CHAPTER 7

Investment Protection under the Energy Charter Treaty in the Early Stages of an Underwater Gas Pipeline Project

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§7.01 INTRODUCTION

The Energy Charter Treaty (the ECT) is a multilateral treaty for international long-term cooperation within the energy sector. The treaty was signed in 1994 and entered into force in 1998. Pursuant to the ECT, the Contracting Parties have undertaken to promote and protect investments in the energy sector by investors from other Contracting Parties and to facilitate the transit of energy through their respective 'Areas'.[1] The ECT stands out in comparison to other investment treaties, not only because of its focus on the energy sector but also because of its large number of Contracting Parties. There are currently fifty-three signatories and Contracting Parties to the ECT, including both states and organisations such as the EU and EURATOM.

The laying down of an underwater gas pipeline will generally require significant resources, even at the very early stages of the project. Before the first section of the gas pipeline is placed on the seabed, the investor will often have spent significant funds preparing and obtaining necessary approvals for the project. Early-stage investments may include hiring consultants and contractors to analyse the environmental effects of the project, dealing with permit processes, and preparing, designing and planning for the manufacture, delivery and assembly of the pipeline.

1. The definition of 'Area' is discussed below, *see* section §7.02[A].

This chapter will first examine whether the construction of a gas pipeline on the seabed within the continental shelf or in the exclusive economic zone (the EEZ)[2] of a Contracting Party to the ECT constitutes an 'Investment' within the meaning of the ECT.[3] Following this, the chapter will discuss *when* an investor's early measures to prepare for the construction of a pipeline may reach the point where the investor is considered to have made an 'Investment' protected by the ECT.[4] In particular, this chapter aims to discuss whether it is possible to recognise an 'Investment' within the meaning of the ECT before a permit for the construction of a pipeline has been obtained.

The ECT provides no firm obligations on the part of the Contracting Parties with regard to the 'Making of Investments',[5] which is a term used to describe a project that is still in a 'pre-investment phase'.[6] The treaty's provisions concerning the 'Making of Investments' are often described as 'soft-law' obligations, which do not offer effective protection against unfair treatment by the host state. Notably, the drafters of the ECT were explicit that firm obligations relating to the 'Making of Investments' would be subject to a separate treaty.[7] However, no such treaty has ever been concluded.

In the absence of any firm obligation of the Contracting Parties to provide protection at the pre-investment phase, the question of *when* an early-stage project has progressed to the point where it may be recognised as an 'Investment' (at least in some part) may be of great significance to an investor embarking on an underwater pipeline project. For example, access to remedies under the ECT may be of considerable value for investors facing obstacles in the permit process with authorities in one of the states where the pipeline is to be laid down. Once the project, at least in part, *does* qualify as an 'Investment' within the meaning of the ECT, the investor is protected by the ECT's protection standards, such as the guarantee of fair and equitable treatment and the protection against unreasonable or discriminatory measures impairing the investment. At that stage, the investor will also gain access to the treaty's dispute resolution mechanisms, including the right to bring a claim before an international arbitral tribunal against the host state. Thus, the question of whether the project qualifies in some part as an 'Investment' under the ECT may have important implications for an investor subjected to unfair, unreasonable or discriminatory treatment in the process of obtaining a permit for its pipeline project.

2. Pipelines intended to be laid down on the seabed of the coastal states' internal waters and territorial sea are excluded from the scope of this article.
3. *See* section §7.02 below.
4. *See* section §7.03 below.
5. *See* e.g., Arts 1(8) and 10(1) ECT and C. Baltag, *The Energy Charter Treaty: The Notion of Investor*, Wolters Kluwer, 2012, pp. 206f.
6. *See* further Art. 1(8) ECT, where 'Making of Investments' is defined as 'establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity'.
7. Article 10(4) ECT.

§7.02 IS THE PIPELINE PROJECT PER SE CAPABLE OF BEING RECOGNISED AS AN 'INVESTMENT' PROTECTED BY THE ECT?

