



EU ENERGY POLICY



Federica, phd.

Jean Monnet Module on EU Foreign Policy



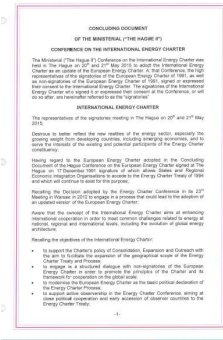
WHAT IS THIS MODULE ABOUT...

- Which are the main features of the EU foreign energy policy? With a particular focus on the Energy Union strategy and the related 2030 Framework for Climate and Energy and the European Energy Security Strategy
- Which is the role of the EU in the Energy Charter Treaty?
- What is the role and function of EURATOM?
- Which is the role of the EU in the international arena with regard energy and climate change policies?

LECTURES' AND SEMINARS' CONTENT

- the main features of the EU foreign energy policy (**Lecture No. 1**)
- the role and function of the European Atomic Energy Community (EAEC or Euratom) (**Lecture No. 2**)
- the role of the EU in the Energy Charter Treaty (**Lecture No. 3**)
- external action instruments in the energy sector and local action support (**Lecture No. 4**)

- mini-simu on climate change: EU at UNEP (**Seminar No. 1**)
- web-sources and materials on EU energy policy (**Seminar No. 2**)



LECTURE N. 3



THE ROLE OF THE EU IN THE ENERGY CHARTER TREATY

ENERGY CHARTER PROTOCOL ON ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS

(Annex 3 to the Final Act of the European Energy Charter Conference)

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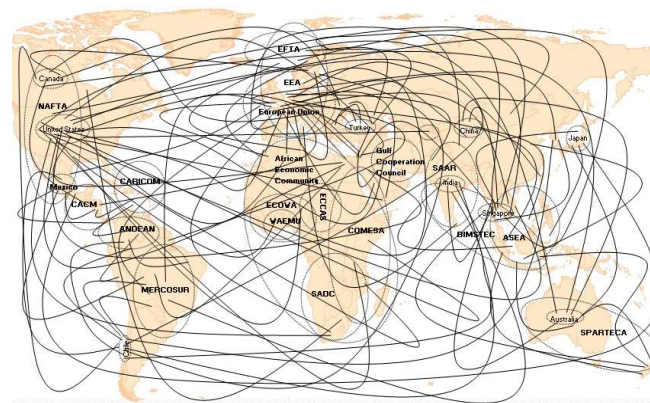
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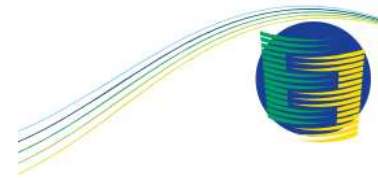
Appreciating the vital role of the private sector including small and medium-sized enterprises in promoting and implementing energy efficiency measures, and intent on ensuring a favourable institutional framework for economically



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LECTURE No. 3



**THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY**
with Related Documents



Euratom

Freedom of transit

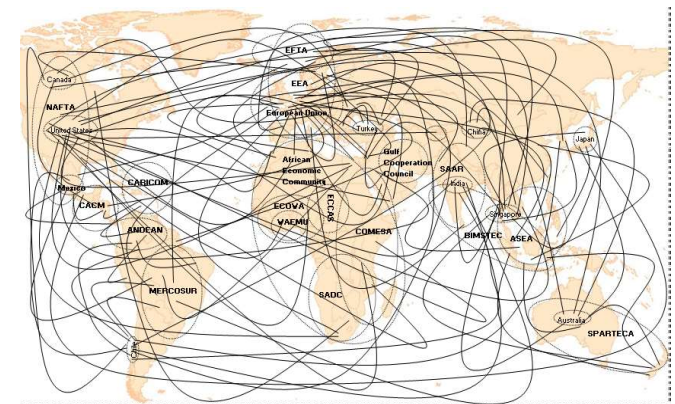
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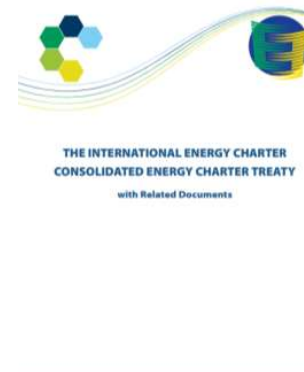
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ENERGY CHARTER TREATY (1)

- signed in December 1994
- entered into force in April 1998.

Sectorial agreement

54 members (including the European Union and Euratom)



ENERGY CHARTER TREATY (2)

Objectives

The main idea behind the Energy Charter is to make available know-how, technology and financial resources of Western companies for the development and trade of energy resources in the eastern side of Europe.

The Energy Charter Treaty will establish a closer cooperation between the European Union and the East European countries. This cooperation will contribute to a sustainable economic and social development in the East European countries. An efficient European energy market and security to investors are created. It will also lead to greater security and a more environmentally sustainable supply and use of energy in Europe.



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY

with Related Documents



RUSSIA AND ECT

Signed the ECT on 17 December 1991, BUT never ratified it

On 20 August 2009 the Russian Federation has officially informed the Depository that it did not intend to become a Contracting Party to the ECT

Such notification results in Russia's termination of its provisional application of the Energy Charter Treaty upon expiration of 60 calendar days from the date on which the notification is received by the Depository.



ARTICLE 45(3(A)) OF THE ECT

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory [...]

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository [...]



UKRAINE AND ECT

signed on 17 December 1994

ratified on 6 February 1998



EUROPEAN UNION AND EURATOM

1994 Energy Charter Treaty

signed on 17 December 1994

deposited on 16 December 1997

entered into force on 16 April 1998



EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM)

international organization established to form a common market for the development of the peaceful uses of atomic energy and facilitate the establishment of a nuclear-energy industry at the regional level

Other aims of the community :

- coordinate research in atomic energy
- encourage the construction of nuclear-power installations
- establish safety and health regulations
- encourage the free flow of information
- establish a common market for trade in nuclear equipment and materials

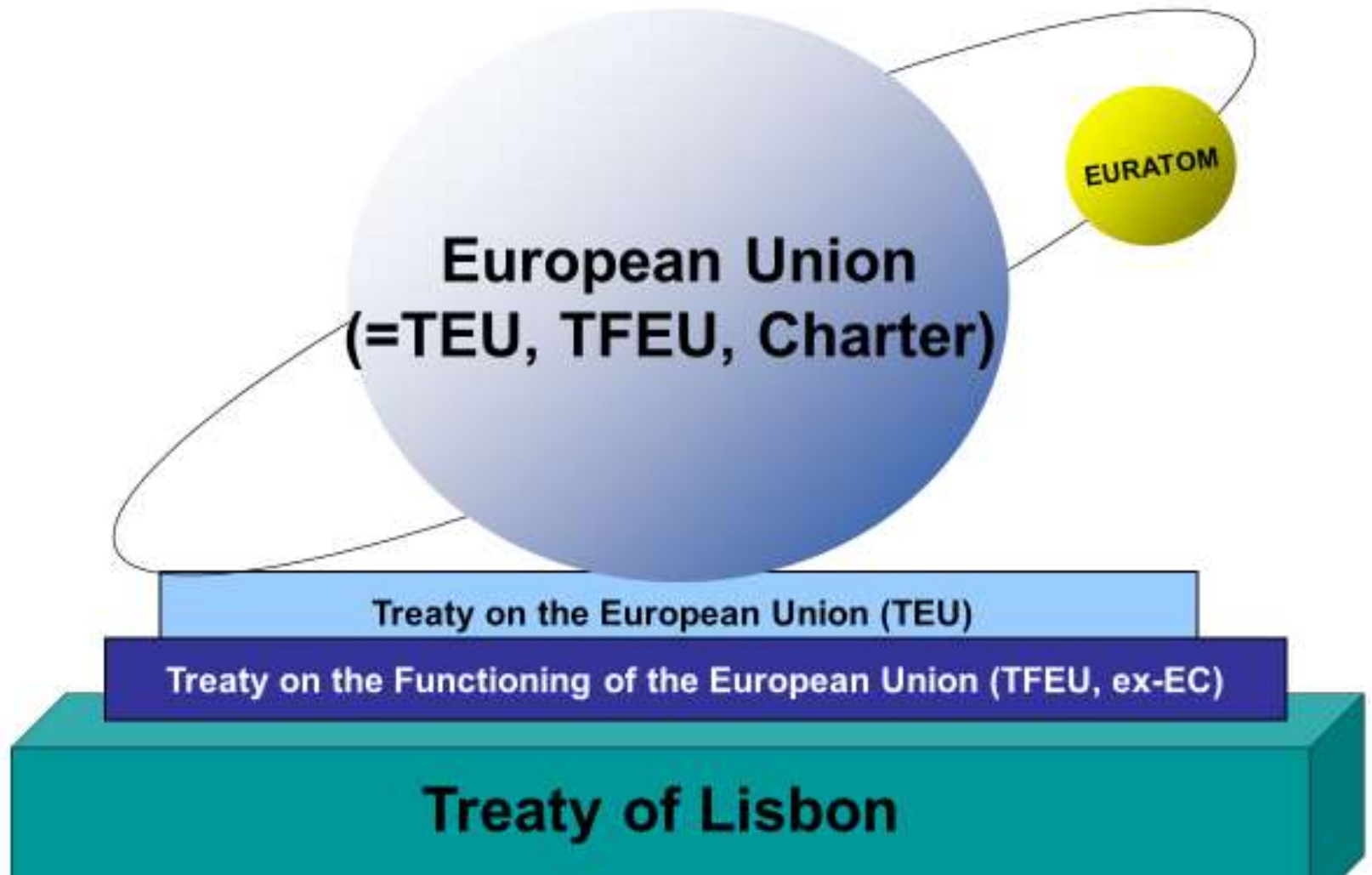
Euratom's control was not extended to nuclear materials intended for military use.

