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# POLICY BRIEF

## *The New International Energy Charter: Sustainable Energy Transition, Investment Dispute Resolution and Market Regulation*

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### Highlights

- The 2015 International Energy Charter, a political declaration, and the 1994 Energy Charter Treaty (ECT), a legal agreement, pursue three objectives:
- 1) Provide stable, transparent and fair conditions to mobilise the investment needed for the sustainable energy transition and achieve universal energy access;
- 2) Facilitate enforcement of investors' rights through international dispute settlement mechanisms; and,
- 3) Offer an international benchmark of market-based principles and rules for energy market regulatory reform.
- Enforcement has traditionally been ensured through investor-state dispute settlement (ISDS), which today is under serious scrutiny due to concerns regarding legitimacy, transparency, impartiality, independence and accountability. ISDS clauses are included in thousands of international investment agreements, with the ECT being the most invoked in terms of investment arbitration.
- At the same time, the overwhelming success of the 2015 International Energy Charter in attracting countries and regions across the world shows long-term political commitment to comply with international standards. Signatories aim to share experiences, lessons learnt and best practices in energy market regulation. A rules-based international energy order, based on steady regulatory convergence, with respect to national sovereignty and sovereign rights over natural resources, will improve the level playing field to achieve global energy goals.



## 1. Introduction

Trade and climate change are unsettled issues on top of the global agenda, as became clear from the strained compromise reached at the latest G20 Summit in Hamburg. At the summit, in July 2017, world leaders stepped back from their usual promise to fight protectionism in all its forms and secure fair trade. Breaking with a tradition of consensus, the communiqué had to accommodate references to climate change and fossil fuels in a separate paragraph. The summit outcomes reflect political turbulences associated mainly with the Paris Agreement, but also affecting the World Trade Organisation (WTO) and “mega” trade agreements such as the original 12-nation Trans-Pacific Partnership (TPP), the 3-nation North American Free Trade Agreement (NAFTA), the European Union and United States Transatlantic Trade and Investment Partnership (TTIP), and the EU-Canada Comprehensive, Economic and Trade Agreement (CETA).

The energy sector interlinks those two fundamental issues, climate change and trade. Of all economic sectors, the energy sector is the biggest greenhouse gas emitter and will have to be completely decarbonised in the transition towards a low-carbon future. With regard to energy trade, it relates to the development of efficient energy markets and the promotion of investment. All countries, developed and emerging ones, regardless of whether they are mostly energy producing, transit or consuming countries, or pursuing universal energy access, will need to cooperate to ensure secure, affordable and sustainable energy. At the same time, rights over the use of natural resources, the energy mix and national energy strategies will remain under the sovereignty of each country.

The energy sector also reflects, in broader terms, the growing tensions between global capitalism (facilitated by open markets) and national democracy (including protectionist choices), an odd mar-

riage with no alternative but continued mutual support.<sup>1</sup> This is precisely what the International Energy Charter of 2015 does by striking a balance between international cooperation, investment frameworks, and market reform, on the one hand, and national security and national sovereignty over natural resources, on the other. The International Energy Charter is a political declaration with to date 87 signatories from all continents. Its vision is to enhance trade and investment flows for a sustainable, secure and affordable energy future, underpinned by the rule of law. It updates the 1991 European Energy Charter (EEC), which led to the 1994 Energy Charter Treaty (ECT or Treaty).

Contrary to the 2015 International Energy Charter, the ECT has legal implications. Indeed as a legal international agreement, the ECT bites. This inconvenient truth perhaps explains the reason why the ECT does not receive sufficient attention in international fora debating the global energy architecture. The \$50 billion *Yukos* record arbitral award, *Vattenfall's* claim of \$ 4.7 billion to Germany for shutting down its nuclear plants following the Fukushima disaster, and the dozens of claims for changes to renewable energy laws, are today's harsh outcomes of a Treaty that was negotiated and signed in the 1990s.

The ECT has been a significant step forward in the creation of a rules-based international energy order. Certainly, the ECT can be reviewed, amended and improved. It only depends on the will of its Contracting Parties to do so. However, a reversal or denial of the rule of law would be unacceptable in modern economic systems. While the answer to whether, when and how the ECT might be changed is uncertain and currently under discussion by Contracting Parties, the need to restate and reinforce predictable, transparent and fair investment frameworks is not possible to postpone. This explains the overwhelming success of the 2015 International Energy Charter. Although devoid of legal effects, it has the capability to reveal long-term

1. Martin Wolf, 'Capitalism and democracy – the odd couple', *Financial Times*, 19 September 2017.



political commitment and therefore to build trust in the global energy business.

This paper elaborates on the specific added value of the 2015 International Energy Charter and the ECT, which is threefold: 1) Provide stable, transparent and fair conditions to mobilise the investment needed for the sustainable energy transition and achieve universal energy access; 2) Facilitate the enforcement of investor's rights through international dispute settlement mechanisms; and, 3) Offer an international benchmark of market-based principles and rules for energy market regulatory reform.<sup>2</sup> The paper also makes references to measures on these three mentioned areas that are being implemented by the Energy Charter Secretariat (ECS or Secretariat). The conclusion will refer to potential future developments of the 2015 International Energy Charter and the ECT.<sup>3</sup>

## 2. Stable, Transparent and Fair Investment Conditions for the Sustainable Energy Transition

The fall of the Berlin Wall anticipated the end of the century. Germany reunified and the European Union agreed on a single currency. Externally, there was a unique opportunity for mutually beneficial co-operation between formerly confronted blocs, which materialised in the signature, in 1991, of the EEC in The Hague. The energy-dependent

