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ENERGY CHARTER TREATY 20 YEAR ANNIVERSARY

20 Years of the Energy Charter Treaty

Graham Coop[1]

Distinguished secretaries-general, ladies and gentlemen,

It gives me great pleasure to speak to you today, in the presence of so many distinguished colleagues and in the wonderful premises of the World Bank, about the nearly two decades that have elapsed since the Energy Charter Treaty (ECT) was signed on 17 December 1994.[2] Much has happened during that time, both within the Energy Charter constituency and beyond, and the world today is very different from the world of two decades ago. Personally, I feel humbled, as well as honoured, to be addressing you today because I know that many colleagues here have been associated with the Energy Charter for longer than I have and are at least as well qualified as I am to talk about it.

Nonetheless, I have spent some time, during my seven years as General Counsel to the Energy Charter Secretariat, thinking about the achievements and the potential of the ECT, and I have actively continued my interest in the Treaty, both intellectually and professionally, following my return to private practice. I think that if you were to ask the average intelligent and energy-focused (but not specifically informed) lawyer about the ECT, he or she would probably say: 'That's the treaty that Russia doesn't want to sign because it requires third-party access to gas pipelines' or, possibly, 'That's the treaty that Russia doesn't want to sign because of the Yukos case'. Those who have made the Treaty a specific focus of their career know, of course, that these statements are misconceptions from a legal viewpoint, although, politically and in the court of public opinion, they may carry a lot of weight. However, I think it is important at this time to ask: first, what the ECT has achieved; second, what it has not (or not yet) achieved and why; and, finally, what needs to happen in order that it might achieve more.

I. WHAT HAS THE ECT ACHIEVED?

If I may again put a question to this—probably imaginary—average intelligent and energy-focused, but not specifically informed, lawyer about the achievements of the

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[2] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 ('ECT').

ECT, I think that the answer would almost certainly have something to do with investor-State arbitration. And there is no doubt that the Treaty's role as a multilateral investment treaty has given rise to some of its more prominent achievements.

Consider this scenario. By 1 October 2004, when I took office as General Counsel, the ECT had given rise to five publicly known investor-State arbitral proceedings. By 30 September 2011, when my term of office came to an end, 30 such cases had been initiated. And when I checked the Energy Charter website this morning, it showed a total of 51 cases. Of course, these are only the cases on the public record. Many of you, like me, have reason to know that these cases are only the tip of the iceberg. But there is no doubt that the use of the ECT investor-State dispute settlement mechanisms is increasing rapidly.

Why is this happening? From my viewpoint, the ECT investor protection guarantees and procedures have been invoked more frequently for two main reasons: they have become more widely known, and the world, or at least the Energy Charter constituency, has become a less predictable place. The increase in awareness of the ECT and its investor-State dispute settlement mechanisms form part, naturally, of a broader increase in awareness of investment protection treaties and investor-State dispute settlement more generally. As I expect everyone here knows, the early 1990s were a pioneering period, not only in the negotiation, but also in the use, of bilateral and multilateral investment protection treaties. At the same time, the early ECT arbitral decisions contributed immensely to raising awareness on the part of the legal profession and the energy industry of the guarantees and protections that the Treaty has to offer.

The very first case to be initiated under the ECT (*AES v Hungary*) was registered in April 2001.[3] This case, however, was amicably settled and never resulted in an award. The first ECT award, resulting from the second ever ECT case, *Nykomb v Latvia*,[4] was issued in December 2003 and rapidly attracted comments (generally favourable) from the legal profession and from energy industry observers.[5] Of the following three pre-2005 cases, one was settled,[6] one resulted in an award in March 2005,[7] and the third produced a decision on jurisdiction in February 2005[8] and a final award in August 2008.[9]

Then, in 2005, six cases were initiated, including the well-known claims against the Russian Federation by three Yukos shareholders based in the United Kingdom and in Cyprus. These claims, which were heard by a common tribunal and resulted in interim awards on jurisdiction and admissibility on 30 November 2009,[10] created a blaze of publicity for the ECT, not without the aid of some

[3] *AES Summit Generation Limited v Republic of Hungary,* ICSID Case No ARB/01/4, Order taking note of discontinuance (3 January 2002).

