernisation of the ECT - Mandate, Procedural Issues and Timeline for Negotiations.Pdf'.

Policy options within the negotiating phase

Introduction

Despite the lengthy efforts from field experts and governments alike - whose countries are ECT members - only 8 countries are interested in proposing policy options for the modernization of ECT. These countries are the EU, Georgia, Japan, Turkey, Albania, Azerbaijan, Luxembourg and Switzerland. From these 9 states, it is noteworthy that Japan proposes that the ECT remains the same without the need to modernize or amend any of its provisions.

EU policy proposal

Regarding the proposed content of the agreement

i) General Principles and objectives

As far as EU's approach is concerned, the modernisation process should be geared towards the facilitation of investments in the energy sector in such a manner that it will accommodate all contracting parties. This can be achieved through the establishment of a specific legal regime tailored for investment protection under the new ECT. Furthermore, according to EU's establishment, the newly constructed ECT must be able to impose the Union's and Member States' laws on third party agents who operate within the Union's Internal market. Finally, the revised version of ECT should promote environmental friendly policies, as well as remaining consistent in achieving the "Paris agreement objectives"

ii) Investment Protection

It is EU's firm belief that the revised version of ECT must include investment protection provisions that are in accordance with the latest developments in international politics and economics, not excluding the energy sector as well[53]. In this

[53] 'Communication from the Commission to the Counsil, the European Parliament, the European Economic and Social Committee of the Regions.Pdf'.

light, the modernized version of the ECT should entail such provisions that can foster a sense of legal certainty to investors and investments of all parties involved.

Also, the EU is of the opinion that the revised version of the ECT must explicitly affirm the exact list of investments and investors that are covered within the treaty itself. Additionally, when it comes to the definition of the word "investor", this term should not be misinterpreted with investors or businesses that do not have an existing business background regarding investments in their country of origin. On the contrary, the newly formed ECT should reinvigorate its firm position that each ECT party is free to endorse whatever public policies deems fit to protect the health and safety of its people, the environment and many more[54]. The EU also emphasizes that such investment protection provisions must not, under any circumstances, commence a false narrative that the contracting States are renouncing their constitutional right (as sovereign states) to modify their domestic laws, some of which may negatively affect the investor's expectations of profits. However, state aid provisions should be included regardless.

Moreover, pursuant to EU's point of view, the revised version of ECT should also include adequate investment protection standards in accordance with EU law[55]. Among many of these protection standards the most notable are the most favoured nation treatment (MFN) provision, the provision of fair and equitable treatment, the umbrella clause provision, expropriations, transfers and denial of benefits[56]. All these provisions need to be appropriately circumscribed to meet EU's reformed approach on investment protection.

As far as the dispute settlement mechanism is concerned, EU wishes to apply it solely on the topics that have been agreed to be modernised (frivolous claims, transparency, security for costs, valuation of damages and party funding) and under the condition that it coincides with EU's perspective on investment protection agreements, as well as EU's position in UNCITRAL WG III and ICSID. Regardless,

[54] 'EU Text Proposal for the Modernisation of the Energy Charter Treaty (ECT)' 22.
[55] 'European Union Text Proposal for the Modernisation of the Energy Charter Treaty' 3.
[56] 'Recommendation for a Council Decision Authorising the Entering into Negotiations on the Modernisation of the Energy Charter Treaty' 7.

EU's efforts should be geared towards ensuring the continuation of those multilateral reforms that took place in those arbitral tribunals and their subsequent transition (of the reforms) to the ECT.

iii) Sustainable development and Corporate Social Responsibility

The EU also wishes to include provisions on climate change and sustainable development that are in accordance with the Paris agreement. Furthermore, another EU's priority is the support on human rights, as well as labour rights with the adoption of certain provisions that foster transparency and corporate social responsibility conducts.

iv) Regional economic integration organization (REIO)

The EU is not in favor of the revision of the REIO provision amidst the modernisation process that is taking place. Nevertheless, should such revision ultimately take place, it is in EU's interest to ensure that there will be no obligation to any contracting party of the ECT, which is simultaneously a party to an Economic Integration Organisation, to abide by any preferential treatment which is applicable to a party of another EIA.

v) Pre-investment

Likewise, the EU is not fond of the notion that the pre-investment regime should be included in the modernisation procedure. However, if this shall be the case, then the EU would prefer not to make the pre-investment provisions subject to dispute settlement.

vi) Transit

When it comes to the transit regime, the EU presumes that this chapter needs to have more transparency in its provisions, especially with regard to the matter

of third-party access on integrated markets, like the EU energy market. Specifically, as far as the transit of gas is concerned, these provisions need to emphasize the point that they do not contradict the right of open access and unrestricted exchange of gas, because the energy trade is taking place virtually without the exchange of physical molecules. Other than that, when it comes to obligations deriving from international agreements and the EU legal framework itself, the EU must abide by them, especially when it concerns any rule regarding third-party access or tariffs.

vii) Dispute settlement provisions

As mentioned before, there are ongoing reforms that are taking place within the framework of UNCITRAL WG III and the ICSID regarding the dispute settlement system in its entirety. Most of the contracting parties of the ECT and the EU itself share the same perspective as regards several facets of the current dispute settlement system. Within the framework of the UNCITRAL WG III, the EU is striving towards a robust settlement mechanism in the form of a Multilateral Investment Court which would bring significant changes in the way with which the disputes are being resolved, especially the ones arising from the commercial relationship between investors and states. In addition to this, the EU, in conjunction with other trading parties, is also seeking to inaugurate an Investment Court System (ICS) for the settlement of investment disputes deriving from various sources, like investment protection agreements or EU bilateral trade

viii) Definition of "Charter"

The definition is relevant for several key provisions of the ECT. In 2015, the International Energy Charter was adopted in order to update the original 1991 European Energy Charter. The ECT Contracting Parties were unable to agree whether the reference to the Charter in the ECT could be understood to also referring to the International Energy Charter. The EU was in favour of such an interpretation.

Therefore, the Modernised ECT should include the 2015 International Energy Charter inside the definition of the 'Charter'[57].

ix) Definition of Economic Activity in the Energy Sector

It is in EU's intention that the wording "Charter" is directly corelated to the "International Energy Charter" (IEC) that was adopted in 2015 and revised the initial European Energy Charter of 1991. This EU's intention can be accounted for the lack of common approval among many of ECT's parties regarding the exact meaning of this wording, as to whether it includes the IEC or not. Therefore, EU's firm position is that the word "Charter", when mentioned, should ultimately be referring to the International Energy Charter, with direct reference on the legislative body of the modernised ECT.

x) Deletion of obsolete provisions

The ECT Secretariat requested to use the modernisation process to address the issue of obsolete ECT provisions. While this is not the EU's priority, it may increase the readability of the ECT and it could therefore be considered to delete obsolete provisions[58].