West had the capital and technology to invest in the East, where abundant hydrocarbon resources were untapped underground. Co-operation would take place according to the principles of open and efficient markets and non-discrimination among market players, so creating conditions to stimulate private investment flows while protecting national sovereignty over natural resources and respecting the environment. The initiative was embraced by European countries and the EU, Russia and the former Soviet republics, the United States, Canada, Australia and Japan. The objectives and principles of the EEC remain valid for the purpose of the ECT.<sup>4</sup>

The EEC outlined the need to translate its declaratory principles into a multilateral legal framework, leading to the signature in 1994 of the ECT, in force since 1998.<sup>5</sup> The international standards on investment promotion and protection, cross-border trade and transit became enforceable through dispute settlement mechanisms. The ECT is technologically-neutral and has a holistic approach on the energy sector. It contains soft law provisions on energy efficiency, competition, transfer of technology, access to capital and taxation. State sovereignty and sovereign rights over energy resources are explicitly recognised. The objective is to create a level playing field with the same rules applying to governments and market players, and in doing so to depoliticise the energy sector.

2. See Statement of Secretary General Urban Rusnák at the World Investment Forum 2016, High-Level IIA Conference, Nairobi, 19 July 2016, available at: <http://unctad-worldinvestmentforum.org/wp-content/uploads/2016/09/WIF-2016-Statement-Intl-Energy-Secretariat.pdf>
3. By way of clarification, a small Secretariat was created by the ECT to assist the Conference, the ministerial governing body composed of ECT signatories. Signatories of the 2015 International Energy Charter and the 1991 EEC are Observers to the Conference.
4. While the 2015 International Energy Charter updates the 1991 EEC, the latter is mentioned in Art 2 ECT: "This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter".
5. The consolidated version of the ECT, the text of the 2015 International Energy Charter and related documents is available at: <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>





The ECT was inspired by three international legal orders.<sup>6</sup> With regard to investment protection, it was based on the well-established practice of bilateral investment treaties and on the NAFTA.<sup>7</sup> As far as trade provisions are concerned, it referred to the GATT/WTO<sup>8</sup> and added transit rules. Furthermore, on market reform, it followed the first proposals of the EU internal energy market. Finally, the Protocol on environmental aspects<sup>9</sup> was in line with the United Nations Framework Convention on Climate Change (UNFCCC) adopted at the Rio Earth Summit in 1992.

Eastern Europe and Central Asia remain important geographical areas of the ECT.<sup>10</sup> The Secretariat is part of the Task Force on Regional Energy Cooperation in Central and Southern Asia, and is working on possible negotiations for a multilateral transit agree-

ment that would be of relevance to the region. The ECS is also a partner of the EU4Energy Programme and collaborates with Eastern neighbours.<sup>11</sup> Since the rotating chairmanship of the Energy Charter Conference was introduced in 2013, it was held by Kazakhstan in 2014 and by Turkmenistan in 2017. At the same time, the importance of market-based principles for the energy sector is spreading across the world.

The geographical expansion is motivated by the revolution that the energy sector is experiencing. Modernisation efforts have resulted in the signature of the International Energy Charter, in May 2015 in The Hague, removing the original European context and raising its international vocation.<sup>12</sup> The main principles such as efficient functioning of energy markets, investment promotion and protection,

6. Andrei Konoplyanik and Thomas Wälde, “Energy Charter Treaty and its Role in International Energy” in *Journal of Energy & Natural Resources Law*, Vol 24, No 4, 2006, pp 523-558. See also: Alex Wilson, *Energy Charter. A multilateral process for managing commercial energy relations*, EPRS PE 607.297, European Parliament, July 2017; Andrey A. Konoplyanik, “4. Multilateral and Bilateral Energy Investment Treaties: Do We Need a Global Solution? Energy Charter Treaty as Objective Result of Evolution of the International Energy Markets and Instruments of Investment Protection and Stimulation” in Kim Talus (Ed.) *Research Handbook on International Energy Law. Research Handbooks in International Law Series*, Edward Elgar Publishing, 2014; Noriko Yodogawa, “Energy Charter Treaty: An Unexploited buy Rich Well”, *IEEJ*, April 2013; Yulia Selivanova (Ed.) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter*, Kluwer Law International, 2011; Craig Bamberger and Thomas Waelde, “The Energy Charter Treaty” in Martha Roggenkamp, Catherine Redgwell, Anita Ronne, Iñigo del Guayo (Eds.), *Energy Law in Europe: National, EU and International Law and Institutions*, 2<sup>nd</sup> edn, Oxford University Press, 2007; Kaj Hobér, “The Energy Charter Treaty”, *Journal World Investment & Trade*, No 8, 2007, pp. 323-356.
7. North-American Free Trade Agreement between Canada, Mexico and United States. It entered into force in 1994.
8. World Trade Organisation, which in 1994 replaced the General Agreement on Tariffs and Trade (GATT). See Speech by WTO Roberto Azevêdo of 17 April 2015, “Azevêdo seeks further cooperation with Energy Charter to support access to energy”, available at [https://www.wto.org/english/news\\_e/spra\\_e/spra55\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra55_e.htm)
9. Protocol on Energy Efficiency and Related Environmental Aspects, which like the ECT was signed in 1994 and entered into force in 1998.
10. See Marat Terterov, “13. The Energy Charter as a Framework for Intergovernmental Cooperation in the Energy Markets of the South Caucasus States” in Meliha B. Altunışık and Oktay F. Tanrisever (Eds.) *The South Caucasus – Security, Energy and Europeanization*, Routledge, 2017; Maria Bun, “The Energy Charter Treaty and Central Asia: Setting an International Standard for Energy-Related Disputes” in Manzoor Ahmad, Julien Chaisse, Teresa Cheng, Manjiao Chi, Jędrzej Górski (Eds.) *One Belt One Road Initiative (“OBOR”)*, TDM 3, October 2017.
11. See [www.energycharter.org/partners/eu4energy/overview/](http://www.energycharter.org/partners/eu4energy/overview/)
12. Letter to Parliament on the results of the Ministerial Conference on the International Energy Charter. Minister Kamp (Economic Affairs) informs the House of Representatives of the results of the Ministerial Conference on the International Energy Charter. Available at: [file:///fileservr.systematcloud.local/C0034\\$/Personal/bonafer\\_c0034/Downloads/letter-to-parliament-on-the-results-of-the-ministerial-conference-on-the-international-energy-charter%20\(1\).pdf](file:///fileservr.systematcloud.local/C0034$/Personal/bonafer_c0034/Downloads/letter-to-parliament-on-the-results-of-the-ministerial-conference-on-the-international-energy-charter%20(1).pdf)



