

Caspian Oil and Gas Offshore 2012

**THE ENERGY CHARTER TREATY AS AN INSTRUMENT OF
INTERNATIONAL AND REGIONAL COOPERATION AND DISPUTE RESOLUTION**

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Mr. Chairman, distinguished panellists and delegates,

I would first of all like to thank you for the opportunity to speak about the Energy Charter and its role as an instrument of international and regional cooperation and dispute resolution. I speak to you on behalf of the Secretary General of the Energy Charter Secretariat, Amb. Urban Rusnák, who with great regret is unable to be here in Astana for this important conference.

I first need to briefly explain, or perhaps remind you, of precisely what I mean by (a) the Energy Charter and (b) the Energy Charter Treaty. The Energy Charter Treaty was developed on the basis of the 1991 Energy Charter. Whereas the Charter was drawn up as a declaration of political intent to promote energy cooperation, the Energy Charter Treaty is a legally-binding multilateral instrument and part of international law.

The legal framework of the Energy Charter Treaty provides some principles on the role of governments in facilitating international cooperation in the energy field and in addressing non-commercial risks.

The Treaty provisions include common rules on investment promotion and protection, and on trade and transit. It also provides dispute resolution mechanisms, including international arbitration.

The Energy Charter Treaty actually entered into force in 1998. It applies today in many of the countries of Eurasia, including the European Union and all its 27 member states, and also in Turkey, Ukraine, Japan, countries of the southern Caucasus, the Central Asian republics, and of course Kazakhstan.

I would like to address you on the two aspects separately, although of course they are strongly linked:

- i. the role of the Energy Charter as an instrument of international and regional cooperation;
- ii. dispute resolution.

(i) An instrument of international and regional cooperation

(a) Investment Protection

The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating rules for a level playing field to be observed by all participating governments.

To attract and encourage the necessary energy infrastructure investments a suitable legal and judicial framework is very much required. The rules of the international trade and cooperation must be defined, accepted and known by the players.

Very generally this is the aim of the WTO. More specifically, in the energy context, this is the aim of the Energy Charter Treaty (ECT).

The ECT is one of the most successful examples of a binding multilateral instrument containing the key criterion of governance, namely the sharing of common rules. The Treaty plays an important role as part of an international effort to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development.

The protection of foreign investments has been a challenging topic for decades. From the 1950s and in the wake of the new global economic order, investment protection has been covered mainly in the form of bilateral investment treaties (BITs). The first bilateral investment treaty was signed between Germany and Pakistan in 1959.

A surge of such treaties has, to date, created a spaghetti bowl of more than 3,000 agreements, signed bilaterally between states under international law. There are many similarities as well as critical differences in the various BITs. BITs cover many different fields. However, only some of them include the energy sector in the range of activities which enjoy legal protection.

In comparison to BITs, an important feature of the Energy Charter Treaty is its multilateral character.

While bilateral investment treaties can be amended or replaced by the agreement of the two countries, a multilateral legal instrument provides much more security and certainty for investors. Furthermore, while BITs generally are valid for a certain period (normally between 10 to 20 years), the ECT as a multilateral legal framework has no limited duration.

Furthermore, the ECT has the widest scope available for the protection of investments as compared to the whole range of BITs. This is due to the fact that the term “investment” in the ECT is widely defined. For that reason, the ECT might be considered as a more advantageous tool than BITs.

Article 10(1) of the Treaty provides that *“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”*. The availability of this umbrella clause functions as an additional important protection for investors. This is because that provision allows for commercial disputes with states to be raised to the level of investment disputes under international law instead of remaining at the commercial level.

(b) Transit

The Transit provisions of the Treaty also have particular relevance for the trade in oil and gas. Before the entry into force of the ECT in 1998, the international rules applicable to transit were those included in Article V of the GATT.

These enshrined the principle of non-discrimination towards goods in transit. In the specific context of energy transit, those rules were further developed through the ECT. The transit provisions of the Treaty build upon the non-discrimination principle embodied in Article V of GATT and develop that principle further in respect of fixed infrastructure such as pipelines and

grids. The aim of these provisions, included in Article 7 of the Treaty, is to provide for a balance between the sovereign interests of States and the need for security and stability of transit.

Under those provisions of the Treaty, the Contracting Parties shall facilitate transit of energy consistent with the principle of freedom of transit. Contracting Parties' national provisions shall treat transit of energy no less favourably than energy originating in or destined for their own markets. Obstacles shall not be placed to the creation of new capacity in energy transport facilities, and established cross-border flows shall be secured.