[4] *Nykomb Synergetics Technology Holding AB v The Republic of Latvia,* SCC Case No 118/2001, Award (16 December 2003).

[5] See eg Kaj Hobér, 'Investment Arbitration in Eastern Europe: Recent Cases on Expropriation' (2003) 14 Am Rev Intl Arb 377, 438; Thomas Wälde and Kaj Hobér, 'The First Energy Treaty Arbitral Award' (2005) 22 J Intl Arb 83; Jonas Wetterfors, 'The First Investor-State Arbitration Award under the 1994 Energy Charter Treaty' (2005) 2(1) Transntl Dispute Management.

[6] *Alstom Power Italia SpA and Alstom SpA v Republic of Mongolia,* ICSID Case No ARB/04/10, Order taking note of discontinuance (13 March 2006).

[7] *Petrobart Limited v The Kyrgyz Republic,* SCC Case No 126/2003, Award (29 March 2005).

[8] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005).

[9] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008).

[10] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009).

enthusiastic stoking by counsel for the three claimants. The interim awards were noteworthy for, among other things, their treatment of the highly complex and sensitive issue of provisional application,[11] which had already been considered, albeit in less detail, in the 2005 decision in *Petrobart v Kyrgyz Republic*[12] and in the 2007 decision on jurisdiction in *Kardassopoulos v Georgia.*[13]

And so it has continued. I do not have time today to review every case, or even every year, in detail. But if you take the time to review the information at the Energy Charter Secretariat's dispute settlement web page, or elsewhere, two interesting statistics stand out. The first relates to the nationalities of the parties—claimants and respondents. If you had asked our mythical average intelligent and energy-focused, but not specifically informed, lawyer—or even a very specifically informed investor-State arbitration specialist in the early 1990s—who he or she expected the majority of respondent States to be, I am quite sure that the response would have been that the majority of claims would be made against transition economy States (for example, Russia and the Central Asian countries) whose huge energy resources were expected to attract substantial inward investment.

Has this actually happened? The answer is yes, but only just. Of the 51 cases listed on the Energy Charter website, 25, or nearly half, were filed against an European Union ('EU') Member State—by which I mean a State that was a member of the EU at the date when the claim was initiated.[14] Of those 25 cases against EU States, moreover, 11 were filed against one of the 'old' EU States—States such as Germany, Italy and Spain that were members of the EU during the early 1990s when the ECT was negotiated and signed.[15] And of those 25 cases against EU States, it would appear—although it is not easy to be certain from the information available—that almost all were filed by claimants who were also

[11] ibid paras 244–398.

[12] *Petrobart* (n 7) 60–3.

[13] *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction (6 July 2007) paras 195–261.

