



# Common Rules for Global Energy Security : Investment Promotion and Protection under the ECT

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# Common Rules for Global Energy Security

*International energy cooperation*

according to the **Principles of the ENERGY CHARTER**

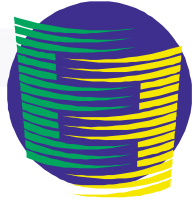
- 54 Contracting Parties (*Afghanistan ratified Feb. 2013*) and open to any exporting, transit or importing country

## Objectives

- Improving ***energy security***
- Implementing ***energy efficiency***
- Enhancing ***energy safety***

## Principles

- Creating a **climate favourable** to ***enterprises*** and ***investment flows***
- Within State ***sovereignty over natural resources***
- ***Non-discrimination*** and ***market*** principles
- Taking into account ***environmental concerns***



## 1991 Energy Charter Declaration, Preamble

- **The signatories** *are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis. (...)*
- **They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.**



# 1994 ENERGY CHARTER TREATY ECT

- Part II on Commerce (*WTO-based*) and Transit
- **Part III on Investment Promotion and Protection**
- Part IV: Sovereignty over Energy Resources; Energy Efficiency and Environmental Related Aspects
- Part V Dispute Settlement : Investor-to-State and State-to-State arbitration
- Part VII Structure and Institutions



## 1994 **Energy Charter Treaty**, Part III Investment Promotion and Protection

- **Cooperation** for stable, equitable, favourable, transparent conditions for foreign investments
- **Obligations** upon the host state to reduce regulatory and political risk
  - Non-discrimination
  - Freedom to transfer investment-related capital
  - Freedom to employ key personnel
  - Protection for losses and against expropriation
- Investor-state **dispute settlement**



# 1994 Energy Charter Treaty, Part III Investment Promotion and Protection

## What it Does Not

- **Determine national energy policies**
- Impose **right to access** national energy markets
- Impose **privatisation**
- Require mandatory **third party access**
- Provide **supranational** regulation



## *Implementation* : Investment Promotion

- Investment Group
  - Policy forum
  - Country reviews
  - Horizontal reports
  - Exceptions
  - Peer pressure and recommendations
  - Share experiences and knowledge
  - Sector and regional studies
- Industry Advisory Panel (IAP)
  - Dialogue with the private sector
  - Risk mitigation
  - Improvement of the business climate







## ECT - Promoting low-carbon investment

- The ECT is an existing framework for cooperation among states with common interests in energy
- Low carbon emphasis already present in ECT but context has become favorable for growth of this core
- Market orientation of ECT links well to economic growth potential of low carbon
- There is an opportunity for ECT to assist members in making policy choices to promote low-carbon



## ECT – Investment Protection (i)

### ■ **Binding** non-discrimination (post-establishment)

- Contingent Standards:
  - National Treatment
  - MFN
- Non-Contingent Standards:
  - Fair and Equitable Treatment
  - Constant Protection and Security
  - *No “impair[ment] by unreasonable or discriminatory measures”*

### ■ **Best-endeavors** for ‘Making of Investments’ (pre-establishment)

- Limit exceptions (or standstill clause)
- Remove existing restrictions
- Blue Book



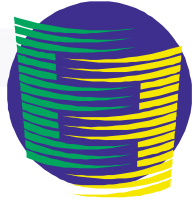
## ECT – Investment Protection (ii)

### ■ Investment:

- Asset-based definition : Goods; Credits and other rights (by law, contract, licences); Company, shares, stocks, equity, bonds and debts; Claims and profits, dividends
- Owned by an national of a Contracting Party
- Denial of Benefit Clause
- Associated with an Economic Activity in the Energy Sector

### ■ Individual investment contracts

- Each State “shall observe any obligations it has entered into with an Investor” (*umbrella clause*)
- Opt-out



## ECT – Investment **Protection** (iii)

- Freedom of investment-related capital transfers
- Freedom of employment of key personnel
- Protection Against Losses
- Protection Against Expropriation
  - “Investments (...) shall not be nationalized, expropriated”
  - “Investments (...) shall not be subjected to a measure or measures having effect equivalent to nationalization or expropriation”
  - Except: In the public interest; Non-discriminatory; Carried out with due process; Prompt, adequate and effective compensation



## ECT – Investment Protection (iv)

### ■ Exceptions

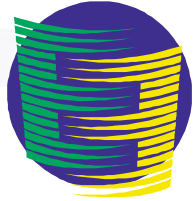
- Measures to protect human, animal and plant life; in case of short supply; to benefit aboriginal people or disadvantaged groups
- Measures to protect essential security interests; to implement non-proliferation; to maintain public order