Under the Treaty, measures to facilitate transit are to be taken without distinction as to origin, destination or ownership of energy, or discrimination as to pricing, and without imposing unreasonable delays, restrictions or charges. This means that countries may not refuse transit, or refuse to agree to the construction of a new pipeline or network capacity, solely on the basis of the origin, destination or ownership of the energy. The Treaty does not provide for mandatory third party access.

The Charter's added value therefore are its binding rules, which are of major significance for further investments into the energy sector, to secure reliable transportation rules and promote market access.

But the Charter has also more flexible and informal instruments at its disposal bodies which cover the substantial areas of the Treaty. Experience shows that dialogue around critical energy issues can do much to promote better understanding, transparency, and exchange of information and, in these ways, contribute to building confidence.

Kazakhstan, I must stress, has been an active member of the ECT since its entry into force in 1998. It notably supported the establishment of a Task Force on Regional Energy Cooperation in Central Asia in 2007. The ECT and Kazakhstan have established a long and positive relationship that is beneficial to both of them. Kazakhstan makes a successful contribution to the Energy Charter Process and the whole Energy Charter constituency and we very much look forward for such a lasting and fruitful relationship.

(ii) Dispute resolution

An effective mechanism for the resolution of transit disputes is particularly important, given the economic significance of energy transit and the fragility of energy security.

(a) Article 26 Investor-State Disputes

As I referred to earlier, the first BIT was signed between Germany and Pakistan in 1959. However, it was without any provision allowing for investors to have recourse to international arbitration tribunals.

This important gap has been filled by Article 26 of the Energy Charter Treaty (Settlement of Disputes between an Investor and a Contracting Party). This provision has been further strengthened by the introduction of the umbrella clause, which I have already referred to.

Under Article 26 of the ECT, an investor who has a dispute with a Contracting Party can refer such dispute to international arbitration. The first case detected by the Secretariat was registered on April 25, 2001. Now, after eleven years, the total number of cases is 33, as far as can be ascertained. As there is no obligation on the parties to a dispute to notify their case to the Energy Charter Secretariat, there may be other cases that the Secretariat is not aware of.

(b) Article 27 Inter-State Dispute Resolution

In addition to investor-state dispute resolution, Article 27 provides for inter-state arbitration. Once again, this reflects the practice of bilateral investment agreements. In comparison with investor- to-state disputes under Article 26, the scope of inter-state disputes is wide. In principle it is not limited to investment disputes but applies to the application and interpretation of the Treaty as a whole-with very limited exceptions. However, for various kinds of inter-state dispute resolutions (such as trade disputes) the ECT contains specific rules that derogate from the general provision of Article 27. According to Article 27 (2), disputes may be submitted to an ad hoc tribunal, subject to certain exceptions. For such disputes, the UNCITRAL Arbitration Rules shall apply, unless there is an agreement to the contrary between the Contracting Parties. There are however exceptions to Article 27 in that international arbitration is not available for Competition or Environmental issues.

(c) Transit disputes

Article 7 (7) of the ECT gives the Contracting Parties of the Treaty the possibility to invoke a conciliation mechanism concerning transit disputes. As compared to “normal” dispute settlement procedures under Article 27, conciliation might have the advantage of being faster and less formal. A Contracting Party being party to a dispute may notify the dispute to the Secretary-General who shall consult with the interested parties and appoint a conciliator within 30 days. If the conciliator fails to secure an agreement within 90 days, he/she shall recommend a resolution or a procedure to achieve resolution, and shall decide the interim tariffs and other terms and conditions to be observed until the dispute is resolved. Paragraph (7) (d) provides that Contracting Parties “undertake to observe and ensure that the entities under their control or jurisdiction observe” any interim decision of the conciliator for the following 12 months unless the dispute is resolved earlier. The conciliation procedures may only be invoked after exhaustion of all other dispute resolution remedies previously agreed between the Contracting Parties or entities concerned.

By providing an alternative means of dispute resolution before international tribunals, the ECT contributes to an increasing confidence of investors and traders, and promoting investment and trade flows between members. This is of particular relevance in the energy sector, due to the fact that disputes may often be very complex and involve huge amounts of money.

To conclude, I argue that the ECT as an efficient legal framework and a mechanism for dispute resolution in the energy field has a great potential to contribute to international and regional cooperation and dispute resolution.