The **Common Market for Trade in Nuclear Material**, which eliminated import and export duties within the community, came into existence in January 1959

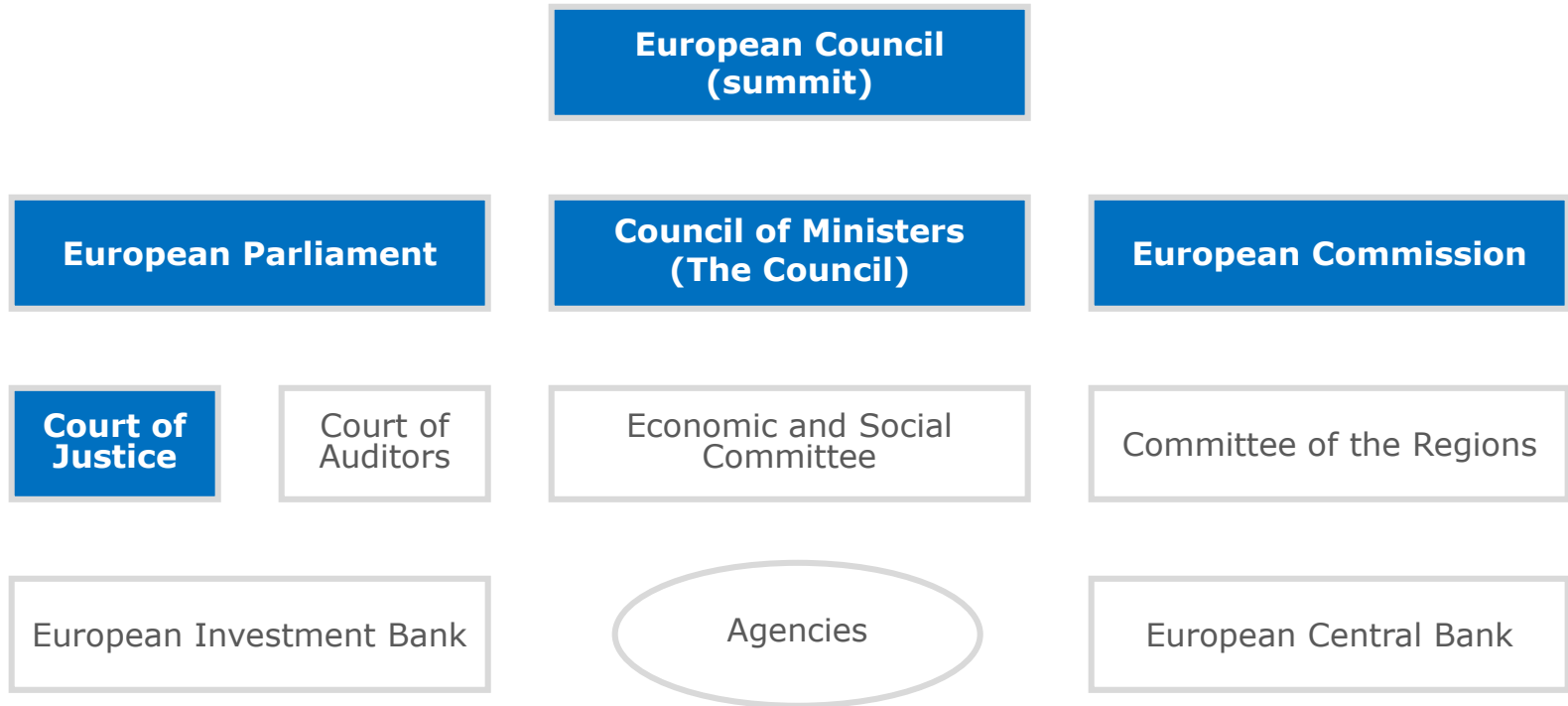
Euratom shared a Court of Justice and a parliament with the European Economic Community and the European Coal and Steel Community; in July 1967, also the executive bodies (the Commission and the Council of Ministers) of all three communities were merged.



Structure of the EU



INSTITUTIONS OF THE EUROPEAN UNION (1)





- News
- Publications
- Meetings
- Interviews and Articles
- Members and Observers

- Derestricted Documents
- VACANCIES
- Short-Term Programmes
- Knowledge Centre
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INTERNATIONAL ENERGY CHARTER

Agreed text in several languages

Frequently asked questions

Sixth Executive Training Programme for Young Professionals: Visegrad+ Session

Strengthening Energy Transition in Ukraine and Europe's Eastern Neighbourhood: Addressing the Region's Challenges through Good Governance Practices

Brussels, 5-8 May 2015

- Visegrad Fund

click on the banner for more information on this event

Energy Charter Press Briefing: Can the Energy Union Be Built without the Energy Charter?



On 27 April 2015 Secretary General Rusnák opened the first ever Energy Charter Press Briefing on the topic of "Energy Union: Can We Do It without the Energy Charter?". Dr. Rusnák began the discussion with some background information on the Energy Charter Treaty. He then explained how the Charter modernisation process had led to the negotiations of a new political declaration, the International Energy Charter (IEC), with the aim of refreshing the principles enshrined in the 1991 European Energy Charter. The IEC reflects the need to adapt the text of the 1991 Charter to modern challenges and dynamics in the energy sector, and to change its language from a mainly East-West perspective to a more global one.

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OTHER NEWS

The Energy Charter's Potential Role in Boosting the Development of Serbia's

Global Energy Governance

The Energy Charter and the G20



ECT - OBJECTIVES

- To attract private capital
- To facilitate cross-border projects
- To promote energy efficiency policies
- To develop technology transfer
- To encourage amicable settlements of disputes
- To be part of a constant and composite dialogue on cross-border energy issues among producer, transit and consumer countries



STRUCTURE OF THE ECT

Treaty: Preamble, 8 Parts, 14 Annexes

Institutional Structure

- Energy Charter Conference → Governing Body
- Energy Charter Secretariat → Administrative Body (monitoring implementation of ECT)



ENERGY CHARTER CONFERENCE

Governing and decision-making body of the Energy Charter process

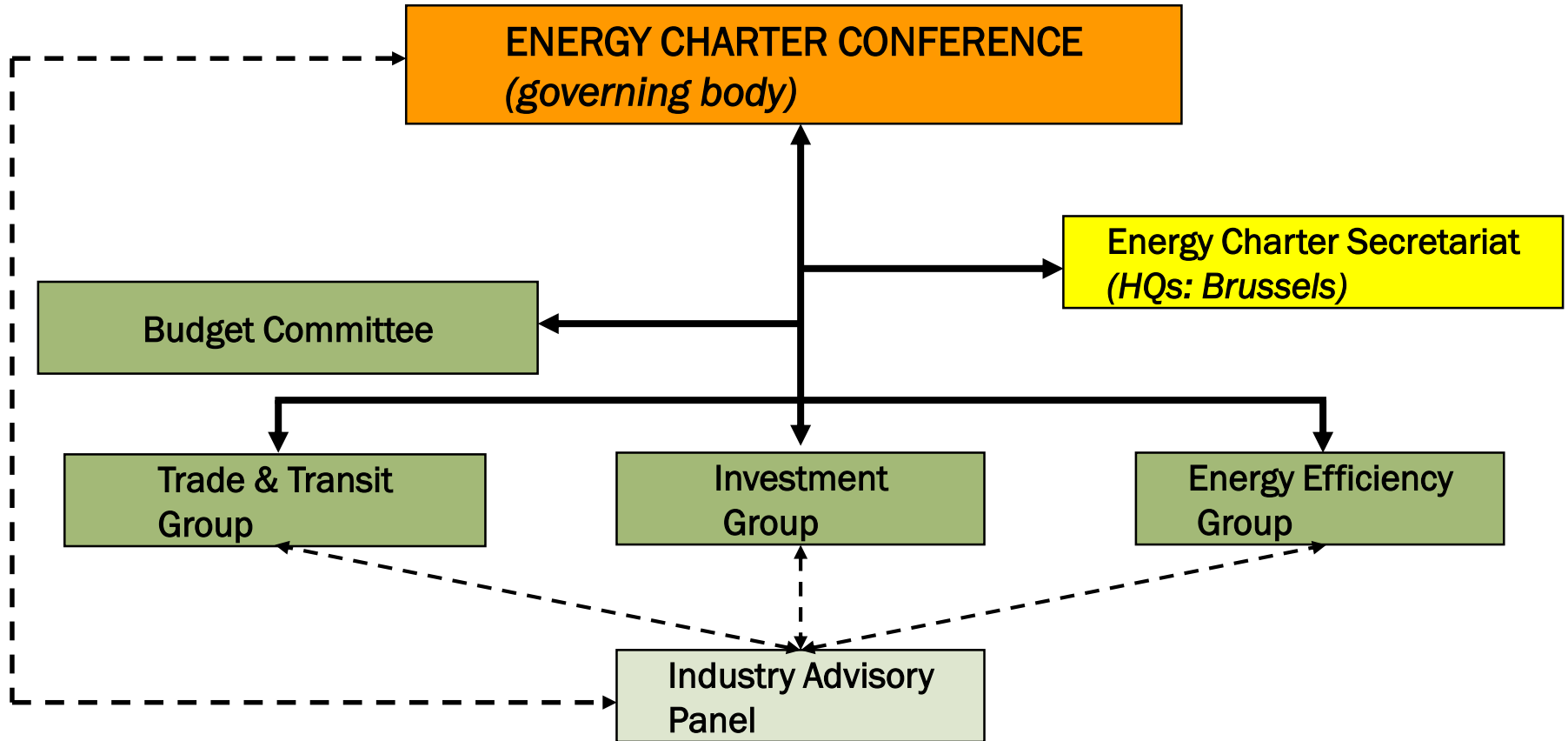
- All States parties to the ECT are members of the Conference, which meets on a regular basis to discuss issues affecting energy cooperation



