Interview: Graham Coop, general counsel of the Energy Charter Secretariat

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Graham Coop

Graham Coop, general counsel of the secretariat that administers the Energy Charter Treaty, explains why the treaty's investment protection provisions might need updating to cover carbon capture & storage and floating LNG, and why Russia would do well to rejoin in the wake of the EU's third energy package.

Tell us a little bit about the Energy Charter Treaty (ECT) and the secretariat.

It is probably best known for its dispute settlement provisions because they have created a legally binding way to resolve high-profile disputes like the dispute between the former shareholders of the Yukos Oil Company and Russia.

The Energy Charter Secretariat is created by the ECT and has responsibilities in connection with all of the areas of the treaty and other responsibilities assigned to it by the Energy Charter Conference, which is an annual meeting of member states that have signed or acceded to the ECT.

The secretariat conducts regular reviews and in-depth reviews of selected ECT member states with a view to reporting on their investment climate and their energy efficiency levels. These reviews are carried out on a voluntary basis, but the idea is to encourage improvements in these areas through friendly peer pressure.

Although disputes are dealt with by international arbitral institutions outside the secretariat, the secretariat has an information gathering and transmission role in this area and makes the investment protection and arbitration provisions of the treaty known to the legal and business community.

With respect to transit, the secretariat conducts and facilitates negotiations towards an official protocol dealing with transit and the secretariat also has a specific role assigned to it by the treaty with respect to the conciliation of transit disputes.

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How did you come to be general counsel of the Energy Charter Secretariat and what's your career background?

I had been in private practice for 15 years – my entire career, in fact – including two years as a partner with Denton Wilde Sapte's energy and infrastructure department in London. Prior to that I had spent 10 years with Freshfields Bruckhaus Deringer in Paris working on energy disputes and energy projects, and I was ultimately named head of energy and natural resources for Freshfields' Paris office.

I've always been interested in the energy sector and I've always wanted a cross-border legal career – being part of an organisation which is not linked to one specific country, but which is truly international. The general counsel position at the Energy Charter Secretariat was advertised in 2004, and as it seemed a unique position in this respect, I applied.

What do you do day-to-day and more broadly in your role as general counsel?

The role includes three main areas of responsibility. The first is the core activity of providing advice as required: to the Energy Charter Conference, to its working groups, to the secretary general and to other senior staff on the interpretation of the ECT and on the workings of the dispute resolution process. I also advise on internal matters such as international employment law and relationships with the host government – Belgium – in connection with Belgian taxation and social security issues, for example. Those are my institutional responsibilities: not necessarily the most exciting part of my job, but one of the most important parts, which has to be done.

Then you have the legal development aspect, which involves building tools that did not exist before. The best example of this is the model agreements. Under my leadership, the secretariat has developed a series of model agreements for cross-border energy projects. There are model agreements for oil and gas pipeline projects, the second edition of which was finalised in 2007 and you can find them on our website. Then there are the model agreements for cross-border electricity projects, which are going to be released on our website very soon, and the latest project is a general cross-border investment agreement, where the project itself doesn't necessarily cross borders, but the flow of investment does.

My third area of responsibility is knowledge-raising, spreading knowledge about the ECT and particularly the dispute resolution aspects of it, which includes speaking at conferences – I've spoken at over 100 conferences since joining the secretariat in 2004 – and writing articles and contributing to publications.

In what ways do you think you've left your personal mark on the Energy Charter Secretariat in the seven years that you've been general counsel?

I inaugurated the biannual investment arbitration conferences, which we've been organising with the Stockholm Chamber of Commerce and the International Centre for the Settlement of Investment Disputes (ICSID) since 2005. The first took place in Stockholm, the second in Washington, DC in 2007, then there was one that was led by the secretariat in Brussels in 2009 and the most recent one last June, in Stockholm again. Plans are already being laid for the next conference in 2013 in Washington, so it has become a

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regular event which I think members of the investment arbitration and energy community look forward to.