and free transit of energy, have been maintained. At the same time, contemporary challenges such as access to energy and the necessity to invest in sustainable energy resources have been added to the new political declaration. This aims to better reflect the new realities of the energy sector, especially the growing weight of developing countries and emerging economies.

The 2015 International Energy Charter reinforces the political commitment to create a friendly-investment climate. This commitment has expanded beyond the traditional boundaries to bring on board new countries from Asia (Bangladesh, Cambodia, China, Korea), Latin America (Chile, Colombia, Guatemala, Panama), the Middle East (Iran, Iraq, Jordan, the United Arab Emirates, Palestine, Yemen), and Africa (Benin, Burkina Faso, Burundi, Chad, Gambia, Kenya, Mauritania, Morocco, Mali, Niger, Nigeria, Rwanda, Senegal, Swaziland, Tanzania, Uganda). The 2016 Tokyo Energy Charter Declaration states that the International Energy Charter should be more universal and attract wider interests from countries worldwide. That is hardly surprising considering today's global energy challenges.

The signature by Iran, Iraq, Nigeria and the United Arab Emirates saw members of the Organisation of Petroleum Exporting Countries (OPEC) join the 2015 International Energy Charter, as an inclusive intergovernmental cooperation of energy producing, transit and consuming countries.<sup>13</sup>

The UNFCCC Paris Agreement adopted in December 2015 set the objective of tackling climate change by keeping the global temperature rise to below 2

degrees, which has huge implications for the way energy is produced and used. A joint report by the IEA and IRENA estimates that to achieve the climate targets by 2050 around 70% of the global energy mix will need to be low-carbon, amounting to 95% in the electricity sector. Another global energy challenge is UN Sustainable Development Goal No 7 calling for secure access to affordable, reliable, sustainable and modern energy for all by 2030. Today 1.1 billion people have no access to electricity. Decarbonising the energy sector and achieving universal energy access will require trillions of dollars to accomplish.

Investment flows in capital-intensive energy projects need open, non-discriminatory, transparent, stable and predictable conditions. Common standards are listed in the G20 Guiding Principles for Global Investment Policymaking. In particular, investment policies should provide legal certainty and protection, including access to fair and effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Regulation should be developed in a transparent manner involving all stakeholders, and be embedded in the rule of law.<sup>14</sup> These very same principles apply to the energy sector under the 2015 International Energy Charter and the ECT. On this basis, the ECS has been developing a new flagship publication, the Energy Investment Risk Assessment (EIRA). Another relevant study is the RISE initiative of the World Bank Group which promotes the goals of the SE4ALL initiative.<sup>15</sup>

The 2015 International Energy Charter and the ECT lay political and legal foundations for the global energy architecture in the areas of trade and

13. For a geopolitical contribution, see Alan Riley, "Delivering Energy and the Nuclear Deal with Iran. Iran should join the Energy Charter to boost oil flows and reassure the world that it intends to comply with the nuclear deal", *Atlantic Council*, 10 August 2015, available at <https://www.atlanticcouncil.org/blogs/new-atlanticist/delivering-energy-and-the-nuclear-deal-with-iran>

14. G20 Trade Ministers Meeting Statement 9-10 July 2016 and Annex III on Guiding Principles for Global Investment Policymaking, available at [https://www.wto.org/english/news\\_e/news16\\_e/dgra\\_09jul16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf)

15. World Bank Group, RISE - Readiness for Investment in Sustainable Energy: A Tool for Policy Makers, 2014, available at <https://openknowledge.worldbank.org/handle/10986/20598>



investment.<sup>16</sup> At the G20 Brisbane Summit in 2014, G20 leaders committed to making international energy institutions more inclusive of emerging and developing economies and to enhance coordination between energy institutions.<sup>17</sup> In the EU, the European Council has supported strengthening the existing multilateral energy institutions and initiatives, including the modernisation of the Energy Charter.<sup>18</sup> From a Chinese perspective, a study on “Global Energy Governance Reform and China’s Participation” outlines the Energy Charter’s role as the “body with a specific legally binding framework for protecting international energy investment and transit gradually extending its global influence, especially in the Asia Pacific Region and Africa.”<sup>19</sup>

The process of promoting the rule of law is not free from drawbacks and challenges. In 2009, Russia – who had signed but not ratified the ECT – withdrew from its provisional application.<sup>20</sup> In 2015, Italy withdrew from the ECT.<sup>21</sup> These are of course valid national decisions. It must be said, though, that the ECT is the only rules-based multilateral framework governing investment and trade in the energy sector. The fundamental idea of the rule of law can be revisited, reviewed and improved, but the attempt

to enhance the rule of law globally cannot be abandoned.