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY

with Related Documents

ENERGY CHARTER PROCESS



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APEC Energy, 1 Oct
2008

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SUBSIDIARY BODIES

Strategy Group

- role of the Energy Charter Process in the global context
- possible enlargement of its constituency.

Investment Group

Trade & Transit Group

Working Group on Energy Efficiency and Related Environmental Aspects

Budget Committee

Legal Advisory Committee



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ECT AND SOVEREIGNTY OVER ENERGY RESOURCE

ECT Article 18 (1)

"The Contracting Parties recognise state sovereignty and sovereign rights over energy resources..."

ECT Article 18 (2)

"... the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources."

ECT Article 18 (3)

"Each state continues to hold in particular the rights to decide the geographical areas ... to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation ..."



The four pillars of the ECT

Dispute settlement

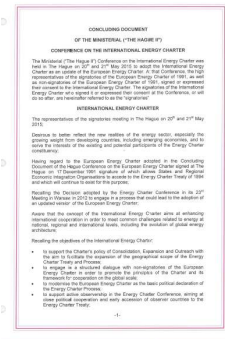
Investment protection

Trade

Transit

Energy efficiency

Energy Charter Treaty



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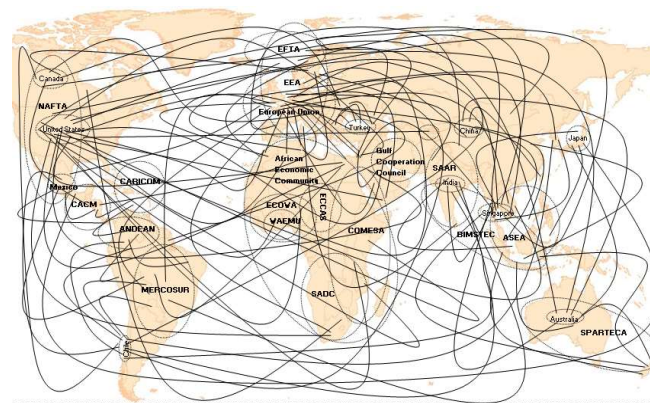
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TRADE IN ENERGY UNDER ECT

Applies by reference WTO rules to all trade in energy materials and products

National treatment once energy goods crossed border

Elimination of quantitative restrictions



THE WTO IN BRIEF

LOCATION: Geneva, Switzerland

ESTABLISHED: 1 January 1995

CREATED BY: Uruguay Round negotiations (1986-94)

MEMBERSHIP: 164 members representing 98% of world trade

FUNCTIONS:

Administering WTO trade agreements

Forum for trade negotiations

Handling trade disputes

Monitoring trade policies

Technical assistance and training for developing economies

Cooperation with other international organizations



<https://www.wto.org>



WTO AGREEMENTS

Goods

Services

**Intellectual
property**

Disputes

GATT

GATS

TRIPS

**Dispute
settlement**

Other goods
agreements
and annexes

Services
annexes

*Market access
commitments*

Countries'
schedules of
commitments

Countries'
schedules of
commitments

THE WTO: MAIN NORMATIVE PRINCIPLES

- 1) Non-discrimination → national treatment (**after** entering in a country, imported and locally-produced goods (as well as services, trademarks, copyrights and patents) must be treated equally)
- 2) Abolition of quantitative restrictions
- 3) Transparency
- 4) Exceptions



DISPUTE SETTLEMENT IN THE WTO

It is regulated by the DSU (**Understanding on rules and procedures governing the settlement of disputes**)

DSB supervises its application

Compulsory jurisdiction

Members obliged to bring disputes under the Covered Agreements to WTO dispute settlement

Exclusive jurisdiction

No other fora



Freedom of transit

ECT Article 7 (1)

Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and 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.



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY
with Related Documents

TRANSIT

Freedom of energy transit

Non-discrimination as to origin, destination or ownership

Non-interruption of flow

Conciliation procedure for transit disputes

Negotiations of Transit Protocol



INVESTMENT PROVISIONS OF THE ECT

Part III of the ECT ('Investment Promotion and Protection')

- Standards of investment protection
- Access to dispute resolution mechanisms



HOST STATE

**BILATERAL
INVESTMENT
TREATY (BIT)**

HOME STATE

(State of nationality of the investor)

STANDARDS OF
PROTECTION of foreign
investments/investors

TODAY:
more than 3000 BITs

FOREIGN INVESTOR

- NATURAL PERSON
- JURIDICAL PERSONS (MNEs)

- What is an
investment?**
- Financial contribution
 - Certain duration
 - Risk

SOURCES OF INTERNATIONAL INVESTMENT LAW

Treaty-law

- Bilateral investment treaties (BITs)
- Free trade agreements with investment provisions or instruments (NAFTA, ASEAN, MERCOSUR)
- Sectorial agreements (Energy Charter Treaty)
- Dispute settlement instruments and regimes (diplomatic protection , 1965 ICSID Convention)

International investment agreements [IIAs]

Customary international law rules

- General standards of protection of foreign investor/investment

Soft-law instruments

- Corporate Social Responsibility
- [public interests] human rights / environmental concerns

Investment arbitration case-law



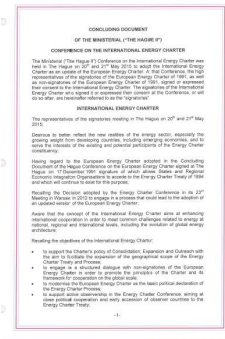
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BITS

Proliferation of BITs since the 1990s

Rationale is international protection for foreign investors and to facilitate the flow of capitals between countries (typically a capital-exporting and a capital importing country)



