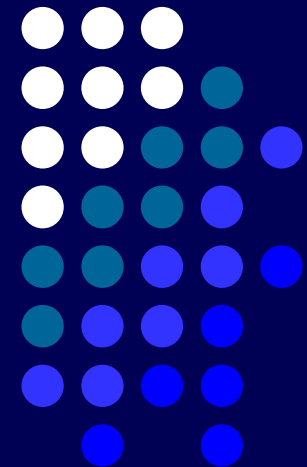


ENERGY CHARTER TREATY ARBITRATION The Yukos Case

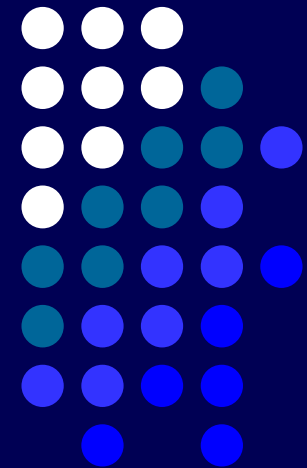
Maxi Scherer
Queen Mary University of London
Wilmer Cutler Pickering Hale and Dorr LLP

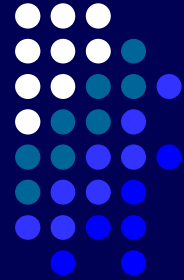
London 15 February 2013



Part 1 The Energy Charter Treaty (ECT)

- I. Purpose
- II. Historical Background
- III. Signatories
- IV. Structure
- v. Dispute Settlement





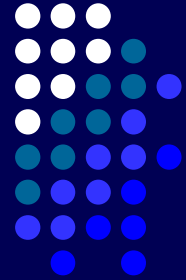
I. Purpose of ECT

- One of the most significant multilateral investment treaties in force
- Regulates the biggest industry in the world
- Politically sensitive area
- Purpose of the ECT

Article 2: “to establish a legal framework in order to promote long-term cooperation in the energy field.”

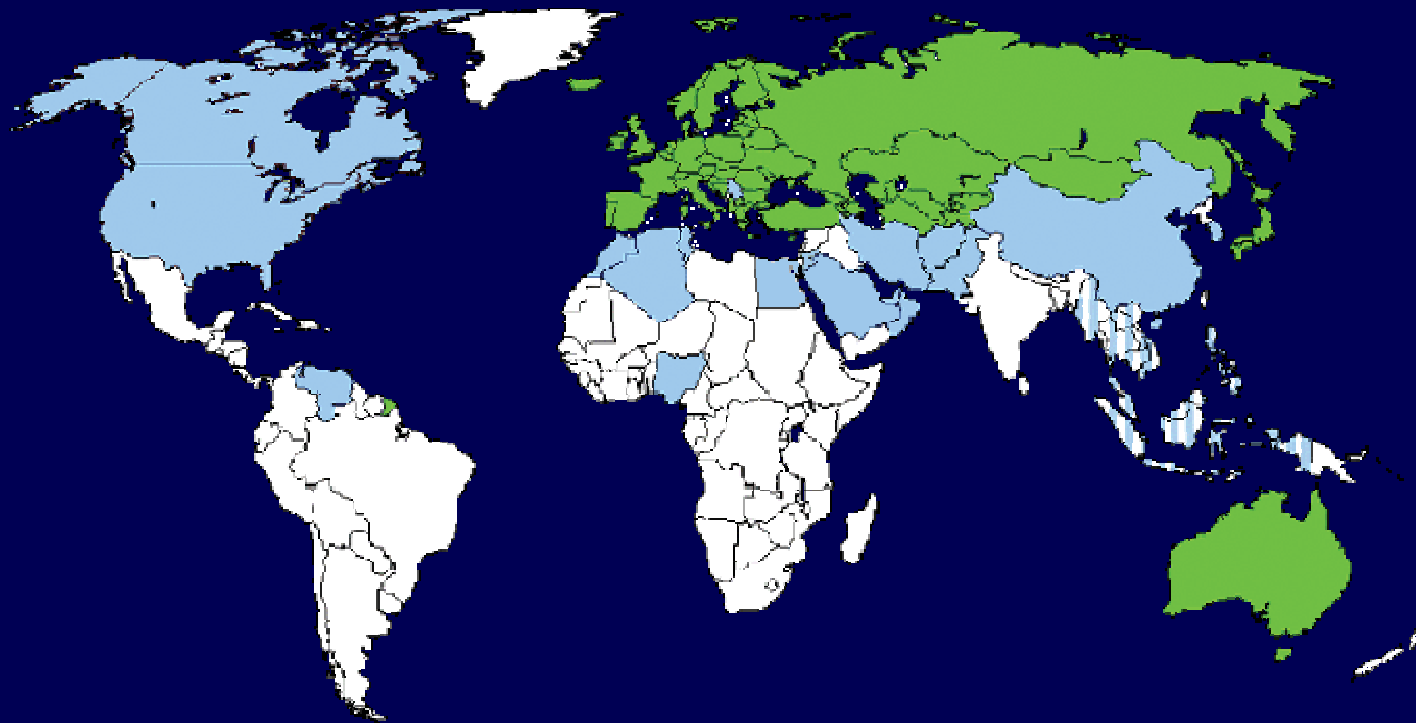
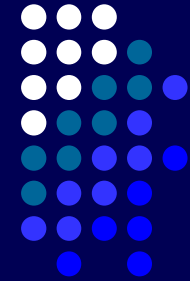
Preamble: encourage economic growth through the adoption of “measures to liberalise investment and trade in energy.”

