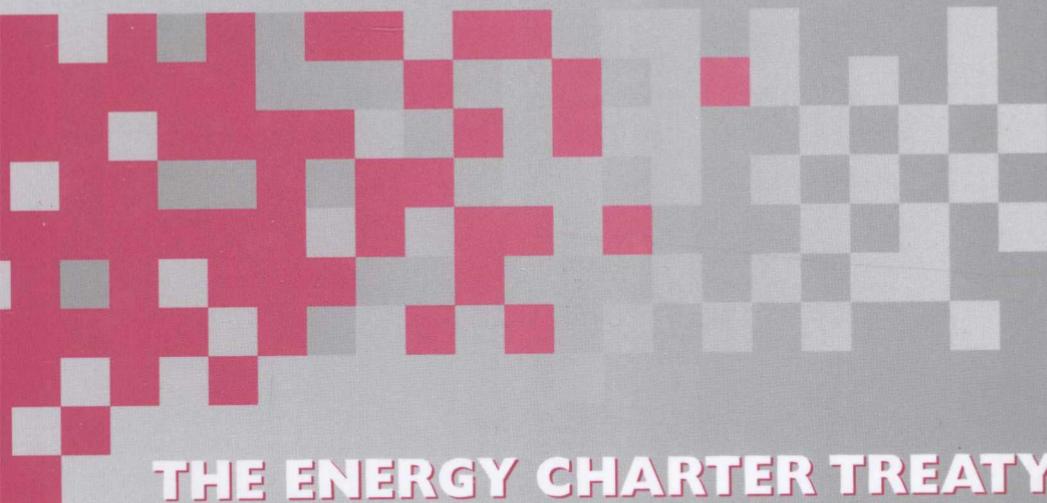


INTERNATIONAL ARBITRATION LAW LIBRARY



THE ENERGY CHARTER TREATY
THE NOTION OF INVESTOR

BY CRINA BALTAG

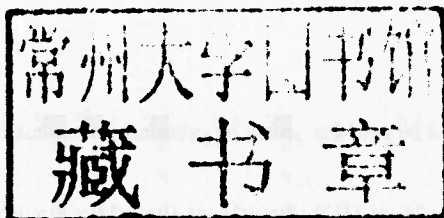


Wolters Kluwer
Law & Business

The Energy Charter Treaty

The Notion of Investor

Crina Baltag



Wolters Kluwer

Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3428-8

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Energy Charter Treaty

International Arbitration Law Library

Series Editor: Prof. Dr. Julian D.M. Lew QC

In the series *International Arbitration Law Library*, the book
The Energy Charter Treaty: The Notion of Investor is the twenty-fifth title.

The titles published in this series are listed at the end of this volume

To Roberto

List of Abbreviations

ICSID Additional Facility Rules (also, AF)	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID
approx.	approximately
ARB	Arbitration
art. (pl. arts)	article(s)
ASEAN	Association of Southeast Asian Nations
BASREC	Baltic Sea Region Energy Co-Operation
BIT (pl. BITs)	Bilateral Investment Treaty
BSEC	Black Sea Economic Cooperation
CIS	Commonwealth of Independent States
EBRD	European Bank for Reconstruction and Development
EC	European Community
EC Treaty	European Community Treaty
ECSC	European Coal and Steel Community
ECSC Treaty	Treaty establishing the European Coal and Steel Community
ECT	Energy Charter Treaty
ed. (pl. eds.)	editor
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
e.g.	<i>exempli gratia</i> (for example)
et seq.	<i>et sequentes</i> (and the following)
EU	European Union
EURATOM	European Atomic Energy Community
EURATOM Treaty	Treaty establishing the European Atomic Energy Community

