

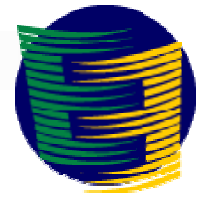


The Energy Charter Treaty: The Added Value of a Multilateral Legal Framework for Energy Investment

Ralf Dickel

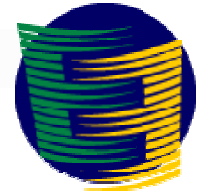
**Director for Trade and Transit
Energy Charter Secretariat**

Luxembourg, 28 May 2009



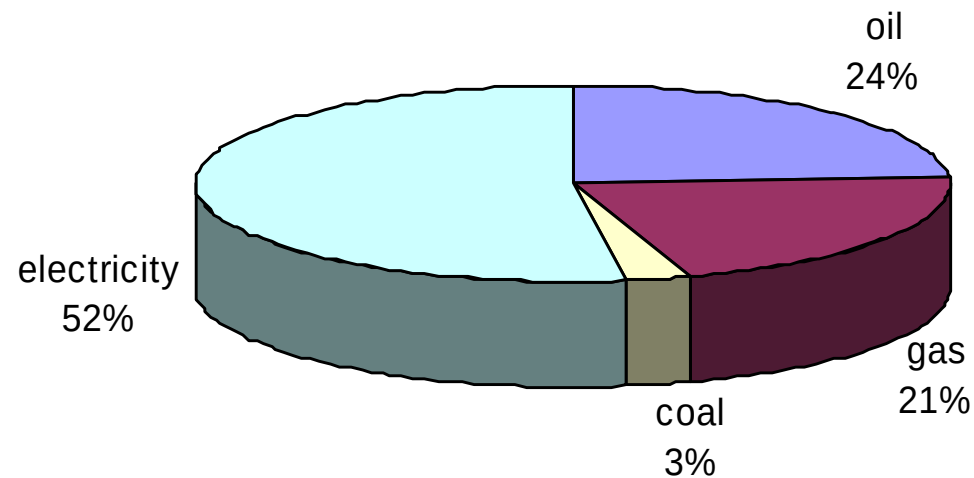
Outline

- Investment challenges
- Global / multilateral aspects of investments
- ECT as an existing and applied multilateral investment protection treaty
 - The Energy Charter and the Energy Charter Treaty
 - Coverage
 - Protection offered by the ECT
 - Known arbitration cases
- The Energy Charter: open to meet new challenges