Arriving from private practice you bring with you a kind of commercial sense which sometimes acts like a breath of fresh air – that's something I feel I've also been able to bring to the secretariat. Two years ago, the secretariat took logistical and financial responsibility for the conference in Brussels, which meant booking a hotel, a conference room, lunches and dinners, and we marketed the event, managed registrations and collected all the registration fees. I took managerial responsibility for this and it was the first time that the secretariat had ever taken such a commercial risk. I was confident that the conference was going to be a success, but my colleagues were more reserved. Just two weeks before the conference we had something like 30 registrations which was not enough to cover the costs and one colleague said: "Graham, if this conference makes a loss can we take it out of your salary?"

I said: "Yes that's fine, as long as any profit will be added on to my salary," and they answered, "Sorry, but it doesn't work like that."

So this colleague's proposal was abandoned, unfortunately for me as it turned out! In the end, the conference made a five-figure profit. In the private sector, you're used to taking these risks and it usually works out; people sign up to conferences and pay their fees at the last minute, because they don't want to risk having something else crop up – but from the public sector viewpoint that was more difficult to see.

Aside from the conferences, I have made information available about ECT investment disputes through my publications, including a book recently published by Juris which emerged from the Brussels conference, and also through our website – I'm very pleased to have inaugurated the table on the ECT website which contains information about all of the known ECT arbitration disputes. Before I arrived this information was only obtainable in a piecemeal fashion by searching various international legal websites or arbitration journals and so forth, but now you can get all of this information in one place.

My third accomplishment is the model agreements. I know that these agreements have been and are being used for specific projects both within and outside the ECT constituency.

Tell us a bit about the book you recently edited.

The book was published following the third in the series of biannual conferences I mentioned, which took place in Brussels in October 2009. Post-conference publications had been published following the two previous conferences as well, in 2005 and 2007.

The key feature about the Brussels conference is that we made a deliberate decision not to deal exclusively with investment arbitration, but also to look at the transit provisions in article 7 of the ECT, which provide a distinct means of settling transit disputes.

The title of the conference was the same as the title of the book: "Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty." I invited every speaker at the conference to contribute a

paper to the publication and most speakers took up this invitation. The ideas in the book owe a lot to the interaction that took place at the conference itself. Neither I nor the secretariat necessarily agree with all the opinions expressed in the book, but I think it's fair to say that the quality of the written contributions is very high.

There is one other feature of the conference that was reflected in the book: in Brussels we invited counsel from both sides of recent ECT investment arbitrations to give the audience a brief presentation on aspects of their case which could be interesting. Although that session was rather innovative – I don't think we'd seen such a session at a conference before – it was very well received, and that's reflected in the first part of the book.

Give us a basic run down of the rule of law that the ECT enforces among member states.

The ECT prescribes a foundation of predictability, stability, non-discrimination and respect for engagements once taken. What it does not do is impose any specific kind of market structure; it does not impose mandatory third-party access or unbundling, nor does it require or indeed prohibit any particular kind of energy development. If a member state wishes to outlaw nuclear power, never allowing nuclear power into its territory in the first place, or if it wishes to outlaw oil and gas development in specific areas, or shale oil and gas development as France has recently opted to do, then there's nothing in the ECT that stops it doing so. On the other hand, if a state were to allow development in one of these areas for a certain length of time, receiving capital from foreign investors, and then outlaw such development causing investors to lose the capital invested, that might give rise to a claim under the treaty.

So energy investors receive protection, but what value does the ECT provide to the member states?

The obvious benefit of the ECT is that it protects your own investors. It also means of course that investors that come to your country enjoy protection, which makes them more willing to come and lowers the cost of investment. Then there's a third benefit, which is quite difficult to sell to politicians – the ECT means that politicians cannot do just as they like, which improves governance in a country because all political parties can point to the treaty as a restraint on arbitrary action. So while the treaty may not be good for individual megalomaniac politicians, it is good for the country as a whole.

