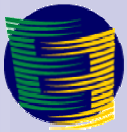


*The Strategic Role of Treaty Protection in Foreign Investment*

London, Friday 10 October 2003



# Attracting Foreign Investment By Offering Treaty Protection

## *The Energy Charter Treaty*

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# OUTLINE

- Introduction
- Overview of the Energy Charter Treaty
- Investment Promotion and Protection Under the Energy Charter Treaty:
  - Coverage
  - Key Provisions
- Various Dispute Settlement Mechanism
- Recent cases and raised issues therein
- Final Words



## The Economist

11/02/2001

### Question:

*“If you had to name the world’s largest industry, which would you pick?”*

### Answer:

*“Energy is the biggest business in the world; there just isn’t any other industry that begins to compare.”*

### Figures:

*“The turnover of the global energy business approx. \$1.8 trillion.  
...global investment in energy between 1990 and 2020 will total  
some \$30 trillion at 1992 prices.”*

### Morale:

*“Energy is the very fuel of society, and societies without access to competitive energy suffer.”*

### Challenge:

**How to ensure that the very fuel of society continues to flow for the benefit of present and future generations.**



THE ENERGY CHARTER SECRETARIAT  
СЕКРЕТАРИАТ ЭНЕРГЕТИЧЕСКОЙ ХАРТИИ

**Status of Ratification - Energy Charter Treaty**  
**9<sup>th</sup> October 2003**

**I Charter Signatories which have deposited instruments of ratification/accession of the Treaty with the Depository**

1. on 12.07.1995 : G E O R G I A
2. on 16.10.1995 : S L O V A K I A
3. on 15.01.1996 : L A T V I A
4. on 12.03.1996 : U Z B E K I S T A N
5. on 17.06.1996 : C Z E C H R E P U B L I C
6. on 22.06.1996 : M O L D O V A
7. on 06.08.1996 : K A Z A K H S T A N
8. on 19.09.1996 : S W I T Z E R L A N D
9. on 15.11.1996 : B U L G A R I A
10. on 25.06.1997 : T A J I K I S T A N
11. on 07.07.1997 : K Y R G Y Z S T A N
12. on 17.07.1997 : T U R K M E N I S T A N
13. on 12.08.1997 : R O M A N I A
14. on 04.09.1997 : G R E E C E
15. on 10.09.1997 : S L O V E N I A
16. on 27.11.1997 : L U X E M B O U R G
17. on 09.12.1997 : C R O A T I A
18. on 12.12.1997 : L I E C H T E N S T E I N
19. on 16.12.1997 : A U S T R I A
20. on 16.12.1997 : D E N M A R K
21. on 16.12.1997 : F I N L A N D
22. on 16.12.1997 : G E R M A N Y
23. on 16.12.1997 : I T A L Y
24. on 16.12.1997 : N E T H E R L A N D S
25. on 16.12.1997 : P O R T U G A L
26. on 16.12.1997 : S P A I N
27. on 16.12.1997 : S W E D E N
28. on 16.12.1997 : U N I T E D K I N G D O M
- on 16.12.1997 : E U R O P E A N  
    C O M M U N I T I E S

29. on 23.12.1997 : A Z E R B A I J A N
30. on 16.01.1998 : C Y P R U S
31. on 19.01.1998 : A R M E N I A
32. on 12.02.1998 : A L B A N I A
33. on 27.03.1998 : T H E F O R M E R  
    Y U G O S L A V R E P U B L I C O F  
    M A C E D O N I A
34. on 08.04.1998 : H U N G A R Y
35. on 04.05.1998 : E S T O N I A
36. on 08.05.1998 : B E L G I U M
37. on 14.09.1998 : L I T H U A N I A
38. on 29.10.1998 : U K R A I N E
39. on 15.04.1999 : I R E L A N D
40. on 28.09.1999 : F R A N C E
41. on 25.11.1999 : M O N G O L I A
43. on 05.04.2001 : T U R K E Y
44. on 24.04.2001 : P O L A N D
45. on 17.05.2001 : B O S N I A A N D  
    H E R Z E G O V I N A
46. on 10.07.2001 : M A L T A
47. on 23.07.2002 : J A P A N

**II Charter Signatories which have not yet deposited instruments of ratification/accession of the Treaty with the Depository**

