

Dissertation Reader's Opinion

Title

Protection of Investments in Gas Sector: Perspectives of Legal Relations between European Union and Russian Federation (237 p., incl. Appendices)

Author

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Topicality

Ms. Elmira Lyapina has chosen a topic that is of crucial importance in relations between Russian Federation and European Union, namely between Russian Federation and those EU member states that are to a great extent dependent on supply of such energy commodities as gas and crude oil. It is quite obvious that agreements between supplier and purchaser have to be well drafted and balanced to avoid any unpredictable situation in trade relations of contractual parties.

At present there is no internationally agreed set of rules for trade of energy resources and investment flows. As a trend during the past twenty-five years, the political and economic mainstream promoted the liberalization of energy markets and the opening of investment opportunities to foreign actors on a nondiscriminatory basis. This has led to the establishment of multilateral institutions such as the World Trade Organization alongside regional arrangements such as the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty, Asia-Pacific Economic Cooperation (APEC), accompanied by bi-regional forums such as the EU-Gulf Cooperation Council and the EU-Russian Dialogue. Today oil and gas are basically freely traded (though this is not based on international agreements), whereas related investment is mainly subject to national legal provisions. This patchwork of rules governing trade and investment of oil and gas is confronted with a variety of challenges, and one part of them, namely those concerning RF/EU are analyzed in this thesis.

Moreover, these projects are not just simple purchase/supply contracts. Considering particularities of the supply of the gas and crude oil and the volume of supplied substances, it is quite clear that the issue is rather complex and today it covers also engineering, procurement and construction (EPC) projects which are uniquely challenging. Parties currently involved in large complex and fast-track EPC projects frequently suffer financial loss that could have been mitigated by effective contract management. Appropriate practical "know-how" of EPC contracts will improve your ability to take appropriate steps, or to obtain necessary advice, to minimise or manage such risks.

The need for stability in the relationship between investors and host governments is particularly acute in the energy sector, where projects tend to be long term and highly capital intensive. Regulatory role in energy sector relations is generally fulfilled by the ECT, which takes a balanced approach to investors' access to resources. On the one hand, the treaty is explicit in confirming national sovereignty over energy resources. On the other hand, there is a requirement that rules on the exploration, development, and acquisition of resources are publicly available, nondiscriminatory, and transparent. The treaty provides a reliable and stable interface between this investment and the host government. Once a foreign investment is made, investors are protected against the most important political risks, such as discrimination, expropriation,

nationalization, breach of individual investment contracts, damages due to war and similar events, and unjustified restrictions on the transfer of funds. Host states are obliged to grant to investments from other ECT members, as well as to related activities such as management, maintenance, use, enjoyment, and disposal treatment at least as favorable as that they accord to the investments of their own investors or of investors of other countries.

After RF withdrew from the provisional application of the ECT and did not ratify the treaty, there is no comprehensive regulation at the regional level and existing gap has to be filled by some other legal instruments. The issue is, whether and to what extent can be newly considered treaty between EU and RF better than ECT.

To sum up, the topic chosen is not only interesting one, but it is also very topical and broadly discussed by the doctrine and in the practice as well.

Structure of thesis

The author claims that the absence of a relevant legal basis between huge commercial partners such as the EU as a single entity and the Russian Federation promoted the emergence of a legal vacuum. The long-term cooperation between Russia and the EU has only one “bilateral agreement” – the Agreement on Partnership and Cooperation signed in 1994, which is however obsolete, and does not meet the contemporary needs. The adequate legal basis for Russia–EU cooperation in the gas sector is still missing. The protection of investments in the gas sector is being realized by bilateral agreements between Russia and EU member states, soft law and general international agreements, without any specifications for those two partners. The aim of this thesis is thus, an attempt to find proper legal tools that would regulate cooperation between EU member states and Russian Federation.

The thesis is structured into 5 Chapters (including introductory chapter and Conclusions). Chapter I deals with introduction and methodology, chapter II follows with an overview of EU-RF gas relations, chapter III provides description of Investment relations between the EU and the RF and author deals with critical analysis of ECT in the first part and with current investment protection treaties in the other part of this chapter. Chapter IV provides proposal for EU/RF BIT and the thesis ends by conclusions in Chapter V in which the author tries to synthesize her findings.

Assesment of formal criteria and contents of the thesis

I find the given thesis to be well - written, well - structured and its topic to be sufficiently discussed. The author of the submitted thesis demonstrated deeper theoretical knowledge of the energy sector regulation, sufficient knowledge of the international framework in the area of investment protection in the energy sector and also quite decent knowledge of EU energy sector

regulation and also knowledge of the relevant case law. As a partial weakness of the thesis is work with secondary sources, and in the thesis reader's opinion, the work would deserve some refreshment by recent articles or monographs.

In my opinion, the submitted thesis fully satisfied all the requirements as for the choice of the topic, logic structure, methodology and amount of the literature cited.

For the defence of the LL.M. thesis I suggest to answer the following questions:

- 1) What was the reason of Russia's withdrawal from ECT
- 2) What would be the main difference between the proposed RF/EU BIT and ECT

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