

*Oh, East is East, and West is West, and never the twain shall meet,
Till Earth and Sky stand presently at God's great Judgment seat;
But there is neither East nor West, Border, nor Breed, nor Birth,
When two strong men stand face to face, though they come from the ends of the
earth!*

Rudyard Kipling



History



- Economic crisis and then collapse of USSR put big energy question on Europe's agenda. Political initiative launched in Europe in June 1990 with first draft 20 August 1991.
- Signed after the Cold War to connect former Soviet and “satellite” countries’ energy sectors with Europe and the world markets.
- Energy demand in Europe vs. Vast resource availability in ex SU and economic crisis.
- Need to establish a commonly accepted foundation for energy cooperation among the states of Eurasia

3 major documents

- I. European Energy Charter Declaration in Hague on 17 December 1991
- II. **ENERGY CHARTER TREATY** was signed in Lisbon in December 1994 together with Energy Efficiency Protocol and came into force on 16 April 1998 (from 40 grew to 56 members with EU and Euratom). **LEGALLY BINDING**.
- III. International Energy Charter 20 May 2015 and adopted by 72 countries and EU, Euratom and ECOWAS. **LEGALLY NON-BINDING** political declaration. Result of new CONEXO strategy.

ENERGY CHARTER TREATY

- The Energy Charter Treaty (ECT) IS AN INTERNATIONAL INVESTMENT TREATY (ECT and Related Documents is 226 pages).
- It was established to address the legal challenges that arise in cross-border investment in the energy sector.
- Framework for energy cooperation that is unique under international law as it is **the only multilateral framework for energy matters**.
- Designed to promote energy security through the operation of more open and competitive energy markets
- Legal basis for using international arbitrations by investors vs countries
- Challenge - sovereignty over natural resources VS principle of international cooperation to allow outside access to those resources.



MEMBERS AND OBSERVERS OF THE ENERGY CHARTER CONFERENCE

as of 9 Jan 2020

MEMBERS (56)

Sig	Rat	EEC	IEC	Country
	2013	2006	2015	Afghanistan
1994	1997	1991	2015	Albania
1994	1997	1991	2015	Armenia
1994	1997	1991	2015	Australia
1994	1997	1991	2015	Austria
1994	1997	1991	2018	Azerbaijan
1994	1997	1991	2015	Belarus
1994	1998	1991	2015	Belgium
1995	2001	1995	2016	Bosnia and Herzegovina
1994	1996	1991	2015	Bulgaria
1994	1997	1993	2015	Croatia
1994	1998	1991	2015	Cyprus
1995	1996	1993	2015	Czech Republic
1994	1997	1991	2015	Denmark
1994	1998	1992	2015	Estonia
1994	1998	1991	2015	European Union
1994	1998	1991	2015	EURATOM
1994	1997	1991	2015	Finland
1994	1999	1991	2015	France
1994	1995	1991	2015	Georgia
1994	1997	1991	2015	Germany
1994	1997	1991	2015	Greece
1995	1998	1991	2015	Hungary
1994	2015	1991		Iceland
1994	1999	1991	2015	Ireland
1995	2002	1991	2015	Japan
	2018	2007	2015	Jordan
1994	1995	1991	2015	Kazakhstan
1994	1997	1992	2015	Kyrgyzstan
1994	1995	1991	2015	Latvia
1994	1997	1991	2015	Liechtenstein
1995	1998	1992	2015	Lithuania
1994	1997	1991	2015	Luxembourg
1994	2001	1991	2015	Malta
1994	1996	1992	2015	Moldova
1999	1997	1997	2015	Mongolia
	2015	2012	2015	Montenegro
1994	1997	1991	2015	Netherlands
1998	1996	2015	2015	North Macedonia
1995		1991	2015	Norway
1994	2000	1991	2015	Poland
1994	1997	1991	2015	Portugal
1994	1996	1991	2015	Romania
1994		1991		Russian Federation
1994	1995	1993	2015	Slovakia
1994	1997	1992	2015	Slovenia
1994	1997	1991	2015	Spain
1994	1997	1991	2015	Sweden
1994	1996	1991	2015	Switzerland
1994	1997	1991		Tajikistan
1994	2001	1991	2015	Turkey
1994	1997	1994	2015	Turkmenistan
1994	1998	1991	2015	Ukraine
1994	1996	1991	2015	United Kingdom
1995	1995	1991	2015	Uzbekistan
2018	2014	2015		Yemen