[14] The 25 cases filed against European Union ('EU') member states are the following, including the date of registration: *AES Summit Generation Limited v Republic of Hungary,* ICSID Case No ARB/01/4 (25 April 2001); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 (19 August 2003); *Electrabel SA v Hungary*, ICSID Case No ARB/07/19 (36 August 2007); *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No ARB/07/22 (13 August 2007); *Mercuria Energy Group Limited v Republic of Poland*, SCC (24 July 2008); *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6 (17 April 2009); *EDF International SA (France) v Republic of Hungary*, UNCITRAL (May 2009); *The PV Investors v Spain*, UNCITRAL (November 2011); *Vattenfall AB and others v Federal Republic of Germany,* ICSID Case No ARB/12/12 (31 May 2012)*; Charanne and Construction Investments v Spain,* SCC (2013); *Antaris Solar and Dr Michael Göde v Czech Republic,* PCA (8 May 2013); *EVN AG v Republic of Bulgaria,* ICSID Case No ARB/13/17 (19 July 2013); *Isolux Infrastructure Netherlands BV v Spain,* SCC (2013); *CSP Equity Investment Sàrl v Spain,* SCC (June 2013); *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain,* ICSID Case No ARB/13/30 (22 November 2013); *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain,* ICSID Case No ARB/13/31 (22 November 2013); *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia,* ICSID Case No ARB/13/32 (5 December 2013); *Eiser Infrastructure Limited and Energía Solar Luxembourg Sàrl v Kingdom of Spain,* ICSID Case No ARB/13/36 (23 December 2013); *Natland Investment Group NV, Natland Group Limited, GIHG Limited, and Radiance Energy Holding SARL v Czech Republic,* UNCITRAL (8 May 2013); *Voltaic Network GmbH v Czech Republic,* UNCITRAL (8 May 2013); *ICW Europe Investments Limited v Czech Republic,* UNCITRAL (8 May 2013); *Photovoltaik Knopf Betriebs-GmbH v Czech Republic,* UNCITRAL (8 May 2013); *WA Investments-Europa Nova Limited v Czech Republic,* UNCITRAL (8 May 2013); *Mr Jürgen Wirtgen, Mr Stefan Wirtgen, and JSW Solar (zwei) v Czech Republic,* UNCITRAL (June 2013); *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain,* ICSID Case No ARB/14/1 (11 February 2014); *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic,* ICSID Case No ARB/14/3 (21 February 2014).

[15] See *Vattenfall AB* ARB/09/6; *PV Investors v Spain*; *Vattenfall* ARB/12/12; *Charanne v Spain; Isolux Infrastructure v Spain*; *CSP Equity Investment v Spain; RREEF v Spain*; *Antin Infrastructure Services v Spain; Eiser Infrastructure v Spain; Masdar v Spain*; *Blusun SA v Italy* (all contained in n 14).

located in another EU country. So the ECT (which was originally conceived, according to public statements and predictions of the time,[16] to protect investments made from traditional capitalist countries into emerging energy-producing economies, in order to protect flows of energy from the latter to the former) has in fact been used, to a very large extent, as an intra-EU investment protection treaty. I will have more to say about that later.

The second statistic—and here I gratefully rely on statistics shared by the Energy Charter Secretary General with the Energy Charter constituency at the last annual ministerial conference in Cyprus—is that the 16 investor-State arbitration cases that have been concluded have produced a very mixed bag of results. To summarize, jurisdiction was denied in four cases,[17] including two where the claim was found to be fraudulent,[18] and in the remaining 12 cases, which were decided on the merits, the claimant succeeded in four cases in recovering some part of what he or it had claimed,[19] was successful in two cases on liability but not on quantum[20] and was unsuccessful in the remaining six cases.[21] And in the four cases where the claimant made some financial recovery, the amount recovered, as a percentage of the amount claimed, was roughly 20 per cent on an unweighted average basis.

For me, these findings demonstrate that even if investor-State arbitration has its faults—and few who participate in the system would deny that there is some scope for improvement—one reproach that cannot, in justice, be made against investor-State arbitration, or at any rate against ECT investor-State arbitration, is that the system is so investor-friendly that the investor always wins.

Investor-State arbitration, or investment protection, is, of course, not the only accomplishment of the ECT. It is, as I said at the outset, probably the most prominent and also the most directly relevant to this audience. However, the ECT, the Energy Charter Secretariat and the Energy Charter process of dialogue have achieved many other things. Some of their most notable achievements are oriented towards project development rather than dispute resolution. For example, many of

[16] See Andrew Seck, 'Investing in the Former Soviet Union's Oil Industry: The Energy Charter Treaty and Its Implications for Mitigating Political Risk' in Thomas Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment* (Kluwer Law International 1996) 110, 120–33; Jeswald W Salacuse, 'The Energy Charter Treaty and Bilateral Investment Treaty Regimes' in Thomas Wälde (ibid) 321, 328–31; Energy Charter Secretariat, 'Energy Transit: The Multilateral Challenge,' Background Paper to the 1998 Energy Ministerial in Moscow, paras 2.31–2.37 <http://www.encharter.org/fileadmin/user_upload/document/Transit_-_Multilateral_Challenge_-_1998_-_ENG.pdf> accessed 2 April 2014; Andrei Konoplyanik and Thomas Wälde 'Energy Charter Treaty and Its Role in International Energy' (2006) 24(4) J Energy & Nat Resources L 523, 524–9.