List of Abbreviations

Final Act	Final Act of the European Energy Charter Conference, Lisbon, 16–17 December 1994
FTA (pl. FTAs)	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
HMG	Her Majesty's Government
ibid.	<i>ibidem</i> (the same place)
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention for the Settlement of Investment Disputes between States and Nationals of Other States
id.	<i>idem</i> (the same)
IEA	International Energy Agency
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
I.U.S.C.T.R.	Iran – United States Claims Tribunal Reports
GBP	Pound sterling/United Kingdom pound
LON	League of Nations
LSG	Legal Sub-Group
NGO (pl. NGOs)	Non-Governmental Organization
no. (pl. nos)	number
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OPEC	Organization of the Petroleum Exporting Countries
para. (pl. paras)	paragraph
pl.	plural
PCIJ	Permanent Court of International Justice
PCA	Permanent Court of Arbitration
REIO (pl. REIOs)	Regional Economic Integration Organization
s.	section
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
United Kingdom (also, UK)	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UN-ECE	United Nations Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
United States (also, U.S.)	United States of America

List of Abbreviations

USD	United States Dollar
Soviet Union (also, USSR)	Union of Soviet Socialist Republics
v.	versus
vol.	volume
WTO	World Trade Organization

Foreword

On 16 December 2003, an arbitral tribunal sitting in Stockholm rendered the first arbitral award under the Energy Charter Treaty (ECT). The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into force in 1998. The ECT is a multilateral treaty with binding force limited in its scope to the critically important energy sector. The treaty was born out of the need to find a mutually accepted foundation for energy cooperation between Western European countries and countries of the former Soviet Union and Eastern Europe. When the ECT was signed it combined two trends in international investment and trade law. *First*, it represented an attempt to commit countries which used to have a centralized and planned economy to a model of market oriented, and liberal, economic policy with respect to investment, trade and transit in the energy sector, the distinctive features being full protection of foreign investments and the obligation to abstain from discrimination in favour of national business. *Secondly*, the ECT is one link in a long chain of attempts to create an international investment and trade regime starting with the aborted International Trade Organization (ITO) based on the 1948 Havana Charter, the GATT, the WTO and the failed Multilateral Agreement on Investments (MAI).

The ECT is a complex treaty covering many aspects of the energy sector. Its language and provisions are not always easy to penetrate and to understand. Since the first arbitral award in 2003, numerous others have followed addressing procedural as well as substantive issues. The awards seem to get longer and longer, but not necessarily clearer and clearer. They are not always consistent. Since ECT arbitral awards are rendered within the framework of public international law, there is no system of binding precedent. This means that it will take a long time for arbitral case law to bring order to the interpretation and understanding of the ECT. There is therefore a growing need for relevant and scholarly analysis of the ECT and of the arbitral practice based on it. This is precisely what Crina Baltag

Foreword

provides in her dissertation 'The Energy Charter Treaty: The Notion of Investor'. The dissertation is a high-octane scholarly analysis of one of the very fundamental elements of the ECT, i.e. the definition of 'investor'. The notion of 'investor' is critical to both the procedural and substantive protections of investors and investments under the ECT. The notion of 'investor' is defined in the ECT, but in reality the notion goes beyond this definition. The dissertation explains in a structured way, and in clear language, the background, the history and the implications of the notion of 'Investor'. I am glad to commend 'The Energy Charter Treaty: The Notion of Investor' as both a scholarly and practically useful publication. It is a required reading for anyone who wants to understand the ECT.

Prof. Dr Kaj Hobér
Stockholm

Preface

The boom in bilateral investment treaties and trade agreements came with an increasing number of disputes between investors and states related to actions and omissions of states with respect to the protection of investors and their investments. These instruments made a significant contribution to the development and implementation of an economic and legal framework for the promotion and safeguard of investors and investments. They also played an important part in and improved the access for investors to dispute resolution mechanisms – and, in particular, to arbitration – for the protection of their investments.

