


7-1-2019

The Plight of Georgia: Russian Occupation and the Energy Charter Treaty

Jennessa M. Lever

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

 Part of the [Comparative and Foreign Law Commons](#), [Energy and Utilities Law Commons](#), [European Law Commons](#), [International Law Commons](#), [Law and Economics Commons](#), [Law and Politics Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Other Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Jennessa M. Lever, *The Plight of Georgia: Russian Occupation and the Energy Charter Treaty*, 44 Brook. J. Int'l L. 831 ().
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol44/iss2/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE PLIGHT OF GEORGIA: RUSSIAN OCCUPATION AND THE ENERGY CHARTER TREATY

INTRODUCTION

The territorial and economic integrity of the country of Georgia was permanently compromised in 2008 following the Five-Day War in the South Ossetia region. The separatist territory of South Ossetia fractured its relationship with Georgia by allowing Russian troops to enter the region and by accepting the offer to join the Russian Federation, uniting Ossetia territories.¹ Georgia, which has long fought to gain economic and territorial separation from Russia, finds itself again threatened with the possibility of another takeover.² Georgia's continued attempts to improve its infrastructure and grow its trade relationship with the West, in particular the European Union, have become strained over this conflict, and the relationship between Georgia and Russia continues to fracture.³ Russia maintains a military occupation of South Ossetia, frequently redrawing boundary lines further into Georgia, most recently reaching within one kilometer of the main road in Georgia and seizing a section of the Baku-Supsa pipeline.⁴ This movement has caused insecurity in gas transfers to Europe and within the nation itself.⁵ The cultivation of a stronger relationship with Europe and the United States has done little to help Georgia as the West has refused to become actively involved in the territorial conflict.⁶

Russia's declaration and recognition of two separatist regions within Georgia as independent nations has allowed Russia to

1. Interfax, *Eighty Percent Vote for Renaming S. Ossetia State of Alania at Referendum – Central Elections Commission*, REGIONAL BUS. NEWS (Apr. 12, 2017).

2. DONALD RAYFIELD, *EDGE OF EMPIRES* 399 (Reaktion Books 2006).

3. *Georgia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Georgia/Cultural-life> (last visited Dec. 28, 2017) [hereinafter *Georgia Life*].

4. *Georgia Profile – Timeline*, BBC (May 18, 2017), <http://www.bbc.com/news/world-europe-17303471> [hereinafter *Georgia Profile*]. Taras Nazarenko, *Russian Seizure of Georgian Pipeline Has Dangerous Implications*, EURACTIV (July 23, 2015), <https://www.euractiv.com/section/energy/opinion/russian-seizure-of-georgian-pipeline-has-dangerous-implications/>.

5. See *Georgia Profile – Timeline*, *supra* note 4; Nazarenko, *supra* note 4.

6. See *Georgia Profile – Timeline*, *supra* note 4; Nazarenko, *supra* note 4.

usurp Georgian territory under the guise of protecting and assisting newly independent territories. Russia offered military support and the issuance of Russian passports to accomplish this land seizure.⁷ This practice has created human rights crises and affects Georgia's natural resource and pipeline control.⁸ Russia's interference in the region has caused the European Union to become nervous due to the former's proximity and the threat that the Russians pose to the pipeline running through Georgia. Despite this Russian land grab's jeopardizing of European Union security, however, no Western powers have intervened in the situation.⁹ Apart from the Tagliavini report,¹⁰ since the 2008 Russo-Georgian War, the European Union has refrained from speaking out against the Russian occupation of Georgia.¹¹ This approach to the current situation endangers the natural resources, economic security, and integrity of Georgia and puts Europe's gas security at risk. Russia's violation of the Energy Charter Treaty (ECT) is not excused by its lack of ratification, due to the provisional application of the treaty.¹² Furthermore, the International Energy Charter (IEC) has not replaced the ECT or its obligations ensuring the continuing obligations under the ECT.

The ECT¹³ could provide reprieve for Georgia should the country see continued interference from Russia. The treaty protects

7. Iskra Kirova, *Public Diplomacy and Conflict Resolution: Russia, Georgia and the EU in Abkhazia and South Ossetia*, USC CENTER PUB. DIPL. ANNENBERG SCH. 7, 16–17 (2012).

8. *Id.*

9. *Id.*

10. The Tagliavini Report was an independent Report on the events leading up to and of the Five-Day War. The Report was named for the leader of the team, Swiss Diplomat Heidi Tagliavini. While the report stated that Georgia had indeed fired the first shot in the armed conflict, it was not lost on the team that Russia had been provoking action prior and took actions violating international law during the war. See Thomas de Waal, *The Still-Topical Tagliavini Report*, CARNEGIE MOSCOW CENTER (Sept. 30, 2015), <http://carnegie.ru/commentary/61451>. Timothy Heritage, *Georgia Started War with Russia: EU-Backed Report*, REUTERS (Sept. 30, 2009), <https://www.reuters.com/article/us-georgia-russia-report/georgia-started-war-with-russia-eu-backed-report-idUSTRE58T4MO20090930>.

11. *Georgia Profile*, *supra* note 4.

12. Matthew Belz, *Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties*, 22 EMORY INTL L. REV. 727 (2009).

13. See *infra* note 103.

energy investments, and through its provisional application provision, Russia could be accused of violating the protectionist nature of the treaty.¹⁴ The ECT's purposes to foster investment in the energy industry and to promote a breakaway from the reliance on the Russian energy giants have been particularly successful in Georgia, where the nation has been able to partner with Azerbaijan to create pipelines and to transfer energy resources to Europe without crossing through Russia.¹⁵ The main artery, the Baku-Supsa Pipeline, has not yet suffered direct interference by Russia since coming under the territory acquired by South Ossetia, but British Petroleum (BP),¹⁶ which runs the pipeline, has not had access to the region since the Five-Day War in 2008, creating uncertainty to the true security of the energy investment.¹⁷ As Russia continues their land grab in the region, Georgia can utilize obligations under the ECT to hold Russia accountable for illegally seizing Georgian land as it interferes with their energy industry. Through continued partnership with the European Union and by fostering stronger relations with the North Atlantic Treaty Organization (NATO), Georgia may be able to push Russian forces from the region and regain its territorial and economic integrity.

Part I of this Note will discuss the history of Georgia, its troubled past, and its relationship with the European Union, leading up to the Five-Day War in 2008 and Russia's continued movement into Georgian territory. Part I also discusses the strategic importance of the Baku-Supsa Pipeline to Georgia and why its continued operation is critical to Georgian infrastructure. Then, Part II will provide a background and analysis of the treaties in force between these nations and the European Union. Such treaties as the ECT and the IEC are aimed at protecting investments in gas transit. The nuances of certain treaty articles and supplements to these treaties provide context under which Russia may be responsible for usurping strategic territory. Next, Part III will

14. Rafael Leal-Arcas et al., *The European Union and its Energy Security Challenges*, 8 J. WORLD ENERGY L. & BUS. 291 (2015).