II. Historical Background



- European Energy Charter signed in 1991
 - Sets out principles and objectives to govern East/West negotiations on energy issue
 - Political declaration
 - Context: End of Cold War
 - Originally European focus but now global interest
 - Currently 58 signatory parties
- Energy Charter Treaty signed in 1994
 - Entry into force 16 April 1998
 - Currently 53 signatory parties

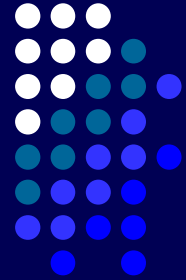
III. Signatories ECT



Countries marked in **green** are signatories to the Energy Charter Treaty, and members of the Energy Charter Conference.

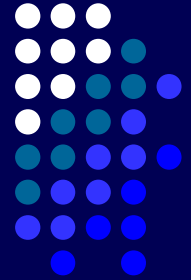
The countries marked in **blue** are observers.

IV. Structure of the ECT



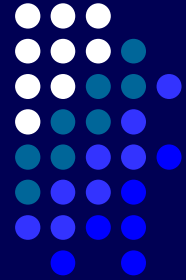
- “Untidy, user-unfriendly package”
 - Treaty: Preamble, 8 Parts, 14 Annexes
 - 5 Decisions, 22 Understandings, 8 Declarations (adopted at the same time than the Treaty to assist in its interpretation and application)
- Institutional Structure
 - Energy Charter Conference
 - Energy Charter Process
 - Energy Charter Secretariat

IV. Structure of the ECT



- Transit (Art 7)
- Investment Promotion and Protection (Art 5, 10-17)
 - Fair-equitable treatment
 - Non-discriminatory treatment
 - Expropriation
- Dispute Settlement (Art 26, 27, 29)

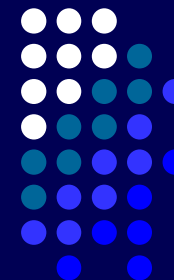
V. Dispute Settlement



- Disputes between Contracting States, Art 26
- Disputes between Investor and State, Art 27
 - national courts
 - previously-agreed dispute settlement procedure
 - treaty arbitration
 - ICSID (International Centre for Settlement of Investment Disputes)



