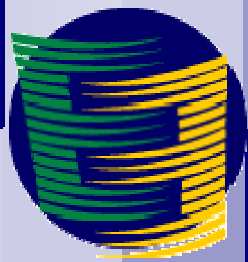


Energy Investment Needs, Opportunities and Risks



The Energy Charter Treaty and protecting energy investments

Graham Coop

General Counsel

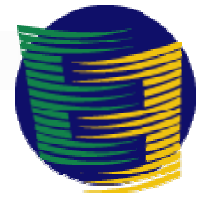
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Energy Charter Secretariat

www.encharter.org

International Odessa Forum

27 July 2010



Historical and political background to the ECT

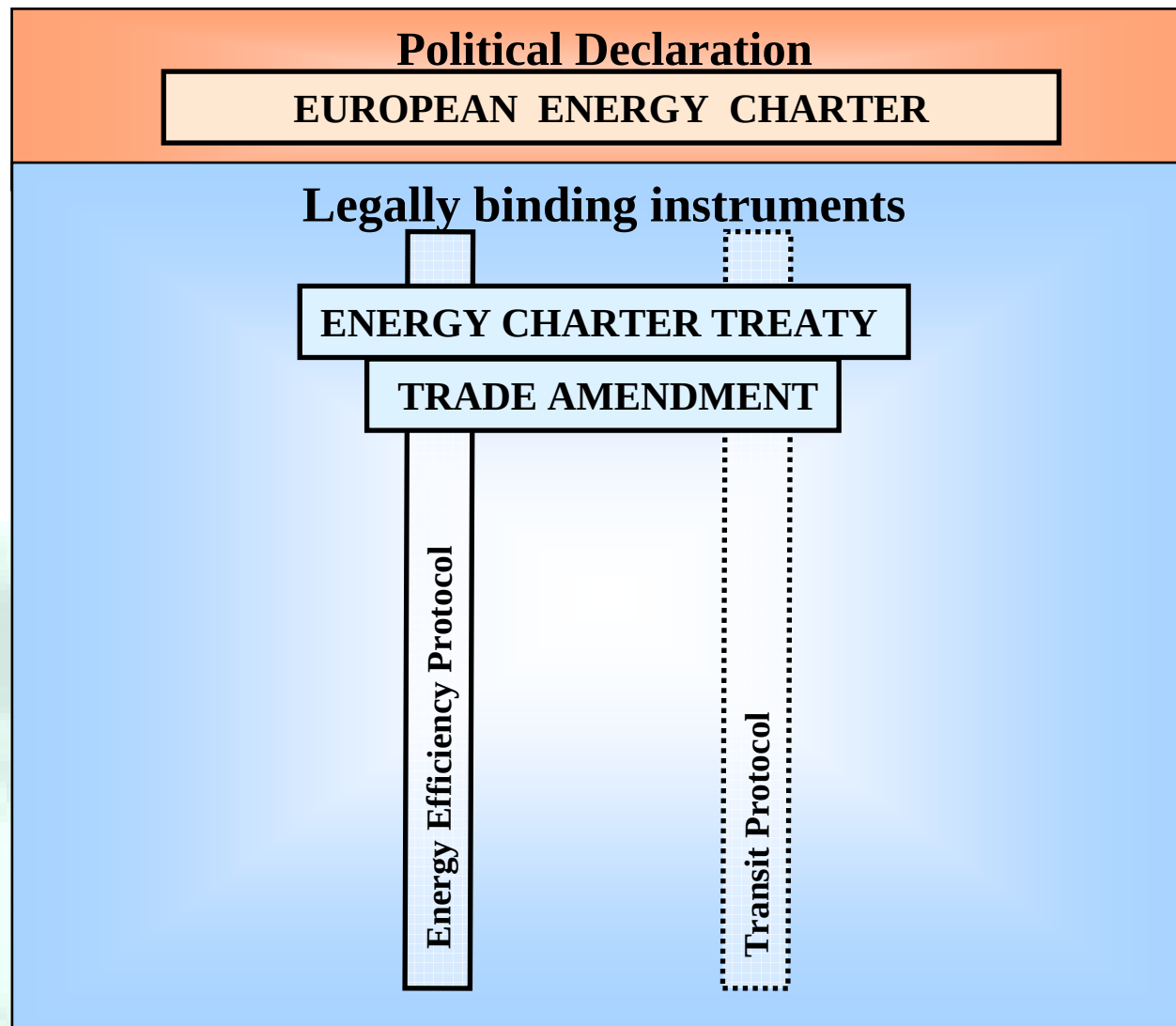
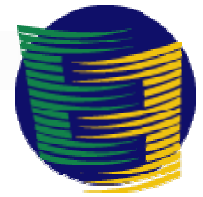
- Common interest in energy cooperation between CIS and western world in post-Cold War era
- Inter-governmental framework was needed to provide legal stability for investments and to secure trade and transit of energy
- Promote energy market reforms (re-structuring and commercialisation, energy price reforms)
- Promote higher energy efficiency