15. *Id.*

16. BP is one of the world's leading oil and gas companies. *BP at a Glance*, BP, <https://www.bp.com/en/global/corporate/what-we-do/bp-at-a-glance.html> (last visited Jan. 14, 2018).

17. *EU Warning over Russia 'Land Grab' in South Ossetia Border Row*, BBC (July 16, 2015), <http://www.bbc.com/news/world-europe-33549462> [hereinafter *EU Warning over Land Grab*].

touch on the recent *Yukos* cases in which the provisional application of the ECT was challenged by Russia, which won on an appeal. While the *Yukos* cases originally provided the largest arbitration award in history, the challenge by Russia creates a loophole in which nations may escape obligations under the provisional application. This part of the Note elaborates on the challenges to Georgia in utilizing this provision for Russian accountability. Finally, Part IV of this Note examines potential solutions available to Georgia to avoid further loss of territory and to maintain its energy and economic security. These possible solutions include: expanded European Union relations for Georgia and an enhanced military response provided by NATO or European nations that can provide forces.

I. HISTORY AND GEORGIA'S PLACE IN EUROPE'S ENERGY TRADE

Georgia has long been a troubled nation, emerging from the Soviet Union with deep-rooted governmental corruption.¹⁸ While Georgia was able, through many regime changes, to quiet corruption and create a policy of governmental integrity, it still finds itself haunted by its Soviet past and looks to Europe for security.

A. A Background History of Georgia

Georgia, a former Soviet territory, has a long history of being at odds with its neighbors over its borders. After spending time as both a fractured part of the Ottoman Empire and as a British territory, the country became a recognized independent nation in 1920;¹⁹ first, through de facto recognition by the Allies and then by the Russo-Georgian Treaty.²⁰ Only a year later, the Georgian nation was incorporated into the Soviet Republic as a territory.²¹ It was under the rule of the Soviet leader, Joseph Stalin, himself born in Georgia, that the state transitioned from an agricultural society to an industrial, urban society.²² While Georgia was able to maintain its language and literature, the country was not able to move towards full independence until

18. *Georgia Life*, *supra* note 3.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

the 1980s under Mikhail Gorbachev's rule.²³ After successful parliamentary elections in October 1990, Georgia declared independence on April 9, 1991.²⁴ During this time, secessionist movements erupted in South Ossetia and Abkhazia, which were quelled by Commonwealth of Independent States peacekeepers.²⁵ It was during this time that the country fell into a period of severe governmental corruption, the effects of which are still seen today.²⁶

Following the Rose Revolution in 2003, the acting administration was once again confronted with a growing opposition.²⁷ Mikheil Saakashvili's²⁸ government was criticized for human rights abuses, as well as a growing sense of authoritarianism, and while he offered to discuss autonomy with the South Ossetia region in 2005, the region rejected the offer of autonomy and held its own unofficial referendum.²⁹ Since that time, conflict in the region has only intensified, particularly straining Georgia's

23. *Id.*

24. *Id.*

25. *Id.* Peacekeepers were put in force after the fall of the Soviet Union and the establishment of the Commonwealth of Independent States. These peacekeepers were Russian Troops who worked alongside UN Observer missions. See Konstantin Korkelia, *The CIS Peace-Keeping Operations in the Context of International Legal Order*, N. ATL. TREATY ORG. (1997–1999), <https://www.nato.int/acad/fellow/97-99/korkelia.pdf>.

26. Korkelia, *supra* note 25. At the time, there was no method for collecting taxes, and governmental posts were sold to finance the government. Instead of financing the government or providing infrastructure for electricity and gas supplies, officials took government funds for themselves. See RAYFIELD, *supra* note 2, at 388.

27. *Georgia Life*, *supra* note 3. The Rose Revolution was a peaceful uprising in which Georgian President Eduard Shevardnadze was ousted from power by Mikheil Saakashvili's western leaning opposition. Following the revolution, new elections were held, in which Saakashvili won 96 percent of the vote. See RAYFIELD, *supra* note 2, at 392.

28. Mikheil Saakashvili was president of Georgia from 2004 to 2007 and again from 2008 to 2013. Saakashvili won his election after ousting President Shevardnadze by forcing him to flee the parliamentary building and holding new elections. His tenure as President of Georgia was primarily focused on keeping Georgia together territorially, leading to frequent conflicts with Russia. Saakashvili's term as President was marred with human rights abuse claims and ended when a video of Georgian prison guards abusing prisoners surfaced. Mikheil Saakashvili, ENCYCLOPAEDIA BRITANNICA (Dec. 17, 2018), <https://www.britannica.com/biography/Mikheil-Saakashvili>.

29. *Georgia Life*, *supra* note 3.

relationship with Russia, which has provided support to separatists in the South Ossetia region.³⁰ In August 2008, the conflict climaxed with Georgian forces engaging with separatists and Russia claiming to defend Russian citizens within the territory by moving forces into Georgia.³¹

The Five-Day War killed hundreds and forced thousands of Georgian refugees into shelters.³² For many Georgians, the loss of territory and the invasion of the Russian military had muffled all that had been achieved in the nation since the Rose Revolution.³³ The military engagement by Russia “bypassed established channels of conflict resolution and unilaterally [moved to] change the boundaries of another United Nations member state.”³⁴ Russia had become particularly bold in the years leading up to the Five-Day War, invading and making its military presence known throughout regions that are associated with the European Union and NATO.³⁵ This action was received poorly by the international community and strained U.S.-Russian relations to the lowest point since the Cold War.³⁶ After brokering a French-executed cease-fire only five days into armed conflict, the Abkhazia³⁷ and South Ossetia regions are unlikely to ever return to full Georgian control.³⁸ Despite Georgia’s losing approximately one-fifth of its territory, a major issue is that the acts of intervention taken by Russia were in full disregard for multilateral institutions, like the United Nations Security Council or the Organization for Security and Cooperation in Europe and agreements thereunder.³⁹

30. *Id.*

31. *Id.*

32. Charles King, *The Five Day War: Managing Moscow After the Georgia Crisis*, FOREIGN AFF. (Nov–Dec. 2008), <https://www.foreignaffairs.com/articles/russia-fsu/2008-11-01/five-day-war>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Abkhazia is another breakaway region in Georgia, located in the north-west corner of the country. While the location is less strategic than that of South Ossetia, it is also backed by Russia and has been a source of conflict for the nations. *Georgia Life*, *supra* note 3.