The EU is a signatory of the ECT, as are the individual EU member states. What is the relationship between the Energy Charter Secretariat and the European institutions? Does the secretariat have a role in helping the EU bring the third energy package into practice?

That question raises some extremely interesting issues surrounding the relationship between EU law on one hand and the ECT on the other. The starting point is the fact that the ECT is part of public international law – a system of law that applies to all countries and also to supranational bodies such as the EU. But you have the system of international law on the one hand and the system of EU law on the other. The question of which system takes precedence is a complex and sensitive question, although both systems agree that the EU can itself take on external obligations to third countries, as it has done by the joining the WTO, for example. When the EU does this, those obligations become part of the EU acquis – and moreover a very

important part of the EU acquis – and although they don't take precedence over the EU founding treaties, they do take precedence over EU secondary legislation including directives and regulations. This is not controversial, but a common viewpoint between international lawyers and European lawyers.

The ECT can be considered as a kind of benchmark with which the third energy package must comply, like all other EU legislation. Indeed, on 15 September, in Commission v Slovak Republic, the Court of Justice of the EU declined to accept the Commission's argument that energy specific EU legislation trumps the ECT.

Therefore the EU is obliged to ensure that its package is in line with the treaty. That is not very restrictive because the ECT does not actually prescribe a specific model of market regulation or deregulation; it doesn't say that member states should, for example, introduce mandatory third party access or should not; it leaves a lot of latitude.

We had some detailed discussions with the European Commission regarding the oil and gas model agreements in 2007. I think the Commission's main concern was that the agreements could encourage expectations which could arguably be contrary to EU law; the oil and gas model agreement contains clauses on environmental standards, on employment standards, on social impact and on safety, for example. These are all quite sensitive areas, particularly the first two. The model agreement also contains a change of law clause, under which if the host government makes changes to its law in a way that imposes extra costs on the investor, then it has to pay the investor compensation. These agreements were submitted to all of the member states for their comments before we finalised them, and strangely enough the strongest objections to the change of law clause came not from developing economies as you might expect, but from the Commission, because they felt that the EU acquis would probably evolve in the future and that the Commission should be free to encourage that without being restrained by change of law clauses found in host government agreements signed by various EU member states.

From the EU's viewpoint, the conflict is more potential rather than actual, but nevertheless it feels quite strongly that our work including the model agreements should be consistent with the present state of the acquis and also with how the acquis might evolve in the future. As no one can actually predict how the acquis might evolve in future this is actually quite a tall order. For our part, we see the ECT like the other international treaties that the EU has entered into with third states – part of an international system of law which EU law, like the internal law of all Energy Charter member states, is required to comply with.

The ECT is one of the very few treaties that has been signed and ratified by the EU as well as by each of the EU member states. That means it is not possible for the EU to argue that the ECT is simply a treaty signed by an EU member state that is inconsistent with the state's obligations under EU law, in the same way it has argued with respect to bilateral investment treaties (BITs) between Sweden, Finland and Austria and third countries. In 2009, the European Court of Justice held that BITS between Sweden, Finland and Austria and various non-EU countries were contrary to article 307 of the EC Treaty. This could not happen with the ECT.

At the same time the EU also cannot argue that the ECT is a treaty purely between the EU and the outside

world as it could with the WTO, because each of the 27 EU members has also signed and ratified the ECT.

Will EU member states eventually be removed as independent parties to the ECT?

This is one of the many questions where law and politics overlap. The EU has of late become increasingly acquisitive of both territorial and substantive competence. It has sought to acquire more and more competence in more and more areas, and the Treaty of Lisbon is one of the most concrete manifestations of that. The EU member states have allowed this to happen, but I'm not sure they will be happy with the process continuing indefinitely.