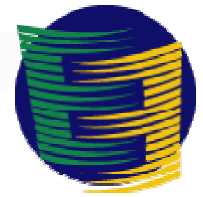


Energy Charter key dates

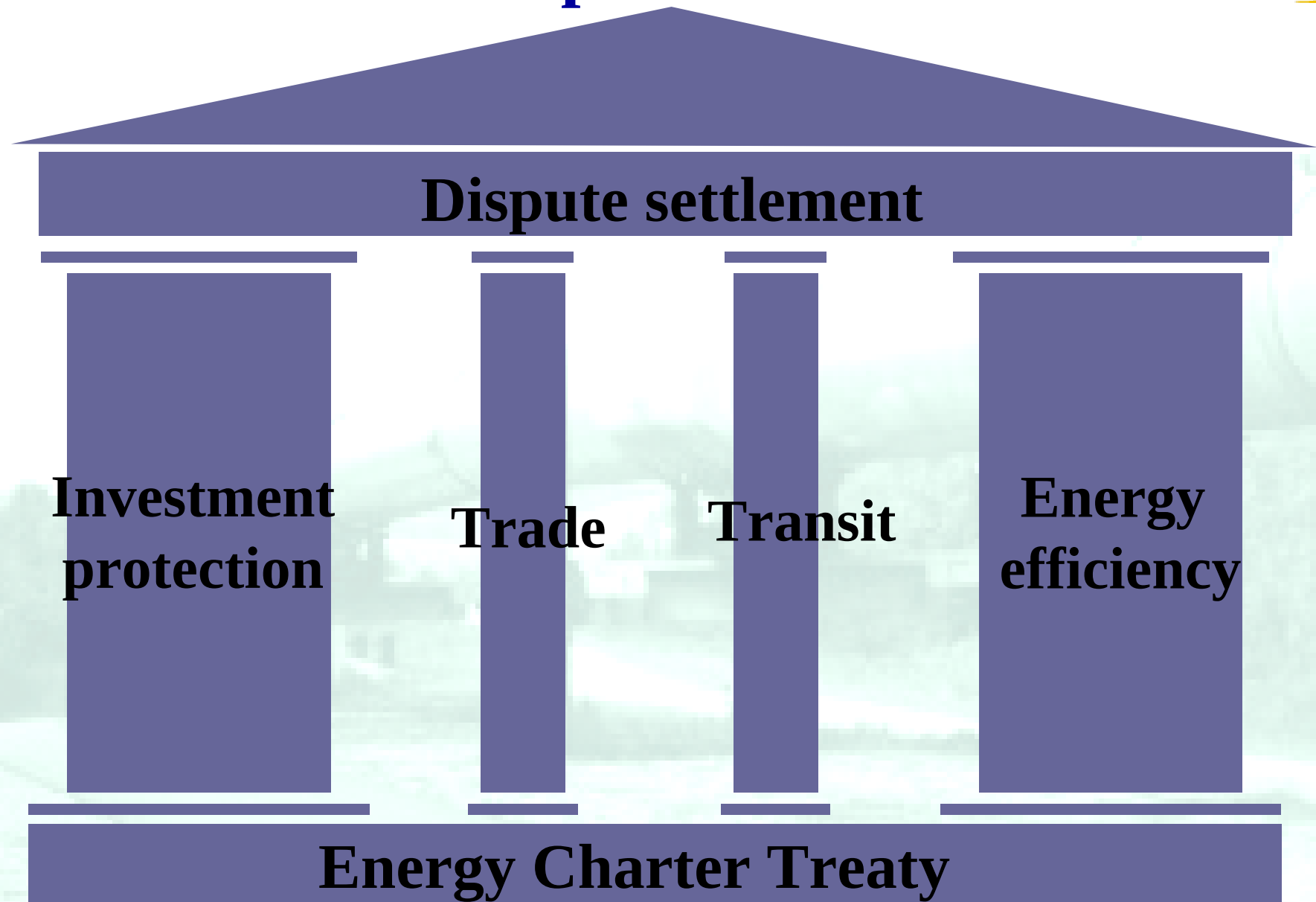
June 25, 1990	Dutch initiative presented in Dublin
December 17, 1991	European Energy Charter signed
December 17, 1994	Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed
April, 1998	ECT came into force
Currently	■ ECT signed by 51 states + European Communities ■ ECT ratified by 46 states. Not yet ratified by: Russia, Belarus, Iceland, Australia, and Norway ■ Russia terminated provisional application in Aug 2009