38. King, *supra* note 32.

39. *Id.* The Commonwealth of Independent States was created following the fall of the Soviet Union to facilitate coordination of policies among the former Soviet states. *Commonwealth of Independent States*, ENCYCLOPEDIA

Following the Five-Day War, Georgia withdrew from the Commonwealth of Independent States, calling on other nations in the region to do the same.⁴⁰ Since 2008, in the aftermath of the Five-Day War, Georgia has continued pressing forward with a policy to quell governmental corruption, ushering in a new era with the Georgian Dream Coalition⁴¹ in 2014, leading to the Deep and Comprehensive Free Trade Area (DCFTA) with the EU.⁴²

Russia maintains its occupation in the Georgian Region of South Ossetia today, moving the border further into Georgian territory. Since 2015, when Russia signed an “alliance and integration” treaty with South Ossetia, the Russian military has remained in the region and has moved the internal border more than 1.5 kilometers further into the country.⁴³ This has created additional concerns in the area, as the new border threatens to cut off the main road in the nation and severs a section of the Baku-Supsa Pipeline from Georgian control.⁴⁴ This main road runs east to west, and if cut off by Russian ‘peacekeepers,’ would cause a crisis for Georgia, as it continues to focus on building its infrastructure.⁴⁵ It does not appear, however, that Georgia will be able to reacquire South Ossetia anytime soon.⁴⁶ In April 2017, the region held a referendum to change its name to the ‘State of Alania,’ aligning itself with its North Ossetia neighbors in Russia and preparing to join the Russian Federation.⁴⁷

BRITANNICA, <https://www.britannica.com/topic/Commonwealth-of-Independent-States> (last visited June 10, 2019).

40. *Georgia Life*, *supra* note 3.

41. The Georgian Dream Coalition aimed to integrate Georgia into more European and American institutions at the beginning of their time in office. *The Georgian Dream Coalition*, INDEP. DIPLOMAT, <https://independentdiplomat.org/project/the-georgian-dream-coalition/> (last visited Jan. 14, 2018).

42. *Georgia Life*, *supra* note 3. The DCFTA aims to help integrate the Georgian economy with the European economy as an association agreement, solidifying the partnership as Georgia’s most important trading partner. *EU-Georgia Trade Deep and Comprehensive Free Trade Area (DCFTA)*, EUR. COMM’N, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153435.pdf (last visited June 10, 2019).

43. *Georgia Profile*, *supra* note 4.

44. *Id.*

45. *Id.*

46. *Id.*

47. Interfax, *supra* note 1.

B. A History of the European Union and its Relationship with Georgia

The original aim of the European Coal and Steel Community (ECSC), the forerunner to the European Union, was the improved movement of coal and steel throughout Europe.⁴⁸ The original six members—France, Germany, Italy, Belgium, Netherlands, and Luxembourg—planned to pool their raw materials in an effort to economically expand, increase employment, create a higher standard of living through a common market, allow equal access to sources of production, establish lower prices, and improve working conditions.⁴⁹ The ECSC played a role in government cooperation in commercial policy, drawing up production programs that established consumption priorities and determined how resources should be allocated while setting export levels.⁵⁰ The ECSC was successful in its mission to balance the distribution of resources and production to facilitate restructuring and redevelopment in Europe after World War II.⁵¹ The organization went through its most significant treaty revision at the beginning of the 1990s when the Maastricht Treaty established the European Union.⁵²

The Maastricht Treaty established the European Union as many people understand it today.⁵³ The European Union brought together the movement of goods, services, people and money into a single market in 1993.⁵⁴ The European Single Market allows for goods and services to be freely transferred throughout the European Union, including the ability of companies “to provide services in countries other than the one in which they are established.”⁵⁵ The Maastricht Treaty has provisions establishing the prohibition of restrictions on imports and exports between members only; exceptions may exist in the cases

48. *Treaty Establishing the European Coal and Steel Community, ECSC Treaty*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0022> (last visited Dec. 28, 2017).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Europe Without Frontiers*, EUR. UNION, https://europa.eu/european-union/about-eu/history/1990-1999_en (last visited Dec. 28, 2017).

54. *Id.*

55. *The European Single Market*, EUR. COMM'N, https://ec.europa.eu/growth/single-market_en (last visited Dec. 28, 2017).

of public morality, public position or security, protection of health and life of humans, animals or plants, and protection of industrial and commercial property, but the treaty does not establish these prohibitions on restrictions for nations outside of the European Union.⁵⁶

The European Union has many valuable partners outside of its members.⁵⁷ These partners sign association agreements to receive trade and economic benefits from the European Union without being a member.⁵⁸ Georgia is one of the European Union's sixteen partner countries that are included in the union's European Neighborhood Policy, and more recently, the Eastern Partnership.⁵⁹ The Eastern Partnership helps partner nations to the European Union work toward a "greater mobility of citizens and stronger collaboration in a number of sectors, such as transport, energy and the environment."⁶⁰ Georgia's benefits as a partner to the European Union include assistance from the European Union Monitoring Mission, which has worked since 2008 to monitor boundary lines in Georgia near the region of South Ossetia.⁶¹ While the European Union's motivation is to support Georgia's territorial integrity, the support also enables the European Union to address the environmental concerns of the Black Sea region.⁶² Economically, the European Union has assisted Georgia in fighting corruption, overhauling tax collection procedures, and opening up the country's economy to foreign

56. *Consolidated Version of the Treaty on the Functioning of the European Union*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E/TXT#d1e2283-1-1> (last visited Dec. 28, 2017).

57. See generally *The European Single Market*, *supra* note 55 (stating the importance of free transfer of goods and desire to partner with other nations in the region).

58. *Consolidated Version of the Treaty on the Functioning of the European Union*, *supra* note 56.

59. *Georgia and the EU*, EUR. UNION EXTERNAL ACTION, https://eeas.europa.eu/headquarters/headquarters-homepage/1237/georgia-and-eu_en (last visited Dec. 28, 2017). The European Neighborhood Policy was initially set up in 2004 and since being reevaluated in 2015, works to create stabilization, security and prosperity for countries to the south and east of the European Union. *European Neighborhood Policy (ENP)*, EUR. UNION EXTERNAL ACTION, https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en (last visited June 10, 2019).

60. *European Neighborhood Policy (ENP)*, *supra* note 59.

61. *Id.*

62. *Id.*

trade and investment.⁶³ As a result of the European Union's trade agreements with Georgia, this assistance also includes bolstering the European Union's ability to provide oil and gas to its own economy. In 2015, one of the European Union's main imports to Georgia was fuel and mining products.⁶⁴ While pharmaceutical products constituted a larger import—almost 50 percent of imports overall⁶⁵—the proposition that a country produces its own gas, yet still needs to import fuel, is particularly baffling. While the European Union Monitoring Mission to Georgia has assumed a peace-keeping role to ensure there is no return to armed hostilities, Georgian territory continues to be usurped by Russian advances throughout the South Ossetia region and deeper into Georgia.⁶⁶

Trade between the European Union and Georgia primarily focuses on rebuilding infrastructure throughout the region.⁶⁷ The DCFTA has provided Georgia with the opportunity to gradually integrate its economy with the European economy.⁶⁸ Georgia has increased its trade with the European Union to more than a quarter of overall trade in 2015, doubling or tripling certain product exports, such as hazelnuts, copper and petroleum oils.⁶⁹ The further establishment of pipeline initiatives to supply oil to Europe, without ties to Russia, binds Europe to the outcome of the current conflict should Russia continue usurping Georgian territory.

