Development of a Stable Investment Environment: the Role of Investment Treaties

White & Case

Robert Wheal

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Investment in the Energy Sector

- More than $1.6 trillion was invested in energy supply in 2013
  - More than doubled (in real terms) since 2002
- Further $130 billion invested to improve energy efficiency
- Renewables attracted $250 billion in 2013 (compared to $60 billion in 2000)

Total: $40.2 trillion

- To maintain production at 2014 levels
- To meet rising demand
What Encourages FDI?

- Policy and/or financial incentives to encourage FDI
- Stability
  - Political
  - Legal
- Comprehensive international policy framework
  - BITs
  - Regional IIAs
  - Energy Charter Treaty
Why are Investment Treaties Important in the Energy Sector?

- Energy investments are typically high risk, long term and capital intensive.
- Many large scale projects are transnational and/or feature the involvement of States or State entities.
- Energy sector can be subject to high levels of regulation and policy making, particularly in times of fluctuating market and political conditions.
What Are Investment Treaties?

- Agreements between States regarding treatment of each other’s investors
  - **Bilateral** Investment Treaties (“BITs”) between two States
  - **Multilateral** Investment Treaties with investment chapters (e.g. Energy Charter Treaty (“ECT”))
  - Other International Investment Agreements (“IIAs”) with differing levels of protections for investors (e.g. Free Trade Agreements)
Established Investment Treaties

- First BIT: Germany-Pakistan, 1959
- Huge numbers of BITs entered into in the 1990s
- More than 2,900 BITs and over 300 IIAs today

Source: UNCTAD, IIA database.
Note: Preliminary data for 2014.
How do Investment Treaties Encourage FDI?

- Intended to promote and protect FDI and do so in two principal ways:
  - Create substantive rights for foreign investors in relation to investments made in the Host State
  - Offer foreign investors direct recourse to international arbitration

- Benefits for Governments
  - Mixed empirical evidence about the impact investment treaties have on FDI
  - Indirectly facilitates FDI by promulgating the rule of law
  - Increase investor confidence and incentivise investment
  - Foreign capital is often required to exploit a State’s natural energy resources

- Benefits for Investors
  - Mitigates political and legal risks
  - Greater control over dispute in neutral forum for settlement
  - Enforceability of award
Known Investor-State Dispute Settlement cases 1987-2014

Source: UNCTAD, ISDS database.
Note: Preliminary data for 2014.
Success Rates in Investor State Disputes

Percentage success rate

- In favour of state - all claims dismissed
- Settled
- In favour of investor - with monetary compensation awarded
- Discontinued
- In favour of investor - no monetary compensation awarded
Investment Treaties - A ‘Fundamental Bargain’

- States promise to provide protections in return for foreign investment into their territory
  - Having received the benefits of those bargains, States should not renege on the associated burdens
  - States do not surrender their right to regulate
  - Investment Treaties are negotiated by States – can be amended by mutual consent

- Not biased towards capital exporting countries and their investors
  - Protections apply equally to the nationals of all State parties to the treaty, unless they have agreed otherwise
  - The investor’s right to refer disputes to international arbitration incentivises States to uphold their side of the bargain but also maintains the balance between the rights and obligations of States and investors
Investment Treaties and The Rule of Law

- Investment Arbitration has helped “depoliticize” the settlement of investment disputes
  - The rule of law depends on the enforcement of defined rights and obligations through neutral decision-making by independent arbitrators

- Increase predictability and stability which is good for the rule of law
  - Proliferation of publicly available investment arbitration awards has contributed to the gradual emergence of a “soft” body of supranational law and the creation of substantive standards
  - States and investors must be able to count on predictability and consistency so that they can base their conduct on the interpretations of the treaty obligations that have gained a resonance in the authorities
The Energy Charter Treaty (ECT)

- “The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade” (emphasis added) (Source: Introduction to the ECT)

- The four pillars: trade, transit, investment protection, energy efficiency

- Investor-state arbitration under the ECT
  - Investment promotion and protection (Part III): contains the common substantive provisions found under BITs
  - The investor-state dispute settlement mechanism (Article 26)
  - State-State dispute mechanism (Article 27)
# Energy Charter Key Dates

<table>
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<tr>
<th>Date</th>
<th>Event</th>
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<tr>
<td>25 June 1990</td>
<td>Dutch initiative presented in Dublin</td>
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<tr>
<td>17 December 1991</td>
<td>European Energy Charter signed</td>
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<tr>
<td>17 December 1994</td>
<td>Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed</td>
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<tr>
<td>April 1998</td>
<td>ECT came into force</td>
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**Currently**
- ECT signed or acceded to by 52 states + European Communities + Euratom
- ECT ratified by 46 states + EC. Not yet ratified by Russia, Belarus, Iceland, Australia and Norway
- Russia* and Belarus: provisional application of ECT
Energy Charter Treaty Constituency*

* As of 3 November 2014

- Observer States to the Energy Charter Conference (signatories to the 1991 Energy Charter)
- Observer States to the Energy Charter Conference by Invitation (non-signatories to the 1991 Energy Charter)
ECT – Case Statistics

- 61 cases brought under the ECT
  - 24 – reached a final award
  - 31 – pending
  - 6 – settled
  - Most frequent respondent State is Spain (13)

*as of January 2015
(Source: Energy Charter Secretariat)
Claims Initiated under the ECT in 2014 and Outlook for 2015

- More than half of known cases initiated in 2014 involved claims against Spain arising from regulatory measures affecting investors in the solar energy sector.
- Claim filed against Italy arising out of Italy’s decision to cut feed-in tariffs for renewable energy projects.
- Other respondents included Bosnia and Herzegovina, Turkey and Romania.
- The number of claims against Spain, the Czech Republic and Italy is expected to grow in 2015.
- Germany and Bulgaria may also face claims in light of their recent reforms in the renewable energy sector.
Hot Topics

- Future of the ECT
- Intra-EU investment treaties
- The Transatlantic Trade and Investment Partnership (TTIP)
- Fluctuations in oil prices
- Italy leaving the ECT
Conclusions

- Need for a stable legal regime to promote and protect international energy investments and resolve investment disputes.
- Investment treaties are a key tool for promoting the rule of law in this way.
- The ECT offers a multilateral framework of rules on investment protection tailored to the energy sector and with wide geopolitical coverage.
- Increases investor confidence which, along with capacity building exercises, can lead to increased FDI.
- Investor-State arbitration (Art. 26) is central to protection offered by the ECT.
- Strategic objective: the ECT ratified and applied in practice by all existing signatories.
Questions?
Thank you