[57] 'Annex to the Recommendation for a Counsil Decision Authorising the Entering into Negotiations on the Modernisation of the Energy Charter Treaty 3.Pdf'.
[58] ibid.

The remaining states' policy recommendations

As far as the rest of the states is concerned, the majority of their propositions, regarding the modernization of the treaty, coincide with one another with few exceptions and with Japan being already disengaged from the procedure arguing that the ECT does not need any modification whatsoever[59].

Albania

Regarding the proposed content of the agreement

i) Pre-Investment

As far as the pre-investment stage is concerned, Albania has proposed its continuation, without significant changes, since it has successfully implemented it thus far and is in accordance with the current ECT guidelines. Nevertheless, Albania is open for some form of modernisation of the pre-investment regime, exploring the possibility of the inclusion of provisions that preclude the coverage of the pre-investment stage[60].

ii) Definition of Charter

With regard to the definition of charter, Albania is in support of the inclusion of the term "International Energy Charter" of 2015 as one of the two terms – the other one being the "European Energy Charter" of 1991 – corresponding to the definition of the wording "Charter" in article 1 (1) of ECT[61].

[59] 'Modernisation_of_the_energy_charter_treaty_a_global_tragedy_at_a_high_cost_for_taxpayers-Final 22.Pdf'.
[60] 'Energy Charter Secretariat, (2019), CCDEC 2019, 08 STR, Decision of the Energy Charter Conference, Adoption by Correspondence - Policy Options for Modernisation of the ECT.Pdf'.
[61] ibid 7.

iii) Definition of Economic Activity in the Energy Sector

Regarding the definition of economic activity in the energy sector, Albania is willing to accept new forms of energy production that are environmentally friendly, hence accepting any potential modification of article 1(5), in order to include provisions that foster new trends of energy investments within the concept of "Economic Activity in the Energy Sector"[62].

iv) Definition of Investment

In regard to the definition of investment, Albania, despite having an illustrative approach regarding the list of things that constitute an investment, is in favor of a potential inclusion of additional traits that should be included when referring to that term, so that all recent developments of investing practices are met. Such additional traits, according to Albania, could be the commitment of capital, the investor's expectation that he will have a profit, as well as the assumption of risk[63].

V) Definition of Investor

When referring to the definition of investor, Albania requires the inclusion of supplementary standards in order to define the term properly and exclude any potential investors that do not have any substantial business activities in the energy sector[64].

Vi) Right to Regulate

Concerning the right to regulate, Albania is pro the notion that the states have to remain free to regulate their energy matters to some extent, especially for the greater good of their people, while also advocating in favor of the formation of a distinct provision within the ECT framework that deals with this matter[65].

[62] ibid 8.
[63] ibid 10.
[64] ibid 13.
[65] ibid 15.

vii) Definition of Fair and Equitable Treatment

With respect to the definition of fair and equitable treatment, Albania suggests its further transparency, as far as its meaning is concerned, so that it will not lead to further misconceptions and misinterpretations from various parties. In this spirit, Albania proposes the International Energy Charter of 2015 as the model guideline to the recent developments around "fair and equitable treatment" practices in the energy sector[66].

viii) MFN clause

As far as the MFN clause is concerned, Albania has acknowledged states' common practice to implement the MFN treatment of various different treaties, as they do seem fit, in various different dispute resolution mechanisms. The existence of a vague framework regarding MFN clause has also contributed to this. At the same time, Albania has, itself, excluded MFN clauses in its own BIT's with other states. With this in mind, Albania is in favour of establishing a mechanism that would prevent states from applying provisions that would benefit them in many dispute settlement procedures. At the same time, Albania proposes the non-application of MFN clauses in any type of dispute settlement mechanism[67].

ix) Clarification of "Most Constant Protection and Security"

In addition, Albania suggests that a further clarification regarding the term "Most Constant Protection and Security" is needed due to its ambiguous meaning thus far, that can lead to a wide range of interpretations on behalf of the investors. In particular, Albania proposes the restriction of the provision's scope to allow only physical security rather than legal[68].

[66] ibid 17.
[67] ibid 19.
[68] ibid 21.

x) Definition of Indirect Expropriation

Furthermore, Albania is open to consider the further explanation of the term expropriation, both direct and indirect, since it has already applied a clear approach regarding this matter on its own BIT's with other states. On that note, Albania is also in favor of more clear rules regarding compensation procedures when an expropriation takes place under the ECT regime. In the same spirit, Albania is open for a more concrete interpretation of the "Umbrella Clause" within the ECT framework[69].

xi) Denial of Benefits

With regard to the denial of benefits term, Albania would like a more transparent framework with which all stakeholders will deny certain benefits (as described in article 17 of ECT, which in turn points in the direction of non-application of part III of the treaty) to investors and investments. According to Albania, special emphasis and clarification should be given to the nature of "denial of benefits" with regard to certain investors who have gained the majority ownership of an investment with their goal being either a request for arbitration or any other advantage deriving from the treaty itself that would greatly benefit them in a potential ISDS[70].

xii) Frivolous Claims

In addition, Albania is keen on the idea of the adoption of certain provisions within the ECT that would allow for an early review of potential "frivolous claims" on behalf of the parties, in order for them to be dismissed early, before the case is examined by an arbitral tribunal and bring additional unnecessary costs to the parties involved. In this light, Albania is pro on the adoption of a provision regarding "Security of Costs", when it comes to "frivolous claims"[71].

[69] ibid 22.
[70] ibid 26.
[71] ibid 30.

xiii) Obsolete Provisions

Finally, Albania is open, on its part, on revisiting certain of ECT's obsolete provisions that need amendment.

Azerbaijan

As far As Azerbaijan is concerned, it has made several recommendations regarding the provisions of ECT that deems they need revision.