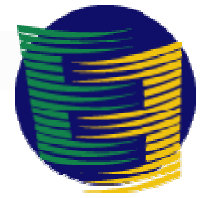
Framework of the Energy Charter Process





The four pillars of the ECT

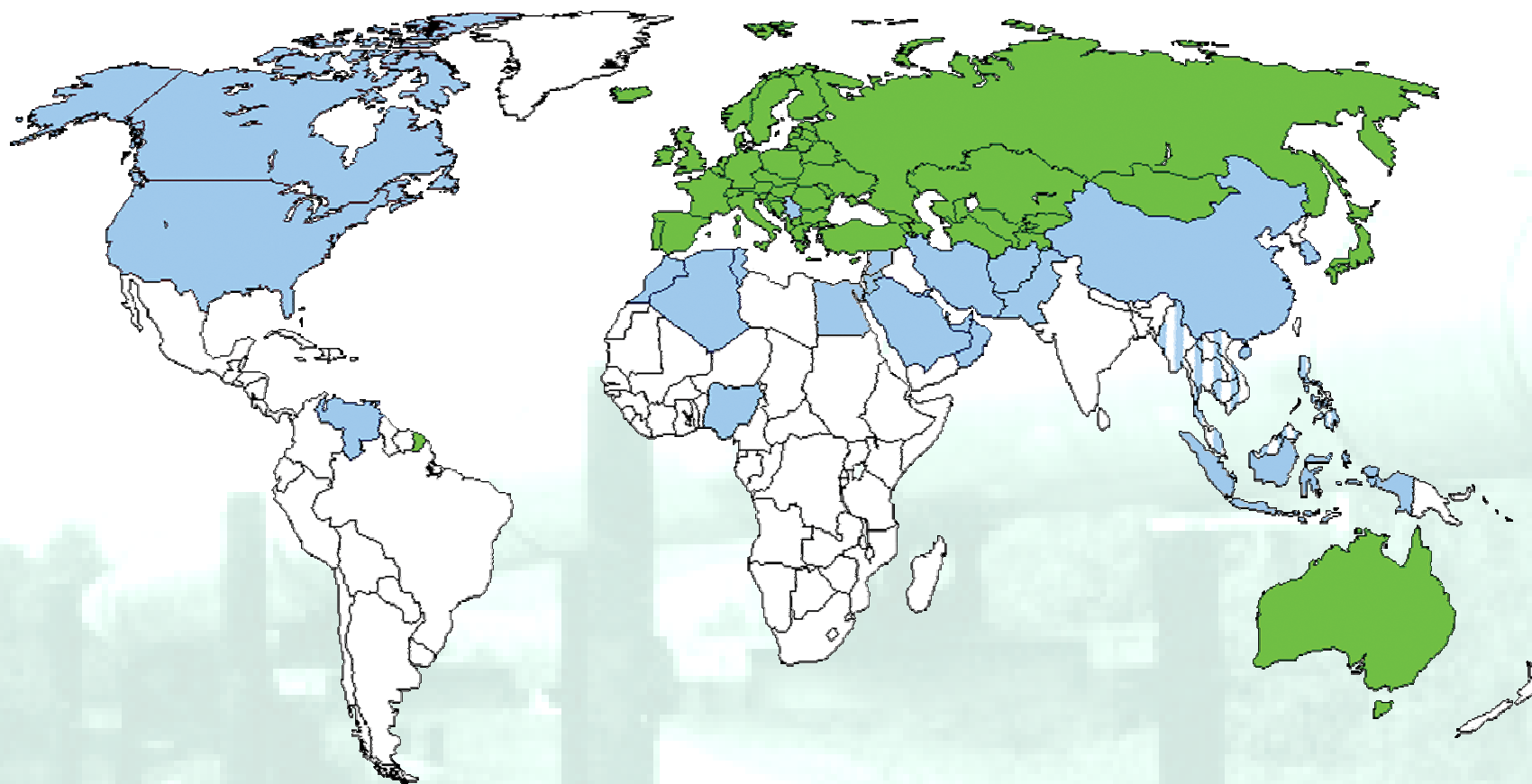




The ECT – a pioneer in its field

- Unique in covering trade, transit, energy efficiency and investment
- Offers intermediary step towards WTO membership
- Establishes inter-governmental forum to discuss energy cooperation issues

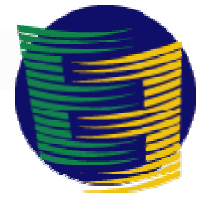
Energy Charter Treaty constituency



■ Energy Charter Treaty Signatory States (1994)

■ Observers

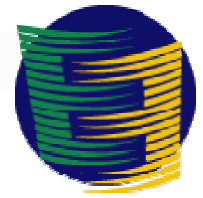
■ Countries of ASEAN (observer status granted to ASEAN, represented by the ASEAN Centre for Energy)



Investment protection

ECT Part III (Articles 10-17)

Offers protected investors a wide range of guarantees and protections (FET, CPS, non-discrimination, MFN, umbrella clause, key personnel, expropriation, freedom of transfers)

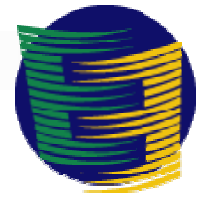


Investor-state dispute resolution

ECT Article 26

Offers protected investors, in the event of alleged violation by host state of Part III obligations, investor-state arbitration under (at investor's choice):

- Arbitration Institute of Stockholm Chamber of Commerce
- ICSID or ICSID Additional Facility (subject to nationality requirements)
- UNCITRAL Rules



