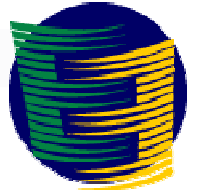




President Medwedew's Conceptual Approach and the Energy Charter

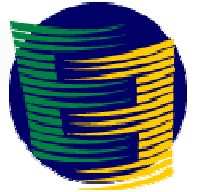
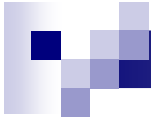
Ralf Dickel, Director for Trade and Transit Energy Charter Secretariat
Tel: + 32 2 775 9840; e-mail: Ralf.Dickel@encharter.org

Meeting of the Baden Baden Group
Moscow 16 November 2009



Comparison / synergies

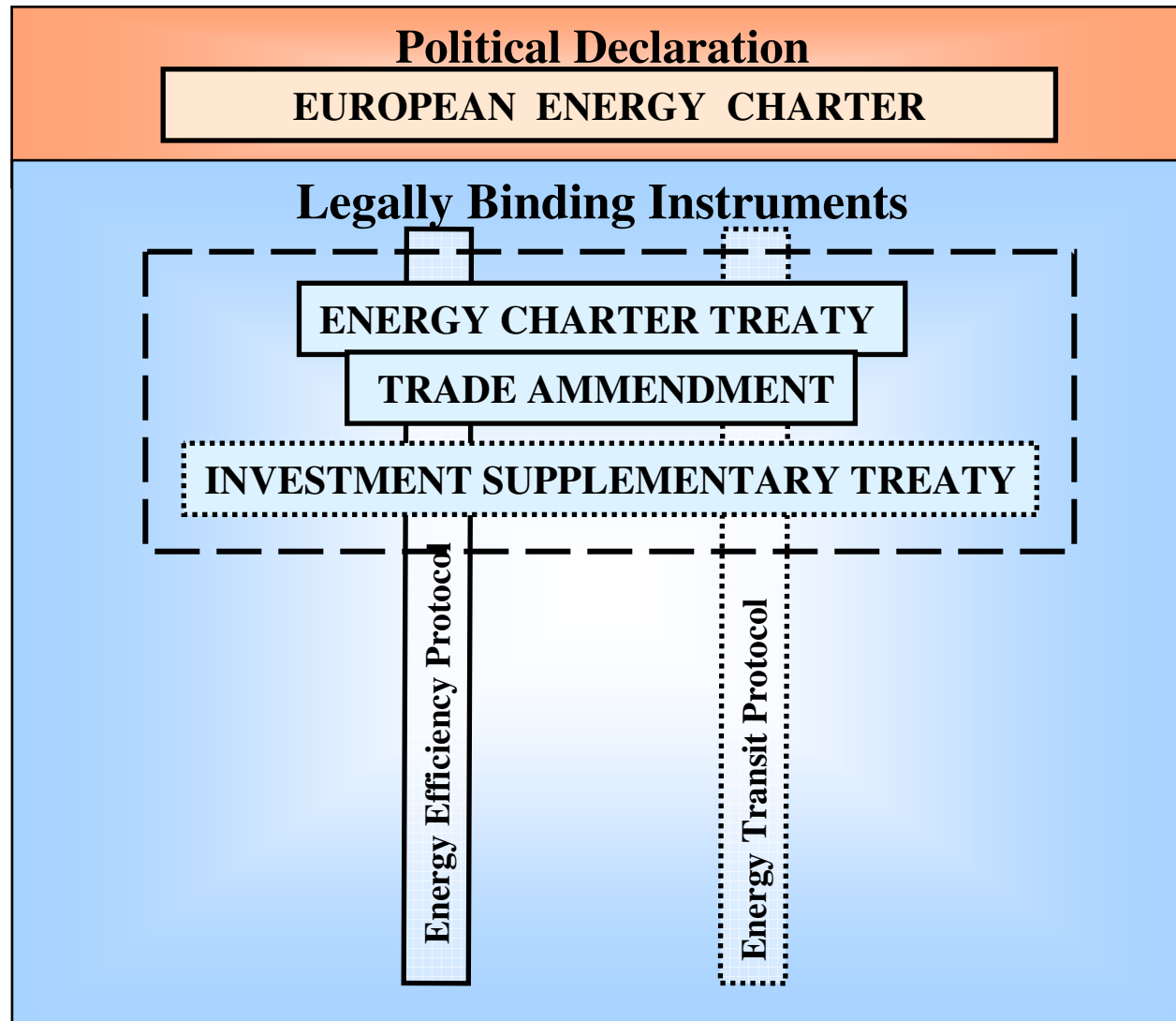
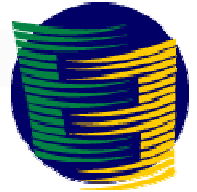
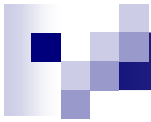
- Elements of the Energy Charter
- Substance covered
- Constituency
- Implementation / enforcement
- Special issue: Transit emergencies
- Synergies