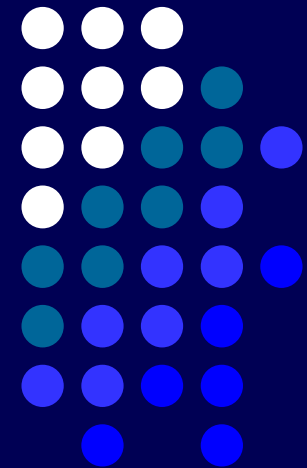
V. Dispute Settlement



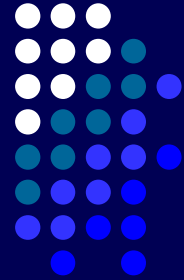
- AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v. Hungary
- Nykomb Synergetics Technology Holding AB (Sweden) v. Latvia
- Plama Consortium Ltd. (Cyprus) v. Bulgaria
- Petrobart Ltd. (Gibraltar) v. Kyrgyzstan
- Alstom Power Italia SpA, Alstom SpA (Italy) v. Mongolia
- Yukos Universal Ltd. (UK – Isle of Man) v. Russian Federation
- Hulley Enterprises Ltd. (Cyprus) v. Russian Federation
- Veteran Petroleum Trust (Cyprus) v. Russian Federation
- Ioannis Kardassopoulos (Greece) v. Georgia
- Amto (Latvia) v. Ukraine
- Hrvatska Elektroprivreda d.d. (HEP) (Croatia) v. Republic of Slovenia
- Libananco Holdings Co. Limited (Cyprus) v. Republic of Turkey
- Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (the Netherlands) v. Azerbaijan
- Barmek Holding A.S. (Turkey) v. Azerbaijan
- Cementownia "Nowa Huta" S.A. (Poland) v. Republic of Turkey
- Europe Cement Investment and Trade S.A. (Poland) v. Republic of Turkey
- Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v. Republic of Kazakhstan
- Electrabel S.A. (Belgium) v. Republic of Hungary
- AES Summit Generation Limited and AES-Tisza Erőmű Kft. (UK) v. Republic of Hungary
- Mohammad Ammar Al-Bahloul (Austria) v. Tajikistan
- Mercuria Energy Group Ltd. (Cyprus) v. Republic of Poland
- Alapli Elektrik B.V. (the Netherlands) v. Republic of Turkey
- Remington Worldwide Limited (UK) v. Ukraine
- Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG (Sweden) v. Federal Republic of Germany
- EDF International S.A. (France) v. Republic of Hungary
- EVN AG (Austria) v. The Former Yugoslav Republic of Macedonia
- AES Corporation and Tau Power B.V. (the Netherlands) v. Kazakhstan
- Ascom S.A. (Moldova) v. Kazakhstan
- Khan Resources B.V. (the Netherlands) v. Mongolia
- Türkiye Petrolleri Anonim Ortaklığı (Turkey) v. Kazakhstan
- The PV Investors v. Spain
- Slovak Gas Holding B.V. (the Netherlands) et al v. Slovak Republic
- Vattenfall AB (Sweden) et al v. Germany

Part 2 The Yukos Arbitration

- I. Facts - Background
- II. Procedure
- III. Provisional Application of ECT
- IV. Jurisdictional Awards



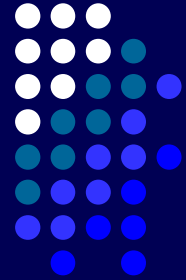
I. Facts – Background



- Yukos group of companies:
 - Main company: Yukos Oil Corporation OJSC
 - CEO: Mr. Mikhail Khodorkovsky
 - Associate: Mr. Platon Lebedev
- Yukos recent history:
 - 1993: Joint stock company
 - 1995-1996: Fully privatised
 - Oct. 2003: merger of Yukos with Sibneft
 - At its peak in 2003: one of the top 10 largest world oil and gas companies

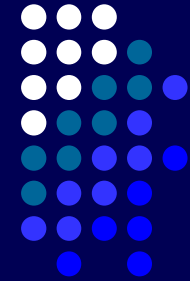


I. Facts – Criminal Proceedings



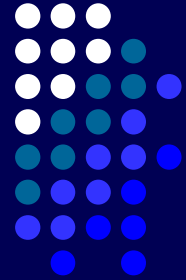
- Russia considers Yukos to be a “criminal enterprise”:
 - Criminal proceedings against management (July 2003)
 - Annulment of the merger between Yukos and Sibneft (Nov. 2003)
 - Tax reassessments for 2000-2006 (Yukos: for a total of approx. US\$ 20.5 billion for 2000-2002 and 2004; also tax reassessments against subsidiaries)
 - Freezing of shares and assets (Oct. 2003 – July 2004)
 - Threat of revocation of oil production licenses (Oct. 2003-Dec. 2004)
 - Sale of Yuganskneftegaz (one of Yukos’ 3 main oil production subsidiaries) (July 2004)
 - Bankruptcy proceedings (March 2006 – Aug. 2006)

II. Procedure

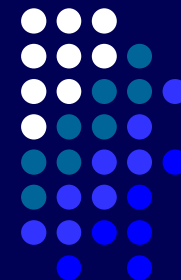


- 3 Claimants:
 - Hulley Enterprises Limited (Cyprus) (PCA Case No. AA 226)
(100% subsidiary of Yukos Universal Ltd)
 - Yukos Universal Limited (Isle of Man) (PCA Case No. AA 227)
(2.25% of Yukos shares)
 - Veteran Petroleum Limited (Cyprus) (PCA Case No. 228)
- 3 arbitrations – 3 decisions – 1 arbitral proceedings
- Same arbitration tribunal, same applicable procedural rules, same applicable law, same counsel: unified proceedings

II. Procedure



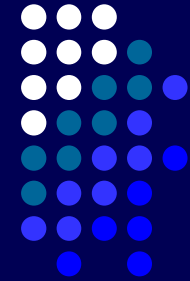
- Arbitral Tribunal:
 - L. Yves Fortier CC QC (Can.): Chairman
 - Charles Poncet (Sw.): appointed by Claimants (after resignation of Daniel Price, USA, and challenge of Gabrielle Kaufmann-Köhler, Sw.)
 - Stephen M. Schwebel (USA): appointed by Respondent