C. *The Baku-Supsa Pipeline*

The Baku-Supsa pipeline runs from Baku, Azerbaijan, through Georgia, and into the European market.⁷⁰ The pipeline runs through the central part of the country, resulting in a one-mile stretch of the pipeline's falling under control of the Russian-

63. *Id.*

64. *Id.*

65. *Id.*

66. *EU Warning over Land Grab*, *supra* note 17.

67. *Treaty Establishing the European Coal and Steel Community, ECSC Treaty*, *supra* note 48.

68. *EU-Georgia Trade Deep and Comprehensive Free Trade Area (DCFTA)*, *supra* note 42.

69. *Id.*

70. Nazarenko, *supra* note 4.

backed movement in South Ossetia.⁷¹ The pipeline began operating in 1999 and provided a reprieve for former Soviet nations from Russian economic pressure.⁷² Pipelines in Georgia have additionally created an economic stability that the country struggled to maintain when it first gained independence.⁷³ By pumping nearly six million tons of gas per year to Europe, Georgia has expanded tax collection and bolstered its infrastructure.⁷⁴ This is significant for Georgia, as it has historically struggled with tax collection, resulting in economic harm.⁷⁵

Russia's control of a one-mile stretch of pipeline may seem insignificant overall, but this stretch can have disastrous effects on the regions, which are affected by the flow of gas through this pipeline.⁷⁶ These effects include: the deprivation of revenue to Georgia; Russia's continued domination and control of the European Union's gas sources; and the potential for another armed military conflict in the region should Russia interfere with the pipeline.⁷⁷

Russia's history of leveraging its control in the oil and gas industry to pressure Europe to achieve their political goals has been prevalent since the fall of the Soviet Union.⁷⁸ For example, in 2015, Russia halted gas delivery to Ukraine to pressure the nation into accepting significant price increases.⁷⁹ These price increases came after Russia's annexation of Crimea in 2014.⁸⁰

71. *Id.*

72. *Id.*

73. RAYFIELD, *supra* note 2, at 390.

74. Nazarenko, *supra* note 4.

75. RAYFIELD, *supra* note 2 at 390.

76. Nazarenko, *supra* note 4.

77. *See id.* The Separatists in South Ossetia could start siphoning off gas from the pipeline which would result in a loss of revenue to the Georgians and their economy. Fatma Babayeva, *Baku-Supsa Pipe's Contribution to Economic Development of Azerbaijan, Georgia Highlighted*, AZERNEWS (May 16, 2016), https://www.azernews.az/oil_and_gas/96668.html. Furthermore, Russia could cut off flow of the pipeline to achieve any further political goals with the Union and Georgia. *Id.* Finally, the reemergence of armed conflict in the region could be a real possibility as the government of Azerbaijan has already articulated that they will intervene militarily, if necessary, to protect the integrity of their pipeline. *Id.*

78. Nazarenko, *supra* note 4.

79. Andrew Roth, *Gazprom Halts Natural Gas Deliveries to Ukraine*, N.Y. TIMES (July 1, 2015), <https://www.nytimes.com/2015/07/02/business/international/gazprom-ukraine-natural-gas-deliveries-russia.html>.

80. *Id.*

Prior to Russia's occupation and annexation of Crimea, Russia allowed Ukraine a \$100 USD discount on gas prices per thousand cubic meters in exchange for leasing rights to the base for the Russian Black Sea Fleet in Crimea.⁸¹ Following annexation, Russia lowered the discount to \$40 USD.⁸² Previously, in 2014, Russia had also cut off natural gas supplies to Ukraine over the conflict in the southeastern region of Ukraine between the Ukrainian Army and pro-Russian separatists after President Viktor F. Yanukovych⁸³ was removed from office.⁸⁴

Russia's standing history of pressuring nations into following its political agenda makes it evident that Russia could use its effective control of this section of the Baku-Supsa pipeline to effect change between the Georgian government and the South Ossetia Region. This seems likely, due to the Russian government's routine express disapproval over the growing relationship between Georgia and the European Union.⁸⁵ In addition, Russia's longstanding criticism of NATO adds fuel to the fire in its disapproval of the Georgian government's continued march towards the West and rejection of Russian policy.⁸⁶ The Georgian government seems to believe that the pipeline will continue to operate uninterrupted, stating, "Uninterrupted operation of the pipeline is one of [the] priority issues. . . . [A]ll measures will be taken for its security."⁸⁷ Russia's seizure of the pipeline can help

81. *Id.*

82. *Id.*

83. Viktor F. Yanukovych was President of Ukraine from 2010 until he was ousted in 2014. Yanukovych was ousted after refusing to sign an association agreement with the European Union in November 2013. His presidency had largely been driven by closer relations with the European Union, and the refusal to accept the agreement caused large street protests turning violent in February 2014. *Profile: Ukraine's Ousted President Viktor Yanukovych*, BBC (Feb. 28, 2014), <http://www.bbc.com/news/world-europe-25182830>.

84. Roth, *supra* note 79.

85. Patrick Smyth, *Ossetia to Be Latest Focus of Russia's Uneasy Relationship with EU*, IRISH TIMES (Mar. 11, 2017), <https://www.irishtimes.com/opinion/ossetia-to-be-latest-focus-of-russia-s-uneasy-relationship-with-eu-1.3005536>.

86. *See id.*

87. *Georgian Official: Baku-Supsa Pipeline to Operate Uninterruptedly*, AZERI NEWS AGENCY (July 28, 2017), http://en.apa.az/azerbaijan_energy_and_industry/georgian-official-baku-supsa-pipeline-to-operate-uninterruptedly.html.

the nation continue to intimidate Georgia.⁸⁸ These tactics comprise Russia's best options to influence Georgia in its clash against South Ossetia.⁸⁹ BP,⁹⁰ which runs the pipeline, states that it has not had access to the section of pipeline currently under Russian control since the 2008 War,⁹¹ and while this has not resulted in a flare-up of tensions, the potential exists.

Despite European Union Foreign Policy Chief Mogherini's comments in 2015 that Georgia should avoid provocative steps,⁹² avoiding provocative steps could result in Georgia striking a deal with Russia to keep the pipeline operating properly.⁹³ Political analysts suggest that Georgia could simply truck the oil from the pipeline prior to its entry into occupied territory to its output in the Black Sea for transport to Europe,⁹⁴ but this is not a viable option. The cost of transferring the oil from the pipeline to the sea would undoubtedly raise prices and cause delays in delivery.⁹⁵ These issues would likely further strain Georgian economy and cause tensions between Georgia and Russia to escalate again.⁹⁶

II. TREATIES

The ECT provides the basis for which Georgia has been able to foster energy investment and infrastructure development.⁹⁷ The IEC and the Vienna Convention on the Law of Treaties (VCLT) provide further context regarding the importance of fostering energy investments in the region and the tools with which Russia may be held accountable under the obligations of the ECT.

88. Nazarenko, *supra* note 4.

89. *Id.*

90. *BP at a Glance*, *supra* note 16.

91. *EU Warning over Land Grab*, *supra* note 17.