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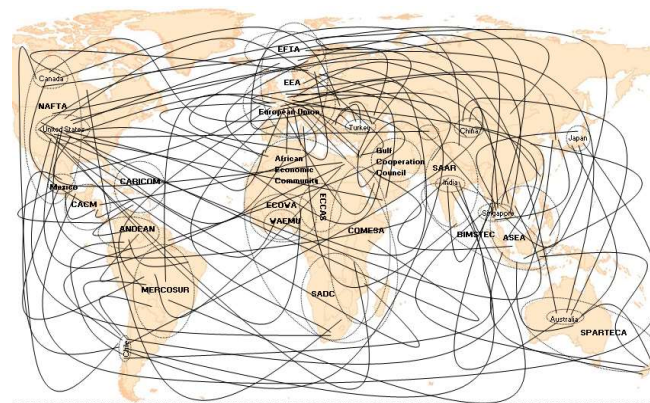
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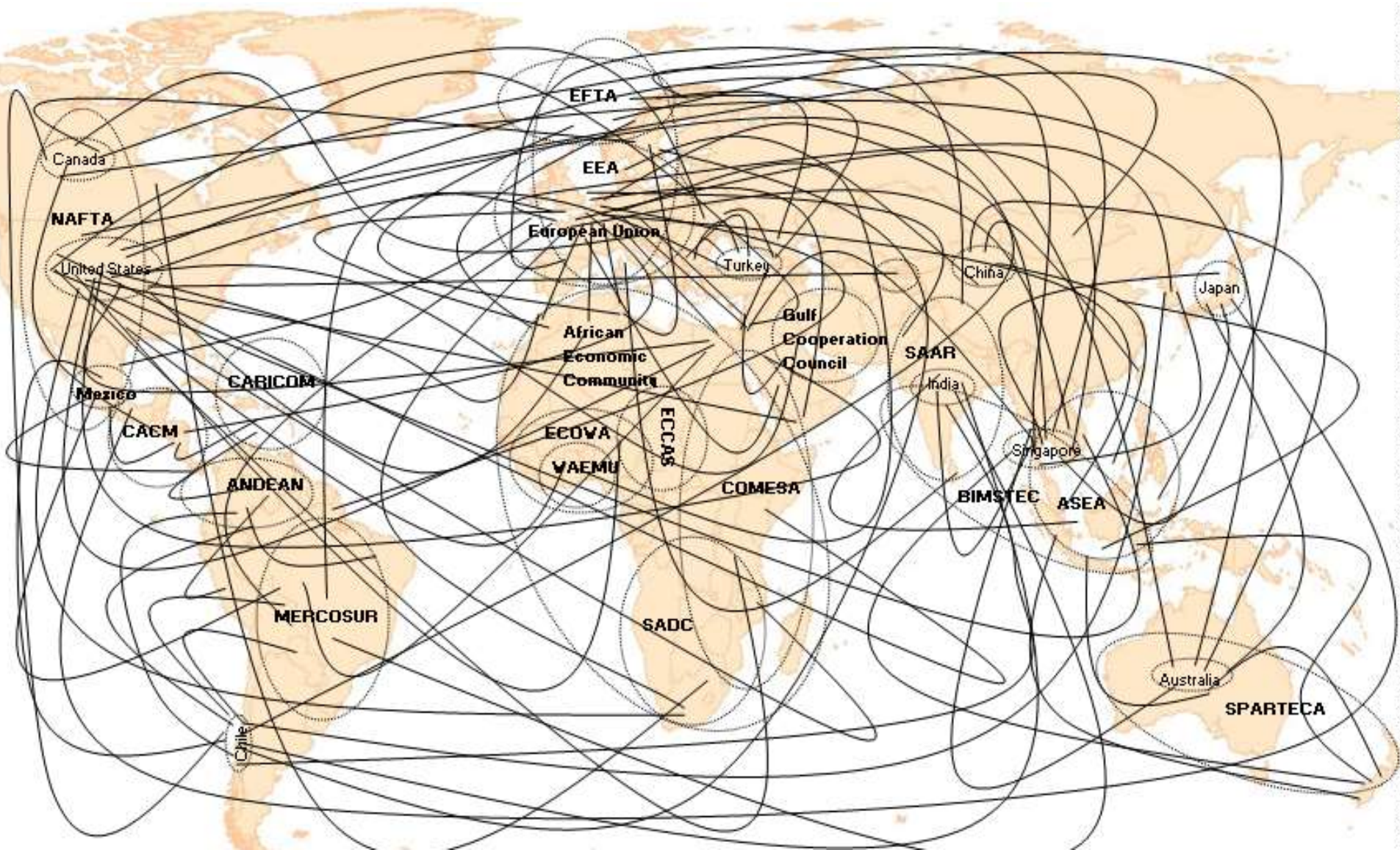
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THE SPAGHETTI BOWL OF IIAS



NETWORK OF IIAS: MORE THAN 3000



Source: UNCTAD, IIA Navigator.

Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.



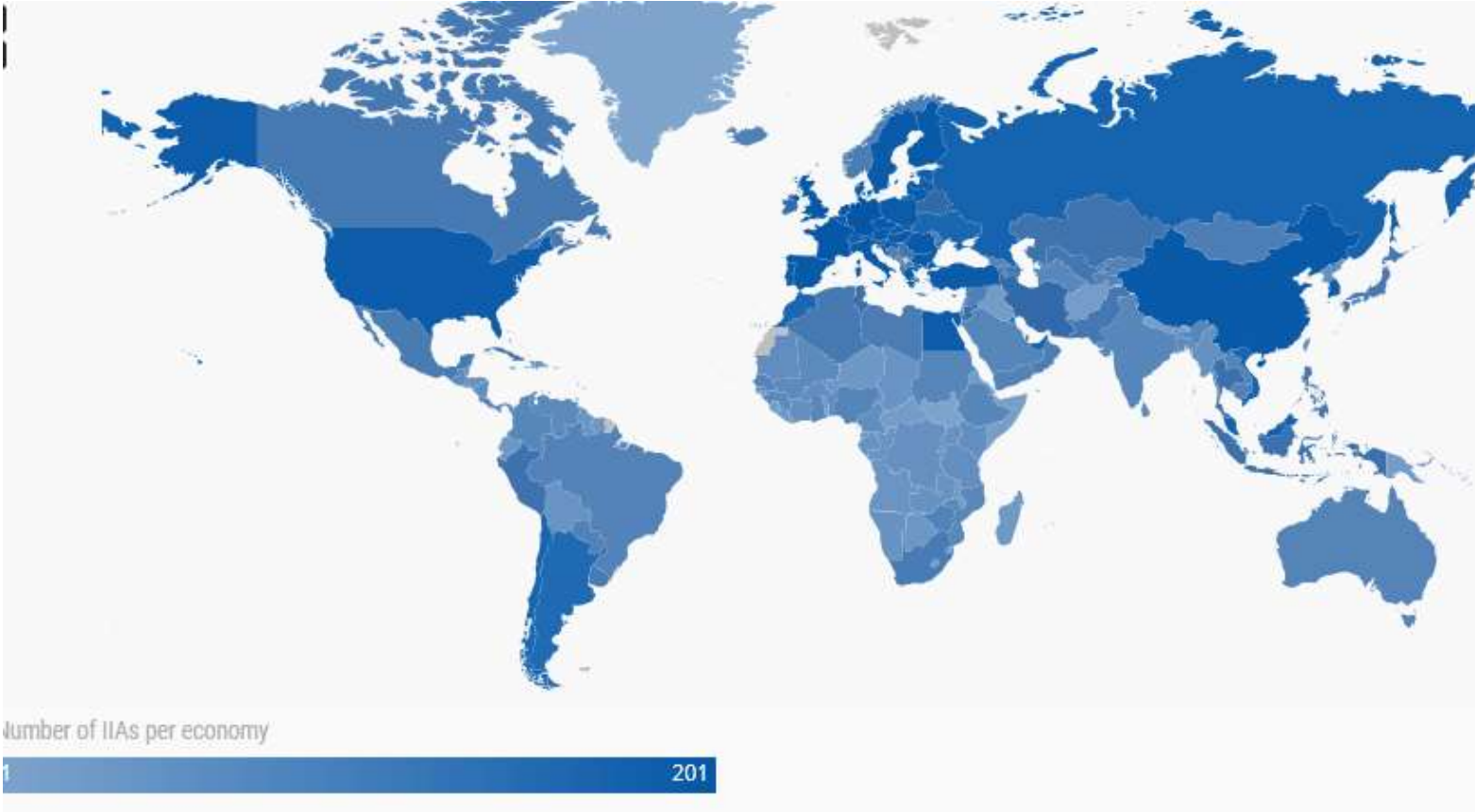
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MAP OF IIAS (UNCTAD)



WHAT IS AN INVESTMENT? THE S.C. SALINI TEST

“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and participation in the risks of the transaction [...]. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and duration of performance of the contract [...]”

(Salini Costruttori SpA and Italstrade SpA v. Morocco, Decision on Jurisdiction, 16 July 2001)

WHAT IS AN *INVESTMENT*?

- A) **Financial contribution (broad).** 'Contribution' is a generic term which includes financial investments, loans, assets, services, in other words EVERY COST, IN EVERY FORM, BORN BY A PARTY FOR AN ECONOMIC PURPOSE
- B) **Certain duration (restricting the def.).** A sale or a contract with no effect after the single operation is not an investment. An investment implies a certain duration
- C) **Risk.** The meaning of *risk* is clear: every operation which entails an element of uncertainty
- D) some awards have added a fourth element (see *Joy Mining* and *Patrick Mitchell* cases), namely "**the regularity of profit and contribution to development for the foreign country**"

WHO IS THE 'INVESTOR' UNDER IIL ?

- Definition of 'investor' may be included in BITs or other investment agreements
 - Netherlands - Argentina BIT (1994) , Article 1:
 - For the purposes of the present Agreement [...] (b) the **term "investor" shall comprise** with regard to either Contracting Party: i. **natural persons having the nationality of that Contracting Party in accordance with its law;** ii. [...] **legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party** in which a place of effective management is situated; and iii. **legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party.** [...]
 - NAFTA, Article 1139. Definitions
 - For purposes of this Chapter [...] **investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment**

Investors as natural persons

- *Hussein Nuaman Soufraki v The United Arab Emirates, ICSID Case ARB/02/7, Award, 7 July 2004:*

“55. It is accepted in international law that **nationality is within the domestic jurisdiction of the State**, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality [...].”

Investors as juridical persons: which nationality?

- Place of incorporation test and effective control test
- Shareholders as investors

STANDARDS OF TREATMENT OF FDI UNDER INTERNATIONAL LAW

1. FAIR & EQUITABLE TREATMENT
2. FULL PROTECTION & SECURITY
3. INTERNATIONAL MINIMUM STANDARD
4. NATIONAL TREATMENT
5. MOST-FAVORED-NATION (MFN) TREATMENT

1- FAIR & EQUITABLE TREATMENT

Netherlands - Argentina BIT (1994)

Article 3

1) Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors [...]