One of the key elements of the ECT is its provisions on the protection of foreign investments in the energy sector. These provisions set forth a number of protection standards, including the aforementioned guarantee of fair and equitable treatment and protection against unreasonable and discriminatory measures.

If the host state acts in violation of one or several of the protection standards, the affected investor may claim compensation and initiate legal proceedings pursuant to the investor-state dispute mechanisms set forth in Article 26 ECT. Under this provision, the investor may choose either to bring a claim before the national courts of the host state of the 'Investment' or to initiate international arbitration proceedings.

To benefit from the ECT's provisions on investment protection and access the mechanisms of dispute resolution, the investor must pass the test of having made an 'Investment' in the 'Area' of the host state. The definition of an 'Investment' in Article 1(6) ECT is broad and includes virtually 'every kind of asset' that is 'owned or controlled […] directly or indirectly' by an investor, provided that the investment is 'associated with an Economic Activity in the Energy Sector'.

In the following subsections §7.02[A]–§7.02[B], it will be examined whether the laying down of an underwater gas pipeline on the seabed located within the continental shelf/EEZ of an ECT Member State is capable per se of fulfilling these criteria.

[A] Does a Gas Pipeline Located on the Continental Shelf/EEZ of an ECT Member State Satisfy the 'Area' Requirement in the ECT?[8]

The first question that must be addressed is whether a gas pipeline located on the continental shelf/EEZ of an ECT Member State is capable of satisfying the 'Area' requirement set out in Article 1(10) ECT, which reads:

> [W]ith respect to a state that is a Contracting Party: (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises rights and jurisdiction.

The question of whether the part of the seabed located within a coastal state's continental shelf/EEZ falls within Article 1(10)(b) ECT is thus dependent on whether the host state exercises 'rights and jurisdiction' with regard to such areas pursuant to the international law of the sea.

8. Although the 'Area' requirement is not expressly included in the 'Investment' definition (other than with respect to 'investments or classes of investments designated by a Contracting Party *in its Area* as "Charter efficiency projects" and so notified to the Secretariat') an investment must have been made in the 'Area' of a Contracting Party to the ECT in order for the protections standards to apply and the mechanisms of dispute resolution to be available, cf. Arts 10 and 26 ECT.

Articles 56(1) and 77(1) of the United Nations Convention on the Law of the Sea (UNCLOS) provide as follows:

> Article 56(1):
>
> In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[9]
>
> Article 77(1):
>
> The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[10]

In view of the wording of Article 1(10) ECT and Articles 56(1) and 77(1) UNCLOS, it would seem beyond doubt that the ECT's definition of 'Area' includes the seabed within the continental shelf as well as the EEZ of a Contracting Party to the ECT. The drafting history of the ECT, particularly the discussion that took place following Norway's objection to the use of the term 'Area', further supports this conclusion. Although the discussion concerned the use of the term in the context of Article 7(10) ECT (regarding the Transit of Energy Materials and Products), Norway's suggestion was to use the word 'territory' instead of 'area' in order to limit the territorial scope of Article 7(10) to land territory, internal waters and territorial sea, and thus to exclude the continental shelf and EEZ from the scope of the provision.[11] Norway's proposal was not accepted, and the discussion supports the notion that the drafters' intention was for the term 'Area' to cover the continental shelf and EEZ of a Contracting Party.[12]

9. The EEZ is defined in Art. 55 UNCLOS: 'The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.' It is worth noting that, pursuant to Art. 77(3) UNCLOS, the EEZ must be claimed by states, in contrast to the continental shelf which exists *ipso facto*, *see* K. Hobér, *The Energy Charter Treaty: A Commentary*, Oxford University Press, 2020, p. 138.
10. The continental shelf is defined in Art. 76(1) UNCLOS: 'The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.' The criteria by which a coastal state is allowed to establish the outer limits of its continental shelf are set out in the remainder of Art. 76.
11. *See* the Energy Charter Treaty's Secretariat's 'CCDEC201607 – Adoption of the Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes', dated 20 June 2016, at para. 22. *See* further, e.g., V. Pogoretskyy, *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law*, Cambridge University Press, 2017, p. 266.
12. *See* further e.g., K. Hobér, *supra* n. 9, at p. 139.