INTERNATIONAL ENERGY CHARTER 2015 (91)

EUROPEAN ENERGY CHARTER 1991 (69)

ENERGY CHARTER TREATY 1994 (56)



OBSERVERS (42)

Country	EEC	IEC
Bangladesh		2015
Benin		2015
Burkina Faso		2017
Burundi	2015	2015
Cambodia		2015
Canada	1991	
Chad	2015	2015
Chile		2015
China		2015
Colombia		2015
EAC		2016
ECCAS		2016
ECOWAS		2015
Eswatini		2015
G5 Sahel		2016
Gambia		2017
Guatemala		2016
Guyana		2018
Indonesia	2009	
Iran		2016
Iraq		2016
Italy	1991	2015
Kenya		2017
Mali		2017
Mauritania	2014	2015
Morocco	2012	2015
Niger	2015	2015
Nigeria		2017
Pakistan	2005	2015
Palestine	2014	2015
Panama		2017
Rwanda		2016
Senegal		2016
Serbia	2001	2015
Sierra Leone		2018
South Korea		2015
Syria	2010	
Tanzania		2015
UAE		2017
Uganda	2019	2015
USA	1991	2015
Vietnam		2018

INTERNATIONAL ORGANISATIONS WITH OBSERVER STATUS (by decision of the Energy Charter Conference):





CHRONOLOGY for



Kazakhstan

1991 European Energy Charter

- signed on 17 December 1991

1994 Energy Charter Treaty

- signed on 17 December 1994
- ratified on 18 October 1995
- deposited on 6 August 1996
- entered into force on 16 April 1998

1994 Protocol on Energy Efficiency and Related Environmental Aspects

- signed on 17 December 1994
- ratified on 18 October 1995
- deposited on 6 August 1996
- entered into force on 16 April 1998 **1998**

Amendment to the Trade related provisions of the Energy Charter Treaty

- provisional application

2015 International Energy Charter

- signed on 20 May 2015

Primary regulation in **commercial** energy pool



Cross-border trade

Transit

FDI

Energy Efficiency

Dispute Settlement



WHO IS IN CHARGE IN ECT

- Article 33 of the ECT – Energy Charter Conference - Governing and decision-making arm of the Organisation
- Each country is a member of Conference. 2020 Chairman is Azerbaijan. 2014 – Kazakhstan (2015-2019 Astana Declaration).
- Multinational Secretariat – daily work of Energy Charter

STRUCTURE

1. Strategy Group
2. Implementation Group (Chaired by Sergey Katyshev & now Klara Rakhmetova, Kazakhstan)
3. Working Group on Governance Issues (Chaired by Klara Rakhmetova, Kazakhstan)
4. Budget Committee
5. Legal Advisory Committee
6. Modernisation Group

(Industry Advisory Panel – voice of private sector)

6 economically largest countries make up over **70%** of the working budget of ECT (Japan, Germany, France, UK, Spain, Australia).

Selected Energy Materials in ECT's focus

- Oil, Coal, Natural Gas, Petroleum and Petroleum Products (15 articles)
- Electrical Energy
- Uranium or thorium ores and concentrates.
- Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.
- Uranium enriched in U235 and its compounds; plutonium and its compounds.
- Radioactive elements and isotopes and radioactive compounds
- Spent (irradiated) fuel elements (cartridges) of nuclear reactors.
- Fuel wood, charcoal