2- FULL PROTECTION & SECURITY

Germany - Argentina BIT (1991)

■ Article 4

Las inversiones de nacionales o sociedades de una de las Partes Contratantes gozaràn de plena protecciòn y seguridad jurìdica en el territorio de la otra Parte Contratante.

Asian Agricultural Products Ltd (AAPL) v Sri Lanka, ICSID Case ARB/87/3, Final Award, 27 June 1990

- "47. [...T]he words 'shall enjoy full protection and security' have to be construed according to the 'common use which custom has affixed' to them [...]. In fact, similar expressions, or even stringer wordings like the 'most constant protection', were utilized since last century in a number of bilateral treaties concluded to encourage the flow of international economic exchanges and to provide the citizens and national companies established on the territory of the other Contracting Party with adequate treatment to them as well as to their property [...]».

3- INTERNATIONAL MINIMUM STANDARD

Argentina - US BIT (1991)

■ *Article II*

2. a) Investment shall [...] in no case be accorded treatment less than that required by international law.

NAFTA

■ *Article 1105. Minimum Standard of Treatment*

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security [...]

NAFTA Free Trade Commission, Notes of Interpretation (31 July 2001)

- "The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens"

4 - NATIONAL TREATMENT

US Model BIT (2012)

- *Article 3. National Treatment*

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors [...]

Pope & Talbot Inc v Canada, NAFTA Case, Award on the Merits of Phase 2, 10 April 2001

- “75. The Tribunal must resolve this dispute by defining the meaning of “like circumstances.” [...] the meaning of the term will vary according to the facts of a given case. By their very nature, “circumstances” are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of “like” can have a range of meanings, from “similar” all the way to “identical”. In other words, the application of the like circumstances standard will require evaluation of the entire fact s [...]”.

5- MOST-FAVORED-NATION (MFN) TREATMENT

ILC, Most-Favoured-Nation Clause, Report of the Working Group, 20 July 2007

“[...] A MFN clause is a provision [...] under which a State agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third States. [...]»

EXPROPRIATION

Requirements of legitimacy

- 1) Must be expressly provided by law
- 2) Measures adopted for 'public utility'
- 3) Non-discriminatory measures
- 4) Compensation (*fair* compensation)
 - *cd. Hull Formula (Diplomatic note by the US Secretary of State Cordell Hull - 1938): "no government is entitled to expropriate private property, for whatever purpose, without provision for **prompt, adequate** and **effective payment** therefore."*

Direct or indirect (or creeping) expropriation

INDIRECT OR 'CREEPING' EXPROPRIATION

SD Myers Inc v Canada, NAFTA/UNCITRAL Case, Partial Award, 13 November 2000

"283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."

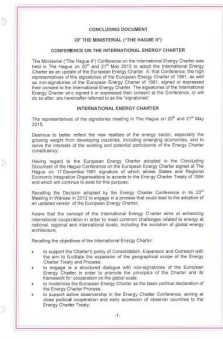
FDI AND DISPUTE SETTLEMENT MECHANISMS

PUBLIC INTERNATIONAL LAW

A. Settlement of disputes through diplomacy

B. Settlement of disputes before international tribunals or through arbitration

- 1) An international tribunal (e.g., ICJ, ITLOS).
- 2) A dispute resolution panel (e.g., WTO).
- 3) Arbitration
 - PCA
 - Ad hoc arbitration



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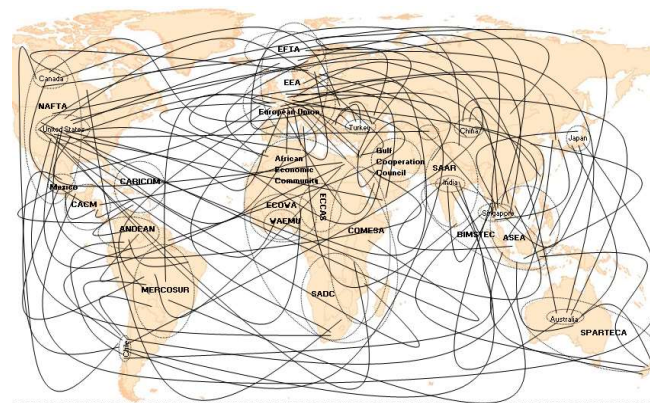
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HOST STATE

HOME STATE



State-to-State arbitration



State-investor arbitration
Investor-State arbitration



ICSID

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

FOREIGN INVESTOR

INVESTOR-STATE/ STATE-INVESTOR DISPUTE SETTLEMENT

1. Public contracts' jurisdictional clauses

- Contract claims

2. Treaty-based jurisdictional clauses

- Treaty claims

ICSID SYSTEM

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

- ICSID Convention
- Washington Convention

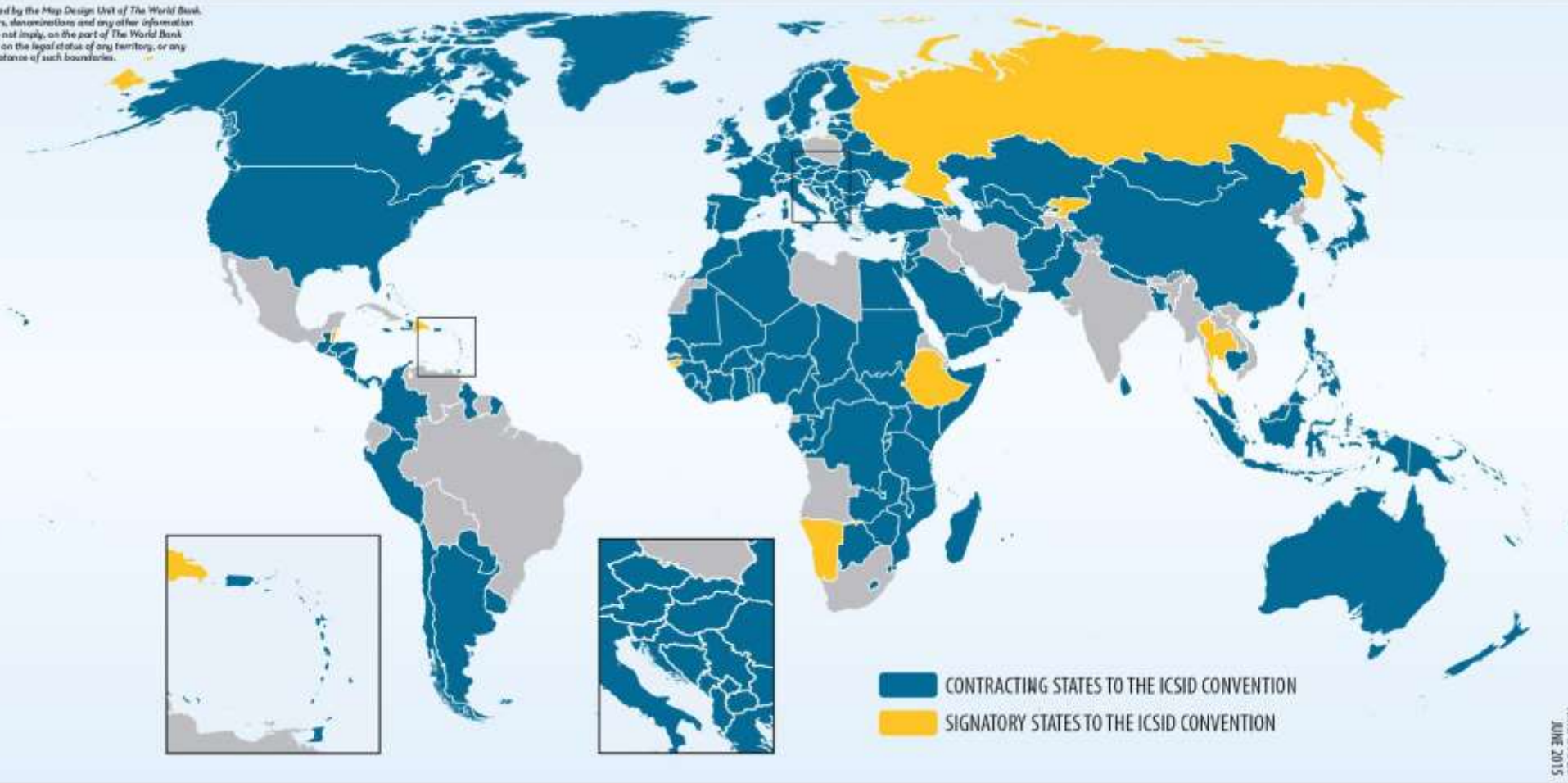
Entered into force 14 October 1966

- 139 members / 154 signatories



INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

...ed by the Map Design Unit of The World Bank.
...s, elevations and any other information
...not imply, on the part of The World Bank
...on the legal status of any territory, or any
...status of such boundaries.