92. *Id.*

93. *Id.*

94. Nazarenko, *supra* note 4.

95. *Id.*

96. *Id.*

97. Nazarenko, *supra* note 4.

A. Energy Charter Treaty

The ECT⁹⁸ arose in 1994 to update and implement the previous European Energy Charter to express the principles of the European Community to secure an energy supply and provide sustainable economic development.⁹⁹ The ECT fostered energy cooperation in a post-Cold War Eurasia in need of investment to upgrade an ailing system of pipelines.¹⁰⁰ The European Union seized the opportunity provided by the fall of the Soviet Union to enhance its own energy security.¹⁰¹ The treaty itself is geared towards protecting the European energy market, and while over fifty countries signed on, not all ratified the treaty.¹⁰² Russia, which never ratified the treaty, did provisionally apply it until 2009, pursuant to Article 45, which is entitled “Provisional Application.”¹⁰³ The provisional application of a treaty is unique, as treaties generally enter into effect on an effective date—not upon signature.¹⁰⁴ The provisional application is generally used with an emergency treaty to expedite implementation on the state level prior to the treaty entering into force.¹⁰⁵ Moreover, the provisional application of the ECT may be seen as emphasizing the importance of the treaty itself by creating immediate cooperation (upon signature) and a chance for development in the energy sector.¹⁰⁶

All signatories to the ECT undertake Article 7, which addresses transit.¹⁰⁷ Article 7 requires that any dispute over a matter arising from transit does not give the controlling party the

98. The ECT was created by the powers of Europe to create a level playing field for energy resource investment throughout Europe and the surrounding nations. Leal-Arcas et al., *supra* note 14, at 294.

99. *The European Energy Charter*, INT'L ENERGY CHARTER, <http://www.energycharter.org/process/european-energy-charter-1991/> (last updated June 2, 2015).

100. Leal-Arcas et al., *supra* note 14, at 301.

101. *Id.*

102. *Id.*

103. The Energy Charter Treaty art. 45, Dec. 17, 1994, *available at* <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> [hereinafter ECT].

104. Belz, *supra* note 12, at 729.

105. *Id.*

106. *Id.* at 750.

107. ECT, *supra* note 103. Article 7 reads in part:

(1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and

right to interrupt or reduce transport.¹⁰⁸ Russia's refusal to participate in further negotiations or talks regarding the ECT re-

Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges. . . . (3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favorable a manner than its provisions treat such materials and products originating in or destined for its own area unless an existing international agreement provides otherwise. (4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1). (5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to (a) permit the construction or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems including the security of supply. Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties. (6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision. (7) [Dispute resolution procedures described in section (6)].

Id. art. 7.

108. *Id.*

lates to its denial of being bound by the ECT and its provisions.¹⁰⁹ Russia asserts that it should not be subject to the provisional application, and as recently as 2017, has been able to defend its contention in the Hague District Court.¹¹⁰ While the initial arbitration tribunal gave Yukos¹¹¹ reprieve, awarding a record sum, the analysis the tribunal applied pertaining to the provisional application of the ECT stated that there was an “all or nothing” application and as Russia had applied some of the laws, it was subject to all of them provisionally despite never formally ratifying the treaty.¹¹² Upon appeal in the Hague District Court, Russia argued the judgement should be set aside because it was not subject to the arbitration clause in Article 26 of the ECT due to its conflicting nature with Russia’s own procedures.¹¹³ Russian law on foreign investments states that “disputes arising from legal relations between foreign investors and Russia which were predominately public law in nature should be resolved by Russian courts.”¹¹⁴ Russia further argued that while the executive at the time issued a memorandum on the legal regime of foreign investment under the ECT, this could not be regarded as law because it was issued by the executive and merely contemplated the compatibility of the ECT with Russian law—not specifically Article 26 of the ECT.¹¹⁵ The Court interpreted this information to mean there was no legal basis in Russian Law for the Arbitration Clause of the ECT. Thus, Russia was not bound by decisions made under it, setting aside judgements made in the *Yukos* case.

109. *Renewed Confrontation in Georgia*, COUNCIL FOREIGN REL. (Mar. 17, 2016), <https://www.cfr.org/report/renewed-confrontation-georgia>.

110. Fenghua Li, *The Yukos Cases and the Provisional Application of the Energy Charter Treaty*, 6 CAMBRIDGE INT'L L.J. 1 (2016) [hereinafter *The Yukos Cases*].

111. *Id.*; Michael D. Goldhaber, *2015 Arbitration Scorecard*, LAW.COM (July 1, 2015), <https://www.law.com/almID/1202731093438/>.

112. Goldhaber, *supra* note 111.

113. *Id.*

114. *Id.*

115. *Id.*

1. Transit Protocol

The Transit Protocol of the ECT was implemented to further the objectives laid out in Article 7 of the ECT.¹¹⁶ The objectives articulated at the Energy Charter Conference in 1998 were “to ensure secure, efficient, uninterrupted and unimpeded transit; to promote more efficient use of transit infrastructure; to facilitate the construction or modification of transit infrastructure.”¹¹⁷ The Agreement of Terms for the Protocol was reached in 2002, but by 2003, the process of negotiations was suspended primarily due to outstanding issues concerning primarily Russia.¹¹⁸ Provisions on energy transit continue to be a top priority for the ECT’s contracting parties, despite not ultimately being able to come to a specific agreement on transit in general.¹¹⁹

The Transit Protocol, however, could be revived as a strategy to strengthen Article 7’s objectives.¹²⁰ The Transit Protocol would provide a strict obligation to observe transit agreements, as well as a strict prohibition on unauthorized taking of energy material and products.¹²¹ The Protocol would also require transit tariffs to be non-discriminatory, objective, reasonable, transparent, and unaffected by market distortions.¹²² While the majority of the contracting parties currently abide by these rules, Russia does not.¹²³ Russia and its nationalized energy giants, including Gazprom, assign tariffs to their gas as they see fit; when a nation receiving gas from Russia does not comply with price increases or other demands, it denies access to the gas until that country, eventually dwindling in supply and in desperate need of gas imports, gives in.¹²⁴

116. *Transit Protocol*, INT’L ENERGY CHARTER, <http://www.energycharter.org/what-we-do/trade-and-transit/transit-protocol/> (last visited Dec. 26, 2017).

117. *Id.*

118. *Id.*

119. *Id.*

120. Andrey A. Konoplyanik, *Gas Transit in Eurasia: Transit Issues Between Russian and the European Union and the Role of the Energy Charter*, 27 J. ENERGY & NAT. RESOURCES L. 445, 486 (2009).