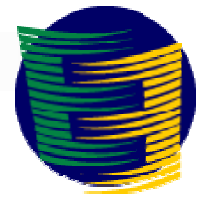


World Energy Investment by Sector

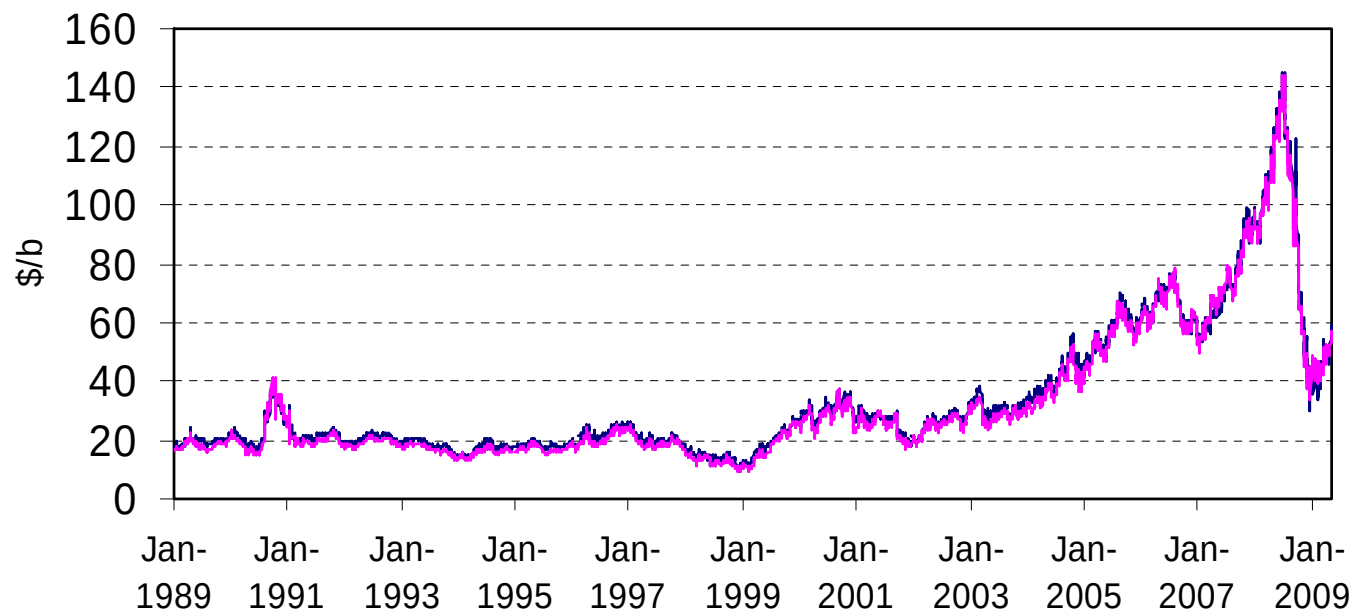
Total energy investment estimated for 2007-2030:
\$26 trillion in the year 2007 dollar



Source: IEA WEO 2008