[17] *Libananco Holdings Co Limited v Republic of Turkey,* ICSID Case No ARB/06/8, Award (2 September 2011) para 570; *Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV v Republic of Azerbaijan,* ICSID Case No ARB/06/15, Award (8 September 2009) 39; *Europe Cement Investment and Trade SA v Republic of Turkey,* ICSID Case No ARB(AF)/07/2, Award (13 August 2009) 33; *Cementownia 'Nowa Huta' SA v Republic of Turkey,* ICSID Case No ARB(AF)/06/2, Award (17 September 2009) para 179.

[18] *Europe Cement* ibid paras 146–76; *Cementownia* ibid 24–5.

[19] *Nykomb Synergetics Technology Holding* (n 4) s 7; *Petrobart Limited* (n 7) 88–9; *Ioannis Kardassopoulos* (n 13) para 693; *Remington Worldwide Limited v Ukraine*, SCC, Award (28 April 2011) (not publicly available).

[20] *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No V 064/2008, Award (8 June 2010) paras 10–11, 95–104; *AES Corporation and Tau Power BV v Republic of Kazakhstan*, ICSID Case No ARB/10/16, Award (1 November 2013) (not publicly available).

[21] *Plama Consortium* (n 9); *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Award (26 March 2008); *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010); *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010); *Mercuria Energy Group Limited v Republic of Poland*, SCC, Award (1 December 2011) (case not publicly available); *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No ARB/08/13, Award (16 July 2012).

you are familiar with the Model Agreements for Cross-Border Pipelines[22] and the Model Agreements for Cross-Border Electricity Projects,[23] which were developed over the last 15 years by a Legal Advisory Task Force made up of volunteers from private practice and industry. Anecdotal evidence suggests that these Agreements have been used as a basis for negotiation of the intergovernmental and host government documentation for many cross-border projects both within and outside the Energy Charter constituency.

Lawyers are often accused of being addicted to the written word, and perhaps you will be relieved to hear that much of the work of the Energy Charter in recent years takes the form of dialogue rather than documents. For example, the Industry Advisory Panel brings together representatives of major energy companies across the Energy Charter constituency in order to strengthen the dialogue with the private sector on the main directions of the Charter process, with a particular focus on risk mitigation and the improvement of the business climate.

To give another example, the Task Force on Regional Energy Cooperation in Central and South Asia was set up in 2007 as a means to intensify and develop cross-border energy trade on the basis of the ECT. At the outset, the focus was on electricity, but with time the Task Force grew to include more participating countries and other energy sources. It now brings together Afghanistan, China, Kazakhstan, Korea, Kyrgyzstan, Mongolia, Pakistan, Tajikistan, Turkmenistan and Uzbekistan. Many of these countries are closely linked by shared natural resources (for example, rivers capable of producing hydro power) and other features. Five of these ten countries, of course, were ruled centrally from Moscow until their independence in 1991, and have learned, as newly independent teenagers often learn to their cost, that independence is not always an unmitigated blessing. I remember participating in the third Task Force meeting in Dushanbe in 2008, where hydro and electricity experts from the different Central Asian republics sat around the same table, for the first time, I was told, in ten years.

Now, self-congratulation is often very agreeable, but we generally learn more from self-questioning. And so I ask my second topic of the day.