II. Procedure

- Seat of the arbitration: The Hague (Netherlands)
- Permanent Court of Arbitration (PCA)
- UNCITRAL Arbitration Rules
- Applicable law: Energy Charter Treaty (ECT)
- Claim: Yukos' expropriation: valued at between US\$ 50 and US\$ 100 billion

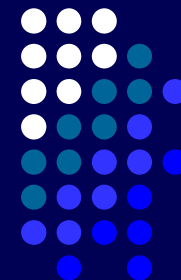
III. Provisional Application of ECT



- Signature: December 1994
- Entry into Force: April 1998
- Russia and the ECT:

17 December 1994 Russian signs the ECT (but no ratification)

III. Provisional Application of ECT

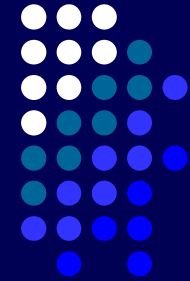


Art. 45(1) ECT

“Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory [...], to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

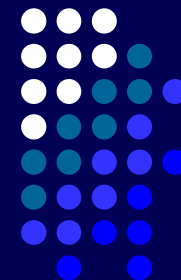
Declaration Medvedev-Poutine

21 April 2009



“The existing bilateral arrangements and multilateral legally binding norms governing international energy relations *have failed* to prevent and resolve conflict situations [...]”

“It would be advisable to elaborate a new *universal international legally binding instrument*, which, unlike the existing Energy Charter-based system, would include all major energy-producing (exporting) countries [...]”



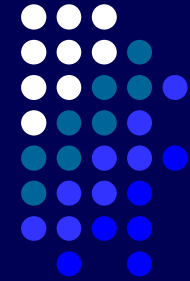
EU Reaction

“The European Union is ***not prepared to replace its Energy Charter*** with an alternative set of principles for governing energy relations proposed recently by Russia [...].”

“***The Energy Charter treaty will continue to live its life*** until the countries that established it decide differently,’ EU Energy Commissioner Andris Piebalgs told reporters after talks with Russian energy officials.”

EU Business 30.04.09

Russia Notice 20 August 2009



Official Notice that Russia does not intend to become a Contracting Party to the ECT

NOTE VERBALE regarding a notification

The Embassy of the Russian Federation in the Portuguese Republic presents its compliments to the Ministry of Foreign Affairs of the Portuguese Republic and has the honour to announce the following.

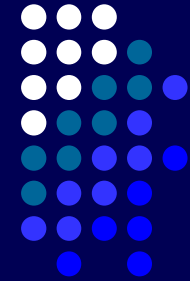
Pursuant to article 45(3)(a) of the Energy Charter Treaty, signed in Lisbon on 17 December 1994, the Russian Federation hereby declares that it does not intend to become a party to this Treaty. The Russian Federation also confirms that, in accordance with article 45(1) of the Treaty, the Russian Federation did not apply provisionally any provision of the Treaty to the extent that the provisional application of such a provision was inconsistent with the Constitution, laws or regulations of the Russian Federation.

The Russian Federation likewise does not intend to become a party to the Protocol on Energy Efficiency and Related Environmental Aspects, signed in Lisbon on 17 December 1994.

Therefore, in accordance with article 18(a) of the 1969 Vienna Convention on the Law of Treaties, the Russian Federation does not consider itself bound by the obligation to refrain from acts which would defeat the object and purpose of the indicated Treaty and Protocol.

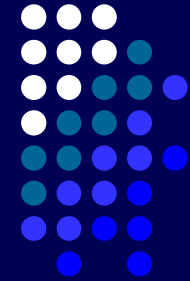
The Embassy of the Russian Federation avails itself of the opportunity to renew to the Ministry of Foreign Affairs of the Portuguese Republic the assurances of its highest consideration.

III. Provisional Application of ECT



- Article 45(3): “(a) *Any signatory may terminate its provisional application* of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory *shall take effect upon the expiration of 60 days* from the date on which such signatory’s written notification is received by the Depository.
(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory [...] with respect to any Investments made [...] during such provisional application by Investors of other signatories shall nevertheless *remain in effect with respect to those Investments for twenty years following the effective date of termination* [...].”

IV. Jurisdictional Awards 2009



- Three interim awards on jurisdiction and Admissibility dated 30 November 2009
- Each over 200 pages
- Available at <http://www.encharter.org>
- Decided: Arbitral Tribunal has jurisdiction to hear the claims
- Merits phase pending

Thank You !

Maxi Scherer
Queen Mary University of London
Wilmer Cutler Pickering Hale and Dorr LLP

maxi.scherer@wilmerhale.com