World Crude Prices (Jan 1989-May 2009)



Source: USDOE/EIA

— WTI — Brent

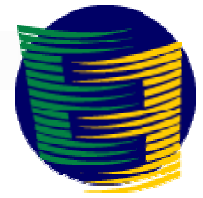


Upstream Costs

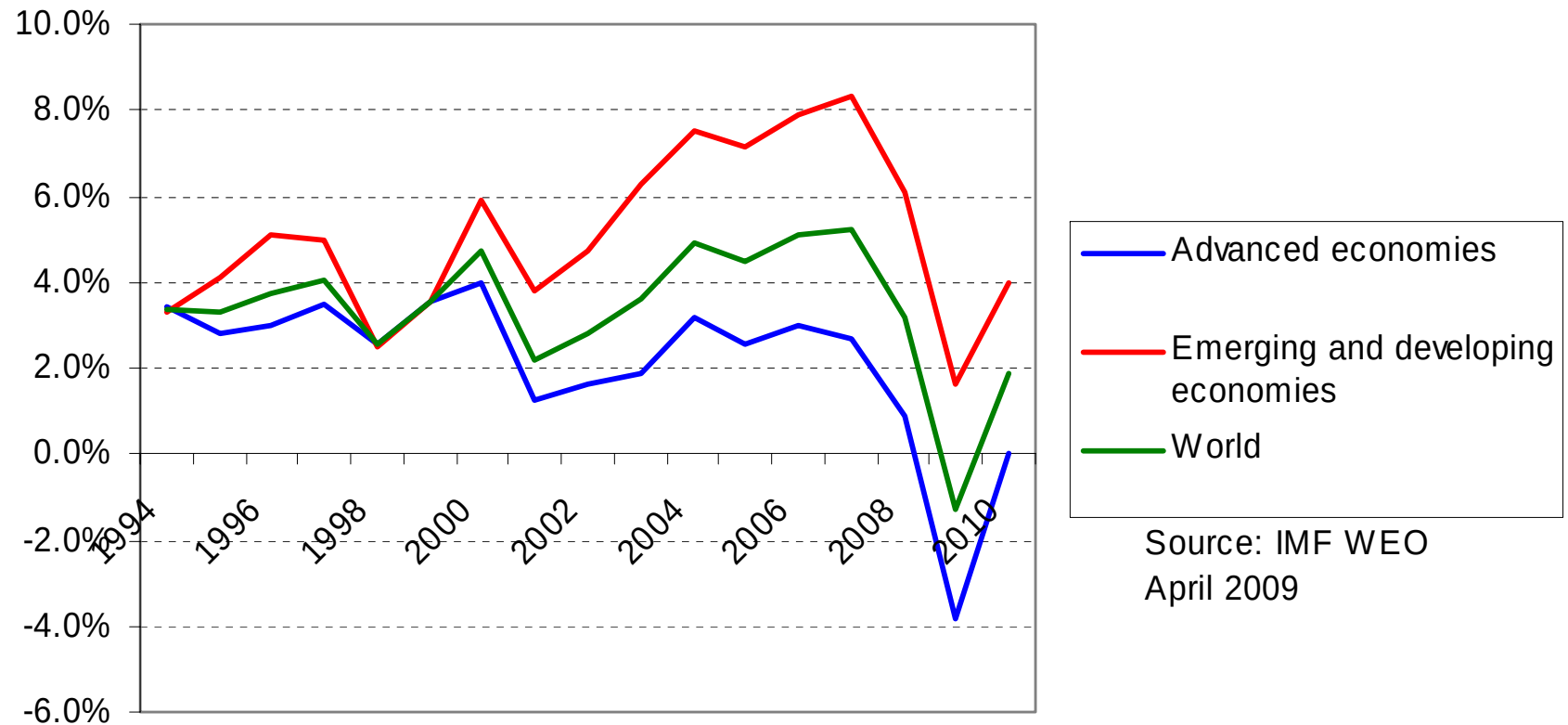
Figure 13.11 • IEA Upstream Investment Cost Index by activity