Contracting Parties acknowledged in the 2016 Tokyo Energy Charter Declaration that “the ECT has the great potential to further contribute to promoting sustainable energy at global level and to strengthening global energy security by extending the application of its legal framework to an increasing number of the countries.”<sup>22</sup>

### 3. Energy Charter Treaty and Investment Dispute Resolution

At the time when the Treaty was negotiated, countries in transition did not yet have a sufficiently developed domestic judicial system. There were concerns about the neutrality, professional competence and efficiency of domestic courts in these countries.<sup>23</sup> The ECT thus included a full system of international dispute resolution. Many of the recent investment claims, however, have been directed against western countries. The objective of the ECT was to increase investor confidence in a sector where disputes are often complex and involve huge sums of money by

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16. See Sijbren de Jong, “The International Energy Charter: a new impetus for global energy governance” in Rafael Leal-Arcas and Jan Wouters (Eds.), *Research Handbook on EU Energy Law and Policy*, EE Elgar, 2017.
  17. 2014 Brisbane Summit G20 Principles on Energy Collaboration, available at: [http://www.g20australia.org/sites/default/files/g20\\_resources/library/g20\\_principles\\_energy\\_collaboration.pdf](http://www.g20australia.org/sites/default/files/g20_resources/library/g20_principles_energy_collaboration.pdf)
  18. Conclusions of 20 July 2015 on Energy Diplomacy <http://data.consilium.europa.eu/doc/document/ST-10995-2015-INIT/en/pdf>
  19. Energy Research Institute, NDRC; Grantham Institute, Imperial College London, “Global Energy Governance Reform and China’s Participation. Final Report”, June 2016, available at: <https://www.imperial.ac.uk/media/imperial-college/grantham-institute/public/publications/collaborative-publications/Global-Energy-Governance-Report-final.pdf>
  20. Alison Ross, “Russia withdraws from Energy Charter Treaty”, *Global Arbitration Review*, 7 August 2009; Kirtsen Westphal, “The Energy Charter Treaty Revisited. The Russian Proposal for an International Energy Convention and the Energy Charter Treaty”, *German Institute for International and Security Affairs*, 2011.
  21. Alison Ross, “What lies behind Italy’s ECT exit?” *Global Arbitration Review*, Volume 10 Issue 3, 29 July 2015.
  22. Energy Charter Tokyo Declaration adopted by the ministerial conference in November 2016, available at <http://www.mofa.go.jp/files/000206632.pdf>
  23. Joachim Karl (Ed.), “The Energy Charter Treaty. A Reader’s Guide”, *Energy Charter Secretariat*, 2002.



providing an alternative means of dispute resolution before international tribunals.

The Treaty offers a wide range of dispute resolution mechanisms: state-to-state arbitration (with specific procedures for competition and environmental issues), WTO-based dispute mechanisms for trade, conciliation procedures for transit, a new early warning mechanism, and the famous and increasingly used investor-state dispute settlement (ISDS) clause.<sup>24</sup> The starting point is always the desirability of an amicable agreement, but if this does not prove possible, the Treaty opens additional avenues to reach a settlement. An investor can then choose to submit the dispute for resolution to: a) national courts; b) a previously agreed dispute settlement procedure; or, c) one of the three arbitration institutes provided for in the Treaty: the International Centre for Settlement of Investment Disputes (ICSID); a tribunal constituted under the rules of the United Nations Commission for International Trade Law (UNCITRAL); and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

In terms of ISDS, the ECT basically replicates a mechanism included in more than 3,300 international investment agreements (IIAs) dating back to 1960s. EU member states account for 1,400 of the IIAs.<sup>25</sup> Those agreements set out limited investment protection standards on how to treat foreign investors established in the host country, including the obligation not to discriminate, provide fair and equitable treatment, compensate in case of illegal direct or indirect expropriation, and allow the investor to transfer funds freely.

While most investment agreements are bilateral arrangements between two countries and cover multiple economic sectors, the ECT is a unique multilateral agreement specifically dealing with energy. By 2016 the total number of known investment arbitration cases amounted to 767. Looking at the overall trend, about 20 per cent of all known cases invoked the ECT (99 cases) or NAFTA (59 cases).<sup>26</sup>

The ECS maintains an updated list of investment dispute settlement cases (by the end of 2017 the total number amounted to 108 ECT cases).<sup>27</sup> It has also been compiling summaries of available arbitral awards. The first ECT case was registered in 2001 and, between 2011 and October 2017, there has been a boom of investment arbitration cases concerning renewable energy sources (53 cases, most of them still pending). The existing 35 final awards include 10 cases where no ECT breach was found, 8 cases that were dismissed on lack of jurisdiction grounds, and 12 cases in which the claimant was awarded compensation for damages.

The contested measures often concern issues such as revocation of licenses and permits, alleged expropriations of direct or indirect nature, or disguised discrimination of foreign investors. In the *EDF v. Hungary* case, the tribunal awarded €107 million in damages to the claimant, finding the breach of fair and equitable treatment and non-impairment provisions by mismanaging the termination of power purchase agreements. This UNCITRAL award of December 2014 was the first known ECT case with damages being awarded to a foreign investor as a result of a challenge to the sovereign regulatory sphere of a respondent state. Other recent landmark

24. Alejandro Carballo, “16. Dispute Resolution under the Energy Charter Treaty” in Dário Moura Vicente (ed.) *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective*, Brill, 2016; Irina De Meyer and Urban Rusnák, “The Energy Charter Early Warning Mechanism: 2014 Russia-Ukraine-EU Transit Issues”, *OGEL* 6, 2015.

25. DG Trade, “Investor-to-State Dispute Settlement (ISDS). Some facts and figures”, European Commission, 12 March 2015.

26. *UNCTAD World Investment Report 2017. Investment and the Digital Economy*, available at [http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf)

27. See <http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>





cases include *Yukos*, *Vattenfall* and Spain's renewables saga.