Regarding the proposed content of the agreement

i) General Comments

Firstly, as a general comment, Azerbaijan acknowledges the fact that it has not signed the GATT 1994 treaty and is, therefore, unwilling to implement article 5 of ECT. In addition, it makes it clear that its own tax legislation comes in opposition to the dictates of article 21 of the treaty regarding the domestic production and the imported goods[72].

ii) Definition of Economic Activity in the Energy Sector

Furthermore, Azerbaijan proposes the amendment of article 1, paragraph 5 of ECT, in order to incorporate new trends and technologies that will breathe new life on the conduct of international trade and the relevant investments in the energy sector[73].

iii) Definition of Investment

With regard to the definition of Investment, Azerbaijan proposes the incorporation of more specific and detailed provisions which will thoroughly, albeit not exclusively, reflect the nature of the term “investment”, with an emphasis on what constitutes an investment and what does not. Regarding the prerequisites for an investment to be deemed as such, Azerbaijan argues that, besides the typical traits it must possess, like the establishment or the acquisition of an asset on behalf of the investor of one contracting state to the territory of another contracting state, an investment must have another set of traits, like movable and immovable property,

[72] ibid 2.
[73] ibid 8.

mortgages, leases, being an enterprise, or any sort of participation within a company, money, intellectual property rights and many more. According to Azerbaijan, an investment must not be deemed as such if it incorporates claims deriving from due payments or any type of public debt operations[74].

iv) Definition of Investor

Referring to the definition of Investor, Azerbaijan calls for a more transparent interpretation on the matter of double nationality of a natural person, as well as on the matter of legal entity. On the former subject, Azerbaijan claims that the dominant nationality of natural person, in case of double nationality, must be the nationality of the country to which this natural person-investor pays its taxes, has its social security credentials and many more. On the latter issue, Azerbaijan claims essentially the same thing, that the legal entity must have its premises in the territory of the contracting state, pay its taxes on that state generally having its business activities within the territory of that particular state[75].

v) Right to Regulate

Additionally, Azerbaijan opts for an equilibrium between one state's right to regulate its energy matters (on the basis of its sovereignty over its energy resources) and the investor's expectation of profit regarding an investment within the territory of that state[76].

vi) Definition of Fair and Equitable Treatment

Regarding the definition of Fair and Equitable Treatment (FET), Azerbaijan opts for the inclusion of additional criteria that meet the provisions of article 10 and are also more descriptive of this term. For instance, it suggests that a list of actions that are prohibited due to the concept of fair and equitable treatment, should be included in paragraph 1 of article 10 of ECT. In addition, according to Azerbaijan, there should be

[74] ibid 10.
[75] ibid 13.
[76] ibid 15.

a clear basis upon which fair and equitable should be exercised. That basis is the provisions of minimum standard of treatment of aliens deriving from international law. Additionally, it should be stated that any other possible violation of this treaty, should not, under any circumstances, be deemed as a violation of the fair and equitable treatment framework[77].

vii) MFN Clause

Concerning the MFN clause, Azerbaijan proposes the inclusion of the phrase "similar situations" in paragraph 2 and 7 of article 10 of ECT, as not to cause misconceptions regarding ECT's non-discriminatory trade policy commitments[78].

viii) Definition of Indirect Expropriation

With respect to the definition of Indirect Expropriation, Azerbaijan suggests a more detailed interpretation of the term with supplementary provisions in the treaty and in contrast with a country's national legislation. Such detailed interpretation should include additional standards when evaluating if an indirect expropriation is taking place or not (for example the economic impact on the investment due to states' actions, the scope of those kind of actions and many more) and also take into account those instances were an expropriation is lawful and non-discriminatory, like for example in the case of national security or protection of the environment, the greater good of the public and so forth. In the latter case, Azerbaijan proposes the amendment of article 13 of ECT to delineate those examples under the prism of direct expropriation, rather than indirect expropriation[79].

ix) Transfers related to Investments

Azerbaijan also wishes to include a provision in article 14, regarding temporary refusal to transfer of payments when the counterpart state does not meet its

[77] ibid 17.
[78] ibid 19.
[79] ibid 22.

obligations to the first party, or there is an unexpected threat that jeopardizes the whole transaction. Of course, this type of refusal must be non-discriminatory[80].

x) Sustainable Development and Corporate Social Responsibility

Likewise, Azerbaijan opts for a more environmentally friendly agenda for the ECT to follow, in line with all the major sustainable development platforms and agreements like the UN "Sustainable Energy for All" initiative, the Paris Agreement and others. Not only that, but Azerbaijan suggests that the ECT must provide added value to the provisions of those agreements and not merely "copy-pasting" them to its own body[81].

xi) Definition of Transit

Lastly, with regard to the definition of transit, Azerbaijan is in favor of a more descriptive approach when referring to the provisions of article 7 of ECT, in order for its definition to be more clear. In particular, Azerbaijan suggests the amendment of the first paragraph of article 7, with the main emphasis given on the "non-discriminatory access to networks", on a "case-by-case" basis, meaning that it wants an individual examination of every single request for access to the network, before permitting such access. Azerbaijan also suggests several more modifications to take place in the later paragraphs of the same article of the treaty[82].

[80] ibid 28.
[81] ibid 38.
[82] ibid 41.

Georgia

Regarding the proposed content of the agreement

i) Pre-Investment

With regard to Georgia's pre-investment recommendations, it proposes the conservation of the exclusion status of treaty protection on pre-investment stage of investments, while simultaneously opting for the application of such protection solely on post-investment stage regarding investments that have already been made. Nevertheless, Georgia is willing to accept a dedicated list of soft law obligations regarding pre-establishment stage of investments[83].

ii) Definition of Charter

Regarding the definition of Charter, Georgia is in favour of conferring the wording "Charter" to the International Energy Charter of 2015 and vice versa. Hence, it proposes the modification of article 1(1) of ECT in order to encapsulate the change that took place in 2015 with the establishment of International Energy Charter[84].

iii) Definition of Investment

Concerning the definition of investment, Georgia advocates the introduction of supplementary attributes of investment, so as to delineate investments from other kinds of transactions in the energy sector that do not constitute investment activity. In this light, it proposes that these attributes should include commitment of capital, expectation of profit and many more. Furthermore, Georgia suggests the maintenance of an exclusive set of assets within the investment framework and maybe also submit exceptions from it, such as one-off commercial transactions, awards rendered regarding investments and many other things. Finally, Georgia is advocate of the creation of a legal validity system that shall surround the concept of investments, like their compliance with the national legislation of the host state or their worthiness for

[83] ibid 5.
[84] ibid 7.

their cases to be brought before tribunals and other international fora , only if they display the aforementioned compliance[85].

iv) Definition of Investor

On the matter of the definition of Investor, Georgia recommends the inclusion of the prerequisite of "substantive business activity" regarding "a company or other organization"[86].

v) Right to Regulate

As for the right of contracting parties to regulate, Georgia acknowledges that right on behalf of the states, so that they are able to exercise it in cases of public security or their will to protect their policy interests. In particular, it proposes the adoption of a dedicated provision on this matter that shall be used in a non-discriminatory manner and also take into account the protection of investors and their investments. According to Georgia such a provision could be included in the preamble of the treaty[87].

vi) Definition of Fair and Equitable Treatment

With regard to the issue of the definition of fair and equitable treatment, Georgia finds the relevant provisions within the ECT somewhat ambiguous and proposes their further clarification through specific references to the minimum standards of treatment under international customary law. More specifically, Georgia suggests the revision of article 10 (1) of the treaty with special emphasis on its first and fourth sentence. Additionally, Georgia is in favor of the creation of a closed list of obligations relevant with fair and equitable treatment, under the condition that the items on this list are compliant with investment activities and meet the aforementioned minimum standards of treatment[88].

