Dispute Settlement under the Energy Charter Treaty

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Overview

1. What is the ECT?
2. ECT Dispute Settlement Mechanisms
3. How have the Mechanisms been used?
4. The ECT and the Nord Stream Pipeline
1.1 What is the Energy Charter Treaty?

Signed in 1994

47 Contracting Parties (including EC), 51 Signatories (Russia did not ratify)

Entered into force 1998

Purpose is

„to establish a legal framework in order to promote long-term cooperation in the energy field

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1.2 The Energy Charter Treaty System

§ More than a multilateral investment treaty

§ Several „Pillars“ of the ECT:

§ Trade (incorporates GATT / WTO-Rules)

§ Transit (Art. 7)
  § Freedom of transit for Energy Materials & Products, non-discrimination and nat. treatment

§ Investment promotion and protection (Part III, Arts. 10 – 17)
  § Investments are all directly or indirectly owned or controlled assets relating to an Economic Activity in the Energy Sector
  § Protection of Investments of an Investor of one Contracting Party in the Area of another Contracting Party.
  § Protection against various forms of political risk: (non-discrimination, fair and equitable treatment, no arbitrary or discriminatory measures, no expropriation without compensation
1.3 Transit under the ECT

§ Regulated in Article 7 ECT. Transit = carriage of EM+P from State A through State B to State C.

§ CP’s are obliged to facilitate energy transit on a non-discriminatory basis

§ CP’s shall encourage ,entities“ to cooperate in construction and modernisation of Energy Transport Facilities (=pipelines)

§ Non-discrimination and national treatment regarding transit and construction of new pipelines (Article 7 IV, V, I)

§ Prohibition to interrupt transit flows in case of dispute
1.4 The Energy Charter Treaty System

ECT – as regards pipelines and energy transit – needs to be supplemented:

- The Transit Protocol
  - Intended to supplement the Transit Provisions
  - Provisions on freedom of transit, access to capacity, construction of pipelines and energy transit
  - Negotiations started 2000, stalled 2006
  - Objections by EU and Russia

- Model Agreements for Cross-Border Pipelines
  - Regulate framework for construction of cross-pipelines
  - Aim is to be a “neutral and non-prescriptive starting point for negotiations”
  - Model Intergovernmental Agreement and Host-Government Agreements (Project Investor – State)
2. ECT Dispute Settlement Mechanisms

§ State – State Dispute Settlement, Art. 27 ECT

§ Investor – State Dispute Settlement, Art. 26 ECT

§ Transit Disputes, Article 7 (7) ECT

§ Trade Disputes, Art. 29 ECT + Annex D (where one party is not a WTO member)

§ Competition and Environmental Disputes
  § Competition: Article 6 (5), Art. 27 (1) ECT
  § Environment: Article 19 (2) ECT (consultation in the ECT Conference)
2.1 State – State Dispute Settlement

§ Article 27 ECT

§ CP’s shall endeavour to settle disputes concerning the application or interpretation of the ECT by through diplomatic channels

§ If no settlement within *reasonable time* occurs, a CP may submit the dispute to ad-hoc arbitration

§ UNCITRAL ad-hoc arbitration in the Hague

§ Scope: all provisions of the ECT?
2.2 Investor-State Dispute Settlement

§ Article 26 (1) ECT

„Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably“

§ Three months „cooling off – period“.

§ Unconditional consent to submit disputes to arbitration. By filing a claim, an arbitration agreement comes into existence.

§ Three venues: ICSID (AF), UNCITRAL ad-hoc, Arbitration Institute of the Stockholm Chamber of Commerce.
2.3 Trade Disputes under the ECT

§ Article 29 ECT in the version of the Trade Amendment

§ Where both Contracting Parties are party to WTO -> WTO applies

§ Article 29: where one Contracting Party is not a party to WTO, WTO applies by reference

§ Dispute settlement: Article 29 and Annex D to the ECT
2.4 Transit Disputes

§ Article 7 (6), (7) ECT

§ Applies in case of “a dispute arising out of any matter arising from Transit through its Area”

§ Only after exhaustion of contractual or other agreed dispute resolution mechanisms

§ Conciliation procedure, Conciliator to be appointed by Sec.-Gen. of the Energy Charter Secretariat

§ Conciliator has 90 days to resolve disputes. If not possible, he may recommend a resolution/procedure and decide on interim tariffs / terms of Transit
3. How have the Mechanisms been used?

§ Competition, Environment and Trade Disputes
  § Unclear, no information available

§ Disputes between Contracting Parties
  § Only one known case, settled through diplomatic channels

§ Investor-State Disputes
  § 20 known cases
  § Coal, Oil, Nuclear; mostly relating to power plants
  § Also cases within the EC (e.g. AES v. Hungary, Electrabel v. Hungary), but: applicability disputed by EC

§ Transit Disputes
  § Procedure not used in 2006 or 2009 gas transit disputes
  § Dispute Settlement not designed for highly politicized disputes where transit is blocked
4. The ECT and the Nord Stream Pipeline

§ Only provisions on investments and transit potentially relevant.

§ Investment
   Ø Is the pipeline an Investment in the “Area” – Article 1(10) ECT, 58 UNCLOS?
   Ø Pipeline companies can be Investors and/or Investments (project company in each state?). Construction and Operation could be protected
   Ø But: are investor-state disputes realistic to happen?

§ Transit
   Ø Construction of pipelines? Discriminatory refusal breach of ECT, but will be difficult to enforce (only State-State).
   Ø Operation of pipelines? Risk of interruption?
   Ø New regulations necessary