[B] Is the Requirement of an 'Economic Activity in the Energy Sector' Satisfied?

The next question to address in order to establish whether the construction of a gas pipeline on the continental shelf/EEZ of an ECT Member State qualifies as a protected 'Investment' under the ECT, is whether such a project is 'associated with an Economic Activity in the Energy Sector', as required by Article 1(6) ECT.

A definition of 'Economic Activity in the Energy Sector' is provided in Article 1(5) ECT:

> 'Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining production, storage, *land transport, transmission,* distribution, trade, marketing, or sale *of Energy Materials and Products except those included in Annex NI*, or concerning the distribution of heat to multiple premises. (Emphasis added.)

'Petroleum gases and other gaseous hydrocarbons' are expressly covered by the definition of 'Energy Materials and Products'.[13] Moreover, a gas pipeline can be said to 'transmit' gas. Intuitively, therefore, one would expect an underwater gas pipeline project to qualify as an 'Economic Activity in the Energy Sector' under the ECT.

Notably, however, Understanding No. 2[14] with respect to Article 1(5) ECT casts doubt on this conclusion. The Understanding includes a list of activities which, although stated to be no more than 'illustrative' of what constitutes an 'Economic Activity in the Energy Sector', could be interpreted as excluding the transmission of gas through an underwater pipeline from the scope of Article 1(5) ECT.

Understanding No. 2 includes the following example of an 'Economic Activity in the Energy Sector':

> (iii) *land transportation*, distribution, storage and supply of Energy Materials and Products, *e.g., by way of transmission* and distribution grids and *pipelines* or dedicated rail lines, *and construction of facilities for such,* including the *laying of* oil, *gas*, and coal-slurry *pipelines*; (Emphasis added.)

The wording of Understanding No. 2 could potentially be construed as indicating that 'transmission' through a gas pipeline should be considered merely as a form of 'transport' ('land transportation […] e.g. *by way of* transmission') and, thus, that 'transmission' (of gas) must occur on *land* ('*land* transportation […]') in order to qualify as an 'Economic Activity in the Energy Sector'. Such an interpretation would, in turn, mean that the transmission of gas by means of an *underwater* pipeline (as well as the 'construction of facilities for such')[15] would not be recognised as an 'Economic Activity in the Energy Sector'. Neither Article 1(5) nor the Understanding, provides a clear answer as to whether the ECT drafters intended to exclude gas transmission

13. *See* ECT Annex EM I.
14. As expressed by one commentator, the so-called Understandings issued with regard to some of the ECT provisions 'are helpful in that they provide guidance for the interpretation of various Treaty provisions', *see* K. Hobér, *supra* n. 9, at p. 5.
15. This is another illustrative example provided in the Understanding.

through underwater gas pipelines (and hence, the construction of such pipelines) from the purview of Article 1(5) ECT.

To determine whether gas transmission through underwater gas pipelines constitutes an 'Economic Activity in the Energy Sector', guidance should be sought in the Vienna Convention on the Law of Treaties (the VCLT). Pursuant to Article 31 VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Instruments accepted by the parties to the treaty (such as the aforementioned Understanding) may also be taken into consideration.[16] According to Article 32 VCLT, the preparatory work of the treaty (such as drafts of the treaty and records of the treaty negotiations) and the circumstances of its conclusion may be taken into account either to confirm the meaning established by applying the principles of Article 31 or to avoid arriving at a meaning that would be ambiguous or obscure, or would lead to a manifestly absurd or unreasonable interpretation. As expressed by one commentator, an interpretation based on the wording and context of a treaty must ultimately be 'submitted to the test of reasonableness'.[17]

Having regard to the above principles of treaty interpretation, the following observations can be made:

(i) Although the Understanding on Article 1(5) ECT may indicate that 'transmission' could be regarded as a subcategory of 'transportation', the wording of Article 1(5) in itself does not clearly indicate that 'transmission' (as opposed to 'transport') must take place *on land* in order to be covered.