Russian signed the ICSID Convention in 1992 but never ratified it

Ukraine signed the ICSID Convention in 1998 and ratified it in 2000

Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Energy policy

EU FOREIGN INVESTMENT POLICY

Before the entry into force of the Lisbon Treaty

- freedom of establishment and the free movement of capital
- Intra-MSs BITs and BITs concluded by MSs with third countries

Lisbon Treaty → exclusive competence on the CCP covers, among others, FDI

ECT: Definitions of “Investment” and “Investor”

ECT Articles 1 (6) and 1 (7)

Investment: Every kind of asset (e.g. shares, claims to money, intellectual property, licences, concessions) owned or controlled directly or indirectly by an Investor

Investor: natural persons of a CP (including permanent residents), and companies/organisations organised in accordance with the laws of a CP



ARTICLE 1(6) ECT

(6) "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;

(d) Intellectual Property; [...]



ARTICLE 1(7) ECT

(7) "Investor" means:

- (a) with respect to a Contracting Party:
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
 - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party; 6

- (b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.



STRONG PROTECTION FOR FOREIGN INVESTMENT

Binding NT, elimination of QR

Freedom of investment-related capital transfers

Protection of individual investment contracts

Freedom of employment of key personnel

Protection Against Political Risks

- Expropriation and nationalization
- Prompt, effective and adequate compensation for any assets expropriated



DSMS IN THE ECT

Article 26 provides procedure on settlement of disputes between investor and a contracting party

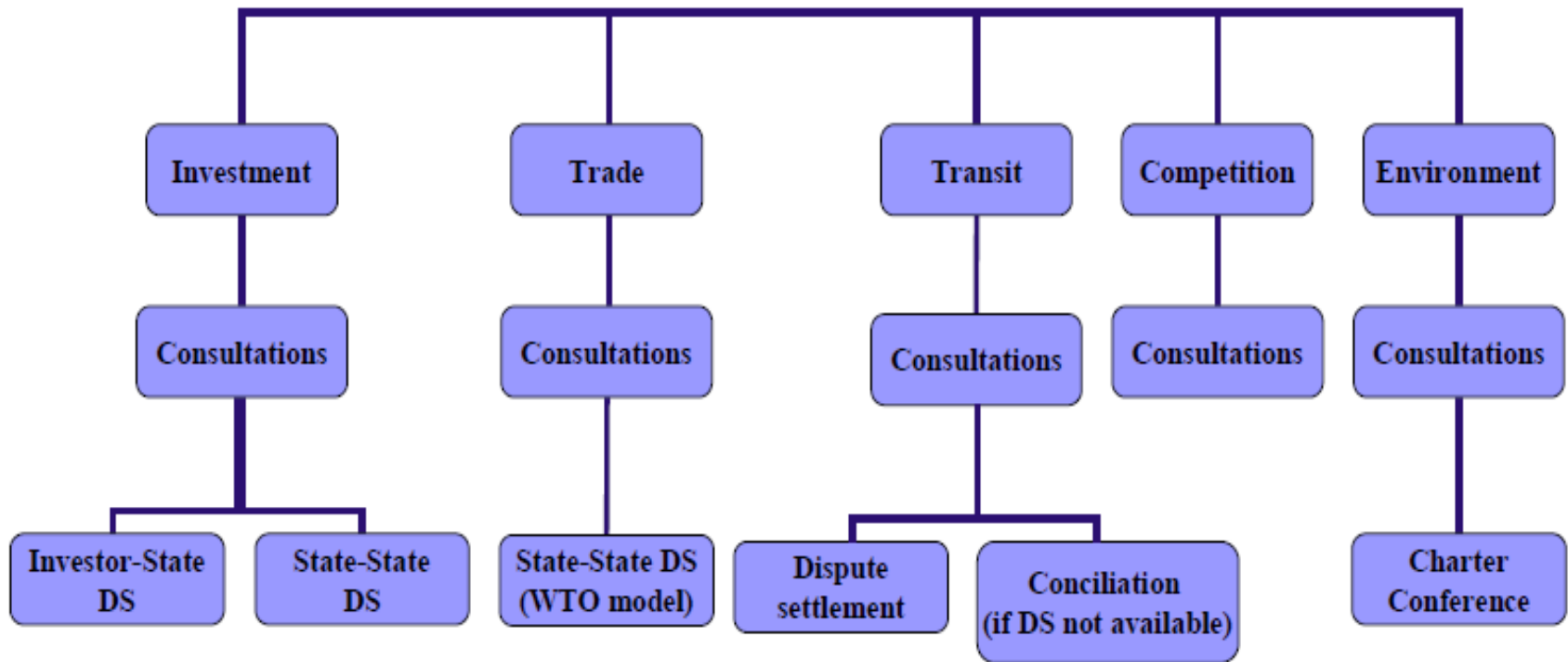
Article 27 provides for a special procedure for disputes between contracting parties

Article 29 and Annex D include a mechanism for settling trade disputes over energy trade between member countries

Article 7.7 provides a specialized mechanism for transit disputes



Overview of dispute settlement under the ECT



INVESTOR-STATE DISPUTES (ART. 26)

Cooling-off period 3 months

Claimant's Option:

- (i) national courts;
- (ii) previously-agreed dispute settlement procedure; or
- (iii) treaty arbitration:
 - ICSID;
 - ad hoc arbitration under UNCITRAL Rules; or
 - Stockholm Chamber of Commerce



Article 26

Settlement of disputes between an Investor and a Contracting Party

- Investor-State disputes
- Breach of an obligation under Part III
- Investor has direct right to bring a claim against Host State for alleged breach of Part III obligation

Enforcement of arbitral awards

- Art.26(8) – States shall
 - ✓ carry out arbitral awards without delay
 - ✓ make provisions for the effective enforcement in their respective territories

- Enforcement of arbitration awards
 - ✓ the New York Convention 1958
 - ✓ the Washington Convention 1965

ARTICLE 26 ECT

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

- (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
- (c) in accordance with the following paragraphs of this Article.



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY
with Related Documents



(3) (a) [...] each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. [...]

(6) A[n arbitral] tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

[...]

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. [...]

Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY
with Related Documents



SOME OF THE MAIN ISSUES

Lack of transparency

Increasing number of arbitrations

Need for increasing awareness of the rights and obligations under the treaty



PROPOSALS

- Reorganize, catalogue, digitalize and make accessible the ***travaux préparatoires***
- publication of the decisions adopted by the Conference since 1994
- **summaries** of ***known*** ECT cases



PROPOSALS

UNDER DISCUSSION

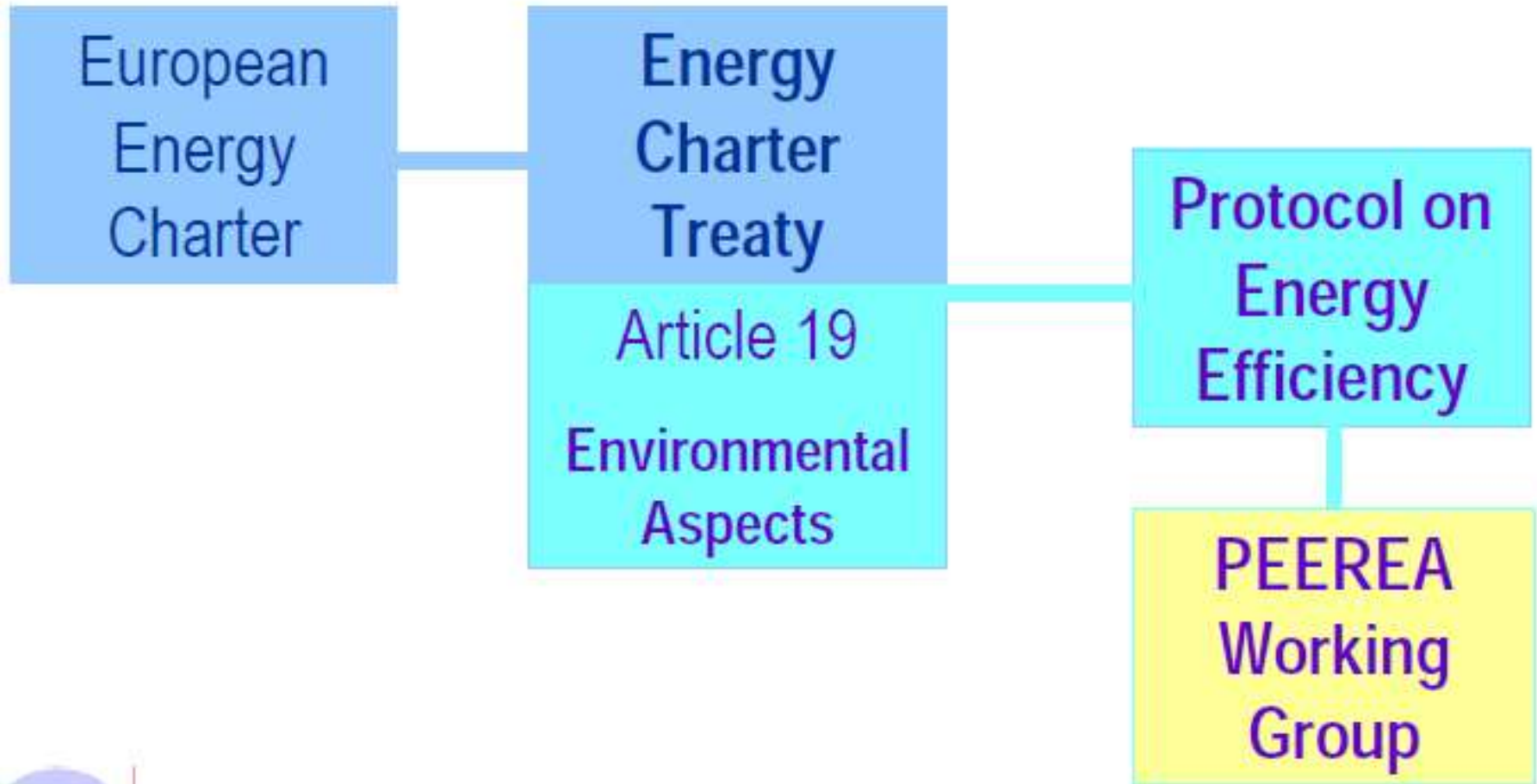
- **Incorporation of the 2013 UNCITRAL Rules on Transparency** in relation to all future arbitrations under the ECT and appointment of the **Energy Charter Secretariat as the repository** receiving and recording information about the arbitrations. → Protocol OR amendment
- **Conciliation expressly covered by the ECT, but not yet been used:** Currently, the **investor can opt for conciliation** but there is some **ambiguity** about what happens if conciliation is not successful; can the investor go to international arbitration? → An interpretation and a conciliation mechanism would help to clarify the situation and facilitate the use of conciliation.



