

# RUSSIA AND THE ECT INVESTMENT ARBITRATION REGIME

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- STRUCTURE OF THE ARGUMENT
  - FDI protection in Russia:
    - Limited access to investment arbitration based on Soviet BITs
    - Limits of provisional application under the ECT
  
  - Protection of Russian investors abroad
    - Access to arbitration based on the ECT
    - The ECT as EU Treaty
  
  - Towards a level playing field for investment protection

- FDI PROTECTION IN RUSSIA
  - Sources of Russian investment law recognize ECT standards  
(Foreign investment law, BITs, Energy Security Convention)
  - Restrictive arbitration clauses of some “first generation” Soviet BITs  
(GER, NL, UK, FIN, SP, BEL-LUX)
    - Berschader*: no access
    - Renta*: access based on broad interpretation
    - RosInvest*: access based on MFN
  - Relief of ECT provisional application limited to investments made before October 2009, for 20 years (*Yukos*)

- PROTECTION OF RUSSIAN INVESTORS ABROAD

- Russian (Soviet) BITs: same limits as FDI in Russia, but benefit of incorporation in EU member states (EU law, EU BITs, intra-EU ECT)
- No BIT with Estonia (Gazprom assets + ownership unbundling): use of ECT?
- ECT: benefits of provisional application recognized for investors of signatories (Art. 45, §2, b), but 20 years protection period limited to FDI in terminating state (Art. 45, §3, b)
- The ECT as EU Treaty: level playing field for Russian investors in the EU and EU investors in Russia?

## – History: Why an ECT?

“Russia and many of its neighbors were rich in energy resources but needed major investments to ensure their development, whilst the states of western Europe had a strategic interest in diversifying their sources of energy supplies.”

“The fundamental objective of the ECT’s provisions on investment issues is to ensure the creation of a ‘level playing field’ for energy sector investments throughout the Charter’s constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments.”

In ECS, An Introduction to the ECT (2004) ([www.encharter.org](http://www.encharter.org))

[www.abdn.ac.uk](http://www.abdn.ac.uk)

## – Reciprocity of protection?

“It is extremely important to recall that the provisions of the Treaty are not only applicable to upstream markets. Political risk is not confined only to one part of the energy value chain, and companies from producer countries are increasingly active on downstream markets. Through the Treaty, these companies receive the same binding protection against non-commercial risk”.

André Merlier, Speech, 4th IEF Energy Lecture, Secretariat of the International Energy Forum, March 2007, Riyadh.

– Arbitral practice: *Electrabel v. Hungary* (intra-EU)

Harmonious interpretation of ECT with EU law

*If there were any material inconsistency between the ECT and EU law, the ECT and EU law should, if possible, be read in harmony.*

Because of: ECT's genesis (the EU's "leading role", "determining actor")  
*the ECT's genesis generates a presumption that no contradiction exists between the ECT and EU law.*

ECT & EU objectives (same objective against anti-competitive conduct)

*FDI in EU Member States cannot have acquired any legitimate expectations that the ECT would shield their investments from the effects of EU law as regards anti-competitive conduct.*

– EU (judicial) practice: Opinion of Advocate General  
Jääskinen in *Commission v. Slovakia* (extra-EU)

“EU energy law cannot be considered as failing to achieve the standards required by the ECT insofar as investments that fall into the *ratione temporis* of those legislative acts are concerned.

Moreover, with respect to the enjoyment and protection of investments, the general level of the protection of fundamental rights provided by EU law affords protection to investors, which fulfills the obligations resulting from Articles 10(1) and 13(1) of the ECT.”



- TOWARDS A LEVEL PLAYING FIELD FOR INVESTMENT PROTECTION
  - Russia has accepted ECT disciplines (Investment Law, BITs, Draft Energy Security Convention)
  - BUT access to arbitration remains challenging for strategic investors in Russia & Russian investors in strategic economies, AND challenge of compliance with / enforcement of arbitral decisions
  - ECT is needed to overcome challenges of enforcement + access to arbitration for both EU investors in Russia & Russian investors in the EU
  - Necessity to re-engage Russia with the ECT investment regime by addressing qualification (perception) of ECT as EU treaty

## Level playing field based on:

- **Investors' perspective: common risks in EU (Western) – Russian (CIS) energy markets**

Price caps & price re-regulation; *ex post* tariff changes; restructuring, unbundling & access to the network; uncertain carbon policies

- **State perspective: common objective of safeguarding regulatory freedom in the energy market**

Avoid overcompensation; protect customers from abuse of dominant position; promote competition & environmental protection



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– Necessity of new “genesis” and “objective” for the ECT

- Need to stabilize investment climate in EU (Western) market for energy security and de-carbonization – not just in the Russian (CIS) market
- Investment implications of interrelated security of supply & demand: recognize contemporary investment environment & flows
- Recognize & engage Russia as “leading” actor of new ECT (Energy Security Convention, arbitral practice, strategic host & home state)
- Opportunity of similar risks in EU (Western) – Russian (CIS) energy: **redefine common investment protection standards adapted to the energy market structure of the 21<sup>st</sup> Century**

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