President Medvedev's Conceptual Approach to the New Legal Framework for Energy Cooperation (April 2009)

The Parties should cooperate in the sphere of energy on the basis of the following principles:

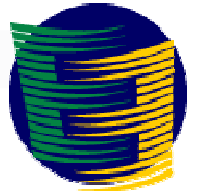
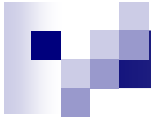
- Recognition of indivisibility of sustainable global energy security and interdependence of all world energy exchange participants;
- Mutual responsibility of energy consuming and supplying countries, as well as of transit states for global energy security;
- Recognition of security of supply (delivery) and demand (transparent and predictable marketing) as key aspects of global energy security



- in force



- negotiations continue or not finished

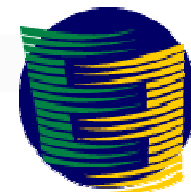


Energy Charter and the Energy Charter Treaty /Conference

- Energy Charter of 1991: signatories to negotiate a Basic Agreements and Protocols (=> ECT of 1994)
- ECT of 1994:
 - Creation of Energy Charter Conference to meet periodically (ECT 34.1) to
 - Carry out duties assigned by the Treaty and protocols (ECT 34 (3) (a))
 - Review and facilitate implementation of the principles of the Energy Charter, the Treaty and the Protocols (ECT 34 (3) (b))
 - Possibility to negotiate new protocols to pursue the objectives and principles of the Energy Charter of 1991 (Art 33.1 ECT)



President Medvedev's Conceptual Approach and the Energy Charter process: substance covered



ISSUES COVERED UNDER THE ECT OF 1994

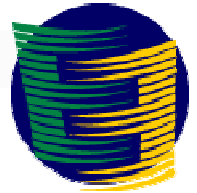
- | | |
|------------------------------|--|
| ■ Sovereignty over resources | ■ Access to technology and technology coop. |
| ■ Access to markets | ■ Energy efficiency and environmental aspects |
| ■ (identical) list of EMP | ■ Transit (in connection with draft Transit Protocol), operational reliability |
| ■ Investment protection | |

ISSUES COVERED UNDER THE ENERGY CHARTER OF 1991

- | | |
|--|------------------------|
| ■ Energy security (supply and demand) | ■ Mutual consultations |
| ■ Transparency of international energy market segments | |