The investment protection side of the ECT, which is analogous to the provisions in BITs, is a particularly sensitive area. Communications from some EU institutions seem to want to bring investment protection treaties under the competence of the EU instead of the member states. Other EU institutions, including the European Parliament, seem much less enthusiastic about the continuation of investment protection in its present form at all. So we don't have complete unanimity within the EU camp. Nevertheless it seems clear that so far as BITs are concerned, the EU institutions agree that member states should no longer be competent to conclude new treaties with third countries and should even be encouraged to terminate the ones they have in order to transfer that competence to the EU institutions. Whether the EU will try to make that happen with the ECT is debatable, because the ECT deals with many matters and it would be difficult to bring them all under the competence of the EU – it's on that basis that the ECT was signed by the EU and all of its member states in the first place. The EU would have great difficulty in forcing its member states to withdraw from the ECT.

If the EU institutions do not agree with BITs, what do they envisage in their place?

That depends very much on which institution you talk to. They are not saying they don't want any treaty investment protection regime to continue, but they do have significant demands in order for the present regime to continue to receive their support. The European Parliament has a more extreme list than, for example, the Commission. The Parliament's list includes blanket exemptions to investment protection where member states wish to improve employment or environmental standards and it also includes significant changes to the procedures for international arbitration, particularly investment disputes. These changes include compulsory exhaustion of local remedies, compulsory right of appeal to some kind of appellate body and restrictions on the selection of arbitrators. So, without saying that the Parliament wants to abolish international arbitration as a means of settling investment disputes, it certainly wants to change it so that it will no longer resemble arbitration as we currently recognise it.

What happens if an investor from an EU member state wants to bring an ECT claim against another EU member state?

This situation has arisen in several investment disputes under article 26. The first instances of investors from an EU member state filing an ECT claim against another EU member state were two cases filed on the same day, AES v Hungary and Electrabel v Hungary. Both these cases were initiated in August 2007.

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The AES case resulted in an award on 23 September 2010, and the European Commission had sought and obtained leave to file an amicus brief in that case. The Commission had, I understand, previously stated that it had reservations over jurisdiction – whether the ECT could actually apply to a dispute between an investor of an EU member state and the government of another EU member state. The interesting thing is that Hungary didn't raise this jurisdictional point. As a result, I believe the tribunal was not particularly interested in hearing the Commission on this jurisdictional point, since neither party had raised it.

The Commission did however present other arguments, to the effect that EU law necessarily evolves and EU member states have to be free to adapt their internal legislation in line with EU law. They also argued that since the EU was one of the founding partners of the ECT, the treaty should be interpreted in line with EU law as far as possible. The tribunal took these arguments into account in the award, but it did not hold that EU law took any kind of precedence over the ECT. It took the traditional public international law view that the ECT was the law applicable in AES v Hungary, and that EU law was "a fact" to be interpreted among the others in the factual matrix, which was to be adjudicated according to the law applicable to the dispute.

It seems to me that while Hungary wanted to defend the claim made by AES, it didn't want the EU to do its defending for it.

There are textual arguments – I personally don't find them very convincing – which can be made based on the wording of article 26 of the ECT to argue the effect that ECT's investment arbitration provisions cannot be used to deal with a claim by an EU investor against another EU member state. So far neither EU investors (as you would expect) nor EU member states have been very enthusiastic about such arguments.

Following the claims brought by AES and Electrabel against Hungary we had a claim brought by Mercuria Energy (Cyprus) against Poland in 2008, which hasn't led to an award yet. Then we had a claim brought by Vattenfall (Sweden) against Germany in April 2009, but that case was settled by consent in March 2011 (the consent award is available on our website). The most recent case of which I am aware was brought by EDF International against Hungary in May 2009. There may well be other cases hidden in the woodwork.

Someone could also bring a claim against the EU as a whole. It would take a courageous investor to want to take on the whole EU apparatus, but it could be done. There's no legal objection.

The idea that immediately comes to mind is Gazprom bringing a claim against the EU on the grounds of liberalisation and unbundling requirements in the EU's third energy package – that's of course if Russia comes back to the ECT.