II. WHAT HAS THE ECT NOT (OR NOT YET) ACHIEVED?

A few minutes ago, I suggested that we ask the average intelligent and energy-focused, but not specifically informed, lawyer about the achievements of the ECT. Now, I suggest that we ask this same hypothetical lawyer what the ECT has not achieved or, at any rate, not achieved to date. What answers would we receive? One answer that I am certain would figure at or near the top of the list is that the Energy Charter failed to contribute effectively in January 2006, and again in January 2009, to the resolution of the gas supply and transit crises involving Russia, Ukraine and numerous European gas-consuming countries. These crises

[22] Energy Charter Secretariat, *Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines* (2nd edn, December 2007) <http://www.encharter.org/fileadmin/user_upload/document/ma-en.pdf> accessed 2 April 2014.

[23] Energy Charter Secretariat, *Model Intergovernmental and Host Government Agreements for Cross-Border Electricity Projects* (November 2008) <http://www.encharter.org/fileadmin/user_upload/document/EMAs_-_ENG.pdf> accessed 2 April 2014.

were resolved, relatively rapidly, but by political rather than legal means. Many commentators at the time, including then Russian Prime Minister Vladimir Putin, expressed disappointment that the ECT was unable to find a solution.[24]

Personally, I have always considered and still consider these criticisms rather unfair. To quote a somewhat politically incorrect French proverb: '*La plus belle fille du monde ne peut donner que ce qu'elle a*' or to paraphrase the proverb slightly to the current circumstances: '*La plus belle fille du monde ne peut donner que ce qu'on lui demande*.' The ECT offers several tools, in its provisions on transit,[25] investment protection[26] and inter-contracting party disputes,[27] that might have been relevant to the 2006 and 2009 gas supply and transit crises. Arguably, these tools are not ideal for this purpose and could be improved, of which more anon, but they could have been used if the participants in these crises—Gazprom, Naftogaz, the governments of Russia and Ukraine and governments and customers in the affected consumer countries—had elected to use them. As we know, both crises were settled in a matter of days but by political, rather than legal, means.

The Energy Charter Secretariat did not stand by watching idly. In both 2006 and in 2009, the then Secretary General wrote to the energy ministers of Russia and Ukraine and to the leaders of the respective gas companies, drawing attention to the possibilities of settlement offered by the ECT. Why did the affected governments and gas companies prefer political solutions to the legal solutions potentially offered by the Treaty? One answer, as demonstrated by events happening today in the same part of the world, is that some problems are seen as simply too serious for politicians to allow their resolution to pass out of their direct control. However, this answer implies a pessimistic outlook, not only for the ECT but also for investment arbitration and indeed for legal dispute settlement in general. I prefer to ask how the ECT could be improved in order to become more attractive as an instrument for settling major—that is, critical—international energy disputes.

One observation that strikes anyone who has worked with the ECT for a significant length of time is that while the Treaty contains clear provisions creating investor protection norms with mechanisms for resolving alleged breaches,[28] as well as somewhat less clear provisions relating to energy transit,[29] it contains no (or virtually no) provisions that are clearly applicable to energy supply contracts. If the ECT in its present form is to apply to these contracts at all, it can only be by characterizing them as investments, as matters of national energy resource

[24] See Prime Minister Vladimir Putin, Opening Ceremony Speech (World Economic Forum, Davos, 28 January 2009), where he stated: 'Unfortunately, the existing Energy Charter has failed to become a working instrument able to regulate emerging problems. I propose we start laying down a new international legal framework for energy security.' See also Michael Emerson and others, *Synergies vs Spheres of Influence in the Pan-European Space* (Centre for European Policy Studies 2009) 95, reporting that 'in reaction to the January 2009 Ukrainian gas transit crisis, the Russian side declared that "the Energy Charter proved to be useless, despite Ukraine's ratification of it"'. Moreover, *Upstream Newspaper*, referring to Vladimir Putin's following order that Russia does not want to participate in the ECT, reported: '[T]he order to ban the ratification of the treaty had been drafted by the Energy Ministry, headed by Putin's nominee Sergei Shmatko, and was agreed in co-ordination with the Russian Foreign Ministry and other state institutions'. 'EU Energy Charter Rejected by Russia' *Upstream* (13 August 2009). Finally, see the presentation given by Katja Yafimava, 'Why Did the Energy Charter Treaty Fail in the Context of Transit? The Case of Russia—Western CIS Transit Disputes' (ECT Conference, Stockholm, 9–10 June 2011) <http://www.sccinstitute.se/filearchive/4/40958/Katja_Yafimava_Presentation.pdf > accessed 2 April 2014.