[85] ibid 11.
[86] ibid 13.
[87] ibid 15.
[88] ibid 17.

vii) MFN Clause

On the aspect of MFN clause, Georgia is in favor of merging various relevant provisions dispersed within the ECT into one article. Furthermore, it proposes the preclusion of the application of the MFN clause in various procedural issues or dispute settlement proceedings. The same holds for the application of the clause in any type of contracting party obligation deriving from the treaty, in the context of any bilateral agreement concerning contractual responsibilities, so as to escape any other similar provisions of other treaties[89].

viii) Clarification of "Most Constant Protection and security"

As regards the clarification for most constant protection and security, Georgia wishes for the clarification of its scope and its limitation to only include physical security of investments, rather than legal security[90].

ix) Definition of indirect Expropriation

On the matter of definition of indirect expropriation, Georgia proposes the application of the latest trends in arbitration practice and other international investment agreements, in order to avoid any misconceptions and misinterpretations in the effort of defining the concept of indirect expropriation[91].

x) Compensation for Losses

As far as the concept od compensation for loses is concerned, Georgia does not have any interest in reforming it, however is willing to consider such reform if needed[92].

[89] ibid 19.
[90] ibid 21.
[91] ibid 22.
[92] ibid 24.

xi) Umbrella Clause

With regard to umbrella clause, Georgia opts for either the conservation of this provision as it is, or the limitation of its scope, solely addressing specific contractual commitments of the contracting party concerned and with the aim of avoiding any misinterpretations on behalf of the contracting parties[93].

xii) Denial of Benefits

On the matter of denial of benefits, Georgia's perspective is that this concept has not been implemented adequately under the ECT regime thus far due to its complexity and ambiguity regarding its activation on behalf of the contracting party concerned. Therefore, Georgia suggests the further extension of the scope of article 17 of ECT regarding the denial of benefits clause, as well as its implementation on investor and their investments and possibly the denial of benefits to those investments that are possessed by people of a host state. In addition, Georgia opts for the clarification of the proceedings leading to denial of benefits, as to better facilitate contracting parties who wish to proceed this way[94].

xiii) Transfers related to Investments

Moreover, with regard to transfers related to investments, Georgia suggests the adoption of certain restrictions to the transfers related to investments, in a non-discriminatory manner, and is, also, willing to accept an exception mechanism to this rule. Georgia also considers the possibility for the adoption of a distinct provision, regarding both these issues, on the body of the treaty[95].

xiv) Frivolous Claims

Regarding the aspect of frivolous claims, Georgia's perspective is that many of the investment cases brought before arbitral tribunals are intended to damage the

[93] ibid 25.
[94] ibid 26.
[95] ibid 28.

prestige of the host state, resulting in the latter incurring unreasonably high costs. Therefore, Georgia proposes the creation of a framework for an early rejection of such objections, like the preliminary objection provided by the ECT. Furthermore, Georgia recommends the formation of a charter regarding limitation clause. With the application of this clause, an investor would lose its right to invoke a dispute settlement, after a limitation period has already passed[96].

xv) Transparency

On the matter of transparency, in principle, Georgia advocates the adoption, on behalf of ECT, of a certain equilibrium of interests between public's awareness on investor-state arbitration and the very practice of arbitral tribunals themselves, that needs to be uniform and consistent. In this light, Georgia proposes the establishment of a special regime tailored to the nature and the scope of ECT, that also satisfies the different interests of all agents involved. Having said that, Georgia does not wish the involvement of UNCITRAL's transparency rules, in any capacity, in the ECT reform, with its reasoning being that these transparency rules are more appropriate for other types of arbitration cases, under different treaties, like the Mauritiius Convention on Transparency in Treaty-based-State Arbitration[97].

xvi) Security of Costs

As far as the concept of security of costs is concerned, Georgia is in favor of incorporating such a provision on the dispute settlement clause of the ECT, with special emphasis given on the day-to-day practice of arbitral tribunals and the opposing parties on the arbitration case, so as to determine the appropriate cutoff, above which this mechanism will be activated. In Georgia's point of view, the incorporation of this provision will contribute to the battle against frivolous claims. In order for such an incorporation to occur, Georgia proposes to take into consideration the ICSID and UNCITRAL practices on the matter[98].

[96] ibid 30.
[97] ibid 32.
[98] ibid 34.

xvii) Valuation of Damages

With regard to the valuation of Damages, Georgia suggests for a proper consultation to take place first and then, taking into account the key takeaways from this consultation, to proceed on the necessary reforms that need to take place regarding this issue, if such reforms are needed[99].

xviii) Third-Party Funding

On the third party funding issue, Georgia is in favor of establishing an equilibrium between the investor's interest to have access to justice through the help of third-party funding and the integrity and transparency of arbitration proceedings themselves. Therefore, Georgia is open for the inclusion of certain disclosure commitments to be introduced in the ECT and its dispute settlement clause, with the addition of certain soft law measures to monitor other procedural facets of third party funding. In this light, Georgia proposes to take into consideration the ICSID and UNCITRAL practices on the matter[100].

xix) Sustainable Development and Corporate Social Responsibility

Regarding the aspect of sustainable development and corporate social responsibility, Georgia suggests the reiteration of those principles in a more transparent wording within the ECT body, either in the preamble of the treaty or in a dedicated article with the treaty itself[101].

xx) Obsolete Provisions

Lastly, Georgia is in favor of the dismissal of obsolete provisions from the body of the treaty.

[99] ibid 36.
[100] ibid 37.
[101] ibid 38.

Luxembourg

Regarding the proposed content of the agreement

i) General Comments

As a general comment regarding the modernisation procedure, Luxembourg stresses the need for its supervision on behalf of the parties themselves, as well as the Energy Charter Secretariat itself[102].

ii) Definition of Economic Activity in the Energy Sector

With regard to the definition of Economic Activity in the Energy Sector, Luxembourg concurs with the Secretary's General approach on the modernisation of the ECT and applauds states' efforts to align with Paris Agreement's objectives for the mitigation of climate change. In this light, it also urges all stakeholders to incorporate all those objectives to the body of the treaty[103].

iii) Right to Regulate

As far as the right to regulate is concerned, Luxembourg is in favor of a distinct article within the treaty, describing in detail the right to regulate with a non-stabilisation clause, with special emphasis on the fulfilment of the parties' obligations deriving from the Paris Agreement[104].

iv) Sustainable Development and Corporate Social Responsibility

Regarding Sustainable Development and Corporate Social Responsibility, Luxemburg opts again for a separate article within the treaty dealing with those issues, with the addition of certain elements, like the revised OECD Guidelines for Multinational Enterprises, the General Assembly Resolution adopted by the General Assembly of the United Nations, the ILO Tripartite Declaration of Principles regarding

[102] ibid 3.
[103] ibid 8.
[104] ibid 16.