The third energy package contains a so-called divestment clause, requiring all TSOs within the EU to obtain unbundling certification. If you're from within the EU, it is automatic, but if you're from outside the EU you have to demonstrate that your country runs a similar unbundled regime to the EU or at the very least that you as a company are unbundled. As matters stand, Gazprom would not be in a position to demonstrate either of these.

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The directives and regulations don't explicitly provide for what happens if you can't get certification, but the implication seems to be that you would have to divest your European network to third parties. It's not at all clear whether this provision is in accordance with the EU's obligations under the ECT – it seems to be quite arguable both ways.

Russia did file a notice with the ECT Depository in August 2009 stating that it did not intend to become a participant in the ECT, and apparently terminating its provisional application of the treaty. To all intents and purposes this implied that Russia no longer wished to be considered part of the ECT legal constituency. One point among others that can be made in order to persuade Russia to come back is that if Russia were a full member of the constituency, then Russian investors including Gazprom would be able to make the argument that I've just articulated, against the EU third energy package.

Do you think there is a chance of Russia coming back to the ECT on the basis of that argument?

I doubt whether that argument alone would do the trick, but I would not exclude the idea of Russia coming back some day and possibly some day in the not too distant future. Although one can see the disadvantages of the ECT from Russia's viewpoint, the situation that Russia is in at the moment has – in many ways – the worst of all worlds. Neither the Russian government nor Russian investors can take advantage of the benefits of the ECT, as you've shown with your question about Gazprom, but on the other hand, they're still stuck with potential investment protection claims at least as far as investments prior to October 2009 are concerned. The tribunal in the Yukos case has held that Russia is still bound by the substantive provisions of the ECT for all investments made prior to October 2009, for the next 20 years – the grace period or sunset period under the treaty's investment protection provisions. So Russia suffers most of the costs and risks of being part of the ECT without having the benefits, and from a purely rational viewpoint it would probably make more sense for Russia to return. Having said that, of course, pure rationality is not the only criterion on which decisions are taken – this decision is clearly highly political.

Is the treaty still relevant in Russia's absence? Its original purpose was to protect the investments of Western European investors in the former Soviet Union.

I think it's fair to say that the relevance of the treaty has been significantly evolving, not just since Russia filed its notice in 2009, but for a lot longer than that. Before Russia's departure the constituency consisted of 51 states. Now there are 50: 27 EU member states plus 23 other states including very important economies such as Japan, Turkey and all the central Asian republics, practically all of the Balkan states and all of the other western and eastern European states, and indeed all of the former Soviet republics apart from Russia itself. It's a very important constituency in geographical terms and in terms of energy resources. Companies like AES, Electrabel and Vattenfall would argue that the ECT would have continued relevance even if its contracting parties were just the 27 EU member states.

In my understanding the original purpose of the ECT was to protect investment by the wealthier economies in western Europe into the less developed economies of the former Soviet Union, but that objective can still be achieved to some extent even without Russia because the other economies of the former Soviet

Union are by no means insignificant. In addition, the treaty protects investment flows in different ways from what was originally foreseen, for example the intra-EU cases, and we have a very recent case brought by a Moldovan company against Kazakhstan.

We should also bear in mind that the treaty may attract new members. For example, China has shown increasing interest in the treaty over the last few years, and if some other significant Asian countries join the treaty, then we'll see a new constellation of investment flows protected by the treaty.

So would you say that the treaty's purpose is changing? We've recently seen threats of claims against Spain and Italy by solar investors and there could potentially be claims against Germany over its change in policy on nuclear, perhaps by EDF and other investors.

You may well be right there. I think the treaty's original purpose was to protect against highly visible expropriations by governments of developing economies to the detriment of investors coming from wealthier economies, rather than host governments changing the terms of a deal for purely domestic or political considerations. That's the traditional factual matrix and more than half the disputes would probably still fit that factual matrix. But more and more cases are being brought under the treaty to deal with what one might call legislative creep or regulatory creep within developed economies and political systems, including EU states. The cases which have been threatened against Spain and Italy are a very good example. From the investors' view-point, Spain and Italy seek to modify their solar feed-in-tariffs in a way that no doubt has some justifications in terms of Spanish or Italian economic or political needs, but which the investors say violates their rights.