In July 2014, an ECT arbitration tribunal, set up under the Permanent Court of Arbitration (PCA) in The Hague, ordered Russia to pay \$50 billion to the *Yukos* oil company shareholders following allegations that Russia had expropriated company assets.<sup>28</sup> However, Russia appealed to the District Court of The Hague, which ruled that Russia was not bound by the ECT because it had not ratified the Treaty (the District Court did not re-assess the merits of the illegal expropriation).<sup>29</sup> This view of non-applicability of the ECT to Russia is contentious and it remains to be seen whether it will be maintained in the appeal to the Supreme Court of the Netherlands.

In May 2012, the Swedish energy utility *Vattenfall* brought ICSID arbitral proceedings against Germany after the government decision to phase out nuclear energy following the Fukushima disaster in 2011.<sup>30</sup> *Vattenfall* alleged that the environment restrictions in the phase-out law amounted to an expropriation under the ECT. Meanwhile, Germany's Constitutional Court ruled in favour of the country's biggest power companies, including *Vattenfall*. The

Court held that the utilities were entitled to appropriate compensation for the government's decision to expedite the shutdown of nuclear reactors.<sup>31</sup>

Numerous cases regarding reforms to renewable energy laws implemented in Spain and other countries have been brought under the ECT. In *Charanne and Construction Investment*,<sup>32</sup> the first award concerning Spain issued on 21 January 2016, the claimants submitted inter alia that Spain had breached the fair and equitable treatment standard by unexpectedly modifying the economic and regulatory regime and by frustrating their legitimate expectations. The claim was dismissed by the tribunal noting that legitimate expectations could not amount to freezing the regulatory framework. A dissenting opinion, however, maintained that the reduction of the feed-in tariff caused harm without providing adequate compensation, violating the legitimate expectations and thus the fair and equitable treatment. A similar award was rendered in *Isolux v. Spain*.<sup>33</sup> On the other hand, in *Eiser* case, an ICSID tribunal ruled that Spain's new regulatory regime for renewable energy breached its obligations under the ECT to accord fair and equitable treatment to foreign investments,

28. *Yukos Universal Ltd. (UK - Isle of Man) v. Russian Federation*, final award on 18 July 2014, Permanent Court of Arbitration Case No AA 227. See Fenghua Li, "The Yukos cases and the provisional application of the Energy Charter Treaty", in *Cambridge International Law Journal*, Vol 6 No 1, 2017, pp 75-86; Mark Kantor, *Editorial Yukos Special*, TDM 5, 2015.

29. An English version of the judgment is available at <https://www.yukoscase.com/wp-content/uploads/2017/03/6-20160420-Judgment-by-the-Hague-District-Court-setting-aside-the-award.pdf>

30. *Vattenfall AB (Sweden) et al v. Germany*, ICSID Case No ARB/12/12.

31. Luke Eric Peterson, "Germany's openness to ISDS transparency and the Vattenfall arbitration", *Investment Arbitration Report*, 2 June 2015.

32. *Charanne (Netherlands) and Construction Investments (Luxembourg) v. Spain*, Final award issued on 16 January 2016, Stockholm Chamber of Commerce, Arbitration No 062/2012. The Spanish support regime and the Charanne dispute are discussed by Iñigo del Guayo, "Energy Law in Spain" in Martha Roggenkamp, Catherine Redgwell, Anita Ronne and Iñigo del Guayo (Eds.), *Energy Law in Europe, National, EU and International Regulation*, 3rd edn, Oxford University Press, 2016; Anna de Luca, "Lodo favorevole alla Spagna a conclusion del primo degli *investment arbitrations* sorti da impianti fotovoltaici: un precedente rilevante?", *Diritto del Commercio Internazionale*, Milano. Giuffrè Editore, Anno XXX Fasc. I- 2016. An English version of the award and dissenting opinion in *Charanne* is available at [www.minetad.gob.es/es-es/gabineteprensa/notasprensa/2016/Paginas/20160125-laudo-sector-fotovoltaico.aspx](http://www.minetad.gob.es/es-es/gabineteprensa/notasprensa/2016/Paginas/20160125-laudo-sector-fotovoltaico.aspx)

33. Damien Charlotin, "In newly-unearthed Energy Charter Treaty award, arbitrators grapple with denial of benefits, nationality planning, tax carve-out and EU law issues", *Investment Arbitration Reporter*, 29 June 2017





ordering Spain to pay 128 million euro.<sup>34</sup> A request for annulment is pending.<sup>35</sup>

Beyond specific cases, the traditional system of ISDS is under scrutiny, within the EU and at international level. Most ECT-based awards confirm the compatibility between the ECT and EU law. However, according to the European Commission, intra-EU investment arbitration is not compatible with EU law.<sup>36</sup> Instead, the Commission has launched an initiative to provide dispute prevention and mediation tools.<sup>37</sup> The question of the compatibility of ISDS and EU law is pending before European Court of Justice regarding an intra-EU BIT between the Netherlands and Slovakia,<sup>38</sup> as well as in the context of the Belgian request for an Opinion on the trade agreement with Canada (CETA). In the Opinion 2/15 on the free trade agreement with Singapore, the Court declared

that ISDS falls within the sphere of shared competence between the EU and its member states.<sup>39</sup>

The ISDS debate has gained momentum following UNCITRAL's mandate in July 2017 to consider possible reform of ISDS and transform it into a court-based system.<sup>40</sup> In 2014, the UNCITRAL rules on transparency in treaty-based investor-state arbitration were adopted to provide more transparency in arbitration proceedings.<sup>41</sup> There have been concerns about the current ISDS perceived deficit of legitimacy, transparency, independence, impartiality and accountability. Reforming ISDS is part of a broader exercise to reform new and old IIAs.<sup>42</sup> In his remarks to the UN General Assembly in September 2017, President Trump referred to “unaccountable international tribunals.”<sup>43</sup>

34. *Eiser Infrastructure Limited and Energinet Energy Services A/S v Spain*, award rendered on 4 May 2017, ICSID Case No ARB/13/36.

