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Dispute Settlement under the Energy Charter Treaty

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Dispute Settlement under the Energy Charter Treaty

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The Energy Charter Treaty ("ECT") is a multilateral treaty, limited in its scope to the energy sector. It establishes a legal framework with respect to investment, trade, transportation and other matters. The aim of the ECT is to promote long-term co-operation in the energy field. The Final Act of the ECT was signed in Lisbon on December 17, 1994 and it entered into force on March 17, 1998. It has been signed and ratified by most East European states, including those of the CIS. The Russian Federation has signed, but not ratified the ECT. This fact notwithstanding, by virtue of the provisions in Article 45 of the ECT, the treaty is provisionally applicable to the Russian Federation.

Articles 26 and 27 set forth the dispute settlement mechanisms available under the ECT. Article 26 deals with disputes between an investor and a contracting party, while the latter deals with disputes between contracting parties, i.e. interstate disputes.

Disputes covered by Article 26 are defined in paragraph 1 of said article as disputes concerning "an alleged breach of an obligation of the former [i.e. a Contracting Party] under Part III".

The main investment obligations of the ECT are set forth in Part III (Investment Promotion and Protection) of the ECT. One of the most fundamental provisions, in Part III, is Article 13 which deals with expropriation.

The language of Article 13 very much resembles similar provisions in Bilateral Investment Protection Treaties, so-called BITs. It constitutes yet another confirmation of the principle of full compensation following expropriation.

Article 13 in many respects forms the hard core of the investment obligations in Part III of the ECT. The contracting parties do, however, make a number of additional undertakings in Articles 10–12 relating, *inter alia*, to encouraging and creating stable, equitable, favourable and transparent conditions for investors. Investments are also to enjoy the most constant protection and security. In addition, contracting parties are obliged to observe any obligations they have entered into with an investor. General as these undertakings may seem, they are quite far-reaching and thus of significant potential importance for investors in the energy field. This is underlined by Article 22 of the ECT. It follows from this provision that each contracting party has undertaken to see to it that its state enterprises conduct their business in accordance with the obligations set forth in Part III of the ECT.

The provisions of Article 22 encapsulate an established principle of state responsibility in international law. These principles of state responsibility have recently been codified by the International Law Commission in its Draft Articles on Responsibility of States for Internationally Wrongful Acts. The combined effect of the principles of state responsibility, Article 22 and Part III of the treaty is quite potent. The undertakings made by the contracting states in the ECT are indeed far reaching.

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As mentioned above, Article 26 deals with disputes between an investor and a contracting party, i.e., a host state. This provision gives the investor a number of choices. He may, for example, submit a dispute to the courts of the Host State, to ICSID arbitration, to the ICSID Additional Facility, to the Arbitration Institute of the Stockholm Chamber of Commerce or to arbitration pursuant to the UNCITRAL Arbitration Rules. As far as questions concerning expropriation are concerned, paragraph 6 of Article 26 is of particular interest. It stipulates that arbitral tribunals established pursuant to the ECT in an investor–Host State dispute must apply the ECT "and applicable rules and principles of international law". This means that the tribunal must apply customary international law relating *e.g.*, to protection of foreign investments and state responsibility. In the latter respect the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, adopted in 2002, will of course play an important role.

Another noteworthy provision in Article 26 is paragraph 5(b) which stipulates that the arbitration shall take place in a country which is a party to the New York Convent, if any party to the dispute so request. Needless to say, this may prove to be of critical importance when it comes to the enforcement of an arbitral award. It is possible that also the last sentence of paragraph 8 in Article 26 may facilitate enforcement of an award. This sentence reads: "Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its area of such awards". The true meaning of this language is not crystal clear, however, and remains to be tested in practice.

At the time of this writing only one arbitral award has been rendered under the ECT. It was rendered in Stockholm on 16 December 2003 in a dispute between a western investor and one of the former republics of the Soviet Union. It is believed that 3–4 arbitrations under the ECT are currently pending in Stockholm, Washington DC and elsewhere.

Given the importance of the energy sector and the protection offered by the ECT to investors in this sector, it is reasonable to assume that the number of arbitrations under the ECT will grow in the years to come. The initiative taken by the Energy Charter Secretariat and the Arbitration Institute of the Stockholm Chamber of Commerce to organize a seminar in Stockholm on 9–10 June on investment arbitration under the ECT is therefore both timely and welcome.