Investor-to-state disputes (Article 26)

- Applicable law
 - ECT
 - International law
- Exceptions to states' unconditional consent to international arbitration
 - The "fork in the road" exception
 - The "umbrella clause" exception



Investor		State	Registration and procedure	Status
1	AES Summit Generation Ltd. (UK)	Hungary	2001 - ICSID	Settlement agreed to by the parties
2	Nykomb Synergetics AB (Sweden)	Latvia	2001 - Stockholm	Award rendered on 16.12.2003
3	Plama Consortium Ltd. (Cyprus)	Bulgaria	2003 - ICSID	Award rendered on 27.08.2008
4	Petrobart Ltd. (Gibraltar)	Kyrgyzstan	2003 - Stockholm	Award rendered on 29.03.2005
5	Alstom Power Italia SpA (Italy)	Mongolia	2004 - ICSID	Settlement agreed to by the parties
6	Yukos Universal Ltd. (UK – Isle of Man)	Russian Federation	2005 - UNCITRAL	Pending; decision on jurisdiction 2009
7	Hulley Enterprises Ltd. (Cyprus)	Russian Federation		
8	Veteran Petroleum Trust (Cyprus)	Russian Federation		
9	Ioannis Kardossopoulos (Greece)	Georgia	2005 - ICSID	Pending; decision on jurisdiction 2007
10	Amto (Latvia)	Ukraine	2005 - Stockholm	Award rendered on 26.03.2008
11	Hrvatska Elektroprivreda d.d. (HEP) (Croatia)	Slovenia	2005 - ICSID	Pending; decision on treaty interpretation 12.06.2009
12	Libananco Holdings Co. Ltd. (Cyprus)	Turkey	2006 - ICSID	Pending