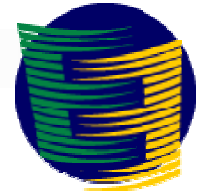
Source: IEA database and analysis.



GDP Growth (1994-2010)

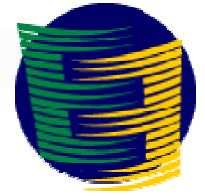


Source: IMF WEO
April 2009



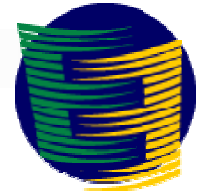
A Difficult Time for Energy Investment

- Economic downturns and the banking sector crisis having detrimental affects on energy investment
- Private banks losing the capability to finance large projects, such as energy projects, after the crisis started in September 2008
- Project feasibility becoming increasingly uncertain in the volatile markets



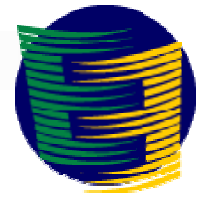
Characteristics of Energy Investment

- Global markets and global investments
- Large-scale investments
- Capital-intensive projects
- large initial investments
- Many project participants
- Long project lives
- Technology driven
- High specificity
- Part of a supply chain



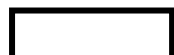
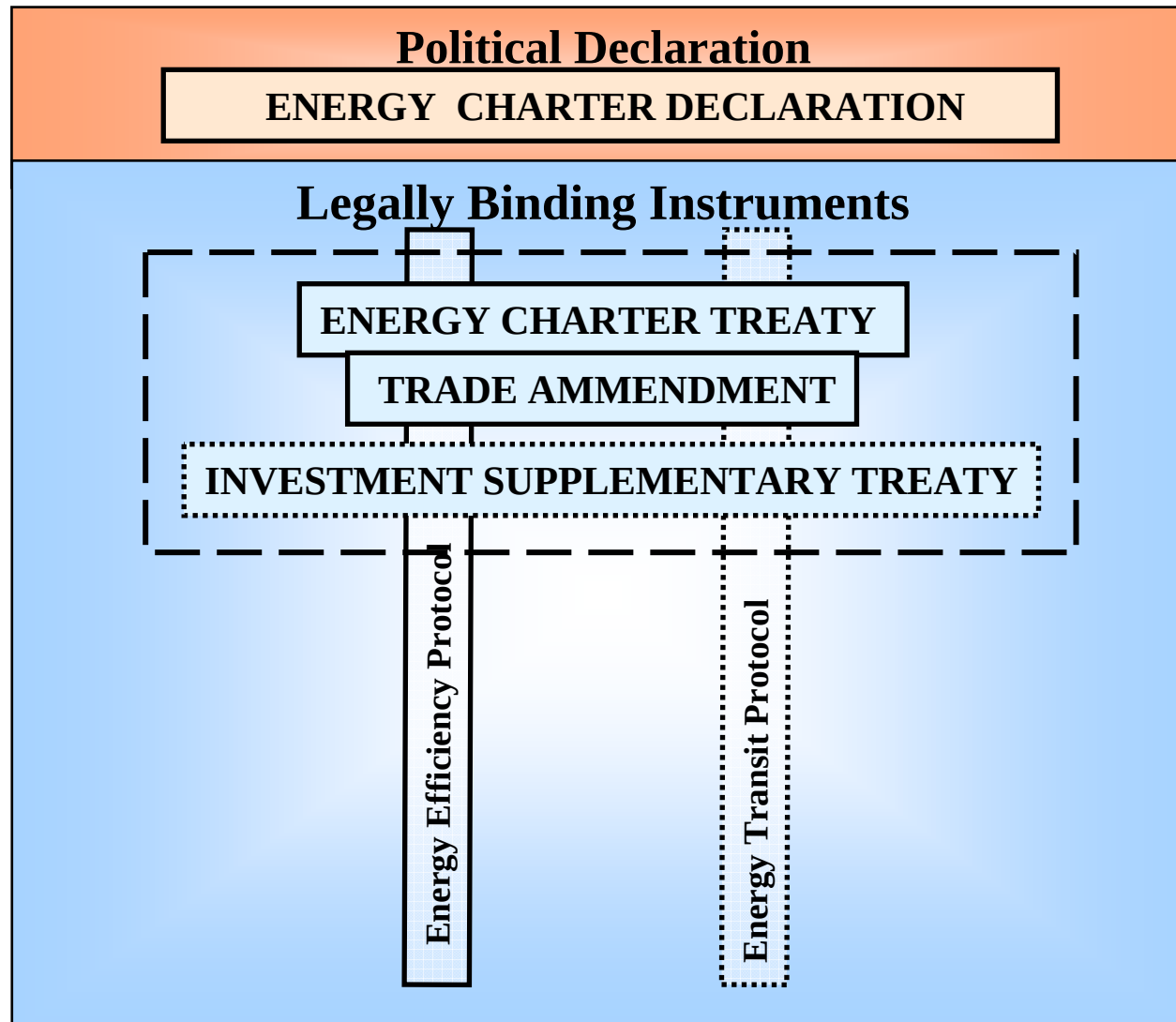
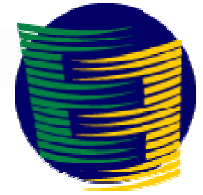
Risks Associated with Energy Investment

- Economic risks
 - ☐ Macroeconomics conditions
 - ☐ Energy prices
 - ☐ Construction
 - ☐ Operation
 - ☐ Foreign currency Exchanges
- Other risks
 - ☐ Natural disasters
 - ☐ Civil unrests, wars
 - ☐ Strikes
- Political/legal risks
 - ☐ Geopolitics
 - ☐ Related regulations
 - ☐ Environmental policies
 - ☐ Profit transfer
 - ☐ Taxes
 - ☐ Expropriation
 - ☐ Jurisdiction
- Need for investment protection:
 - ☐ De facto, rating etc
 - ☐ By treaty



Advantage of a Multilateral Framework

- Replaces $n \times (n-1) / 2$ bilateral investment treaties
- Sets a (minimum) protection standard for energy investment
- Reflects the global character of financing and procurement
 - All participants in a project from member countries enjoy the same minimum protection
 - Transparent standard
 - By definition symmetric upstream / downstream protection
- Joint adaptation possible to meet new developments



