



UiO : **Scandinavian Institute of Maritime Law**
University of Oslo

Associate Professor Ivar Alvik

Investments in Climate and Renewable Energy under the Energy Charter Treaty



The Energy Charter Treaty – General Overview

- Post-cold war initiative between West and East European/Eurasian countries
- Underlying concern for energy security and liberalization of the energy sector – means to extend Western liberal policies into Eastern Europe
- Common interest perspective – develop and strengthen energy supply by means of western technology and capital
- Facilitation of investments as primary means to improve energy security – pre- vs. post admission

Main structure – four key areas

- Investment
- Trade & transit – ref. GATT
- Energy Efficiency – focus on policy development
- Dispute settlement

Environmental and Climate Concerns under the ECT – Promotion of Energy Efficiency

- ECT article 18 – sovereignty over energy resources
- ECT article 19 – obligation to promote and facilitate energy efficiency, renewable energy sources and new technology
- The Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)
 - List of policy principles to promote energy efficiency (art 3)
 - Requires member states to formulate policy aims and strategies in a transparent manner, and implement domestic energy efficiency programmes (articles 5 and 8)
 - Framework for policy review and discussion

Investment Protection under the ECT – Key Notions

- “Investor” – art 1 (7)
- “Investment” – art 1 (6)
- “Economic Activity in the Energy Sector” – art 1 (5)

Substantive standards of protection – key provisions

- “Fair and equitable treatment” – art 10.1
- Requirement to observe obligations –
”umbrella clause”
- Non-discrimination – art 10.7
- Expropriation only against prompt, adequate
and effective compensation – art 13
- Compulsory arbitration of disputes – art 26

Application of the ECT to Investments in Climate and Renewable Energy - case example (*Nykomb v. Latvia*)

- Recognised need for increased energy generation capacity combined with air pollution from existing coal based energy production
- Low energy prices due to import of cheap (mostly nuclear) energy from Russia and Lithuania
- Contract between Swedish owned company Windau and the Latvian state owned electricity company Latvanergo to build co-generation gas power plant based on obligation of Latvanergo to purchase electricity (PPA) at stipulated 8 year “double tariff” in applicable energy legislation
- Double tariff legislation later repealed leading to the refusal of Latvanergo to pay double tariffs
- Claim by Windau’s Swedish parent company against Latvia before the SCC Arbitration Institute in Stockholm
- Held by the tribunal that Windau had a contractual right to the double tariff, and that the refusal to pay constituted an unreasonable and discriminatory measure

Investments in Climate and Renewable Energy – Role and Scope of the ECT?

- Potentially significant role through extending BIT principles of investment protection to the energy sector – as exemplified by the *Nykomb case*
- Scope of protection – “economic activity within the Energy Sector”
 - Potential for dynamic interpretation based on the perceived purpose of the ECT to promote sustainable development and energy efficiency?
 - Possibility of designating specific investments as “Charter efficiency projects” by notification to the secretariat
- Level of protection - determined by reference to “general” international investment law or specific development of ECT law?
 - Importance of the specific concerns and purposes enshrined by the ECT
 - Potential for ECT influence on the “general” law?