35. Zoe Williams, “ICSID selects three panelists to hear Spain’s bid to overturn unfavourable solar-dispute award”, *Investment Arbitration Reporter*, 24 October 2017.

36. Luke Eric Peterson, “In recent briefs, European Commission casts doubt on application of Energy Charter Treaty to any intra-EU dispute”, *Investment Arbitration Reporter*, 8 September 2014.

37. European Commission Inception Impact Assessment, “Prevention and amicable resolution of investment disputes within the single market”, 25 July 2017.

38. See Advocate General’s Opinion in Case C-284/16 *Slovak Republic v Achmea BV* on 19 September 2017.

39. See Marise Cremona, Anne Thies and Ramses A Wessel (Eds.) *The European Union and International Settlement*, Hart Publishing, 2017; Gloria María Alvarez, “Achieving a Valid application of EU Law in Intra-EU Energy Charter Treaty Disputes: a Matter of Functions”, *Theses – Queen Mary University of London*, 2017, available at: [https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25803/Alvarez\\_G\\_PhD\\_final\\_230817.pdf?sequence=1](https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/25803/Alvarez_G_PhD_final_230817.pdf?sequence=1)

40. See: Press release UNIS/L/250 “UNCITRAL to consider possible reform of investor-State dispute settlement”, 14 July 2017; Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM (2017) 493 final, 13 September 2017; Gabrielle Kaufmann-Kohler and Michele Potestà “Challenges on the road toward a multilateral investment court” *Columbia FDI Perspectives*, No 201, 5 June 2017.

41. UN General Assembly resolution 69/116 of 10 December 2014. Text available at <https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>

42. See *UNCTAD World Investment Report 2015 and 2017*.

43. See <https://www.whitehouse.gov/the-press-office/2017/09/19/remarks-president-trump-72nd-session-united-nations-general-assembly>



The Energy Charter Conference in November 2017 in Ashgabat has launched a discussion on the modernisation of the ECT.<sup>44</sup> The objective is to know whether some provisions of the ECT need to be clarified or updated according to the new trends in international investment policy. The process will involve Contracting Parties, Observers and the industry. Reviewing the ECT is the next phase of modernisation, which follows the adoption of the 2015 International Energy Charter and its global expansion.

All in all, modernisation of the ECT is an inclusive and dynamic exercise about strengthening international investment law, not of undoing reform.<sup>45</sup> Along with the expansion of the International Energy Charter, the ultimate objective is to address how universal principles and the rule of law can best apply in practice. This was also the basis for the “Brussels International Energy Charter Forum – Mobilising Investments for a Sustainable Energy Future” held in May 2017 and co-organised by the ECS, SCC, ICSID, PCA and the Florence School of Regulation.<sup>46</sup>

#### 4. International Energy Charter and Market Regulation

Despite the ongoing scrutiny and review of the ISDS, in practice the ECT is already acting as a legal benchmark in the transition towards a sustainable energy system. The risks of stranded costs (and thus

litigation) along the whole investment chain are real.<sup>47</sup> The number of disputes will certainly increase under the ECT due to a broad definition of investment as an economic activity in the energy sector. The legal benchmark will be the result of arbitration awards, which will provide guidance for further cases.<sup>48</sup> Arguably, this will be too little too late. Concepts such as indirect expropriation or fair and equitable treatment are not defined in the ECT, and its meaning is interpreted by private arbitrators on a case by case basis. Furthermore, awards may be kept confidential by the parties and do not constitute legal precedents for future cases.

States’ right to regulate, in addition to ISDS, is at the heart of IIAs’ reform. Investment treaties place limits on governments’ regulatory freedom to the extent that foreign investors perceiving that changes to national/regional policy negatively affect their legitimate expectations, will bring arbitral proceedings against the state or region (in case of the EU).<sup>49</sup> The objective of the reform is that countries retain their right to regulate in order to pursue public policy interests. UNCTAD has presented policy options to clarify or circumscribe general provisions such as the most favoured-national treatment, fair and equitable treatment, indirect expropriation (measures resulting in the effective loss of management control or a significant depreciation of the assets value even if the formal title remains with the foreign investor).<sup>50</sup> Likewise, the ECS has been working on promoting

44. The text of the Ashgabat Energy Charter Declaration is available at [http://www.energycharter.org/fileadmin/Documents-Media/News/20171129-Final\\_Ashgabat\\_declaration.pdf](http://www.energycharter.org/fileadmin/Documents-Media/News/20171129-Final_Ashgabat_declaration.pdf)

45. Nathalie Bernasconi-Osterwalder, “Expansion of the Energy Charter to Africa and Asia: Undoing Reform in International Investment Law”, *Investment Treaty News*, International Institute for Sustainable Development, Issue 2 Vol 8, June 2017.

46. See <http://www.energycharter.org/what-we-do/events/brussels-international-energy-charter-forum/>

47. IRENA, “Stranded Assets and Renewables. How the energy transition affects the value of energy reserves, buildings and capital stock” *Working paper based on global REmap analysis*, July 2017.

48. European Parliament, Question E-005748/2014, Answer given by Mr Oettinger on behalf of the European Commission on 22 August 2014.