Multinational Enterprises, the Un Global Compact, the UN Guiding Principles on Business and Human Rights and, lastly, the UN Framework Convention on Climate Change and the Paris Agreement[105].

Switzerland

Regarding the proposed content of the agreement

i) Definition of Charter

With regard to the definition of Charter, Switzerland is willing to agree for a potential inclusion of the wording "2015 International Energy Charter" as one of the definitions of the word "Charter" within the Treaty[106].

ii) Definition of Economic Activity in the Energy Sector

In regard to the definition of the Economic Activity in the Energy Sector, Switzerland is, again, willing to agree for a potential amendment. In particular, it wishes for a modification of article 1(5) of ECT, in order to include additional types of investments that are not included so far within the treaty. Examples of such types of investments are offshore cables, pipelines and vessels. In addition, it also wishes for the amendment of Annex EM, in order to include energy technologies that are not included thus far, like biogas, hydrogen and other biogenic feedstock[107].

iii) Definition of Investment

Regarding the definition of investment, Switzerland requires for the inclusion of additional standards, like expectation of profit and the assumption of risk. It further requires for the investment's compliance with the host state's legislation and regulation[108].

[105] ibid 39.
[106] ibid 7.
[107] ibid 9.
[108] ibid 11.

iv) Definition of Investor

As far as the definition of Investor is concerned, Switzerland opts for the inclusion of additional criteria, in order for an investor to be deemed as such, with special emphasis given on the prerequisite of having either "substantial business activity" in that state, or substantial amount of capital[109].

v) Right to Regulate

Concerning the right to regulate, Switzerland opts for the inclusion of this term in the preamble of the treaty. As with the definition of Fair and Equitable Treatment, it wishes for its better clarification through an open type list of FET commitments[110].

vi) MFN Clause

The MFN clause topic is also one of the topics that Switzerland deems as candidate for modernisation. In particular, Switzerland requires that no procedural provisions from different or past agreements should be eligible for application in a current dispute. Additionally, it requires that there must be a contrast between investors and investments and that any procedural aspect of a dispute should not be included within the scope of MFN treatment[111].

vii) Clarification of "Most Constant Protection and Security"

On the matter of most constant protection and security, Switzerland wishes for the clarification of this concept to be referred only to physical security[112].

[109] ibid 14.
[110] ibid 16.
[111] ibid 20.
[112] ibid 21.

viii) Definition of Indirect Expropriation

About the definition of indirect expropriation, Switzerland requires better explanation of article 13 of ECT through the adoption of certain standards for indirect expropriation[113].

ix) Umbrella Clause

Additionally, concerning the umbrella clause, Switzerland wishes for the reduction of its scope in having exclusive or written commitments[114].

x) Denial of Benefits

Likewise, Switzerland demands more transparency with regard to denial of benefits. More specifically, it suggests the further clarification of article 17 of ECT, so that it includes specific provisions regarding "substantial business activity"[115].

xi) Transfers related to Investments

As far as transfers related to investments is concerned, Switzerland would like the inclusion of a certain type of guarantee clause within article 14 of ECT, for the adoption of restrictive measures in case of emergency like failure of balance of payments or other forms monetary struggles, under the condition that they are non-discriminatory[116].

xii) Frivolous Claims

On the matter of frivolous claims, Switzerland wants more clarity, as the existing mention to the ICSID guidelines may not align with the rest proceedings under article 26 (4)[117].

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[113] ibid 23.
[114] ibid 25.
[115] ibid 27.
[116] ibid 28.
[117] ibid 30.

xiii) Transparency

Furthermore, Switzerland is advocate of the principle of transparency within arbitral proceedings, hence it is really fond of the notion of having UNCITRAL guidelines on transparency embedded in the body of the treaty[118].

xiv) Security for Costs

Moreover, Switzerland acknowledges the call for a "security for costs" provision, hence it is a proponent of the amendment of the ECT in this regard, in order to include such a provision or a variation of this, which will subsequently lead arbitral tribunals to interpret it as a security for costs provision[119].

xv) Valuation of Damages

As far as the valuation of damages is concerned, Switzerland is a proponent of the notion that such awards must be delineated only to monetary damages and not other forms of remedies[120].

xvi) Third-Party Funding

With regard to third party funding, Switzerland is a proponent of a potential drafting on the matter, rather than a separate provision in the body of the treaty. This declaration though should reflect the outcome of the ICSID discussions on the matter[121].

xvii) Sustainable Development and Corporate Social Responsibility

Finally, Switzerland wants a non-legally binding type of provision regarding sustainable development and corporate social responsibility matters. In Switzerland's perspective, a preambular reference would suffice[122].

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[118] ibid 32.
[119] ibid 34.
[120] ibid 36.
[121] ibid 37.
[122] ibid 39.

Turkey

Regarding the proposed content of the agreement

i) General Comments

As a general comment, Turkey supports the modernisation process of ECT that is undertaken by the Energy Charter Process and acknowledges the need for such a change to take place due to the recent developments occurring in the energy sector and the investment framework in general. A crucial role to these developments has been played by international fora and organizations like the UNCITRAL, OECD and ICSID, who all wish to reform the entire ISDS system after many complaints from all stakeholders regarding the unreliability of the system as its currently constructed[123].

ii) Pre-Investment

With regard to the pre-investment regime, Turkey supports only the coverage of the post-investment phase on behalf of the ECT, with its reasoning being a draft submitted before the ICSID in 1989, stating that Turkey only recognizes disputes originating from investment activities which have been granted, are in accordance with Turkey's foreign capital legislation and have already started. Therefore, Turkey proposes the revision of the relevant provisions of ECT, in particular the entirety of Part III and article 10 (1), (2), (3), (4), (5) and (6)[124].

iii) Definition of Charter

As far as the definition of Charter is concerned, Turkey proposes the modification of article 1(1) of ECT in order to also include the 2015 International Energy Charter as one of the definitions of the wording "Charter"[125].

[123] ibid 4.
[124] ibid 5-6.
[125] ibid 7.

iv) Definition of Economic Activity in the Energy Sector

On the matter of defining the economic activity in the Energy Sector, Turkey suggests the amendment of article 1(5) of ECT and its Annexes in order to incorporate new energy and technology trends that assist in the fight against climate change and, therefore, bring a new perspective on the term of "economic activity in the energy sector"[126].