(ii) It is the authors' understanding that 'transmission', rather than 'transport' or 'transportation', is the phrase more commonly used in the industry to describe the flow of gas through a gas pipeline.

(iii) The fact that 'land transport' in Article 1(5) ECT is followed not only by the word 'transmission' but also by 'trade, marketing, or sale' indicates that the word 'land' should be read together with 'transport' only, and not with the subsequent words in the provision, such as 'transmission'. An interpretation to the contrary would indicate, for example, that 'marketing' is covered only to the extent that it could be categorised as 'land marketing', which would arguably be an unreasonable and absurd interpretation within the meaning of Article 32 VCLT.

(iv) The drafting history of the ECT indicates that the reason for adding the word 'land'[18] to the definition of 'Economic Activity in the Energy Sector' in Article 1(5) ECT was to exclude 'maritime transportation' rather than to exclude underwater gas pipelines as a transmission (or 'transport') method.[19]

16. *See* K. Hobér, *supra* n. 9, at pp. 31f.
17. *See* the commentary to Art. 31 VCLT in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, 2nd ed., Springer, 2018, at pp. 579–588.
18. '*[L]and* transport, transmission, distribution […]'.
19. The insertion of 'land' to the definition of 'Economic Activity in the Energy Sector' was addressed by the ECT drafters in the context of discussing whether 'air transport' should be

(v) The conclusion in (iv) above seems to be consistent with the fact that Article 1(5) refers to both 'transport' and 'transmission', which would arguably not have been necessary if the drafters had regarded 'transmission' as merely a form of 'transport'.

To conclude, in the authors' view, a reasonable, good faith interpretation in accordance with Articles 31–32 VCLT is that the transmission of gas through an underwater gas pipeline constitutes an 'Economic Activity in the Energy Sector' within the meaning of Article 1(5) ECT.

Accordingly, the construction of an underwater gas pipeline on the seabed within the continental shelf or EEZ of an ECT Member State is indeed capable per se of qualifying as an 'Investment' pursuant to Article 1(6) ECT.

§7.03 CAN THE PIPELINE PROJECT BE A PROTECTED 'INVESTMENT' BEFORE A PERMIT HAS BEEN OBTAINED?

[A] Are Early Steps in Advance of a Permit Application Capable of Being Recognised as 'Investment[s]' under the ECT?

Article 1(6) ECT provides, in part, the following definition of an 'Investment':

> 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
> […]
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
> […]
>
> 'Investment' refers to any investment associated with an Economic Activity in the Energy Sector […]

As mentioned in the introduction to this article, the ECT makes an important distinction between 'Investment[s]' and the 'Making of Investments'. The latter is defined in Article 1(8) ECT as 'establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity'.

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covered, which suggests that the term 'transport' was understood by the drafters to refer to transport of goods by trucks, airplanes or ships rather than a broader term that would comprise all types of 'transmission', such as that of gas through a gas pipeline, *see* 'CONF 98, Draft ECT – Chairman's Compromise Text' dated 22 April 1994, p. 4. *See also* K. Hobér, *supra* n. 9, at p. 65.

The definition of the 'Making of Investments' in Article 1(8) ECT suggests that the ECT drafters intended that at least some concrete steps would need to be taken by the potential investor before an 'Investment' is considered to have been made. However, the 'Investment' definition in Article 1(6) ECT is extremely broad, which suggests that the threshold for having made an 'Investment' is relatively low. As noted by one commentator:

> [I]n practice the process of distinguishing the two notions [i.e., the post- and pre-investment phases] is facilitated by the broad definition of 'Investment' in Article 1(6). If something does not qualify as an Investment, it falls into the pre-investment category. As a consequence, *the pre-investment measures covered by the ECT are rather limited*.[20] (Emphasis added.)