49. UNCTAD *Investment Policy Framework for Sustainable Development 2015*.

50. UNCTAD *World Investment Report 2015. Reforming International Investment Governance*.



best practices in regulatory reform applicable to the ECT.<sup>51</sup>

Reforming ISDS and strengthening states' right to regulate are steps in the right direction in terms of improving the application of thousands of multi-sector investment treaties. Nevertheless, these initiatives do not convey the bigger picture of the energy sector. Energy is associated with the idea of national security and national sovereignty. State monopolies have opened up to private and foreign investment as a consequence of new trends on liberalisation starting mostly in the 1990s. However, there is a tension between the objective of remaining open to foreign investment, on the one hand, and government's concerns about energy security and national security, on the other.<sup>52</sup> The situation is further complicated by the fact that in the midst of the liberalisation process and the question of markets versus governments, a new revolution started consisting of the transition towards a sustainable energy future.<sup>53</sup>

The G20 Outreach Energy Regulators Round Table in 2013 approached energy markets from the perspective of regulatory frameworks and referred to regulation not just as the states' right to regulate but as "an absolutely necessary element in the provision of safe, secure, reliable, environmentally sound, adaptive and efficient energy infrastructure and markets working in the public interest." In that sense, it was noted that national regulatory authorities (NRAs) are a "crucial institutional player to achieve these goals." A paradigmatic example is the EU Agency for

the Cooperation of Energy Regulators (ACER) created in 2009 as the result of years of voluntary collaboration between NRAs.<sup>54</sup>

Moreover, the G8 Saint Petersburg meeting in 2006 declared that "clear, stable and predictable national regulatory frameworks significantly contribute to global energy security, and multilateral arrangements can further enhance these frameworks." Accordingly, the G8 supported "the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation."

Therefore, governments regulate upstream, e.g. signing and acceding to international investment treaties, and downstream, e.g. creating NRAs to implement national legislation that must in turn respect international law. International treaties set out common principles and rules drafted in general terms, while national regulation is composed of concrete decisions taking into account the specific market conditions of each country and region. The 2015 International Energy Charter and the ECT represent a suitable intergovernmental umbrella to promote energy market regulation at national, regional and global levels.

In its capacity as a regional economic integration organisation (REIO), the EU is a contracting party to the ECT and therefore bound by it. While the interplay between the two legal frameworks raises many issues,<sup>55</sup> the EU and the ECT pursue the same objective of creating a level playing field in open and competitive energy markets. EU law should be inter-

51. Decision of the Energy Charter Conference of 11 October 2017 CCDEC 2017 04, available at <http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201704.pdf>

52. OECD *Working Papers on Investment Policies Related to National Security*, 2016.

53. Ignacio J. Pérez-Arriaga (Ed) *Regulation of the Power Sector*, Springer, 2013.

54. Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (*OJ L 211, 14.8.2009*).

55. Anatole Boute, "3. Energy Trade and Investment Law. International Limits to EU Energy Law and Policy" in Martha M. Roggenkamp, Catherine Redgwell, Anita Ronne and Iñigo del Guayo (Eds) *Energy Law in Europe. National, EU and International Regulation*, 3rd edn, Oxford University Press, 2016; Ernesto Bonafé and Gokce Mette, "Escalated Interactions between EU Energy Law and the Energy Charter Treaty", *Journal of World Energy Law & Business*, 9 (3), 2016.



preted in accordance with the EU's obligations stemming from the ECT.<sup>56</sup> In that sense, multiple ECT arbitration cases certainly influenced the Commission to put forward a proposal for a new Directive on renewable energy that overcomes past shortcomings: "An EU-level framework setting out high-level principles for support schemes [to] provide investor certainty, which may have been undermined in the past by the stop and go policy – and sometimes retroactive measures – taken by certain Member States."<sup>57</sup>

In Africa, the ECT inspired in 2003 the adoption of the Economic Community of West African States (ECOWAS) Energy Protocol. Its Preamble recognises that the ECT "represent[s] the leading internationally accepted basis for the promotion, cooperation, integration and development of energy investment projects and energy trade among sovereign nations." The ECOWAS adhesion to the terms and principles of the ECT "will demonstrate to international investors and capital markets that the ECOWAS region is a very attractive region for investing in energy projects and infrastructure".<sup>58</sup> The Energy Protocol was succeeded by the Treaty of the West African Gas Pipeline Project (WAGP) and the West African Power Pool (WAPP).<sup>59</sup>

ECOWAS signed the 2015 International Energy Charter, which was also signed by the East African Community, the Economic Community of Central African States, and the G5 Sahel. The EU Technical Assistance Facility for the SE4All initiative, implemented by DG DEVCO of the European Commission, has helped the ECS to engage with African countries, particularly with Chad, Mauritania, Mozambique, Nigeria, Tanzania and Swaziland.<sup>60</sup> On the other hand, the 2015 International Energy Charter and the ECT are relevant for North Africa and the Middle East and could contribute to reinforce the regional institutions and initiatives in the Mediterranean.<sup>61</sup>

Four countries in Latin America, Chile, Colombia, Guatemala and Panama, have signed the 2015 International Energy Charter. A memorandum of understanding between the ECS and the Latin American Association of Energy Regulatory Entities (*ARIAE*, in Spanish) was signed in April 2016 in Cusco, Peru. The Senate of the Republic of Colombia hosted in August 2016 the International Energy Charter: "from Bogota to Tokyo", co-organised by the Senate, the National Department Federation, the Externado

56. Advocate General's Opinion in Case C-264/09 *European Commission v Republic of Slovakia* on 15 March 2011, para 60.

57. European Commission Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM (2016) 767 final, 30.11.2016

58. ECOWAS Energy Protocol A/P4/1/03.

59. M.C. Ogwezy, "Legal Framework for the Implementation of ECOWAS Energy Programmes: The Energy Protocol, WAPP Agreement and WAGP Treaty", *OGEL*, 15 (1), January 2017.

60. See related Commission Communication "Increasing the impact of EU Development Policy: an Agenda for Change" COM (2011) 637 final, 13 October 2011.

61. Ernesto Bonafé, "9. New Regional and International Developments to boost the Euro-Mediterranean Energy Sector", in Alessandro Rubino, Ilhan Ozturk, Veronica Lenzi, Maria Teresa Costa-Campi (Eds.), *Regulation and Investments in Energy Markets. Solutions for the Mediterranean*, 1<sup>st</sup> edn, Elsevier, 2015.