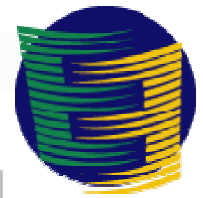
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The information above was compiled from various public sources; while the Secretariat has made every effort to ensure that this information is reliable, its accuracy and completeness cannot be guaranteed. For more details on the cases, please consult www.encharter.org¹¹



	Investor	State	Registration and procedure	Status
13	Azpetrol (Netherlands)	Azerbaijan	2006 - ICSID	Pending
14	Barmek Holding A.S. (Turkey)	Azerbaijan	2006 - ICSID	Settlement agreed to by the parties
15	Cementownia "Nowa Huta" S.A. (Poland)	Turkey	2006 - ICSID	Award rendered on 17.09.2009
16	Europe Cement S.A. (Poland)	Turkey	2007 - ICSID	Award rendered on 13.08.2009
17	Liman Caspian Oil BV (Netherlands)	Kazakhstan	2007 - ICSID	Pending
18	Electrabel S.A. (Belgium)	Hungary	2007 - ICSID	Pending
19	AES Summit Generation Limited (UK)	Hungary	2007 - ICSID	Pending
20	Mercuria Energy Group Ltd. (Cyprus)	Poland	2008 - Stockholm	Pending
21	Alapli Elektrik B.V. (Netherlands)	Turkey	2008 - ICSID	Pending
22	Vattenfall AB (Sweden)	Germany	2009 - ICSID	Pending
23	EDF International S.A. (France)	Hungary	2009 - UNCITRAL	Pending
24	EVN A.G. (Austria)	Macedonia (FYROM)	2009 - ICSID	Pending

The information above was compiled from various public sources; while the Secretariat has made every effort to ensure that this information is reliable, its accuracy and completeness cannot be guaranteed. For more details on the cases, please consult www.encharter.org¹²



Applicable definitions of “Investment” and “Investor”

ECT Articles 1 (6) and 1 (7)

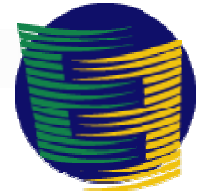
Investment: Every kind of asset (e.g. shares, claims to money, intellectual property, licences, concessions) owned or controlled directly or indirectly by an Investor

Investor: natural persons of a CP (including permanent residents), and companies/organisations organised in accordance with the laws of a CP



Applicable definitions of “investment” and “investor”

Petrobart v. Kyrgyz Republic



Parties to dispute:

Petrobart Limited: company registered in Gibraltar.

Kyrgyzgazmunaizat (“KGM”): state joint stock company in the Kyrgyz Republic

The dispute:

Dates:

- 23 February 1998: Supply contract concluded between Petrobart and KGM for the supply and transfer of stable gas condensate
- February and March: failure to pay supply – interruption of delivery
- 1998-1999: proceeding before domestic courts
- 2000-2003: UNICTRAL Arbitration
- 2003- 2005: SCC arbitration

Claim:

- Violation of Article 10 (1) ECT
- Jurisdiction

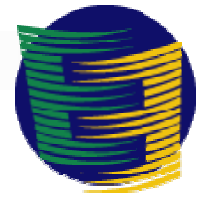
The arbitration:

1 September 2003: Petrobart’s request for arbitration against the Kyrgyz Republic submitted to the Arbitration Institute of the Stockholm Chamber of Commerce

23 May 2005: award rendered



Applicable definitions of “investment” and “investor”



Petrobart v. Kyrgyz Republic

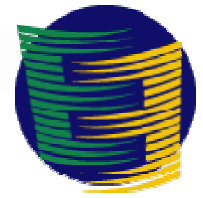
(extracts from Final Award dated 29 March 1995)

The Arbitral Tribunal ... notes that the Contract ... concerned the sale of goods at an agreed price. ... The question is whether Petrobart’s right under the Contract to payment for goods delivered under the Contract was an asset and constituted an investment under the Treaty (pp. 69 and 71)

Article 1(6)(c) of the Treaty provides that as assets constituting an investment are to be counted “claims to money and claims to performance pursuant to contract having an economic value and associated with an investment” (p. 71). ...