V) Definition of Investment

On the matter of the definition of Investment, Turkey requires the adoption of an indicative list of additional attributes that a potential investment needs to possess, like the commitment of capital, the expectation of profit, the assumption of risk and many more. In addition, it requires that such investments fully abide by the laws and regulations of the host state at the time they commence[127].

vi) Definition of Investor

Regarding the definition of investor, Turkey proposes three policy options. First, the adoption of additional standards within the definition of "investor", like the prerequisite to have its headquarters or having significant business activity in the area of the host state. Second, the further support of the Denial of Benefits Clause and third, taking into account only the dominant nationality in the event where there is dual nationality[128].

vii) Right to Regulate

As far as the right to regulate is concerned, Turkey is advocate of the inclusion of a dedicated provision regarding this matter on the preamble of the treaty, as well as a separate article analyzing this topic with a non-stabilization clause[129].

[126] ibid 9.
[127] ibid 12.
[128] ibid 14.
[129] ibid 16.

viii) Definition of Fair and Equitable Treatment

Concerning the definition of fair and equitable treatment (FET), Turkey opts for the adoption of a specific list with measures that shall be deemed as a violation of the FET guidelines, in order to prevent any misconceptions and interpretation on tribunals' behalf regarding the true essence of the "fair and equitable treatment" principle[130].

ix) MFN Clause

With reference to the MFN clause, Turkey suggests that these types of MFN clauses, either found in current "International Investment Agreements" (IIAs) or in future ones , must be excluded from any kind of procedural and dispute resolution provisions, while also promoting the necessary comparison between investors and investments that are in the same circumstances and the same situation[131].

x) Clarification of "Most Constant Protection and Security"

With respect to the most constant protection and security provision, Turkey wishes for its clarification to include exclusively the physical security aspect. In addition, it proposes the amendment of article 10 (1) of ECT, so that it indicates this type of clarification[132].

xi) Definition of Indirect Expropriation

At the same time, Turkey is advocate of the further clarification of the term "Indirect Expropriation". In particular, it follows the path laid down by the decisions of arbitral tribunals on the matter and wishes to carry that perspective over to the body of the ECT, either in a form of a separate article, or within a dedicated Annex inside the treaty. Turkey gives special emphasis on article 13 of the treaty, proposing its modification in order to include additional criteria on the matter of indirect

[130] ibid 18.
[131] ibid 20.
[132] ibid 21.

expropriation. On the Umbrella Clause Issue, Turkey is willing to accept only written commitments[133].

xii) Denial of Benefits

About the denial of benefits issue, Turkey stresses the need to address the matter of frivolous claims and prevent it from happening in cases of "ghost enterprises" and investors with malicious intentions towards the host state where an investment takes place. Turkey, therefore, recommends the revision of article 17 of ECT, so that it will inhibit host state's own investors to legally turn against their own state under the umbrella of the ECT[134].

xiii) Transfers related to Investments

Regarding the transfers related to investments, Turkey opts for the adoption of a safeguard mechanism stated in article 14 of the treaty, that shall adopt constraining measures in case of extensive difficulties regarding balance of payments, with the prerequisite that those restrictive measures are not discriminatory and are in accordance with the IMF agreement[135].

xiv) Frivolous Claims

On the subject of frivolous claims, Turkey, being subject to many fraudulent prosecutions by investors under many BIT's and under the ECT, wishes for an early discharge of those claims that have no merit. In addition, it requires for a supplementary framework on dispute resolution topics to cover security for costs, third party funding, transparency and valuation for damages[136].

[133] ibid 23.
[134] ibid 27.
[135] ibid 28,29.
[136] ibid 30-31.

xv) Transparency

With regard to the matter of transparency, Turkey proposes the implementation of the UNCITRAL guidelines, as adopted in 2010. Hence, it recommends the revision of Part V of the treaty with the inclusion of a separate article on the matter of Transparency[137].

xvi) Security for Costs

Furthermore, regarding security for costs, Turkey advocates in favor of the adoption of explicit provisions on this matter based on the current ICSID agreement. It further advocates for interim measures to be clarified on whether they also incorporate orders for security of costs. Finally, it proposes the incorporation of both a supplementary framework on dispute resolution issues (like transparency, frivolous claims etc.) and a soft law regime regarding procedural aspects for the implementation of this framework that can better guide states and tribunals[138].

xvii) Valuation of Damages

Moreover, regarding the valuation of damages, Turkey opts for the issuance of an award (on behalf of the arbitral tribunals) that covers only the monetary damages and nothing else. In this spirit, Turkey proposes the establishment of a supplementary protocol dealing solely with dispute resolution issues (like security for costs, third party funding etc.)[139].

xviii) Third-Party Funding

Regarding the issue of third party funding, Turkey is in favour of establishing a declaration that will either have an essential role or adhere to the outcomes of the UNCITRAL discussions on the matter, with its reasoning being the recent amendment of the “New rule 21 of the Arbitration Rules and new Rule 32 of the Additional Facility

[137] ibid 32-33.
[138] ibid 34.
[139] ibid 36.

Arbitration" and the obligations deriving from both these rules regarding the source of those fundings, as well as their transparency[140].

xix) Sustainable development and corporate social Responsibility

With regard to the sustainable development and social corporate responsibility aspect, Turkey advocates for the establishment of an official proclamation regarding this matter in conjunction with its instruments, such us the OECD guidelines, ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN global compact and many more[141].

xx) Access to Infrastructure (Including denial of access and available capacities)

As far as the matter of access to infrastructure (including its denial), Turkey is of the opinion that no change must occur to the current access to infrastructure framework, as it has always been conducted either through intergovernmental agreements or host government agreements for many years now, and, therefore it does not need any chage[142].

xxi) Definitions and Principles on Tariff Setting

On the matter of definitions and principles on tariff setting, Turkey suggests the adoption of a generic set of rules (like transparency and non-discrimination) concerning this issue, since the already broad, legal and technical complexity of attempting to tariff the transmission operations, has its drawbacks due to the many states that are involved in the whole procedure in the form of transit countries[143].

xxii) REIO

Finally, regarding REIO, Turkey wishes for the better clarification of the legal relationship of REIO's parties among themselves.

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[140] ibid 37.
[141] ibid 40.
[142] ibid 42.
[143] ibid 43.

ECT regime and EU law

The ECT has been heavily scrutinized, especially from mid-2010's, regarding its ISDS mechanism in relation to EU law and vice versa. This can be noticed by the fact that there are more than 125 arbitration cases under the ECT regime. Furthermore, despite the common misconception that arbitration cases were mainly filed by investors against host states, whose judicial system is fragile, the majority of arbitration cases are intra-EU. This trend has reinstated the discussion around the topic of EU law and ECT compatibility. Nevertheless, the sufficiency of ISDS has also been questioned, due to the immense levels of public controversy regarding investor-state arbitration.