Notably, there are no publicly available cases in which an ECT tribunal has determined whether a project would fall within the category of 'Making of Investments' pursuant to Article 1(8) ECT.[21] However, there are a number of awards rendered under investment protection treaties where arbitral tribunals were faced with the more general question of whether an 'Investment' had been made or if additional steps were required in order for a protected 'Investment' to come into existence. Those awards suggest that it is not imperative that the most important step of an investment project has been taken (such as entering into an essential agreement or the granting of a permit) in order for an investor to be deemed to have made an 'Investment'.[22] In the view of the authors, there is no basis in the language of the ECT to impose such a requirement. Rather, the notion that early measures and steps in preparation for the construction of a pipeline could suffice to establish an 'Investment' finds support in the broad 'Investment' definition in Article 1(6) ECT, as well as in the above-mentioned Understanding No. 2 with respect to 1(5) ECT. The following observations can be made in this regard.

First, in addition to providing that 'every kind of asset' is capable of being recognised as an 'Investment' (including, e.g., 'claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment'), Article 1(6) ECT states that '"Investment" refers to any investment *associated with* an Economic Activity in the Energy Sector […].'[23] It could be argued already on this basis that measures such as entering into contracts concerning, e.g., research on the environmental effects of a pipeline project, as well as early design-related issues, are 'Investment[s]', as they are 'associated with' an Economic Activity in the Energy Sector, namely the construction of a pipeline.

Second, as for the aforementioned Understanding No. 2 on the meaning of 'Economic Activity in the Energy Sector', the list of 'illustrative' examples provides that

20. K. Hobér, *supra* n. 9, at p. 132.
21. *Ibid*., at p. 135.
22. *See*, e.g., *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, at para. 4.13, and *Plama Consortium Ltd v. Republic of Bulgaria,* ICSID Case No. ARB/3/24, Decision on Jurisdiction, 8 February 2005, at para. 128.
23. Emphasis added.

the 'construction of facilities' for the transmission of gas through a pipeline, as well as measures such as 'research, consulting, planning, management and design activities *related to the activities mentioned above*'[24] (i.e., *inter alia*, the construction of a pipeline) in and of themselves qualify as 'Economic Activity in the Energy Sector'. Hence, such activities would not only be '*associated* with an Economic Activity in the Energy Sector'[25] but would be a direct investment into such an activity, providing further support to the proposition that such measures are capable of being recognised as 'Investment[s]'.

Thus, considering that measures such as 'research, consulting, planning, management and design activities' will generally have been taken before a permit application is filed, 'Investment[s]' in an underwater pipeline project capable of protection under the ECT may have been made already before a permit is obtained.

In turn, this would mean that there could be a basis for the investor to launch a claim against an ECT Contracting Party, in whose 'Area' the pipeline is to be placed, in cases where the investor has been subjected to unfair treatment in connection with the application process.

Notably, however, it has been suggested that 'studies, visits, the opening up of development offices or negotiations' carried out before the investor has obtained a 'right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector'[26] are 'business development risk, which falls under the pre-investment regime'.[27] As noted by the same author, however:

> Given the very expansive concept of investment […] and the typically long lead-time from first contact to start-up of a commercial operation, with the many steps in between, it will be quite difficult to distinguish clearly the two phases and their legal treatment. A restrictive approach would use the establishment of a productive operation as the threshold, where pre-investment business development, undertaken at the risk of the investor, converts into a completed investment falling under the Treaty's protection. *This view, however, does not do justice to the long sequence of increasingly capital-intensive activities by which an investment incrementally matures*; companies, for example in energy exploration and development, will carry out desk studies, in situ investigations, preliminary drilling, intensive drilling, appraisal and, finally, move to feasibility studies and erection of plant, testing and producing from it. *Each stage involves an investment, i.e. a risky, long-term oriented commitment of money which is done, as the investment increases, with increasing need of confidence in the legal stability of the operation.* This modern notion of investment is reflected in Article 1(6) […].[28]

Considering the wording of Article 1(6) (in particular the part clarifying that ''Investment' refers to any investment associated with an Economic Activity in the

24. Emphasis added.
25. Emphasis added.
26. Article 1(6)(f) ECT.
27. *See* T.W. Wälde; 'Chapter 13. International Investment under the 1994 Energy Charter Treaty', in T.W. Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, Kluwer International, 1996, pp. 251–320, at p. 280.
28. *Ibid.*, at pp. 279f.

