The Policy and Legal Environment for Investments in the wider-European gas markets

Dr Marat Terterov
Principal Coordinator
Energy Charter Secretariat

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The energy security context

- Energy security dynamics/security of supply debates have not gone away inside the EU, despite the low oil price
- We are in much more of a buyer’s market for gas than we were a few years ago
- But the risk of disruption (and someone freezing in the winter) is still with us: this has major potential for political fallout for decision makers in the EU
- Gas: the most imperfect of perfect markets
- Energy security in the EU now about inter-connectivity, greater market liquidity, diversification and more flexible pricing arrangements
- Is the age of energy independence over?
Policies supporting the evolution of the European energy market at a glance

• EU energy market not a very ‘sexy’ discussion topic prior to 2004 – policy followed UK liberalisation model and aimed to apply it in the EU gas market

• 2004 expansion of the EU changes the game/adds geopolitical dimension. EU expands to the border of the former-Soviet Union. Transit security becomes an issue. Internally, the EU pursued both liberalisation and integration of New European members in the East into European energy market rules

• The 2006-09 gas supply disruptions change the nature of EU energy security fundamentally and become a big ‘wake up call’ for the Europeans. EU reacts to events – seeks ‘deepening’ of internal market and much greater focus on diversification of the gas supply

• Post-2009 focus: Third Energy Package and construction of an integrated internal energy market based on European law. Climate and decarbonisation objectives always present in the policy context
European Commission unveils the Energy Union in 2014

- Not a reinvention of the wheel – effectively a deepening/acceleration of previous policy
- Strong view that policy is driven by Member States in the EU east
- Focus on internal market, de-carbonisation, diversification and suzerainty of European (over international) law
- Strong policy/institutional support for Ukraine/Ukraine transit
Considering legal regimes underscoring an attractive investment environment

- Clarity is key: the need for clear rules and regulations in order to help send the right signals from governments to investors
- We traditionally look at emerging market economies as attractive yet high risk investment environments
- Resource abundance has often translated into risk
- More recently, concerns over the investment climate inside the EU has become a major subject of discussion
Investment not only required in upstream/hydrocarbons

- EU needs investment to complete the internal energy market and support the objectives of the Energy Union. These requirements are nothing short of being massive (LNG terminals, interconnectors, renewables, grids, etc)
- But is Brussels sending the right signals to investors in order to meet these objectives?
- EU energy market has attracted much investment into renewable energy
- Difference between subsidised finance and private investment/equity
- 33 cases of international arbitration ongoing against the government of Spain
Dispute resolution: moving towards an EU-wide dispute resolution mechanism?

- The use of arbitration to defend investor rights
- Resolving intra-EU disputes on the basis of European legislation or on the basis of international arbitration tribunals?
- Reference to European legislation and the role of the ECJ
- But what to do with investments and trade deals based on international agreements?
- A possible role for the Energy Charter Treaty?
The Energy Charter Treaty (ECT) and applicable rules on dispute resolution

- ECT was created to mitigate against risk in the energy sectors of the emerging markets of Eurasia
- Becomes the world’s foremost multi-lateral investment treaty and investment protection regime applicable to the energy sector
- ECT now becoming ‘rediscovered’ by investment arbitrators in the EU
- ECT becoming more popular with investors as an instrument to defend their rights
- Very wide definition of ‘investment’ and ‘investor’
- Allows investors to use international courts
- Allows investors to use the ECT as well as other legal instruments in parallel
Current international trends in arbitration proceedings under the ECT

- ECT signed up to in 1994 and comes into force in 1998
- 2008: there were just 17 known cases of arbitration under the ECT
- 2016: almost 100 known cases of arbitration under the ECT
- 63 arbitration cases against EU member states (including 33 against Spain, 7 against Italy, 7 against the Czech Republic)
- 45 cases relating to so-called retrospective changes in the sphere of renewable energy legislation (in the EU)
- 18 non-renewable cases
- 36 current cases against non-EU ECT member states
- Taking the above into account, should Russia be scared of the ECT?
Where does this place Investment?

- Today’s world looks different to the one we had 10 years ago (in terms of the European gas markets and broader)
- The concept and context of energy security has been redefined and the market has evolved significantly
- World’s major producers are embracing renewables
- In Europe, all energy policy against backdrop of climate debate
- Discussion of investments no longer just about commercial viability
- Investment into upstream down for second year in a row, according to the IEA (first time since the mid-1980s)
- Perception that the global oil industry is in crisis.
But of course the age of oil is far from over

- All major forecasting scenarios suggest that oil/gas will remain important for decades, despite COP21/renewables, the age of energy transition
- COP21 is not about the end of fossil fuels, but rather about the pace of release of their harmful effects into the environment
- Focus on sustainability, not just commercial viability (risk vs reward)
Thank you!

Get in touch with us!

Website: www.energycharter.org
E-mail: info@energycharter.org
Facebook: facebook.com/EnergyCharter
Twitter: @Energy_Charter | @SecGenEnCharter
LinkedIn: linkedin.com/company/energy-charter