The wording of the treaty hasn't changed, the meaning of the treaty probably hasn't changed either, but it's fair to say that investors are using the treaty in ways that probably weren't expected when the treaty was first negotiated and signed in the early 1990s.

On the question of China, is there any pressure on it to join? What sort of interest has it shown in the ECT?

China has been an observer of the ECT since 2001. That means that China has the right to attend meetings, the right to receive all our documents and publications and the right to speak at our meetings, though not the right to vote. Recently China has been showing more and more interest – perhaps not in joining the treaty in the immediate future, but in finding out what joining the treaty would mean. China has sent secondees from its National Energy Administration – a very influential sector of the Chinese energy ministry – to our offices for six-month internships. There seems to be an increasing appetite in Beijing for information from the secretariat and an increasing appetite for us to organise events there – and you can see that this corresponds with China's long-term ambitions and strategies. China is becoming more and more receptive to cross-border energy projects supplied by central Asian countries, which of course are geographically contiguous to China just as they are to Russia.

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Which countries are likely to accede to the ECT next?

There are two ways of becoming a contracting party to the ECT. The first way was to sign the treaty soon after it was first negotiated and to ratify it later. The ECT was open for signature from December 1994 until June 1995 and most of our present member states signed it during those months and then ratified it during the following three to four years. There are a few die-hards that never got around to ratifying the treaty; one was Russia; the others are Australia; Belarus; Iceland and Norway.

For states that didn't sign the ECT during its first six months, there is a different procedure for becoming a contracting party, namely accession. Acceding to the ECT is a little more complex than signing and ratifying. A state has to start by signing a political document called the European Energy Charter, which is a very brief statement of political principle in favour of a level playing field of predictability and stability in energy markets and investment regimes. After doing that, a state wishing to accede has to prepare three reports concerning the compatibility of the state's legislation with the requirements of the ECT. It has to get its own house in order in the same way that a state wanting to join the EU has to enact the EU acquis before joining.

These accession reports have to be approved by the Energy Charter Conference. The secretariat is frequently involved in helping acceding states to coordinate their preparations, but ultimately the acceding state is responsible for the reports and it's the existing treaty member states that take the decision whether to accept the reports and whether to invite the new state to accede. That decision has to be taken unanimously: the conference doesn't have to accept a new member state and doesn't have to give reasons for not accepting, so it's possible that applications for membership by certain states would encounter difficulties for purely political reasons.

If the conference accepts an application for accession – and up to now the conference always has accepted such applications – the final step is that the acceding state has to take up the invitation by passing a formal act of accession through its internal political structures, and then depositing this with the ECT depository. That's the step that often takes the longest because most would-be ECT member states explore the possibility of membership with the secretariat and the conference first and only then start to think about the risks and costs from their viewpoint.

So to answer your question, we have interest at the moment from Serbia which as you know is also seeking to join the EU. But there is also some interest from Indonesia, Jordan, Pakistan and Afghanistan.

Which country would the secretariat most like to have sign up?

If we could choose, I would say either the US or China would be very nice. It's much more difficult to get a very large economy, a very large political society to take on such a significant obligation. Moreover, both the US and China are strong enough to think that they can go it alone. But I think they're both becoming a little bit less unilateralist and a bit more multilateralist in their approach as compared to the situation five or ten years ago.

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Does the ECT need to change in future to adapt new types of energy resources becoming available – renewables and unconventional oil and gas for example?

I'll answer the question you've asked and also another question which you haven't asked but I'm sure will be interesting!