Trade in ECT's focus

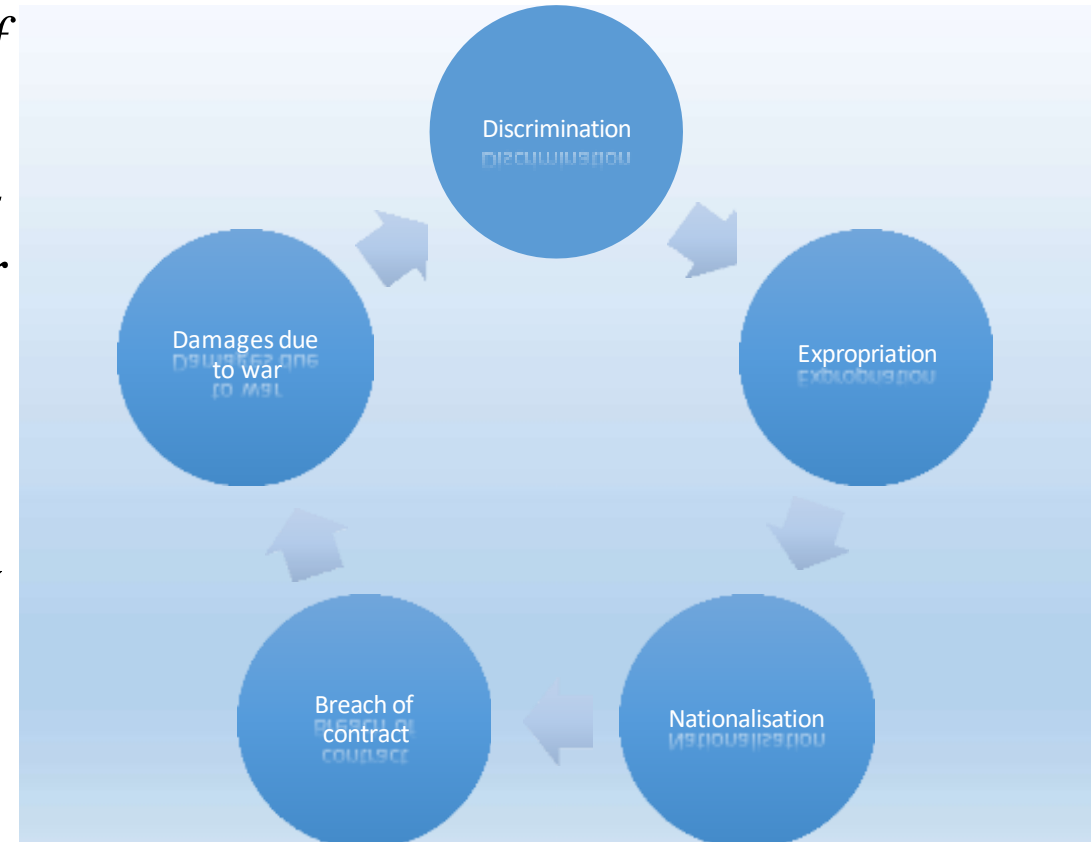
- Purpose - to create open and non-discriminatory energy markets
- Framework follows rules of GATT system (now WTO) using concepts “most favored nation” – equal treatment of EU imports and “national treatment” treating foreign investors no worse than domestic investors
- ECT – bridge for WTO rules in the energy sector of its countries
- Does cover goods – energy materials such as crude oil & natural gas, uranium, etc. and energy equipment
- Does not cover services and IP rights

“Economic Activity in the Energy Sector” means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

Investment in ECT's focus

- Fundamental objective – “*ensure the creation of a ‘level playing field’ for energy sector investments, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments*”.
- Protection of investors and their investments from political risks ECT is **unique** for investors because ECT binds all country members within its multilateral framework
- Once investment is allowed investor can seek legal redress through int. arbitration

WHAT INVESTOR IS AFRAID OF?



Dispute settlement in ECT's focus

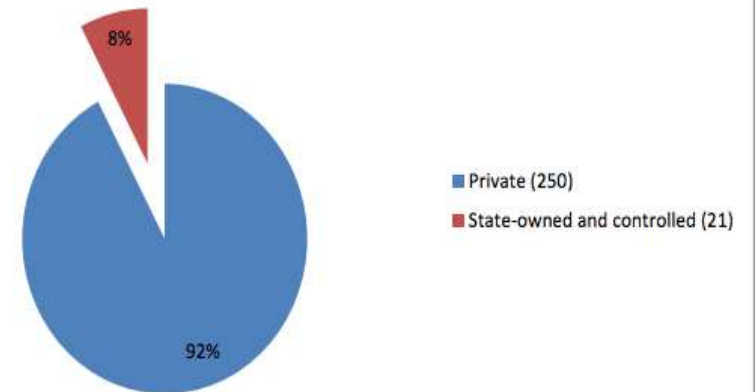
- Article 27 - dispute resolution between two contracting states (was n e v e r used)
- Article 26 – dispute resolution between an investor and a state (128 ECT cases out of all 983 cases in the world)

Process – Investor State Dispute Settlement

Choice of arbitration:

- ICSID (under World Bank from 1965)
- ICSID Additional Facilities Rules
- UNCITRAL Ad hoc rules
- AR of the Stockholm Chamber of Commerce

Classification of claimant investors according to ownership and control (128 cases)



Biggest case: USD500mln award re Kazakhstan

- Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan
- Claims arising out of the alleged campaign of harassment by the Kazakh State which culminated with the abrupt cancellation of oil and gas exploration contracts held by claimant's local operating companies, followed by the seizure of its Kazakh assets.
- Stockholm Chamber of Commerce
- Claim: USD **2.6bln** Award in favour of investor: **USD497mln**
- Breaches found: Fair and equitable treatment / Denial of justice claims
- Treaty: ECT

Investor-State Dispute Settlement (ISDS)



Kazakhstan

Data	against Kazakhstan	Claimant is from Kazakhstan	TOTAL
Numbers of disputes	19	5	24
Pending status	7	1 (Georgia)	8
In favour of foreign investor	7 • 5+1 liability with no damages	N/A	7 Awards - USD660mln
In favour of State/KZ investor	5	1	6
Settled	1	3	4

Energy efficiency in ECT's focus

- Article 19: each Contracting Party "*... shall strive to minimise in an economically efficient manner, harmful Environmental Impacts arising from energy use.*"
- the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) defines in more detail the policy principles that can promote energy efficiency and provides guidance on the development of energy efficiency programmes
- **Not legally binding!**

Transit in ECT's focus

- ECT has set of rules that covers the entire energy chain
- Covers production and generation of energy
- Terms of energy trade and transportation across various national jurisdictions to international markets
- Prevents disruption of fuel passing between countries
- Energy Charter Transit Protocol Draft / No success for 20 years/
Negotiations with Russia / Russia delivers 40% of its gas to Europe through Ukraine / Ukraine Russia gas deal signed in December 2019 for 5 years.
- In 2016 Kazakhstan delegate Klara Rakhmetova received an award for ... promoting the country's initiatives, ... to resume negotiations of a Multilateral framework Agreement on Transit of energy resources, as set out in the Astana Declaration.

Areas for ECT's improvement

- Academics raise difficult questions on ECT and courts call it “ambiguous”
- ECT does not have “*more precise definitions of investment protection standards*”, no “*responsibilities for investors*”, ECT “*follows expansionist ambitions*” – Nathalie Bernasconi-Osterwalder, lawyer of International Institute for Sustainable Development



Justice in the world ?

“If you wanted to convince the public that **international trade agreements are a way to let multinational companies get rich** at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid **compensators** whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS.”

The Economist, October 2014



Survival Clause

The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of **20 years** from such date.



Withdrawals from ECT



1. USA signed EEC in 1991 but withdrew from ECT process / Bilateral investment treaties are better protection !



2. Australia / signed but not ratified. Makes contributions and participates in work.



3. Norway / signed but not ratified. Contributes and participates in work.



4. Belarus / not ratified but does provisional application. Same.



5. Russia (largest energy producer in Eurasia!) withdrew in 18.10.2009 / Suspicion of Western initiatives by Putin regime, Yukos expropriation claim intent (1 month after withdrawal) / Russia's withdrawal is "major blow to ECT".



6. Italy from January 2016 / official - costs savings EUR300k / 7 dispute cases re renewables vs Italy

Modernisation of ECT | Rich or healthy?

In order to concretize the modernizing of the ECT, the treaty itself needs to be reframed to align with the

Modernizing the Energy Charter Treaty:
What about termination?

1. United Nations Framework Convention on Climate Change (which entered into force on March 21, 1994 and today has 197 parties),
2. the Paris Agreement (which entered into force on November 4, 2016 and now has 185 parties) and
3. the SDGs adopted at the United Nations Sustainable Development Summit in 2015.

Put simply, for climate goals to be achieved, the ECT must introduce a distinction between investments based on fossil fuels and those based on renewable energy.

– Tania Voon, professor in Law, Melbourne University



Energy transition to zero carbon economy

- In November 2019 the Energy Charter Conference mandated the Modernisation Group to start negotiations on modernisation of the ECT.
- 16 January 2020. German Government to phase out of coal and nuclear by 2038 and agreed to pay about EUR45bln
- 16 January 2020. Microsoft to become carbon negative by 2030.



Future?