Energy Sector'), together with the fact that 'research, consulting, planning, management and design activities […]' can themselves qualify as 'Economic Activity in the Energy Sector',[29] there is arguably no basis for concluding categorically that 'studies, visits, the opening up of development offices or negotiations' carried out in the early stages of a project would fall under the pre-investment regime. Rather, each measure taken during the initial phase of a project must be individually analysed to determine whether the requirements of an 'Investment' are met in the circumstances. In the authors' view, measures relating to early-stage research and design of the pipeline, which may be necessary, *inter alia*, for the purpose of applying for a permit, may indeed qualify as 'Investment[s]' under the ECT.

In order for an investor to establish that a protected 'Investment' has come into existence before a permit is obtained, it may be worth considering also other supporting circumstances. This may include arguments based on Article 1(6)(f) ECT, which stipulates that '*any right conferred by law or contract* or by virtue of any licences and permits granted pursuant to law *to undertake any Economic Activity in the Energy Sector*'[30] is to be considered an 'asset' capable of being recognised as an 'Investment'.

Certain rights relating to the laying down of pipelines on the seabed within the continental shelf/EEZ of coastal states are provided for in UNCLOS. Below, we will discuss whether such rights, depending on the circumstances, may suffice to establish the existence of an 'Investment' pursuant to Article 1(6)(f) ECT.

[B] May 'Rights' under UNCLOS Constitute an 'Investment' under the ECT?[31]

Article 79(1) UNCLOS stipulates that '[a]ll States are *entitled* to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of [Article 79]'. The provision establishes a right for all UNCLOS states to lay submarine pipelines (and cables) on the continental shelf of other states, which is conditioned only by (i) the coastal state's right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention and the reduction and control of pollution from pipelines pursuant to Article 79(2) and (ii) the requirement of the coastal state's consent to the delineation of the course for the pipeline pursuant to Article 79(3).[32] UNCLOS thus provides for a 'right' under public

29. *See* the above-mentioned Understanding No. 2 with respect to Art. 1(5) ECT.
30. Emphasis added.
31. Where the investor is a state-owned entity, it may also be considered whether 'rights' relevant to the existence of an 'Investment' could be derived from the ECT transit provisions (Art. 7 ECT). It appears unlikely, however, that an ECT tribunal would find that the ECT transit provisions provide obligations and rights relating to the laying down of submarine pipelines derogating from those set forth in UNCLOS.
32. *See* D. Langlet, 'Nord Stream, the Environment and the Law: Disentangling a Multijurisdictional Energy Project', *Scandinavian Studies in Law*, 59, 2014, pp. 79–108, at pp. 86f. Although the *delineation* of the course for the pipeline is indeed subject to the coastal state's consent, it should be emphasised that pursuant to Art. 300 UNCLOS, the coastal state has to exercise that right in good faith and in a manner which would not constitute an abuse of rights.

international law to lay down pipelines on the continental shelf of other UNCLOS states.[33]

On the face of it, the rights under UNCLOS appear to be granted only to the state parties to the convention. However, the term 'States' is to be given a broad meaning, encompassing not only the states themselves but also their nationals.[34] Thus, although an 'Investor' under the ECT cannot be a state party to UNCLOS,[35] an investor may rely on the rights conferred by UNCLOS to lay down pipelines on the continental shelf/EEZ of a state party to UNCLOS.

