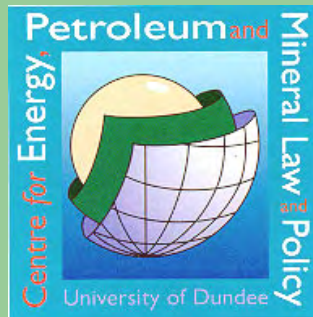
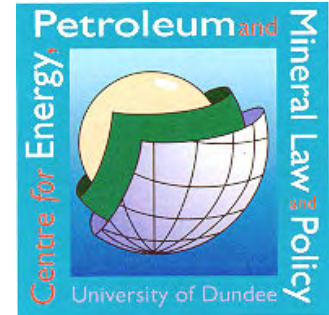


Legal Framework Building for Energy Cooperation: The Role of Governments and Private Sector in Multinational Energy Projects

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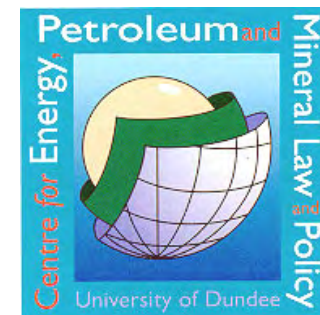


Cross-roads



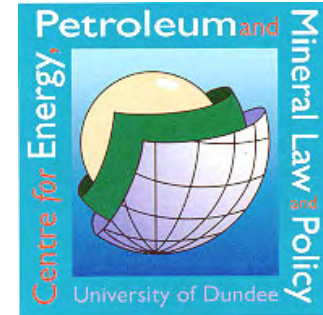
- We have reached the end of a long and fruitful period of state-investor cooperation in international energy projects which began in the early 1990s
- The Energy Charter Treaty was an example of this
- Long-term investment in energy is currently held up by (1) the impact of the current recession/financial constraints + sense that no-one knows what lies over the horizon, and
- (2) the investment implications of the 'low-carbon economy transition'

How Did We Arrive Here? It's a Lawyer's World!!



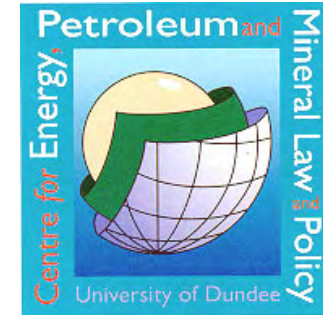
- Huge legal push to promote FDI started in 1990s: development of BITs (more than 2600) and MITs especially ECT
- With a BIT you can impose standards on host State conduct which can be enforced by an arbitral tribunal: FET the most famous – a general, fact-specific standard that contains - legitimate expectations and legal and predictable business framework guarantees – many cases on this especially from Argentina; but does not detract from investor's capacity to make contract claims too; ECT has FET too
- Tsunami of legal claims in 21st century against host States in East Europe, Turkey and Latin America – activation of ECT in this context
- Concerns of host States: Treaty-shopping by investors
- Is the new system fair?
- Disputes affect not only oil, gas & electricity – also water & telecoms – expansion of international investment in these areas too leading to disputes pending (from Argentina to Mongolia)

The Energy Charter Treaty



- Russia: non-ratification of ECT – but does it still apply provisionally? An issue now being discussed in the context of the Yukos case in The Hague
- ECT's minimal role in recent transit disputes between Russia and Ukraine; Laws can be issued to increase taxes, increase royalties, nationalise the sector/type of business
- Surge of claims by investors under ECT making this treaty very popular with lawyers – and some academics
- Does the ECT respect sovereignty?
- Do we need a new energy treaty? But first – consider a new priority...

The Climate Change Factor

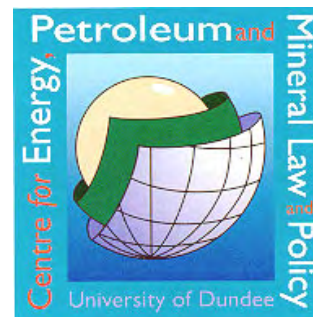


- Responses to this global problem are still at a very early stage – but they already create regulatory uncertainty for prudent investors considering long-term investments
- Energy projects – especially those with fossil fuels - will be affected by measures taken in the medium term (Kyoto 2, etc, but see recent US EPA measures – environmental regulation by the State impacting on investors; use of tax in reaction to perceived failure of cap-and-trade schemes)
- In the longer-term, possible impact of climate change measures on property rights/risk of expropriation claims
- Note too the impact of climate change itself and resulting measures of adaptation by States – perhaps taken hastily

Where we are now

- President Medvedev: a new ECT is required with more formal dispute settlement provisions – drop conciliation for transit and opt for arbitration
- BUT the ECT dispute settlement provisions already work - even if the context and the goals of energy policy have changed dramatically since it was negotiated
- Negotiation of a new MIT/ECT would take too long + States lack the appetite for a new round of negotiations lasting several years; the optimism about east-west relations in the 1990s is absent
- The investment framework is changing: decline of BIT-making but note the operation of existing treaty provisions – large number of cases pending
- Withdraw from the investment system? See threats by Venezuela, Bolivia, Ecuador to withdraw from ICSID; not clever + not practical
- Enforcement of existing awards – Argentina an example of measures taken by ICSID to ensure payments are made – cf. Libya in 1980s
- And note the recent Mongolian case: use of interim measures to set up escrow account pending award (mining case) – taken up elsewhere (Ecuador)

Moving Forward: the Benefits of Cooperation



- De facto the ECT has expanded its global reach to include new players as observers, mirroring changes in global energy economy
- Perhaps it is time to take this further – a re-launch rather than a re-write!
- But key is to gain support of individual States for any changes and for key energy investors to have their concerns listened to and addressed – or investment will not take place!
- Harder to take action on climate change issues that affect energy investment – best in short term to establish monitoring institution for review and channelling of investor concerns to States