121. *Id.*

122. *Id.*

123. *Id.*

124. Roth, *supra* note 79.

B. The International Energy Charter

The IEC was primarily drafted to “engage in a structured dialogue with non-signatories of the European Energy Charter in order to promote the principles of the Charter and its framework for cooperation on the Global Scale, [and] to modernize the European Energy Charter as the basic political declaration of the Energy Charter Process.”¹²⁵ As a twenty-first century solution, the IEC notably does not include Russia as a signatory and focuses on access to clean energy and the diversification of energy sources.¹²⁶

1. Arbitration Possibilities available for Dispute Resolutions

Arbitration is required by the ECT for settlement of disputes between contracting parties by Article 27.¹²⁷ Article 27(1) states that parties must first endeavor to settle disputes through diplomatic channels; however, if that is not successful within a reasonable amount of time, they may submit the matter to an ad hoc tribunal under Article 27.¹²⁸ This provision of the ECT calls for three arbitrators, one appointed by each contracting party, and a third, who may not be a national or citizen of a contracting party to the dispute appointed by the parties to the dispute.¹²⁹ If the contracting parties cannot agree on a non-affiliated arbitrator to serve as president of the tribunal, the Secretary-General of the Permanent Court of International Arbitration will select the arbitrator.¹³⁰

C. Treaty Interpretation

The VCLT governs how treaties between parties to the convention are interpreted.¹³¹ It is widely regarded as a codification of

125. See *supra* note 99.

126. *Id.*

127. ECT, *supra* note 103, art. 27.

128. ECT, *supra* note 103, art. 27.

129. *Id.*

130. *Id.*

131. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT]. The VCLT entered into force in 1980, applying to treaties commenced and concluded by states. The VCLT also applies to international organizations. *Vienna Convention on the Law of Treaties*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/vienna_convention_on_the_law_of_treaties (last visited Jan. 14, 2018).

international law norms applicable to treaties, with some provisions being referred to by the International Court of Justice as Customary International Law.¹³² Both Russia and Georgia are party to the VCLT; thus, it can be used to interpret a treaty, such as the ECT, between the two states.¹³³ The relevant articles for interpretation in relation to the current threat to the transit provision of the ECT include Articles 11–17, and Article 25.¹³⁴ Article 31 of the VCLT states, “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.”¹³⁵ Article 7 of the ECT concerning transit states that Contracting Parties shall undertake “necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit . . . and without imposing any unreasonable delays, restrictions or charges.”¹³⁶ These VCLT provisions are tools Georgia can use to interpret Russia’s obligations under the ECT.

1. Signatory v. Ratification

Article 39 of the ECT states, “This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.”¹³⁷ The requirement to approve a treaty via ratification eliminates the ability of the treaty to be in force with only a signature. With the provisional application, however, the treaty is in force prior to its ratification or entry into force.¹³⁸ This provides particular importance to the signing of a treaty, as

132. Karl Zemanek, *Vienna Convention on the Law of Treaties*, UNITED NATIONS (2009), <http://legal.un.org/avl/ha/vclt/vclt.html>.

133. See VCLT, *supra* note 131.

134. *Id.* (The relevant provisions address the following: the means of expressing consent to be bound by a treaty (Article 11); consent to be bound by a treaty expressed by signature (Article 12); consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty (Article 13); consent to be bound by a treaty expressed by ratification, acceptance or approval (Article 14); consent to be bound by a treaty expressed by accession (Article 15); the exchange or deposit of instruments of ratification, acceptance, approval or accession (Article 16); consent to be bound by part of a treaty and the choice of differing provisions (Article 17); and the provisional application (Article 25)).

135. *Id.* art. 31.

136. ECT, *supra* note 103, art. 7.

137. ECT, *supra* note 103, art 39.

138. *Id.*

the provisional application alone binds the country in question to the obligations of the treaty.¹³⁹

2. Provisional Application

Article 45 of the ECT relates specifically to the Provisional Application of the Treaty.¹⁴⁰ Not all signatories of the ECT ratified their acceptance of the Treaty¹⁴¹; Russia became a signatory to the Treaty, but never ratified the Treaty.¹⁴² The provisional application of a treaty that is primarily an investment treaty is unique, as the treaty does not deal with international security or regulation.¹⁴³ This does, however, accomplish the same goal of requiring nations to implement the provisions of the treaty prior to its entry into force.¹⁴⁴ Nations were required to implement the provisions of the treaty until thirty ratifications of the treaty were acquired (occurring on April 16, 1998), setting it into force. Additionally, if any nation did not ratify the treaty and did not explicitly, pursuant to Article 45(1), declare its inability to accept the provisional application upon signing, it would still be subject to the provisional application.¹⁴⁵ Russia delivered no such declaration, and therefore, was required to provisionally apply the treaty.¹⁴⁶ Russia applied the ECT provisionally until announcing on August 20, 2009 that the country would officially not become a full participant in the ECT, choosing to never ratify it and ending the provisional application with effect from October 19, 2009.¹⁴⁷ This is possible through Article 45(3)(a) of the ECT.¹⁴⁸ Russia continued to participate actively in the meetings

139. See generally Belz, *supra* note 12, at 750.

140. ECT, *supra* note 103, art. 45.

141. Australia, Belarus, Iceland, and Norway also did not ratify the ECT. *Energy Charter Treaty: Signatories / Contracting Parties*, INT'L ENERGY CHARTER, <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/> (last updated Feb. 18, 2019).

142. *Id.*

143. Belz, *supra* note 12, at 734.

144. *Id.*

145. *Id.* at 736, 737 (Australia, Iceland and Norway filed declarations at signature that they would not provisionally apply the ECT in accordance with Article 45(2)).

146. *Id.* at 738 (Aus., Ice., and Norway did).

147. Graham Coop, *20 Years of the Energy Charter Treaty*, 29 ICSID REV. – FOREIGN INVESTMENT L.J. 515, 520 (2014).

148. Belz, *supra* note 12, at 737; ECT, *supra* note 103, art. 45(3)(a).

and activities surrounding the ECT, making clear that it had not completely rejected the substance of the Treaty.¹⁴⁹ One year later, in September 2010, Russia released the Draft Convention on Ensuring International Energy Security, which some refer to as “ECT-Lite.”¹⁵⁰ This Convention removed the provisions that Russia had often complained about, including the clause considered ‘anti-Gazprom’¹⁵¹ and Article 7(3) of the ECT, which requires equal treatment of domestic and international materials for tariffs.¹⁵²

Russia’s readiness to leave its obligations under the ECT and to adopt policies it deems more favorable to its institutions does not prevent the country from continuing to be held accountable through provisions of the ECT. Upon termination of the provisional application, a former signatory of the ECT is obligated to apply Part III (Investment Promotion and Protection) and Part V (Dispute Resolution) with respect to investments made during their time under the provisional application for twenty years following the effective date of termination.¹⁵³ This obligates Russia to apply Parts III and V of the Treaty until October 19, 2029. Retroactive interpretation of the Treaty, however, could allow Russia to escape any liability surrounding actions taken during the provisional application of the Treaty. Upon the tribunal’s interpretation in *Kardassopoulos v. Georgia*,¹⁵⁴ other tribunals

149. Coop, *supra* note 147.

150. *Id.*

151. Gazprom is the largest gas company in Russia and the world. While the company is privately owned it often draws criticism as being a source of contention between Russia and the World. Gazprom has a reputation as a bully and often Russia will reinforce high prices by the giant assisting in gas shut offs and other activities. *Inside the Global Giants: Gazprom – The World’s Largest Gas Company*, BBC, http://www.bbc.co.uk/worldservice/specials/151_globalgiants/page4.shtml (last visited Jan. 12, 2018).