- in force

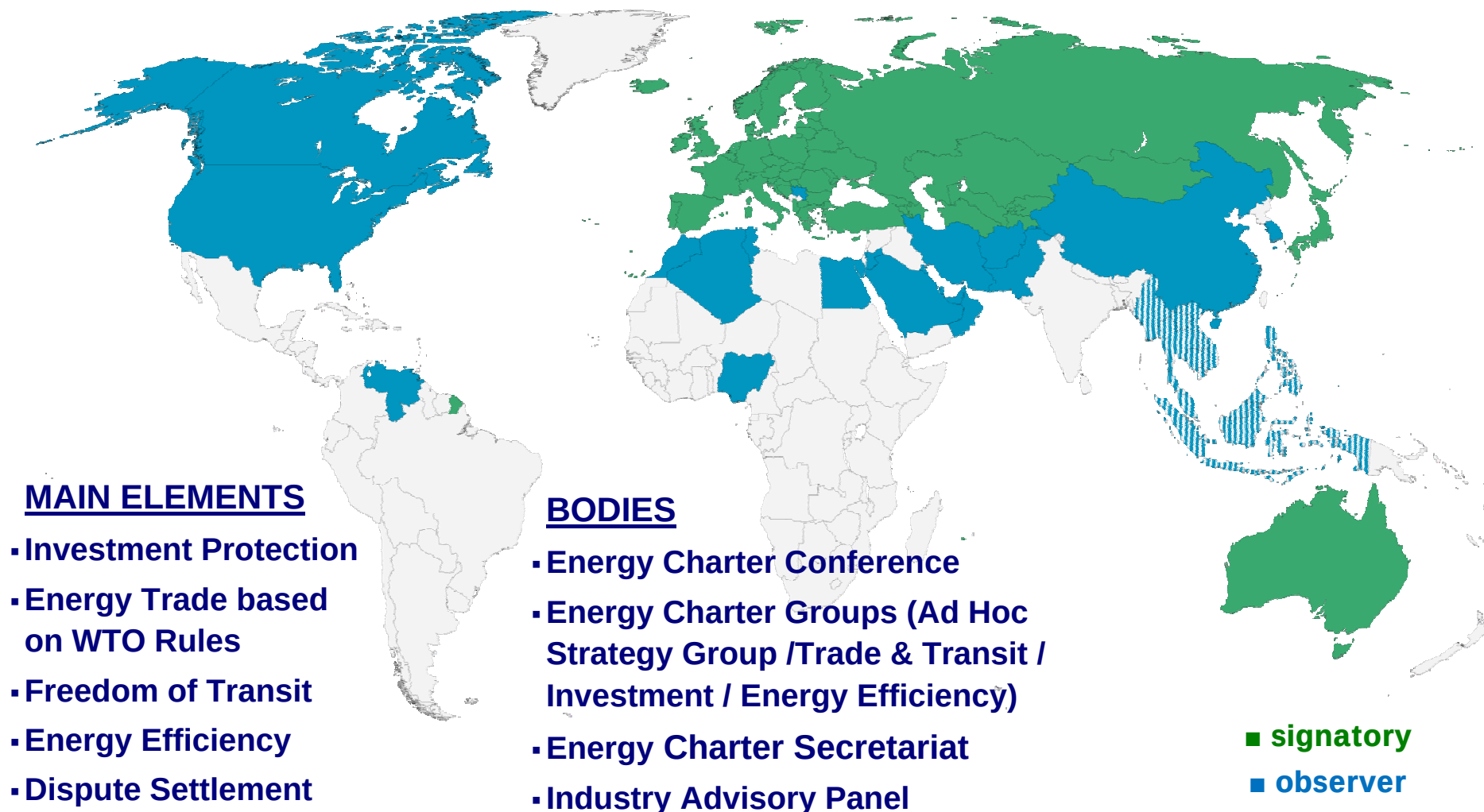


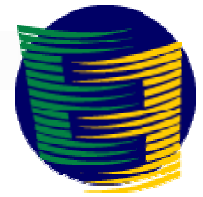
- negotiations continue or not finished



The Energy Charter Treaty

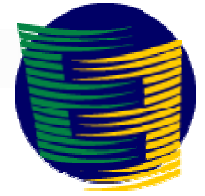
1994: Signature 1998: In Force





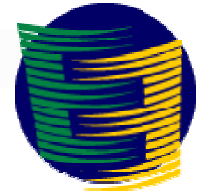
ECT Investment Protection

- **Strong Protection for Foreign Investment**
 - Binding NT/MFN obligation for post-establishment phase, elimination of QR, TRIMs (e.g. national content)
 - Best-efforts to promote NT/MFN for pre-investment phase
 - 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
 - Breach of individual investment contracts
 - Unjustified restrictions on the transfer of funds
- **Monitoring / Review Process**



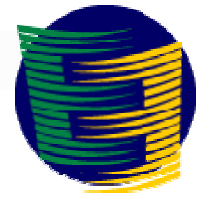
Definition of “Investment” and “Investor”

- **Investment**: Every kind of asset (e.g. shares, claims to money, intellectual property, licenses, concessions);
- **Investor**: natural persons of a CP (including permanent residents), and companies/organisations organised in accordance with the laws of a CP.



Definition of Energy Materials and Products (Annex EM)

- Nuclear energy
- Coal
- Natural gas (liquefied and in gaseous state)
- Petroleum and petroleum products
- Electrical energy
- Fuel wood
- Charcoal



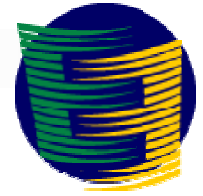
Protection Continues after Withdrawal

Art 45(3) b:

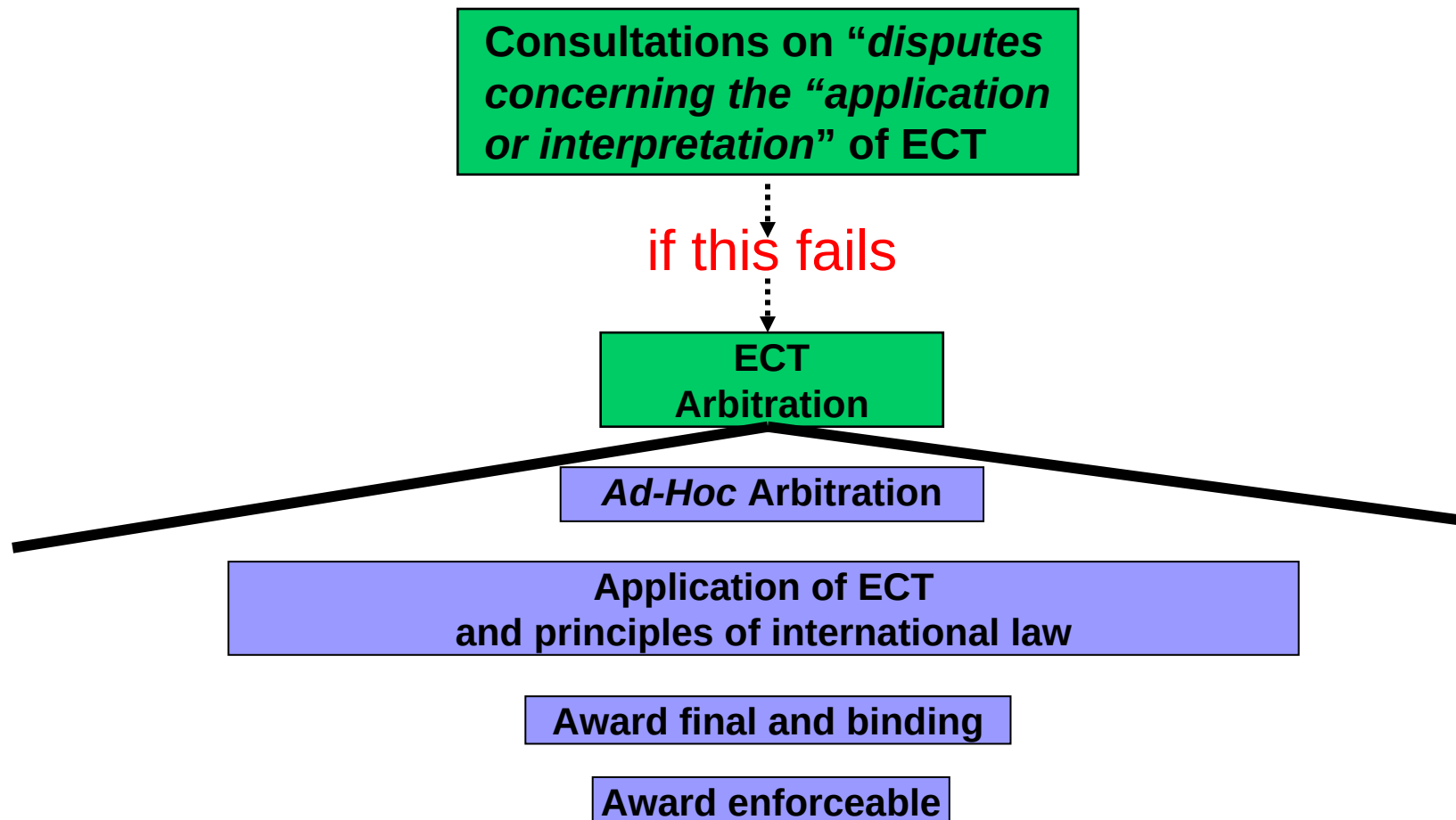
In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III [*investment*] and V [*Dispute settlement*] with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for **twenty years** following the effective date of termination, except as otherwise provided in subparagraph (c).

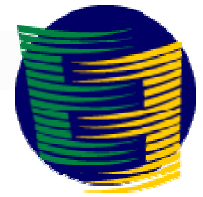
Art 47 (3)

The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of **20 years** from such date.