Arbitral organisations under the ECT

- International Center for Settlement of Investment Disputes (ICSID)
- United Nations Commission on International Trade Law (UNCITRAL)
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- Permanent Court of Arbitration (PCA)

Energy Efficiency in the Charter Process



INVESTMENT-RELATED TREATY-BASED PROVISIONS ON THE PROTECTION OF THE ENVIRONMENT

Hungary-Russian Federation BIT (1996)

Article 2. Promotion and reciprocal protection of investments

3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.

SOFT-LAW INSTRUMENTS BEARING ON INVESTMENT AND ENVIRONMENT

UN Conference on Environment and Development, Rio Declaration on Environment and Development, 12 August 1992

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 2011

VI. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:

- a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
- b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and
- c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.

ECT: ENVIRONMENTAL ASPECTS (ART. 19)

Minimise harmful environmental impacts

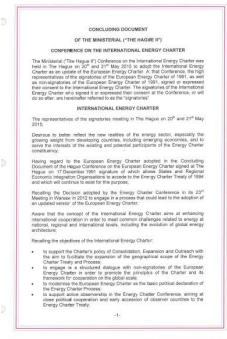
Take precautionary measures to minimize environmental degradation

Have particular regard to improving energy efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and technologies



THE INTERNATIONAL ENERGY CHARTER
CONSOLIDATED ENERGY CHARTER TREATY
with Related Documents





LECTURE N. 3



THE ROLE OF THE EU IN THE ENERGY CHARTER TREATY



ENERGY CHARTER PROTOCOL ON ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS

(Annex 3 to the Final Act of the European Energy Charter Conference)

PREAMBLE

THE CONTRACTING PARTIES to this Protocol,

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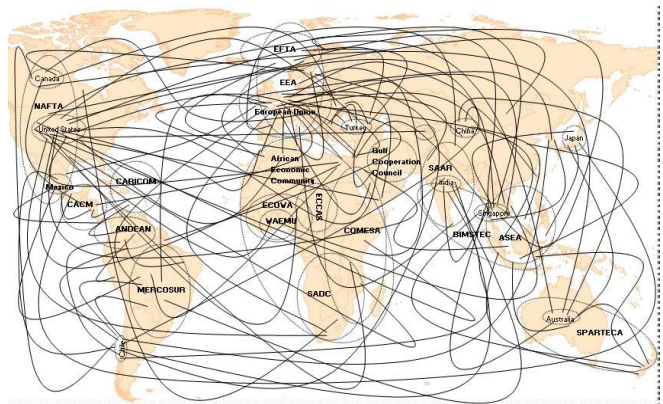
Mindful of the work undertaken by international organisations and fora in the field of energy efficiency and environmental aspects of the energy cycle;

Aware of the improvements in supply security, and of the significant economic and environmental gains, which result from the implementation of cost-effective energy efficiency measures; and aware of their importance for restructuring economies and improving living standards;

Recognising that improvements in energy efficiency reduce negative environmental consequences of the energy cycle including global warming and acidification;

Convinced that energy prices should reflect as far as possible a competitive market, ensuring market-oriented price formation, including fuller reflection of environmental costs and benefits, and recognising that such price formation is vital to progress in energy efficiency and associated environmental protection;

Appreciating the vital role of the private sector including small and medium-sized enterprises in promoting and implementing energy efficiency measures, and intent on ensuring a favourable institutional framework for economically



Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Energy policy

PROTOCOL ON ENERGY EFFICIENCY AND ENVIRONMENTAL RELATED ASPECTS

Objectives:

1. Promotion of energy efficiency policies;
2. Creation of conditions through efficient energy markets;
3. Fostering co-operation in the field of energy efficiency

Through the implementation of PEEREA, the Energy Charter provides its member countries with a **menu of good practices and a forum** in which to share experiences and policy advice on energy efficiency issues.

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The limit of PEEREA

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Legally binding tool

Mechanisms of control:
Regular reviews and
In-depth EE reviews



All activities done
on a voluntary basis



EU'S PARTICIPATION IN THE ECT'S DISPUTE SETTLEMENT

THE DECLARATION OF TRANSPARENCY

The EU establishes how the responsibility regarding the ECT should be apportioned:

"The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences."

"The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days."

The EU would be responsible to the extent that it has competence over the issue.

In situation involving shared competence it could be assumed that the joint responsibility would apply.



EXCLUSIVE COMPETENCES OF THE UNION

Article 3 TFEU

1. The Union shall have exclusive competence in the following areas:
 - (a) customs union;
 - (b) the establishing of the competition rules necessary for the functioning of the internal market;
 - (c) monetary policy for the Member States whose currency is the euro;
 - (d) the conservation of marine biological resources under the common fisheries policy;
 - (e) **common commercial policy.**

2. The Union shall also have exclusive competence for **the conclusion of an international agreement** when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

SHARED COMPETENCES OF THE UNION

Article 4 TFEU

[...] 2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) **energy**;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

[...]

Article 5 TFEU

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.

[...]

INVESTMENT DISPUTES BTW EU MSS UNDER THE ECT

It would appear that the ECT should apply to intra-EU disputes, as there is nothing in the Treaty itself to indicate otherwise.

However, it needs to be considered

- (i) whether an arbitral tribunal has jurisdiction to entertain a claim by an Investor of one EU member state against another EU member state;
- (ii) what (if any) impact the respective parties' membership of the EU ought to have on the merits.

THE *ELECTRABEL* CASE (1)

On 30 November 2012, an ICSID Arbitral Tribunal rendered an award in a dispute between Electrabel and the State of Hungary regarding early termination of a power purchase agreement (“PPA”) following a binding decision by the European Commission that such PPA contained unlawful State aid

This case is one of several arbitration cases that deal with the possible conflict between EU law and the guarantees that are offered to private investors under the ECT

THE *ELECTRABEL* CASE (2)

Facts of the case

Claims arising out of Hungary's termination of a power purchase agreement concluded with the investor, allegedly as part of the State's program for liberalizing its electricity market to comply with EU laws on State aid.

[power purchase agreement concluded between Electrabel's subsidiary Dunamenti Eromu (the owner-operator of a power plant near Budapest) and the State-owned electricity wholesaler MVM.]

Electrabel complained chiefly that the early termination of the PPA

- (i) violated the standard of fair and equitable treatment ("FET standard") and
- (ii) constituted an unlawful expropriation under Article 13 ECT. It must be underlined that Electrabel did not attack the validity of the European Commission's decision, but rather complained about the alleged incorrect enforcement of the Final Decision by Hungary.

THE *ELECTRABEL* CASE (3)

Applicable law and decision of the Arbitral Tribunal

The Arbitral Tribunal's starting point was that – under Article 26 ECT – it was required to apply the ECT and EU law (being classified as international law).

According to the Arbitral Tribunal, EU law could be presumed not to conflict or otherwise be inconsistent with the ECT because

- (i) the European Union was a Party to the ECT and it would have been inconsistent and nonsensical for it to subscribe to the ECT knowing this would lead to a breach of EU law,
- (ii) the ECT and EU law shared the same objective, i.e., to combat anti-competitive conducts, and
- (iii) the ECT implicitly recognized the binding character of decisions by the European Commission.

Therefore, the Arbitral Tribunal held that the ECT could not protect a European investor from a Member State's enforcement of a binding decision of the European Commission under EU law.