48. A U S T R A L I A
49. B E L A R U S \*
50. I C E L A N D
51. N O R W A Y
52. R U S S I A N F E D E R A T I O N \*

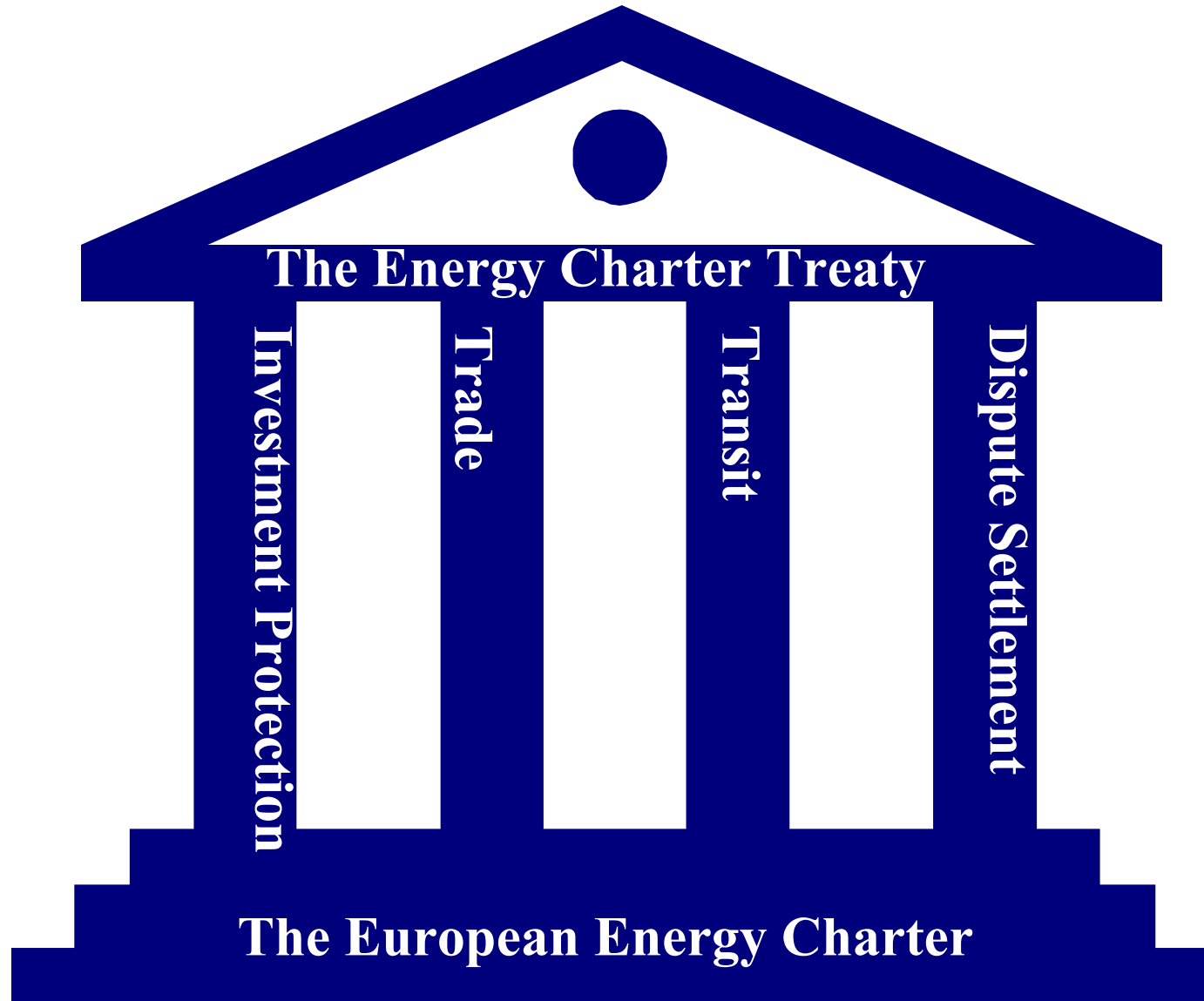
\* apply the Treaty provisionally



# PURPOSE OF THE TREATY

## Art. 2

- This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.





# COVERAGE

## Investment of an Investor of a Contracting Party

- ✓ Investment must be associated with an “Economic Activity in the Energy Sector” (Article 1.6)
- ✓ Investment must relate to Energy Markets and Products (Article 1.4)



# DEFINITION OF INVESTMENT

## ART. 1(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;
- e) Returns;
- f) Any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. (...)





# DEFINITION OF “ECONOMIC ACTIVITY IN THE ENERGY SECTOR” ART. 1(5)

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



# KEY INVESTMENT PROVISIONS

- Encourage and create stable, equitable, favourable transparent conditions (10.1)
- Fair and equitable treatment (10.1)
- Non-discriminatory treatment (10.1 & 10.7)
- Observe Investment Contracts (10.1)
- No discriminatory expropriation (accompanied by prompt adequate and effective compensation) (13)
- Freedom of transfers related to investment (14)
- Prohibition of trade related investment measures
- Subrogation (15)



# ARTICLE 10 (1)

Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.



# VARIOUS DISPUTE SETTLEMENT MECHANISMS

## 1. Investment Disputes

- State-state arbitration for most non-trade related disputes (including investment disputes) with two notable exceptions (Art. 27).
- Investor-state arbitration for investment disputes (Art. 26).

## 2. Trade Disputes

- GATT/WTO-like panel system for trade dispute (Art. 29, Annex D).

## 3. Other Dispute Mechanisms

- Disputes under Article 7: Transit Disputes –Conciliation
- Disputes under Article 6: Competition
- Disputes under Article 19: Environment Disputes



# AVAILABLE DISPUTE VENUES TO INVESTORS

- The courts or administrative tribunals of the Contracting Party party to the dispute;
- In accordance with any applicable, previously agreed dispute settlement procedure; or
- International Arbitration
  - Unconditional consent, 2 exceptions: Annexes ID and IA



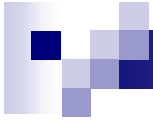
# AVAILABLE ARBITRATION VENUES

- The International Centre for the Settlement of Investment disputes established by the ICSID Convention of 1965;
- The ICSID Additional Facility Rules for the Administration of Proceedings by the Centre;
- A sole or ad hoc arbitration tribunal established under the UNCITRAL Arbitration Rules; or
- A proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.



# RECENT CASES AND ISSUES RAISED THEREIN

- Case 1: Arbitration Institute of the Stockholm Chamber of Commerce
- Case 2: Arbitration Institute of the Stockholm Chamber of Commerce
- Case 3: ICSID



# Final Words....