### ■ State-to-State dispute settlement

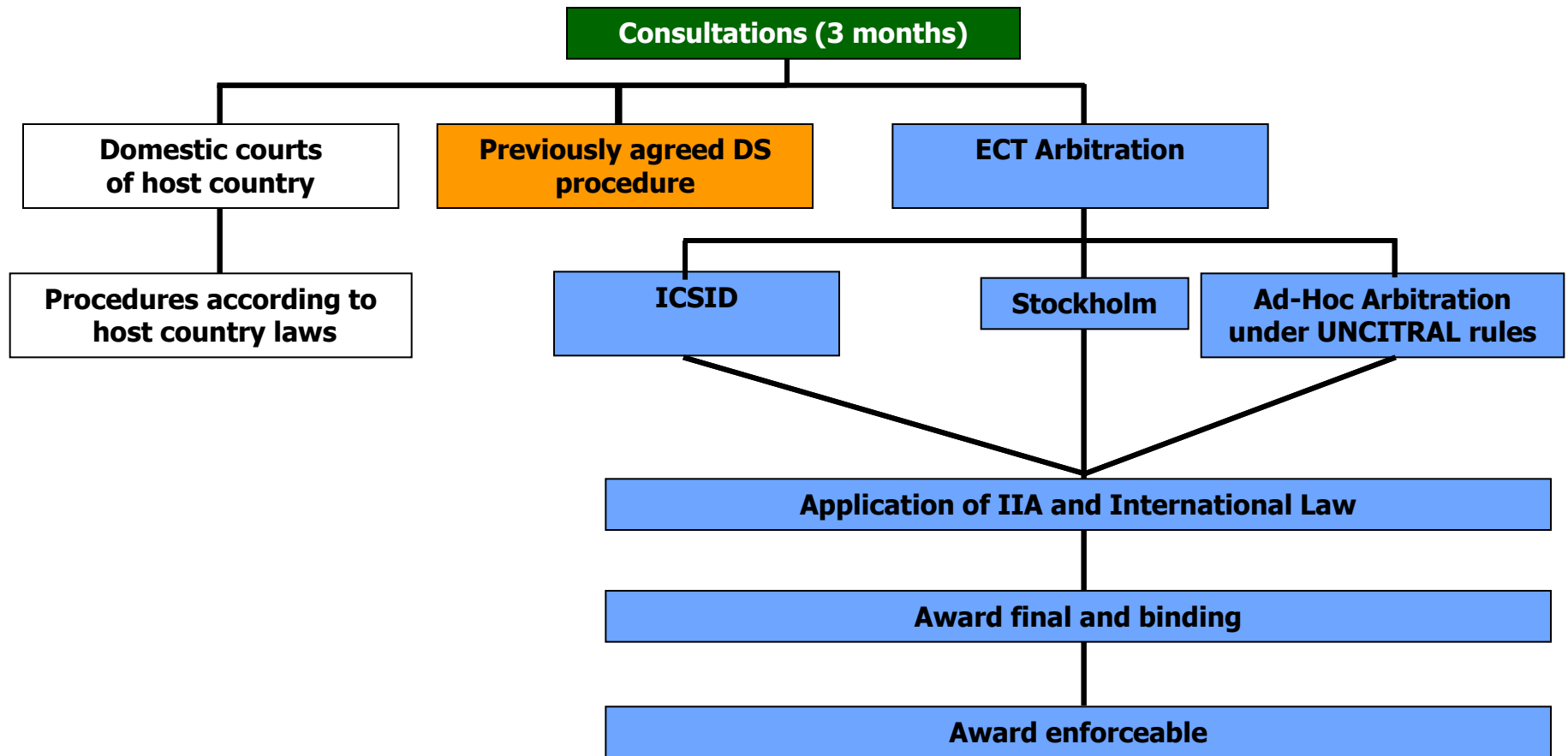
- Diplomatic channels or *ad hoc* arbitration

### ■ Investor-State dispute settlement

- Request for amicable settlement and three months cooling-off period
- Before local courts or before the ICSID / arbitral tribunal under UNCITRAL rules / Stockholm Chamber of Commerce



# ECT Investor-State dispute settlement





# ENERGY CHARTER TREATY: Multilateral Investment Rules for Energy

- **Open and global** energy cooperation framework
- **Integrating environmental concerns** and sovereignty over energy resources
- **Dispute Settlement**
- **Managing complexity:**
  - 1' 275 BITs and completing WTO commitments
  - Taking **account of international energy co-operation**<sub>15</sub>