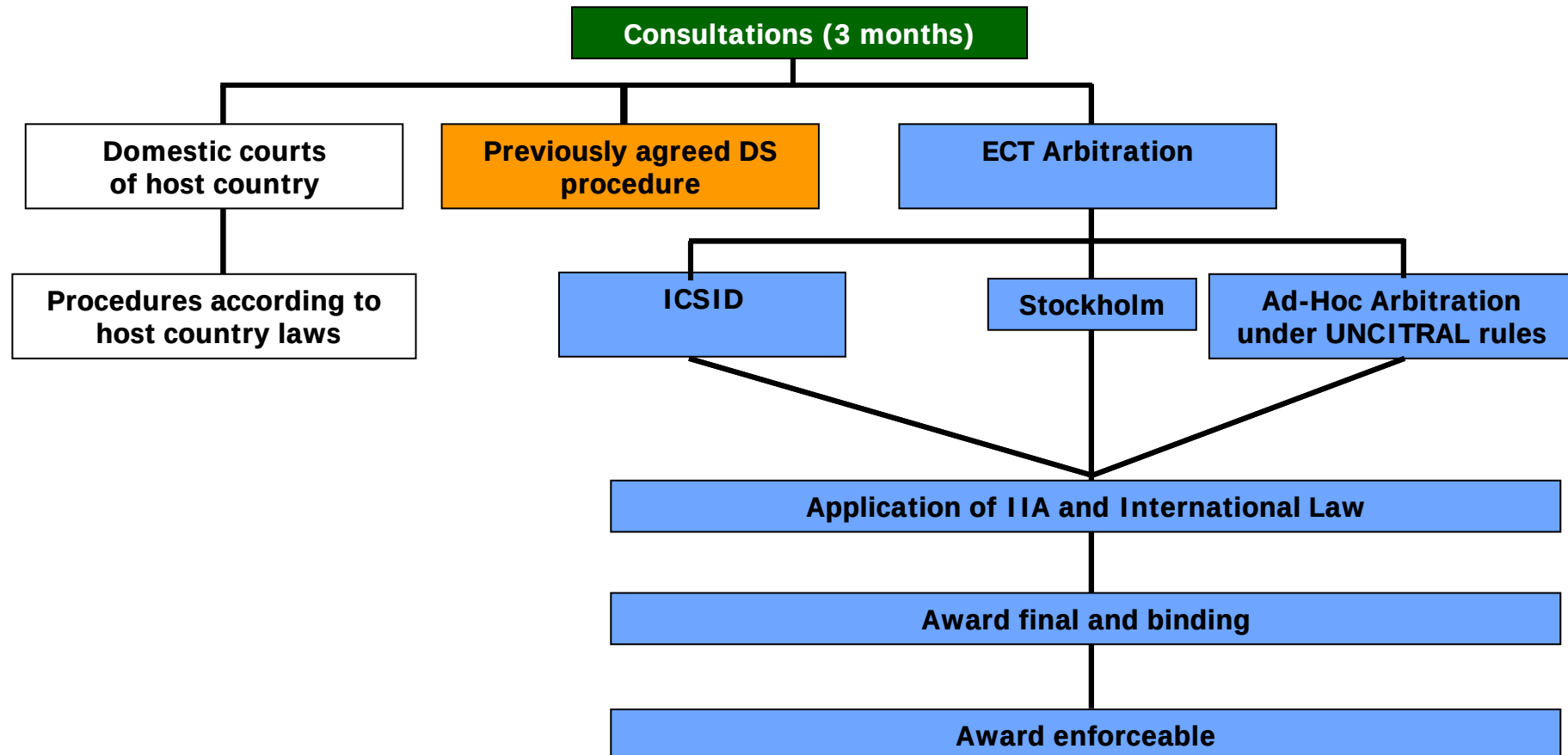


State-State Dispute Settlement





Investor-State Dispute Settlement





21 Cases Known to the Secretariat

(see website: www.encharter.org)

Date of registration:

2001: 2 cases

2003: 2 cases

2004: 1 case

2005: 6 cases

2006: 3 cases

2007: 4 cases

2008: 2 cases

2009: 1 case so far

Status:

2 settled outside

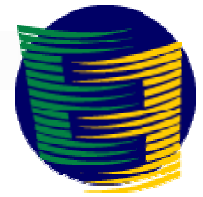
4 awards rendered

**1 jurisdiction decided
award pending**

3 awaiting jurisdiction

10 pending

1 not started



The Energy Charter: Open to Adaptation

■ **Art.33.1 negotiation of new instruments**

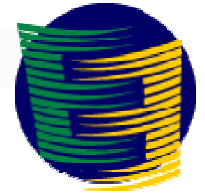
“The Charter Conference may authorize the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter.” [*=Energy Charter of 1991*].

■ **Art 34(7) review**

“..at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent to which the provisions of the Treaty and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat.”

■ **Creation of the Ad Hoc Strategy Group in 2007**

- to serve as a forum for discussion on strategic issues relevant in the context of the Charter and the ECT
- to foster favourable conditions for the promotion of the principles of the Charter..
- to discuss horizontal issues, such as energy security, accession activities,
- to advise on strategic policy direction to be implemented through the Charter’s working Groups
- to identify potential inexactness and unclearness of certain ECT provisions and develop adequate proposals on how to resolve these challenges.



The Way Forward

- Promoting an open and competitive energy market
- Avoiding the temptation of protectionism in the economic downturns
- Importance of multilateralism in the global market
- The ECT a proven multilateral instrument of investment protection, to further build on



Thank you for your attention!