[25] ECT (n 2) art 7 on 'Transit'.

[26] ibid art 10 on 'Promotion, Protection and Treatment of Investment'.

[27] ibid art 27 on 'Settlement of Disputes between Contracting Parties'.

[28] ibid part III on 'Investment Promotion and Protection' and part V on 'Dispute Settlement'.

[29] See n 25 earlier in this article.

sovereignty or by some other exercise of the lawyer's well-known professional imagination in order to bring them within the purview of the Treaty.

This shortcoming of the ECT, if you will, could undoubtedly be improved through an amendment, which would have to be adopted unanimously, but it may be that inventive legal minds could achieve almost as satisfactory a result through an Energy Charter protocol, understanding, or declaration. To quote our French hosts once again: '*Le mieux est l'ennemi du bien.*'

Another reproach that is frequently levelled not just against the ECT but also against investment arbitration, and, indeed, against legal procedures in general, relates to slowness or lack of rapidity. It is said—and rightly—that disputes over supply and transit of life-changing quantities of energy are too urgent to await the leisurely deliberations of international legal procedures. However, there are numerous precedents of fast-track, or expedited, dispute resolution procedures for urgent cases. Perhaps one of the most striking examples is the Court of Arbitration for Sport's *ad hoc* Division, which was first introduced for the Olympic Games in Atlanta in 1996. The *ad hoc* Division aims to 'provide all participants in the Games with free access to justice within time limits that keep pace with the competition'.[30] To this end, during the Olympics, a panel of arbitrators relocate to the host city and is on call 24 hours a day with a view to rendering decisions within 24 hours of a request for arbitration being filed.

Without asserting that a 24-hour time limit would be feasible for the settlement of major international energy transit or supply disputes, there is no doubt that more could be done to make existing, or newly created, dispute settlement procedures work more quickly. It would not require an amendment to the ECT. Rather, willing contracting parties could, via a protocol, agree to shorter time limits to accomplish dispute resolution steps that they are already required to accomplish under the basic Treaty. And this brings me to my third and final topic for today.

III. WHAT MORE COULD THE ECT ACHIEVE AND WHAT NEEDS TO HAPPEN IN ORDER THAT IT MIGHT?

The ECT has been described, and I wish I could remember by whom, as 'a beautiful idea that never quite happened'. Once again, I feel that this epithet is a little unfair. The ECT has in fact happened and, as I discussed earlier, has substantial achievements to its credit. However, few would deny that it could achieve more. What could it achieve and what are the conditions for these achievements to happen? In my opinion, the *sine qua non* is: wider acceptance of the ECT as a standard of international or global governance.

Allow me to explain. Like every treaty, the ECT was intended to create a set of norms, binding at international law, to serve as a standard of regional, or potentially ultimately global, governance. Its predecessor, the misnamed European

[30] Court of Arbitration for Sport, 'The Court of Arbitration for Sport (CAS) Will Be at the Games of the XXX Olympiad in London' (9 July 2012) <http://www.tas-cas.org/d2wfiles/document/6042/5048/0/London20-20General20Media20Release.pdf> accessed 2 April 2014; Court of Arbitration for Sports, 'The Court of Arbitration for Sports (CAS) Ready for the Sochi Winter Olympic Games' (20 January 2014) <http://www.tas-cas.org/d2wfiles/document/7273/5048/0/CAS20Ad20hoc20Division20Media20Release20-20General20-20201420_English_.pdf> accessed 2 April 2014.

Energy Charter, which was signed in 1991,[31] was not intended to create international legal norms and—unlike the 1994 ECT—was not registered as a treaty pursuant to Article 102 of the Charter of the United Nations. The signatories and contracting parties to the Treaty knew that they were creating a standard of international or ultimately global governance.