152. Coop, *supra* note 147.

153. Belz, *supra* note 12, at 737–38.

154. Ioannis Kardassopoulos and Ron Fuchs initiated arbitration proceedings against Georgia in 2005 and 2007, respectively. They claimed that the Georgian government had failed to provide compensation for losses sustained after the government’s termination of the rights to operate, maintain and construct pipelines and refineries and to export oil and gas. Belz, *supra* note 12, at 739. This came as the Georgian government chose to establish a new state-owned oil corporation in order to work with Azerbaijan to develop the oil industry on a larger scale. *Id.* The tribunal, using the ECT, found that the Georgian government had taken actions that constituted a direct expropriation of Mr. Kardassopoulos’ interest in the gas investment program. *Id.* at 738. Maria

must analyze a state's domestic law to determine if it is consistent with the provisional application despite acceptance upon signature.¹⁵⁵ Under Article 45(1) of the 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."¹⁵⁶ Should a treaty be inconsistent with the domestic law of a signatory, regardless of a state's agreement to apply the treaty provisionally, it will not apply.¹⁵⁷ This weakens the rule of law overall, as well as the primary purpose of the ECT, because it allows states to later claim that their obligations were in contravention with domestic law.¹⁵⁸

To further analyze Russia's ability to be bound, the VCLT authorizes a look at subsequent practices of the party.¹⁵⁹ This presents problems to Georgia if Russia were to intervene in the operation of the Baku-Supsa Pipeline through its occupation of South Ossetia.¹⁶⁰ Russia has continually shut off oil and gas supplies to Europe in order to force European nations to comply with its tax proposals or any other political objectives it seeks to achieve, thereby not complying with the main objective of the Treaty through Article 10(1).¹⁶¹ Most notably, Russia cut gas supplies to Ukraine in 2006 after the latter refused to agree to a 400 percent increase in the price of natural gas.¹⁶² The shutoff lasted four days and had effects throughout the rest of South-eastern Europe.¹⁶³ Russia repeated this in 2009 and again in

Kostytska, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award*, International Arbitration Case Law (Oct. 2011), WINSTON & STRAWN, LLP, <https://www.winston.com/images/content/9/8/v2/986/Kostytska1.pdf>.

155. Belz, *supra* note 12, at 745.

156. ECT, *supra* note 103, art. 45(1).

157. *Id.*

158. Belz, *supra* note 12, at 745.

159. *Id.* at 746.

160. *See id.*

161. Article 10(1) reads: "shall also enjoy the most constant protection and security and no contracting party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use enjoyment or disposal." ECT, *supra* note 103, art. 10(1).

162. Daniel Doty, *Crushing Europe's Pipeline Dreams: Russia's Mineral Monopoly, Weakness in the Euro. Energy Market, and Realism in the Future*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 759, 769 (2013).

163. Doty, *supra* note 162, at 769–70.

2015 and will likely continue the practice in order to preserve high prices and its political agenda.¹⁶⁴

III. YUKOS AND THE APPLICATION OF THE ECT

Yukos was not the first case utilizing the ECT in arbitration proceedings; however, it was the largest arbitration award in history under the Treaty.¹⁶⁵ An appeal to the Hague District Court's reversal of the award is pending, leaving the provisional application of the ECT as an open-ended question with an uncertain answer.¹⁶⁶

A. The Yukos Cases and the Threat to the Provisional Application

Three separate shareholders of the now defunct Yukos Oil Company were successful in 2014, winning the largest arbitration award in history under the ECT.¹⁶⁷ The victory was short-lived as Russia filed in the Hague District Court three Writ of Summons, which sought to set aside the awards, as well as challenge the jurisdiction of the arbitral tribunal to hear the cases.¹⁶⁸ Russia argued that the tribunal had no jurisdiction due to the lack of a valid arbitration agreement, despite the tribunal's determination that it held jurisdiction through the ECT.¹⁶⁹ Russia, as only a signatory to the ECT, was subject to the provisional application of the Treaty.¹⁷⁰ The Hague District Court's approach to the provisional application of the ECT entailed a piecemeal approach, meaning that the tribunal could examine Russia's domestic law to determine if such laws were consistent with one clause of the ECT—in this case, the arbitration clause.¹⁷¹ The Court also looked at whether international investment arbitration and methods of dispute resolution were authorized in Russian law to determine if they were irreconcilable with the points and principles laid out in Russian legislation.¹⁷² The Court ultimately found that because Russia had never ratified

164. *See id.* at 770.

165. Goldhaber, *supra* note 111.

166. *Id.*

167. *Id.* *The Yukos Cases*, *supra* note 110, at 76.

168. *The Yukos Cases*, *supra* note 110, at 76.

169. *Id.* at 77.

170. *Id.*

171. *Id.*

172. *Id.* at 78

the ECT, it was only bound by the provisions that complied with Russian national law.¹⁷³ The Court determined this through a fragmented approach hinging on constitutional limitations of Russia that did not allow for treaties deviating from Russia's national law to be applied based merely on their signature; rather they had to be ratified.¹⁷⁴ This determination was in spite of Article 25 of the VCLT, which provides the legal basis for provisional applications.¹⁷⁵ This clause, though, is amorphous and has not been applied consistently except to acknowledge that while there is an obligation to refrain from acts that would defeat the object and purpose of a treaty, it does not create a positive legal duty upon a signatory to do certain acts or to carry out specific provisions from a particular treaty.¹⁷⁶

The decision by the tribunal in *Yukos* creates a problem for arbitrations going forward under the ECT and arbitrations in general.¹⁷⁷ The ruling exposes holes in the provisional application of the ECT, particularly for those nations that have not ratified the Treaty.¹⁷⁸ This loophole created by the tribunal allows nations to escape obligations under the ECT simply by not ratifying the Treaty, while still retaining all benefits accorded during their time as provisional applicants.¹⁷⁹ This undermines the exact object and purpose of the Treaty—to create a level playing field—and may, upon further examination on appeal, be overturned.¹⁸⁰ The political and economic significance of *Yukos* ensures that the case will continue to be examined and that the tribunal for the case will continue to clarify and shape the use of

173. *Id.*

174. *Id.*

175. *Id.* at 79.

176. *Id.* at 78.

177. Ben Knowles & Khaled Moyeed, *The US\$50 Billion Yukos Award Overturned – Enforcement Becomes a Game of Russian Roulette*, WOLTERS KLUWER: KLUWER ARB. BLOG (May 13, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/>.

178. *The Yukos Cases*, *supra* note 110, at 85. This primarily applies only to Belarus and Russia as Australia, Norway, and Iceland all made declarations that they were not going to apply the treaty provisionally which was allowed under the treaty. *Id.*

179. *Id.*

180. *Id.*

provisional application clauses holding signatories accountable.¹⁸¹ This is good news for Georgia, which seeks to capitalize on the ability to hold Russia accountable for actions taken in contravention to the Treaty.