The fact that a new means of producing energy has been discovered, for example extracting oil or gas from shale, or obtaining electricity from wind turbines, is not in itself a reason to call for modification or adaptation of the ECT. The list of energy materials and products in the treaty sets out a list of forms of energy, not a list of ways of producing energy. For example, electricity is a form of energy covered by the treaty, which means that any equipment used for the production of electricity will also be covered by the treaty whether it's an oil-fired or coal-fired electricity generator, a gas combined cycle generator, a wind farm or a biomass farm – these are all covered by the treaty in the same way. The same applies if the form of energy is crude oil; it doesn't matter whether the crude oil comes from conventional oil fields or from shale.

Having said that there are technological and economic changes which might make it desirable for the treaty to be modified. Energy players are beginning to give more resources and attention to carbon capture, which is not a traditional form of energy or energy activity. Similarly carbon storage is becoming more important and carbon dioxide, which is the substance that you put in these storage facilities, is not a form of energy listed in the treaty.

The next question is: what changes are actually possible? The treaty can be updated in several different ways. The most fundamental way is by amending the treaty, which requires that the amendment be adopted unanimously by the existing member states; not every state has to vote for it, but no state must vote against it. Once an amendment is adopted, individual member states still have the option of ratifying that amendment themselves or not, and they only become bound by the amendment if they individually ratify. The treaty has in fact been amended once – to bring the ECT's trade provisions, which were originally in line with GATT, up to date so that they comply with the WTO. The trade amendment was adopted in April 1998 and achieved enough ratifications to enter into force in January 2010. So amending the treaty is a possibility, though it can take a long time for an amendment to become effective.

Apart from that, the member states can adopt protocols to the treaty. These are supplementary treaties, if you like, which may not contradict or amend the treaty but can add new obligations to the treaty.

Or the member states can conclude legally binding understandings – interpretations of the treaty – or non-legally binding declarations. So we have quite a versatile armoury of ways in which the treaty can be brought up to date – some of which require more work than others.

And are you considering making any changes to the treaty for carbon capture and storage?

Changes in order to deal with carbon capture and storage have been discussed, but to say that there are plans for such changes is saying quite a lot. You always find some individuals and some member states

who think it's urgent to change the treaty, and others who think it's urgent de ne rien faire as the French say – urgent to wait.

There's probably going to be quite a lot of investment in electricity transmission and distribution infrastructure in the next few years, building smart grids and so on – does the treaty have protections for that type of investment?

There's a definition of "economic activity in the energy sector" in article 1 (5) of the treaty. There is quite a list: exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products – so it covers quite a lot. That includes electricity grids, oil and gas pipeline systems and facilities for transporting energy by land.

But it should be noted that sea transport is apparently excluded, and I am unaware of any reason for this apart from the fact that sea transport has historically come under a different ministry from the energy ministry. There have been interesting discussions about exactly where the frontier between land and sea should be demarcated, and in 2008 I contributed to a secretariat publication and subsequently wrote an article in Sweet & Maxwell's International Energy Law Review about the application of the ECT to LNG facilities, including liquefaction facilities and regasification facilities. These are very complicated legal areas, especially with regard to floating LNG.

Would floating LNG be included within the wording of the current treaty?

I can't answer that question off the cuff!

Coop's new book, Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, has been available from Juris Publishing since mid-June and features chapters from Yas Banifatemi of Shearman & Sterling, which is representing Yukos's shareholders in their ECT arbitration against Russia; Colin Brown from the European Commission trade directorate; Peter Cameron from the Centre for Energy, Petroleum, Mineral Law and Policy at the University of Dundee; and arbitrator Kaj Hobér from the Swedish law firm Mannheimer Swartling among many others.

ENERGY CHARTER SECRETARIAT

Number of staff: 28 full-time permanent staff, with various secondees and interns

Annual budget: Approximately €4.5 million a year

Legal team: The legal affairs unit is the smallest unit of the secretariat and consists of three people: Coop as general counsel and head of the legal affairs unit, one legal assistant who is normally a junior lawyer and one legal secretary.

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