However, any set of internationally binding norms necessarily imposes limitations on national sovereignty. And the idea that States should voluntarily accept such limitations, which was always difficult to sell, is becoming increasingly so in today's world. This phenomenon is not confined to the Energy Charter constituency. In the EU context, for the last few years at least, anyone who lives in an EU Member State has been constantly exposed to a debate concerning the extent to which the European Commission and other European institutions are assuming progressively wider powers and thus usurping the sovereignty of EU Member States. There is no doubt that in the United Kingdom, France and elsewhere, a significant segment of public opinion rejects the concept that national sovereignty should be limited by the exercise of powers by central EU institutions. Similar popular backlashes against internationally binding legal norms can be observed in connection with the World Trade Organization, the UN-sponsored climate change negotiations, and in other domains.

Turning again to the ECT, what can we learn from the behaviour of the two main traditional protagonists: the EU and Russia? As I am sure you all know, the Russian Federation announced on 20 August 2009 its intention not to become a participant in the ECT, thus ending its provisional application of the Treaty with effect from 19 October 2009.[32] However, Russia continued and continues to participate actively in Energy Charter meetings and activities, thus making clear that it has not definitively rejected the value of the ECT as a standard of international energy governance. In September 2010, Russia released the text of its Draft Convention on Ensuring International Energy Security.[33] When analysed, this Convention proves to be something of an 'ECT-lite', with considerably less constraining investor-State dispute resolution provisions and a number of clauses intended to settle certain controversies that have played out between Russia and the EU in recent years, including the so-called anti-Gazprom clause in the EU's Third Energy Package and the ambiguous ECT Article 7(3) on equality of domestic and international transit tariffs.[34]

However, what has formed, and informed, the Russian approach to the ECT? I suggest that the answer—or, at least, a part of the answer—may be found in the approach of the EU. And, in this respect, the approach of the EU to investor-State arbitration generally is instructive. As everyone here knows, the entry

[31] European Energy Charter (signed 17 December 1991); Concluding Document of the Hague Conference on the European Energy Charter, in Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents – A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat 2004) 209.

[32] As a background, see the Russian Federation Regulation No 1055-r on the Intention of the Russian Federation Not to Become a Participant to the Energy Charter Treaty and to the Protocol to the Energy Charter Treaty on Energy Efficiency and Related Environmental Aspects (30 July 2009).

[33] In September 2010, the Draft Convention on Ensuring International Energy Security <http://ua-energy.org/upload/files/Convention-engl1.pdf> accessed 2 April 2014, elaborated by a group of Russian experts, was sent to the Energy Charter Secretariat, UN Economic Commission for Europe, and a number of other organizations.

[34] See ECT (n 2) art 7(1), according to which '[e]ach Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.'

into force on 1 December 2009 of the Treaty of Lisbon extended the scope of the EU's common commercial policy expressly to foreign direct investment.[35] As Jan Asmus Bischoff states in his recent article 'Initial Hiccups or More?' the EU institutions and Member States are still arguing, more than four years later, about exactly what this means and what role the EU and its Member States will play in the future in the field of international investment law.[36]

I will spare this audience the details of this controversy, both because I am sure most of you are thoroughly familiar with it and because more learned commentators than I have explained it far better than I could hope to do. To summarize extremely briefly: (i) the EU institutions are extremely disquieted about the continued existence of intra-EU bilateral investment treaties ('BITs') (everyone here will be familiar with the approach adopted by the Commission in the context of *Eastern Sugar v Czech Republic*[37] and similar cases) and (ii) the EU institutions are scarcely less nervous about the continued existence of extra-EU BITs—that is, BITs between an EU Member State and a third State [everyone here will be familiar with the Commission's cases against Austria,[38] Finland[39] and Sweden[40] on the basis of which the Court of Justice of the European Union ('CJEU') ordered the three defendant States to renegotiate or, if necessary, terminate their extra-EU BITs on the basis of a hypothetical incompatibility between these BITs and the EU's exchange control powers]. With respect to extra-EU BITs, however, the EU institutions have moderated their initial reformist zeal. From a set of initial proposals (particularly by the European Parliament) that would have modified investor-State arbitration beyond all recognition, the European institutions now appear to have accepted that the assumption of EU competence over extra-EU investor protection treaties will necessarily be gradual and that existing investment protection treaties between EU States and third States will continue to play a valuable role for a long time to come.