IV. POTENTIAL SOLUTIONS

Support for Georgia's ongoing conflict with Russia dwindles when confronted with armed interference by Russia. It is through the strength of a strong relationship with Europe and a continued expansion in relations with the West that Georgia may be able to regain autonomy and continue to prosper.

A. Expanded European Union Relations

Georgia currently shares a prosperous relationship with the European Union, deepening their trade relationship by establishing a DCFTA and signing an association agreement that went into force on July 1, 2016.¹⁸² The European Union continues to affirm its support for Georgia in the wake of the Five-Day War and states that it is committed to helping Georgia "overcome the consequences of internal conflicts in Georgia's breakaway regions. . . ."¹⁸³ While the European Union Monitoring Mission (EUMM) and the other initiatives put in place by the European Union are important and necessary to Georgia's success, it is not enough. The socioeconomic development of Georgia can contribute to success in the region, but does not prohibit or deter Russia from continually creeping further into the country as it seeks to expand the territory of South Ossetia.¹⁸⁴

European Union involvement on the ground in Georgia has not been evident, despite Georgia's own commitment to peacekeeping that contributes to the European Union's Common Security and Defense Policy operations.¹⁸⁵ The EUMM's work patrolling the areas adjacent to the boundary line is simply not effective, and is likely overpowered by the military power displayed by

181. *Id.*

182. *EU-Georgia Relations – Factsheet*, EUR. UNION EXTERNAL ACTION (Oct. 11, 2017), https://eeas.europa.eu/headquarters/headquarters-homepage_en/23634/EU-Georgia%20relations,%20factsheet.

183. *Id.*

184. *Id.*

185. *Id.*

Russia on the other side of the boundary.¹⁸⁶ As Georgia continues to expand its trade with the European Union, particularly through the sale of gas passing through its pipelines, the portion of the Baku-Supsa oil pipeline under Russia's control becomes even more critical to protect.¹⁸⁷ While the European Union continues to assert support and attempts to foster engagement between regions based on a human rights approach, this human rights-based approach ignores the potential for an economic downfall in the region.¹⁸⁸ The border within Georgia, supported by Russia's "creeping annexation," has moved just five hundred meters away from Georgia's main highway, threatening all aspects of economic success in the region.¹⁸⁹ The European Union's financial contributions have made a difference in Georgia's ability to develop economically. These contributions have raised the income of Georgian farmers, provided proper access to justice through the establishment of a Government Legal Aid Service, established regional development programs, and ensured transparent finances for the Georgian Government. Due to Russia's movement into Georgia, this all is at risk.¹⁹⁰ Furthermore, the European Union has helped to establish further mobility for citizens and pushed Georgia to adopt its higher export standard requirements.¹⁹¹

B. Enhanced Military Response to Russia's Aggression

Russia's current approach to gaining territory has not yet led to a military outbreak of any substantive proportions since the Five-Day War. Russia did not, however, fulfill its commitment to the Six-Point Cease-Fire Agreement ("Sarkozy Plan") established after the war and has subsequently not been held accountable for not complying with the points in the agreement.¹⁹² The six points of the Sarkozy Plan—"renouncing force, ending hostilities, letting in humanitarian aid, withdrawing both armies in initial positions, and putting Abkhazia and South Ossetia on the

186. *Id.*

187. *EU Warning over Land Grab*, *supra* note 17.

188. *Id.*

189. *Id.*

190. *EU-Georgia Relations – Factsheet*, *supra* note 182.

191. *Id.*

192. *Renewed Confrontation in Georgia*, *supra* note 109.

international agenda”¹⁹³—were deemed to be sufficient in calming the aggression and preventing a full destruction of Georgia.¹⁹⁴ Georgia was forced to retreat and back down from its conflict with Russia after 2008, as Europe held the former state accountable for its irresponsibility at the border, closing doors to closer a European partnership with Georgia.¹⁹⁵

Russia’s aggression in Ukraine should serve as a guide for what could happen in Georgia if no additional military help is offered to Georgia.¹⁹⁶ Without the military assistance of a European Union nation or NATO, Georgians would face usurpation of their nation by Russia.¹⁹⁷ The problem currently existing in bridging this approach is Georgia’s lack of strategic importance to nations other than Russia.¹⁹⁸ Russia sees Georgia as a nation that currently allows Europe to seek oil and gas resources outside of its own state-controlled energy empire, thus taking away bargaining chips Russia has used to keep prices high.¹⁹⁹ Europe, however, does not receive enough of its gas supply from pipelines in Georgia for the threat of a Russian takeover to produce a European military response.²⁰⁰ Furthermore, the United States has dropped much of its diplomatic activity in Georgia since the war, preferring not to intervene when it is militarily involved elsewhere.²⁰¹ If the United States continues to disengage from European conflicts, it could allow Russia to exploit what the latter could see as a weakness on the part of the West—an abandoned Georgia.²⁰² The Council on Foreign Relations suggested in early 2016 that it was in the United States’ best interest to maintain robust political support for Georgia in order to maintain a strong position against Russian aggression in the region.²⁰³ While Russian President Vladimir Putin continues to exploit weaknesses, he responds to showings of strength by other nations and the

193. RAYFIELD, *supra* note 2, at 398

194. *Id.*

195. *Id.*

196. *Renewed Confrontation in Georgia*, *supra* note 109.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

United States.²⁰⁴ While Russia seemed to believe the Obama administration would have acted more forcefully in Georgia than it did during the crisis in Ukraine, it is unforeseen how the current Trump administration would react.²⁰⁵ The United States could assist Georgia substantially through a greater NATO presence and U.S. military aid's boosting Black Sea security, but this does not appear to be on the current priority list of the Trump administration.²⁰⁶

CONCLUSION

Russia's continued path of aggression in energy trade threatens Georgia's economic and territorial security. While the options available to Georgia that do not include armed conflict are few, the opportunity to utilize the ECT to remove Russia from the region due to interference with investments in Georgia is possible. Through balanced diplomatic efforts, Georgia can find a path to economic prosperity.

*Jennessa M. Lever**

204. Putin is known for flaunting his military power and continues to defy the West with military actions throughout the region. Henry Meyer, *Vladimir Putin*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/business/vladimir-putin/2018/07/11/af1fe564-8518-11e8-9e06-4db52ac42e05_story.html?noredirect=on&utm_term=.7069e8e5ec4d.

205. *Id.*

206. *Id.*

* B.A., Simmons University (formerly Simmons College)(2014); J.D., Brooklyn Law School (2019); Executive Notes and Comments Editor, *Brooklyn Journal of International Law* (2018-2019). Thank you to the Journal staff for their support in the development of this Note. In particular, I would like to thank George Somi, Wynnee Ngo, and Samantha Sigelakis-Minski for their assistance and guidance throughout this process. I would additionally like to thank my father, Hayden Lever, for always being my biggest advocate and first editor; and my mother, Tamara Lever who supports me in everything I do. Without my parents' unconditional love and support, I would not be where I am today. All errors or omissions are my own.