University and the ECS.<sup>62</sup> The Secretariat has also continued contact with Mexico.<sup>63</sup>

In 2016, the energy utilities of China (State Grid), Russia (Rosseti), Japan (SoftBank) and South Korea (KEPCO) signed a memorandum of understanding and agreed to the long-term development of an Asian Supergrid to move electricity from Siberia to Seoul. Outsourcing a significant proportion of a country's electricity generation to a neighbouring country presupposes the existence of mutual trust, political stability and good faith.<sup>64</sup> Two reports on the concept of Asian Supergrid have been prepared by Korea Economic Energy Institute and the ECS.<sup>65</sup> Upon the invitation of the Government of Mongolia and the Asian Development Bank, the Secretariat, has become a member of the steering committee for the Northeast Asia Power System Interconnection.

In 2015, China signed the International Energy Charter and welcomed its contribution to the 'Belt and Road' initiative. A new International Energy Charter-China Electricity Council Joint Research Centre was created in September 2017 in Beijing to focus on ECT core business issues and energy market reform. On the same occasion, the Electric Power Planning & Engineering Institute hosted the second meeting of the Energy Charter Industry Advisory Panel in China. The first meeting was organised in 2015 by the China National Petroleum Corporation

(CNPC). Also, officials from the National Energy Administration are regularly seconded to the ECS in Brussels.<sup>66</sup>

The energy market reform ahead is daunting. Multiple signatories from across the world expect the 2015 International Energy Charter to deliver. It is indeed a multilateral platform fit for the purpose, as it lays the foundations for creating energy markets at regional and global levels. The 2015 International Energy Charter is a first step to a voluntary accession to the ECT. It is also a unique platform to share experiences, lessons learnt, best practices and to engage in policy dialogue and further action on the following areas:

Providing an attractive framework to mobilise private investment aiming to achieve the international objectives of climate change mitigation and universal energy access;

Ensuring that market development is compatible with the preservation of state sovereignty and sovereign rights over natural resources;

Understanding that countries' commitment to market integration involves restructuring the institutional landscape and decision-making criteria, coordination, information and technology sharing;

Market outcomes resulting from freely acting market forces;

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62. See <http://www.energycharter.org/what-we-do/events/international-energy-charter-from-bogota-to-tokyo/>. See also Margarita Teresa Nieves Zárate and Augusto Hernández Vidal, "Colombia Energy Investment Report", *Energy Charter Secretariat*, June 2016, available at <http://www.energycharter.org/what-we-do/publications/colombia-energy-investment-report>

63. Report on *Mexico's Energy Sector under the Universal Principles of the 2015 International Energy Charter*, available at [http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Mexico\\_Report.pdf](http://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/Mexico_Report.pdf)

64. The Economist, "Rise of the supergrid. Electricity now flows across continents, courtesy of direct current. Transmitting power over thousands of kilometres requires a new electricity infrastructure", 14 January 2017.

65. "Gobitec and Asian super Grid for Renewable Energies in Northeast Asia" (2014) and "The role of the Energy Charter Treaty in fostering regional electricity market integration: Lessons learnt from the EU and implications for Northeast Asia" (2015), both reports available at [www.energycharter.org](http://www.energycharter.org)

66. See Xiang Li, "China Investment Report", *Energy Charter Secretariat*, November 2017. See also from an ECS Fellow, Wenhua Shan, "Report on the compatibility of Chinese laws and regulations with the Energy Charter Treaty", *Energy Charter Secretariat*, October 2015.



Ensuring a level playing, which means existing regulations must not discriminate among agents on grounds of nationality.

The greatest challenge in developing regional markets is perhaps to find out a way “*to change the ‘national mentality’ of the companies, consumers, institutions and regulators into a ‘regional mentality’, where the prime objective is to maximise the global social welfare of the region, while making sure that the individual participant countries are also better off with the integration*”.<sup>67</sup> Building trust in markets is a step in the right direction.

## 5. Conclusion

By providing predictable, transparent and attractive regulatory frameworks to mobilise private investment, the 2015 International Energy Charter (a political declaration) and the ECT (a legal treaty) *de facto* contribute to achieving the climate objectives of the Paris Agreement and the Sustainable Development Goal No7 of universal access to affordable, reliable, sustainable and modern energy. The rule of law represents the foundation of a global energy architecture, and therefore needs to be reinforced and actively promoted.

A main feature of the rule of law is its enforceability. ISDS is the traditional dispute resolution mechanism in international investment law and, as such, is part of thousands of international investment agreements. However, there is growing concern about its legitimacy, transparency, impartiality, independence and accountability. Alternative amicable mechanisms and a new multilateral investment court are being considered. The objective is to improve the investment climate by providing a new system of investment dispute prevention and resolution.

At the same time, many countries and regions across the world have signed the 2015 International Energy Charter, and engage in the ECT accession process,

thus showing a commitment to complying with international standards. This is a first positive step. An international level playing field will be achieved by means of further regulatory convergence on key issues such as open markets, liberalisation, wholesale (and retail) competition, enhanced cross-border network regulation, geographical market extension and regional integration, support of sustainable energy technologies, energy security, demand-side management, energy efficiency and affordability, while respecting state sovereignty and sovereign rights over natural resources.

That is the new investment and trade environment to which the 2015 International Energy Charter and the ECT apply today. Signatory countries and regions can support one another by sharing experiences, lessons learnt and best practices in energy market regulation. Expectations are high. It is time to deliver.

67. Luis Olmos and Ignacio J. Pérez-Arriaga, “Chapter 10 Regional Markets” in Ignacio J. Pérez-Arriaga (ed.) *Regulation of the Power Sector*, Springer, 2013.



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