In this context, and against this background, it would seem that the EU really does not know how to approach the ECT in light of the new powers granted to it by the Treaty of Lisbon. As I mentioned earlier, something like half of all known ECT investor-State cases—and considerably more than half of the recent known ECT investor-State cases—concern disputes between an EU investor and another EU government. In other words, the ECT is invoked as an intra-EU BIT more often than not. The European Commission is clearly very concerned about this

[35] Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon [2010] OJ C83/49, combined reading of articles 3.1, 206 and 207, as modified by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306 (opened for signature 13 December 2007, entered into force 1 December 2009).

[36] Jan Asmus Bischoff, 'Initial Hiccups or More? About the Efforts of the EU to Find Its Future Role in International Investment Law' (2014) 11(1) Transntl Dispute Management.

[37] In *Eastern Sugar BV (The Netherlands) v The Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007), the Czech government had passed regulations to comply with the Common Agricultural Policy of the EU, which led Eastern Sugar to claim breach of fair and equitable treatment. The Czech government argued that the arbitral tribunal did not have jurisdiction, since their bilateral investment treaty with the Netherlands had been superseded by EU law. The arbitration tribunal rejected this argumentation. It ruled in favour of Eastern Sugar and ordered the Czech Republic to pay €25.4 million to the company (see particularly paras 142–90).

[38] Case C-205/06 *Commission v Republic of Austria* [2009] ECR I-01301, paras 33–46.

[39] Case C-118/07 *Commission v Republic of Finland* [2009] ECR I-10889, paras 38–43, 48–50.

[40] Case C-249/06 *Commission v Kingdom of Sweden* [2009] ECR I-1335, paras 34–45.

situation, as its amicus interventions in the second *AES v Hungary* case[41] and in *Electrabel v Hungary*[42] make clear. Alternatively, the EU institutions have neglected opportunities to confront, or engage with, the ECT on the same basis as they have engaged with extra-EU BITs between individual EU Member States and third States. The Council Regulation (EU) 1219/2012—the so-called grandfathering regulation—which was adopted on 12 December 2012, is intended to establish 'terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements' with third countries.[43] This Regulation clearly does not address multilateral investment treaties, including the ECT. Similarly, the CJEU, in its 15 September 2011 judgment in *Commission v Slovak Republic*, despite the direct relevance of the ECT to the matter at issue, did not address the ECT, preferring to base its decision on the equally, but no more relevant, Investment Protection Agreement between the Swiss Federation and the Czech and Slovak Federative Republic.[44]

Ladies and gentlemen, if the trumpet gives an uncertain sound, who will prepare for the battle? I put it to you that the EU's ambivalence towards the ECT informs the reaction not only of the Russian Federation but also of other ECT Member States as well as non-member observer States such as the USA and China, which might potentially take the prospect of ECT membership more seriously if they heard the EU singing with one voice on the issue. The ECT has already achieved much, both as an instrument of investment protection and with respect to energy transit, trade and energy efficiency, but it could achieve far more if Member States and non-Member States accepted the ECT as a gold standard of international or global energy governance.

Ladies and gentlemen, thank you for your attention.

[41] *AES Summit* (n 21) para 8.2.

[42] *Electrabel SA v Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) paras 4.89–4.110 (EU submission).

[43] Council Regulation (EU) 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351, art 1.1.

[44] Case C-264/09 *Commission v Republic of Slovakia* [2011] ECR I-08065, para 41, 51–3. Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 5 October 1990, entered into force 7 August 1991).