The fabled dispute between Achmea and Slovakia, the so-called "Achmea Case" has revitalized the debate on whether EU law is compatible with the ECT regime. The CJEU, with its landmark judgment, stated that any interference of international arbitration courts within any intra – EU dispute is unlawful and could be perceived as state aid[144]. The prohibition of intra-EU BITs to intra-EU cases within the context of the ECT regime was the main point of a debate that was ignited with this ruling[145]. This debate has evolved over the years, into being a controversial issue with different opinions among legal practitioners and academia. For example, commission's firm position has always been that intra EU cases cannot be legally resolved through the lens of the ECT. Conversely, professor Basedow proved that the EU ultimately acknowledged ECT's potential application in intra-EU disputes, albeit reluctantly.

Furthermore, the expanding number of cases with each one having different jurisprudence, pointing to different directions and interpretations, has given further fuel to the discussion regarding the interconnection between the ECT regime and EU law. For example, some scholars were in favor of EU's law superiority over

[144] Anna Herranz-Surrallés, 'The Energy Charter Treaty: Old and New Dilemmas in Global Energy Governance' in Michèle Knodt and Jörg Kemmerzell (eds), *Handbook of Energy Governance in Europe* (Springer International Publishing 2020) <http://link.springer.com/10.1007/978-3-319-73526-9_65-1> accessed 16 November 2021.
[145] Cees Verburg, 'Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement' (2019) 20 The Journal of World Investment & Trade 425.

ECT, based on the rulings of certain arbitral tribunals that concurred to this conclusion, like in the case of Electrabel v. Hungary. Conversely, there were other tribunals that concurred the opposite, like in the case of RREEF v. Spain[146]. Then again there are other scholars that dismiss the superiority debate altogether. Not only this, but the ECT provides a protective grid of provisions around investors who are not sufficiently protected by the EU law. This is especially the case regarding expropriation and the concept of fair and equitable treatment. Nevertheless, it has been common knowledge by now that there has been a constant conflict among different regulatory regimes within the EU that risk the sustainability of the current relations between different regions. An example of this is the Nord Stream 2 v. EU case.

European Commission's view on competence-based responsibility

European Commission has openly expressed its opinion, throughout the decades that the EU itself, as a whole, and each and every Member State, take international responsibility as far as their own remits are concerned, independently of one another and always in the light of the current international status-quo. More specifically, in its comments on the Articles of the Responsibility of International Organisations (ARIO), the European Commission emphasized the point that the EU has a legal order of its own and is responsible for the organization of the legal relationship among its member states, their enterprises and individuals. Therefore, the Commission makes a distinction regarding competences, to those that are attributed solely to EU as a whole and those that are attributed to the Member States. An example of this, is the fact that the EU is solely responsible in case of a breach of international obligations regarding tariff classifications, despite Member States carrying such classifications by themselves, since the EU is holding exclusive competence as far as the customs union is concerned.

This competence-based responsibility has been always propagated by the EU and its member states in numerous cases and conflicts under the umbrella of the WTO, who lacks the relevant legal framework regarding competences. There are various cases and international disputes where, through the Commission's

[146] Ibid.

declaration, the EU assumes the entirety of its international responsibility, as an autonomous entity, regarding tariff concessions, tariff matters, subsidy measures and many more[147]. And all of this because the Commission strongly maintains that it is exclusively competent for these matters. Several examples of such cases were the *Computer Equipment case,* the *Geographical Indications case*, the *Large Civil Aircraft Case* and, finally, the *Commercial Vessels case.*

The commission follows a similar pattern regarding competence-based responsibility in disputes that fall under the ECT regime as well. Much like the WTO regime, the ECT is reluctant to place division of competences amongst EU, as an entity, and each one of the member states independently. On the contrary, the European Commission, upon EU's accession to the ECT, has made a bold declaration geared towards a competence-based approach that applies to both the European Communities and the member states with regard to the fulfilment of their obligations under the ECT format. With regard to the Electrabel case, where a power purchase agreement was terminated prematurely by the Hungarian government, the Commission's position was that both the EU and its member states were collectively responsible for ECT infringements to the extent of their respective competences. More specifically, the Commission the Commission upgraded the responsibility for unlawful state aid from the individual level of Member States to that of the European Union as a whole.

The Hungarian Government was, therefore, wrongly held to be the opposing party to the claimant regarding the termination of the power purchase agreement. In many of the disputes between member states that also appear to be disputes within the ECT context, the Commission has tried to intervene many times, like for instance the AES summit, Miccula, RREEF Infrastructure and many more.

EU Regulation 912/2014 uniquely highlights the Commission's absolute approach regarding international liability, by adopting a framework for conducting economic accountability associated with arbitral tribunals that deal with investor-state disputes. These arbitral tribunals have been constituted by international conventions,

[147] Emilija Leinarte, 'The Principle of Independent Responsibility of the European Union and Its Member States in the International Economic Context' (2018) 21 Journal of International Economic Law 171.

to which the EU is a member. The delimitation of competences between the European Union and the member states takes precedence over international liability for treatment subject to dispute settlement, in accordance with paragraph 3 of the preamble of that regulation. According to the Commission, regardless of whether the treatment in question is granted by the Union itself or by another member state, the Union shall be primarily responsible for defending all claims alleging a violation of rules included in an agreement, falling within the exclusive jurisdiction of the Union.

Politicisation of ISDS and ECT regime

Setting aside the EU-ECT relations, the public and political current against ISDS caused political urgency in reforming the ECT dispute settlement provisions. In the context of the TTIP negotiations there were officially more than 3 million against ISDS campaigns within the EU. Criticisms of ISDS mainly included fundamental objection to granting foreign companies exclusive rights to sue states and a host of procedural concerns, such as the lack of clarity and integrity in arbitration[148]. Although the ECT remained off the public radar for a long time, anti-ISDS campaigns eventually ended up targeting it as "the most dangerous investment treaty in the world", according to the CEO in 2018. In addition to being the most contested international treaty, the ISDS has been a subject of criticism for its ambiguous and expansive investment protection provisions, which are increasingly susceptible to wide-ranging and conflicting interpretations. Indeed, as early as the 1990's, legal experts have highlighted the issue that certain provisions of the ECT provide extensive opportunities for individuals to complain and take legal action against governments.

Yet another developing cause of public contestation and academic debate has to do with the extent to which the ECT is the proper mechanism for promoting the transition to renewable energy. Some experts argue that regulation-based energy governance and strong investment protection measures are necessary to boost the confidence of renewable energy investments, which are particularly prone to regulatory risks. The mere fact that the renewable energy sector constitutes the

[148] Tienhaara and Downie (n 38) 452.

majority of arbitration cases before the ECJ, is indicative of this argument. On the other hand, however, the conflict between investment protection and the right of states to regulate environmental issues is illustrated in a number of cases before the ECJ. Some of the best known cases are Vattenfal v. Germany in 2012, where Germany was sued by a Swedish company over a decision to shut down nuclear power in that country, or Rockhopper v. Italy in 2018, where a UK-based gas and oil company went to arbitration against Italy for revoking a drilling concession in the Adriatic Sea (CEO, 2018)[149]. In any case, the contribution of ISDS in terms of promoting renewable energy investment has been questioned by some experts, arguing that the removal of subsidies may reduce political risks and that the potential positive impact of ISDS on investment cannot be verified with concrete evidence[150].