If the provisions of EU law and that of the ECT contradict each other, the Arbitral Tribunal considered that EU law would prevail over the ECT in relations between EU Members themselves.

INVESTMENT DISPUTES BTW EU MSS AND INVESTORS OF NON-MSS UNDER THE ECT (1)

As regards nationals of non-EU member state parties to the ECT, EU law is *res inter alios acta* → questions of EU law are questions of fact, relevant to the same extent as questions of Contracting Parties' domestic law.

This is not to say that EU law is wholly irrelevant to the determination of breaches of the provisions of Part III of the ECT.

ARTICLE 25(1) OF THE ECT

The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as 'EIA') to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

[...An EIA is] an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame

INVESTMENT DISPUTES BTW EU MSS AND INVESTORS OF NON-MSS UNDER THE ECT (2)

It is clear that the EU falls within this definition, as is confirmed by the Declaration made by the Communities and their member states with respect to Article 25.

European Communities and their member states' Declaration:

The European Communities and their Member States recall that [...]

(a) companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall [...] be treated in the same way as natural persons who are nationals of Member States; [...]

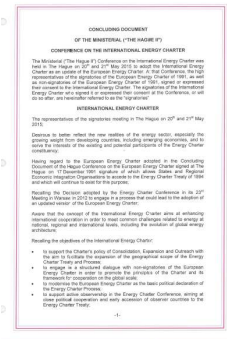
The European Communities and their Member States further recall that:

Community law provides for the possibility to extend the treatment described above to branches and agencies of companies or firms not established in one of the Member States; and that, the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities.

INVESTMENT DISPUTES BTW EU MSS AND INVESTORS OF NON-MSS UNDER THE ECT (3)

If the Investment is a company or firm whose central administration or principal place of business is within the EU and the company or firm has an effective and continuous link with the economy of one of the member states, it will itself benefit from such preferential treatment.

This would seem to leave little scope for Article 25 effectively to apply.



LECTURE N. 3



THE ROLE OF THE EU IN THE ENERGY CHARTER TREATY

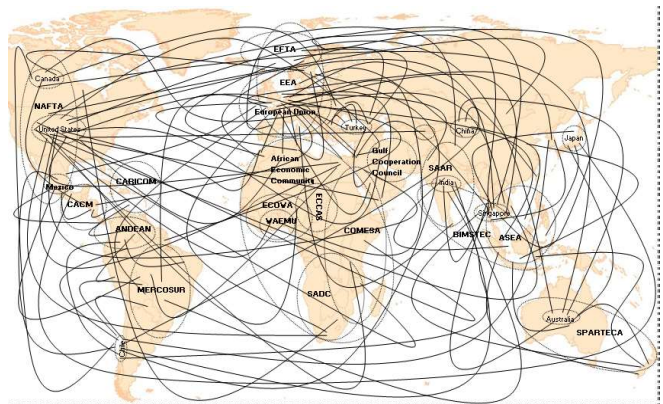


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Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Energy policy

THE INTERNATIONAL ENERGY CHARTER

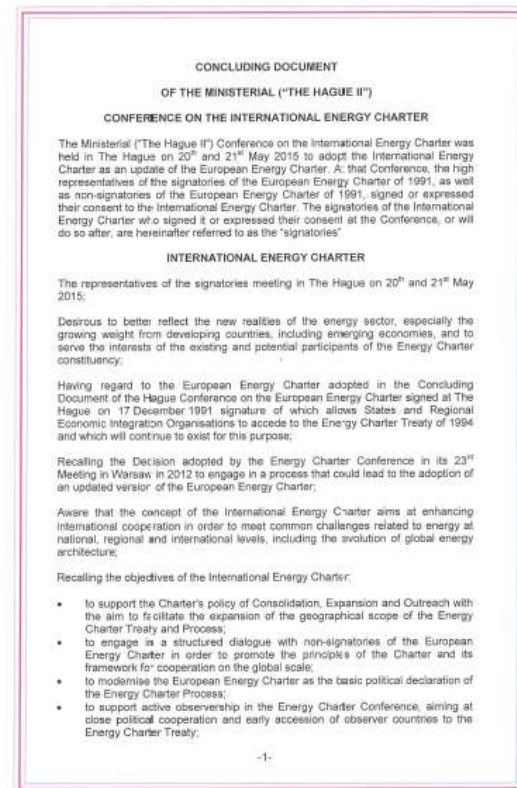
declaration of political intention

Formally adopted and signed at the Ministerial Conference of 20-21 May 2015 (around 80 States took part in negotiations)

It maps out **common principles for international cooperation in the field of energy**

Promotes energy cooperation among nations for the sake of **energy security and sustainability.**

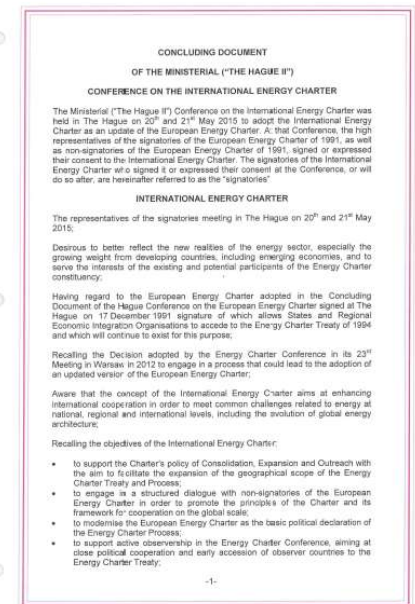
Fits well into the global policy agenda reflected, for instance, in the G20 Leaders' **Communiqué of the Brisbane Summit** in November 2014 and the UN Document "**The Future We Want**" endorsed by the UN Conference on Sustainable Development in June 2012.



SIGNATORIES OF THE INTERNATIONAL ENERGY CHARTER

Afghanistan, Albania, Armenia, Austria, Bangladesh, Belarus, Belgium, Benin, Bulgaria, Burundi, Cambodia, Chad, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Economic Community of West African States (ECOWAS), Estonia, **European Union and Euratom**, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritania, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, Niger, Norway, Pakistan, Palestine, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tanzania, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Uganda, **Ukraine**, United Kingdom, United States, Uzbekistan, Yemen

(68 Signatories)



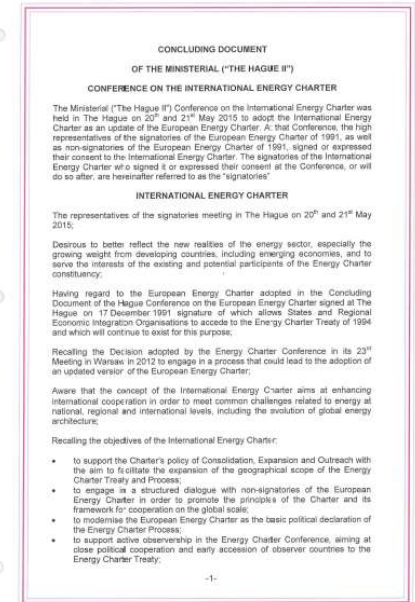
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OTHER COUNTRIES THAT ADOPTED THE INTERNATIONAL ENERGY CHARTER

11 other countries were present in the Hague on 20-21 May 2015 for the adoption of the International Energy Charter and adopted it officially. It is planned that these countries will sign the international Energy Charter in the future.

- Botswana, Burkina Faso, Cambodia (signed on 19 October 2015), Iran, Israel, Kyrgyzstan (signed on 19 October 2015), Lebanon, Nigeria, Philippines, Republic of Korea, Tajikistan



address energy challenges of the 21st century & promote the expansion of the geographical scope of the Energy Charter Treaty



a non-legally binding declaration of political will

interested countries to become part of the Energy Charter Process that provides for a multilateral set of rules for global energy governance



international cooperation in the field of energy

International Energy Charter



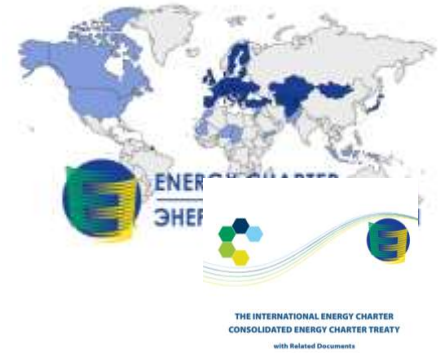
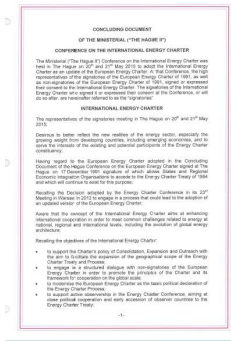
bring together energy producing, transiting and consuming countries

the principles of the European Energy Charter of 1991 are reflected in the new text as well as the most topical energy challenges of 21st century

a document with a broader, international scope



includes issues like the growing weight of developing countries, sustainable energy development & the promotion of mutually beneficial energy cooperation



• LECTURE N. 3

• THE ROLE OF THE EU IN THE ENERGY CHARTER TREATY

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