In this vast network of treaties and agreements aspiring to offer investors proper conditions for a stable and predictable investment environment, the Energy Charter Treaty (ECT) stands out as a unique multilateral treaty aimed at facilitating transactions and investments in the energy field. The ECT came to life soon after the fall of the communist regimes across Europe and the dissolution of the Soviet Union, and it was motivated by the desire of the Western European states to secure their access to the much needed natural resources of the Eastern countries.

This book is an overview of the notion of ‘Investor’ within the ECT framework and its related treaties and arbitration rules. The notion of ‘Investor’ is essential for the substantive and procedural protection of Investors and their Investments. Although the ECT provides for a definition of Investor, the notion of ‘Investor’ goes beyond this definition: it is shaped not only by the provisions of the ECT, but also by the related treaties and rules under the Investor-Contracting Party dispute resolution mechanism. It is also fundamental for the understanding of the notion of ‘Investor’ to consider it as it naturally interacts with the concepts of ‘Contracting Party’ and ‘Investment’. The notion of ‘Investor’ has two essential characteristics: it is challenging to assign it with a precise definition – any attempt to define this notion will not comprehensively encompass all its features; and it is a flexible notion, tailored to suit the treaties and rules interacting with the ECT. The intrinsic complexity of the notion of ‘Investor’ is amplified by web of provisions of

Preface

the ECT, not always comprehensible and straightforward. The speed of the ECT's negotiation was not only the determinant factor that contributed to the entry into force of the ECT, but also led to a compromise treaty. In this context, it is essential that a proper analysis of the notion of 'Investor' be made in the light of the rules of treaty interpretation of the Vienna Convention on the Law of Treaties.

This book is the amended version of my Ph.D. thesis, written under the supervision of Professors Loukas Mistelis and Julian Lew at Queen Mary University of London between 2008 and 2011. I am grateful for their supervision and unconditional support. I dedicate this book to Roberto, my husband, and to our families and friends. Their love and support made the publication of this book possible. A special thought goes to my mother, a true example of determination and integrity. I am indebted to Dr Kaj Hobér and Dr Federico Ortino, my Ph.D. examiners, and to Norah Gallagher for their valuable comments on earlier drafts of this book. I would like to thank Dr Patricia Shaughnessy for her constant help and encouragement. I would also like to acknowledge the support of the Energy Charter Secretariat, and in particular of Mr Graham Coop, General Counsel, for allowing me to access the documents of the negotiation of the ECT. I am extremely grateful to Eleanor Taylor and the team from Kluwer Law International for their guidance and patience. Errors in this book are, of course, mine.

Table of Contents

List of Abbreviations	xi
Foreword	xv
Preface	xvii
Chapter 1	
Energy Resources and the Energy Charter Treaty	1
1.1. Investors and Investments in the Energy Field	1
1.2. The European Energy Charter and the Energy Charter Treaty	6
1.3. The Notion of Investor in Context	13
1.4. General Considerations	17
Chapter 2	
Investor and Contracting Parties to the Energy Charter Treaty	27
2.1. The Energy Charter Treaty and Its Contracting Parties	27
2.1.1. Consent to be Bound by the Energy Charter Treaty	28
2.1.2. Entry into Force and Withdrawal from the Energy Charter Treaty	30
2.1.3. Signatories and the Provisional Application of the Energy Charter Treaty	31
2.1.3.1. Provisional Application of the Energy Charter Treaty and the Vienna Convention on the Law of Treaties	32
2.1.3.2. Conditions for the Provisional Application	35
2.1.3.3. Effects of the Provisional Application	49
2.1.3.4. Termination of the Provisional Application	51
2.1.4. Contracting Parties and the Application of the Energy Charter Treaty to Territories	56

Table of Contents

2.1.5.	Regional Economic Integration Organizations as Contracting Parties to the Energy Charter Treaty	57
2.1.5.1.	The European Communities, the European Union and the Energy Charter Treaty	58
2.1.5.2.	The European Union and its Member States as Contracting Parties to the Energy Charter Treaty	61
2.2.	Contracting Parties to the Energy Charter Treaty and the Related Treaties and Arbitration Rules	63
2.2.1.	Contracting Parties and the ICSID Convention and the ICSID Additional Facility Rules	64
2.2.2.	Contracting Parties and the SCC and UNCITRAL Rules	67