The discussion on the reforms regarding the dispute settlement provisions was launched in the context of a second modernisation process in 2018 by the ECT Secretariat, in an attempt to address all the aforementioned issues and, in particular, the public opposition to ISDS. The majority of parties are in favour of modernising ISDS (e.g. through the inclusion of special guarantees on the right to regulate and other measures to enhance transparency and third party participation), but the outcome of this procedure is not yet clear. Firstly, the reform of the ECT's dispute settlement provisions is troublesome to address in isolation, given the broader reform of ISDS at EU and global level. In response to the domestic dispute, the EU has advocated a reformed investor-state arbitration system with permanent judges, an appeal mechanism and enhanced safeguards against corporate abuse. The so-called Investment Court System (ICS), when it comes to bilateral agreements, and the Multilateral Investment Court (MIC) at the global level have been jointly promoted by the European Union since 2016[151].

In addition, there was a general trend towards a horizontal shift for greater public authority following the submission of country comments to the ECT Secretariat, including responses from the EU and eight more countries.

[149] Anna Herranz-Surrallés, '"Authority Shifts" in Global Governance: Intersecting Politicizations and the Reform of Investor–State Arbitration' (2020) 8 Politics and Governance 336.
[150] Tienhaara and Downie (n 38).
[151] Verburg (n 145).

Notwithstanding, although most parties strongly supported the addition of special clauses to ensure “the right of governments to regulate”, they alluded to this in different ways. On the one hand the EU emphasized public goods and the inclusion of other international rights and obligations, such as climate change protection, sustainable development goals or corporate social responsibility. The most concrete proposition in this sense was suggested by Luxembourg, with the introduction of a non-stabilisation clause, which would prevent companies from contesting regulatory measures designed to enable the energy transition and the implementation of the Paris Agreement (Energy Charter Secretariat, 2019, p.16). On the other hand, when addressing the right of states to regulate, Azerbaijan, Georgia and Albania highlighted the conservation of sovereignty, namely the principle of “sovereignty over energy resources” or the option to waive specific classes of assets from ISDS following “essential security” considerations. Hence, in this second sense, upgrading would also include a vertical dimension, that is, the deepening of national authority in determining when ISDS would apply.

Moreover, the lack of attention to the issue of climate change and the need for alignment of investment provisions with the UNFCC Paris Agreement, as well as the UN Sustainable Development Objectives, has led many academics and energy practitioners alike to criticize the modernisation process (Keay-Bright and Defilla 2019). Moreover many argue that the lack of clear position of the ECT on climate change should awaken the EU and drive it out of the ECT altogether (Voon, 2019).

Conclusions

A robust legal framework is always necessary to achieve consistency and transparency regarding the effectiveness of an investment in the energy sector. This is all the more relevant in view of the ever-increasing demand for energy, as well as the very security of supply and demand at a global level. So far, those bilateral relations that have been established to address energy issues have not been fruitful. For instance, a common problem encountered in cross-border energy trade has to do with transit. Transit usually involves at least three countries, however the energy flow reaches the final consumers only after it has crossed several countries. It is, therefore, only through a multilateral agreement that the issue of cross-border energy flows could be adequately addressed[152]. Other aspects of the energy sector can be affected in the same way. Furthermore, international security, which is the ultimate goal of the existing system of governance in the energy markets around the world, must be based on legal provisions that take into account the geopolitical aspect of energy. In the meantime, there is a continuous evolution in the field of energy markets and energy trade, and, therefore, it is very important to adopt multilateral rules for trade in the energy sector.

There is a difference between energy sector products and other goods in international trade. This difference lies on the fact that the former are finite compared to the latter, and, therefore, the governance of the international energy sector needs to always take into account this nuance, when implementing energy policies. A further element is that energy resources are not evenly distributed, instead they are held by a small number of producing countries. It can, therefore, easily be said that politics may have an impact on the field of international energy trade. The diverse interests of different agents, therefore, play an important role in shaping energy governance policies.

It is important to listen to the concerns of all stakeholders in the energy sector, both producing countries and energy-dependent countries. It is not always

[152] Herrmann and Terhechte (n 2).

easy to strike a balance between the different interests of the players. It is necessary to make observations about the nature of the values and interests of both producing and consuming countries along the energy chain. From this perspective, the rules and values of the Energy Charter were fully adopted by the decisions of the G8 summits in 2006 and 2007 respectively.

The energy Charter helped to achieve a compromise between many different parties, which took place 30 years ago and reflected the needs and concerns of that time. It is well known that the ECT regime is not as comprehensive as many would have liked it to be, as more precise rules on transit are required, as well as rules on the pre-investment stage. Nevertheless, The ECT is still of considerable value to this day, as. It is the only treaty that regulates energy issues across the whole spectrum of international trade and economic activity. Examples include trade, transit, investment and energy efficiency. Moreover, there is a special complementary relationship between the ECT and the WTO, as far as the world trade rules are concerned, with the former successfully covering that part of trade activity relating exclusively to the energy sector, as an extension of the WTO's general rules.

Another aspect of ECT's contribution to WTO's regime is the addition of a detailed investment policy framework along with a set of specific transit rules, both of which are absent from WTO, or, better yet, have not been fully explored within its own framework. In particular, WTO has benefited greatly from this development thus far, since it has always dealt with investment policy only through the lens of obligations deriving from national treatment, or prohibition of quantitative restrictions.

Furthermore, climate change policies could be greatly benefited from ECT's investment protection regime, should it decide to follow through with saving the environment. A glimpse of this protection regime can be observed in ECT's dispute settlement provisions which includes state-aid and investor-state arbitration. Private agents, like energy companies, can further contribute to this cause by providing further assistance to ECT's provisions through the application of strict dispute settlement rules.

Finally, the Energy Charter Process should place its focus on attracting a larger number of countries to its cause, regardless of their origin or their place along the energy value chain (producing, importing, transit and others). It is noteworthy that its main body of legal enforcement on energy matters, the ECT, has, so far, managed to incorporate many and divergent interests of many and different players. It is, therefore, imperative for the Process to continue along this path and convince many more stakeholders that it is in their best interest to join the Process' "family" and benefit from its unique energy platform for the development and implementation of binding disciplines that are in favor of all parties involved. Of course, should the status quo of some players be tilted negatively, then these particular stakeholders, that are affected, could always express their concerns or objections to the rest of the energy charter forum and find an adequate solution from within.

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