Thus, a right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This must also include the right to be paid for such a sale (p. 72).

The Arbitral Tribunal thus concludes on this point that Petrobart was an investor having an investment in the Kyrgyz Republic and that the Republic owed Petrobart protection under the Treaty (p. 72).

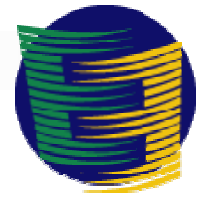


Mailbox companies

ECT Article 17

Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised....



Mailbox companies

Plama v. Republic of Bulgaria

Parties to dispute:

Plama Consortium Limited: a company incorporated in Cyprus

Republic of Bulgaria

The dispute:

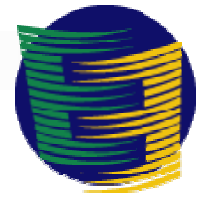
Ownership

Denial of benefits (ECT Art.17 (1))

The arbitration:

Decision on jurisdiction: 8 February 2005.

- Tribunal has jurisdiction based on ECT
- MFN clause of Bulgaria/Cyprus BIT

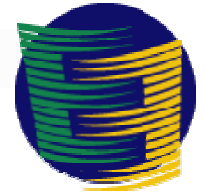


Provisional application

ECT Article 45 (1)

(emphasis added; emphasised language referred to as “limitation clause”)

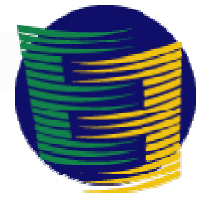
Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.



Provisional application

ECT Article 45 (2) (a)

Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application....



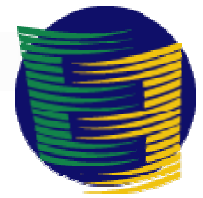
Provisional application

Kardassopoulos v. Republic of Georgia

(extracts from Decision on Jurisdiction dated 6 July 2007)

... [P]rovisional application imports the application of all [a treaty's] provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred (p. 58).

... [S]ome of the treaty's language, which will have been drafted with the intention of providing for ... the treaty's definitive entry into force, may not fit precisely with the situation created by its provisional application.... The ... remedy is to leave the treaty as it stands and to rely on an implicit acceptance of the need to apply it (provisionally) on a *mutatis mutandis* basis (p. 58).

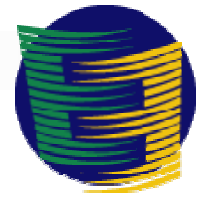


Provisional application

Kardassopoulos v. Republic of Georgia

(extracts from Decision on Jurisdiction dated 6 July 2007)

... [T]he language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so...(p. 59).

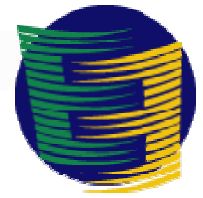


Provisional application

Hulley Enterprises Limited v. Russian Federation

(issues considered in Interim Award on Jurisdiction and Admissibility dated 30 November 2009)

- Are Article 45(1) and 45(2) rights linked?
- Is Article 45(1) right subject to a notice or transparency requirement?
- Should Article 45(1) limitation clause be approached on an all-or- nothing or on a piecemeal basis?
- Is provisional application of international treaties *per se* inconsistent with Russia's constitution, laws or regulations?



Investment arbitration and the EU

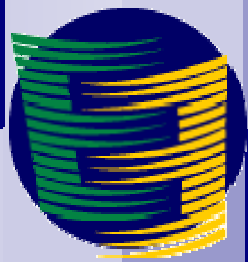
Eastern Sugar BV v. Czech Republic

(extract from Partial Award dated 27 March 2007)

[T]he Arbitral Tribunal is of the view that the BIT and the EU Treaty are not *incompatible*.

Free movement of capital and protection of the investment are different, but complementary things (p. 36).

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