The issue to be considered is whether this 'right' may constitute an 'Investment' within the meaning of Article 1(6) ECT. More specifically, the relevant question is whether a right under UNCLOS to lay down pipelines on the continental shelf/EEZ may constitute a 'right' under Article 1(6)(f) ECT, i.e., a 'right conferred by law or contract […] to undertake any Economic Activity in the Energy Sector'.[36] For reasons already addressed above, the latter part of the requirement – that the right must relate to an 'Economic Activity in the Energy Sector' – should reasonably be met.

It, therefore, remains to determine whether the right under UNCLOS to lay down pipelines on the continental shelf/EEZ is 'conferred by law or contract' within the meaning of Article 1(6)(f) ECT.

Although UNCLOS is an international 'convention', a convention is indeed a 'contract' between states. Applying the principles of treaty interpretation described above, including the starting point of focusing on the 'ordinary meaning' of the text of the treaty, it could thus be argued that rights under UNCLOS are indeed 'right[s] conferred by […] contract'.[37] A potential objection against such an argument could be that a 'right *conferred* by contract',[38] at least when read in conjunction with the first sentence of Article 1(6) ECT ('… every kind of asset, *owned or controlled* directly or indirectly *by an Investor* …'),[39] suggests that the contract at issue must have been

33. With respect to the EEZ, Art. 58(1) UNCLOS stipulates that 'all States' enjoy the 'freedoms […] of laying down submarine cables and pipelines'. However, the freedoms in Art. 58(1) are 'subject to relevant provisions of this Convention', which for the laying of pipelines are the provisions of Art. 79. Thus, Art. 79 UNCLOS will apply regardless of the distinction between the continental shelf and the EEZ. *See* A. Proelss, 'Article 58: Rights and Duties of Other States in the Exclusive Economic Zone', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary*, Hart Publishing, C.H. Beck Verlag, Nomos Verlagsgeschellschaft, 2017, pp. 449f.
34. *See* D.R. Burnett, R.C. Beckman & T.M. Davenport, *Submarine Cables: The Handbook of Law and Policy*, Martinus Nijhoff Publishers, 2014, pp. 79f.; and D.J. Englender, 'Article 79: Submarine Cables and Pipelines on the Continental Shelf', in A. Proelss (ed.), *supra* n. 33, at p. 623.
35. Cf. Art. 1(7) ECT.
36. It must be recalled, however, that the assets listed in Art. 1(6) ECT are mere examples of assets qualifying as 'Investment[s]' under the ECT. Accordingly, whether the right under UNCLOS to lay down pipelines on the continental shelf/EEZ may constitute an Investment under the ECT does not necessarily hinge on the list of examples set out in Art. 1(6)(f).
37. *See* e.g., Cambridge Dictionary, in which a 'contract' is defined as 'a legal document that states and explains a formal agreement between two different people or groups, or the agreement itself' and a 'convention' as 'a formal agreement between country leaders, politicians, and states on a matter that involves them all'.
38. Emphasis added.
39. Emphasis added.

entered into by the investor itself (which is obviously not the case with UNCLOS). However, such an argument would be difficult to reconcile with the fact that rights 'conferred by law' are also covered by Article 1(6)(f) ECT. On balance, therefore, a right conferred under an international convention such as UNCLOS should reasonably be considered as a 'right conferred by […] contract' within the meaning of Article 1(6)(f) ECT.

One commentator has noted that the question of whether a right pursuant to Article 1(6)(f) ECT has come into existence depends on the legal status of that right. The commentator furthermore appears to suggest that there is a distinction to be made between, on the one hand, the situation where an investor has signed a document containing a legally binding right to undertake an Economic Activity in the Energy Sector (a 'contract'), and, on the other hand, the situation where the right is conferred merely 'by law'. In the first situation, the contract itself may represent an independent value for the investor capable of qualifying as an 'Investment', and even pre-contractual rights may constitute 'Investments' if such rights are 'created effectively under the law […] and […] [have] some financial value ("asset")' for the foreign investor. As for 'right[s] conferred by law', the commentator adds that such a right may also qualify as an 'Investment', but only provided that 'the investor has acted and committed resources' in reliance of such right.[40] Since it is difficult to say that a right conferred by law has a financial value to an individual or entity unless the individual or entity has, at least in some manner, 'acted and committed resources' relating to such right, there seems to be merit to this proposition.