Chapter 3

Natural Persons and Legal Entities as Investors Under the Energy Charter Treaty		69
3.1.	Natural Persons and the Notion of Investor	70
3.1.1.	Nationality	75
3.1.2.	Citizenship	78
3.1.3.	EU Citizenship	80
3.1.4.	Permanent Residence	82
3.1.5.	Dual Nationality <i>Lato Sensu</i>	84
3.2.	Legal Entities and the Notion of Investor	102
3.2.1.	Company	103
3.2.1.1.	Societas Europaea	107
3.2.1.2.	Investors of a Contracting Party Controlled by Investors of another Contracting Party	108
3.2.1.3.	Shareholders of a Company	116
3.2.1.4.	State-Owned Companies	130
3.2.2.	Other Organization	134
3.2.3.	Dual Nationality of Legal Entities	140
3.2.4.	Implied Requirements for Legal Entities	141
3.3.	Investors and the 'Denial of Benefits' Clause under the Energy Charter Treaty	147
3.3.1.	Nature of the 'Denial of Benefits' Clause	149
3.3.2.	Application and Effects of the 'Denial of Benefits' Clause	153
3.3.3.	Denial of Benefits to a Legal Entity	160
3.3.4.	Denial of Benefits to an Investment	163

Chapter 4

Investor and the Notion of Investment Under the Energy Charter Treaty		165
4.1.	Investment and the Energy Charter Treaty	167
4.2.	Investment Associated with an Economic Activity in the Energy Sector	184
4.3.	Investment in the Area of a Contracting Party	190

Table of Contents

4.4.	Lawfulness, Approval and Authorization of Investment	196
4.5.	Origin of Investment	199
4.6.	Pre-investment	202
4.7.	Investment and the ICSID Convention	211
Chapter 5		
Conclusions		221
Bibliography		227
Table of Cases		247
Table of Treaties and Legislation		261
Table of Bilateral Investment Treaties		265
Index		271

Chapter 1

Energy Resources and the Energy Charter Treaty

1.1. INVESTORS AND INVESTMENTS IN THE ENERGY FIELD

Energy resources are the driving force of the economic development, although their ownership most often lies in the hands of states.¹ The world's confirmed reserves of oil and gas have increased since 1980, at an average annual rate of 2.4% and 3.4% respectively.² More than half of the oil reserves are concentrated in the Middle East,³ while over 60% of the world's gas reserves are in the fields located in Russia and the Middle East.⁴ Over 80% of the coal deposits are found in six countries, amongst which are the United States (27.6%), Russia

1. Energy is 'one of the most important sources of "hard" foreign currency earnings and a major source of tax revenue'. See, Energy Charter Secretariat, 'The Energy Charter Treaty. A Reader's Guide', 7, <http://www.encharter.org/fileadmin/user_upload/document/ECT_Guide_ENG.pdf>, 29 July 2011.
2. Commission of the European Communities; 'Second Strategic Energy Review. An EU Energy Security and Solidarity Action Plan; Europe's current and future energy position. Demand – resources – investments', 33–34, Brussels, 13 November 2008, SEC(2008) 2871, vol. 1. The proved oil reserves at the end of 2010 increased with more than 20% compared with the 1999 figure. See, 'BP Statistical Review of World Energy 2010', 6, <http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2008/STAGING/local_assets/2010_downloads/statistical_review_of_world_energy_full_report_2010.pdf>, 29 July 2011, and 'BP Statistical Review of World Energy 2011', 6, <http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf>, 3 October 2011.
3. BP Statistical Review of World Energy 2011, 6.
4. *Ibid.*, 20. In 2010, the Middle East countries had a share of 40.5%, while Russia, 23.9%. (*ibid.*)