With respect to the rights conferred by UNCLOS, they are indeed of a character unlikely to represent 'independent' financial value to an investor, in the same manner, that a contract signed by the investor may represent. Therefore, it is not unlikely that an ECT tribunal would require the potential investor to have, at least to *some* extent, 'acted and committed resources' in reliance of the UNCLOS rights, in order to characterise such UNCLOS rights as 'rights' under Article 1(6)(f) ECT. Notably, however, 'acts and committing of resources' would not necessarily have to include entering into contracts with third parties. Rather, resources committed internally to prepare for the permit application, or work on the design of the contemplated pipeline, would arguably also suffice.

In summary, rights under UNCLOS have the potential to qualify as 'rights conferred by law or contract' under Article 1(6)(f) ECT. It is likely, however, that an arbitral tribunal would require some concrete steps to have been taken by the investor in reliance of such rights and in pursuing a project. Since such steps will normally have been taken once a permit application is submitted, an investor in a project concerning the laying down of an underwater gas pipeline on the continental shelf/EEZ of a state party to the ECT will generally be fairly well-positioned to argue that an 'Investment' has already been made before a permit has been granted.

40. *See* T.W. Wälde, *supra* n. 27, at p. 272.

§7.04 CONCLUSION

It would seem beyond doubt that an underwater gas pipeline laid down on the continental shelf or EEZ of an ECT Member State is located within the 'Area' of the state, as required in order for an 'Investment' to be protected under the ECT. It would seem equally clear that the transmission of gas by means of an underwater pipeline, as well as the construction of the pipeline, constitute an 'Economic Activity in the Energy Sector' pursuant to Article 1(5) ECT. It follows that investments associated with such activities are capable of being recognised as 'Investment[s]' pursuant to Article 1(6) ECT.

Depending on the preparatory measures and steps taken by the Investor in advance of its permit application, there are compelling reasons in favour of the position that a pipeline project is, as a matter of principle, capable of reaching the point where an 'Investment' has already been made before a permit is obtained. For example, the Understanding with respect to Article 1(5) ECT clarifies that 'research, consulting, planning, management and design activities' related to, *inter alia*, the construction of an underwater gas pipeline constitutes 'Economic Activity in the Energy Sector'. Thus, an investment in such an activity, such as entering into contracts concerning 'research', 'consulting' or 'design' in preparation for a permit application, would arguably qualify as an 'Investment' in accordance with the ordinary meaning of those terms.

It appears, however, more uncertain whether the right to lay down underwater pipelines on the continental shelf/EEZ pursuant to UNCLOS, when considered in isolation, constitutes a 'right conferred by law or contract' within the meaning of Article 1(6)(f) ECT. However, considering the preparatory steps and measures that investors will generally have taken before submitting a permit application, investors will often be in a fairly good position to argue that an 'Investment' has been established on the basis of Article 1(6)(f) – even in cases where contracts with third parties, enabling the investor to establish an investment under Article 1(6)(c), may not yet have been signed.

If the investor succeeds in establishing that an 'Investment' protected by the ECT has come into existence before a permit is obtained, this may have important implications in instances where the investor is subjected to unfair, unreasonable or discriminatory treatment in connection with the permit application process. Instead of having to resort to possible remedies under domestic law before the courts of the host state, the investor would be protected under the ECT and may submit its claim(s) arising out of such treatment to international arbitration.

Thus, and in conclusion, an investor preparing to embark on a project involving the laying down of an underwater gas pipeline on the continental shelf/EEZ passing through one or several ECT Member States is wise to carefully document any and all steps involving committing resources, entering into contracts and spending time (even internal time) on researching, planning and designing the pipeline to demonstrate that the project should enjoy the 'Investment' protection status of the treaty.