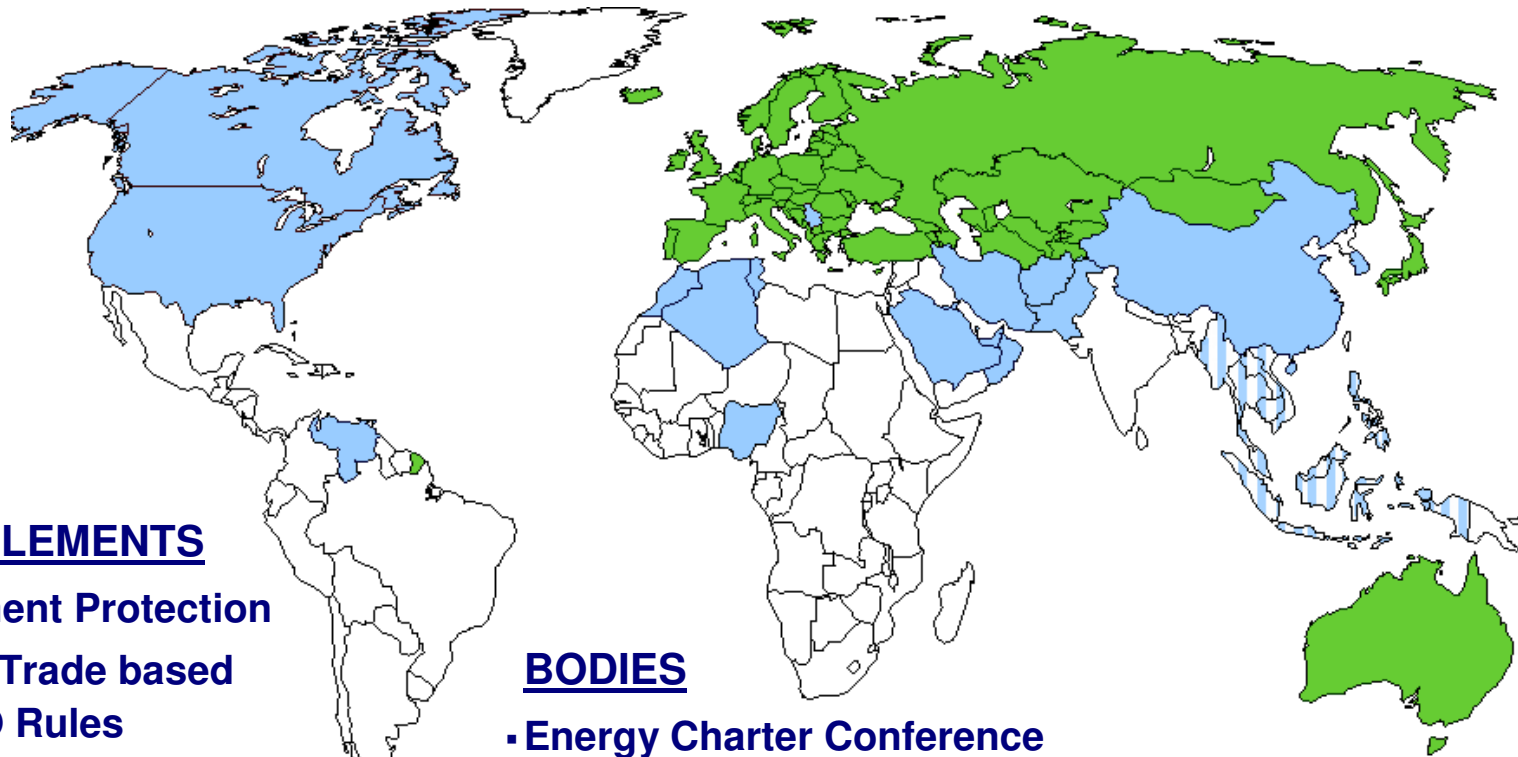
POSSIBLE APPROACHES TO ISSUES NOT COVERED UNDER ECT OR CHARTER

- | | |
|--|--|
| ■ Promotion of mutual exchange of energy business assets | ■ Physical security of essential energy infrastructure |
| ■ Promotion of important infrastructure projects | ■ Terminological and notional uniformity |



The Energy Charter Treaty

1994: Signature 1998: In Force



MAIN ELEMENTS

- Investment Protection
- Energy Trade based on WTO Rules
- Freedom Of Transit
- Energy Efficiency
- Dispute Settlement

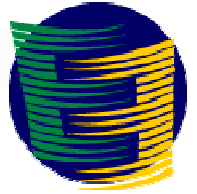
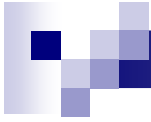
BODIES

- Energy Charter Conference
- Energy Charter Secretariat
- Energy Charter Groups (Trade & Transit / Investment / Efficiency)
- Industry Advisory Panel

■ signatory

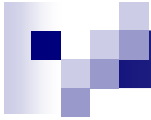
(Russia withdrew from provisional application effective Oct.2009)

■ observer



What forum to discuss Global Energy Governance? Energy Charter and G 20

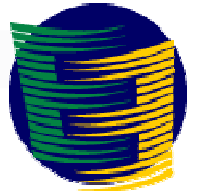
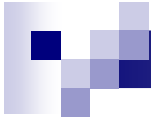
- **9 Signatories of the ECT:**
Australia, France, Germany, Italy, Japan, Russia,
Turkey, UK, EU
- **2 Signatories of the Energy Charter of 1991:**
Canada, US
- **4 Observers:**
China, Indonesia, Saudi Arabia, South Korea
- **5 Not yet part of the EC process:**
Argentina, Brazil, India, Mexico, South Africa



Implementation of international agreements

- Creation of a higher legal body creating and enforcing rules (EU, EU Commission, Council, European Court)
- Dispute settlement between parties (WTO, ECT, BITs...: panels or arbitration => New York Convention)
- Political pressure
- Standards for sector reform (IEA shared goals, PEEREA):
Review and peer pressure by other countries
- Code of Conduct (usually for private sector)
public (=> commercial) pressure

	Substance	Main provisions	Dispute settlement (NOT enforcement)	
			State-to-state	Private-state
Cross border Protection	Investment (Art 10 – 14)	Non-discrimination Promotion and protection of Investments	Art. 27 (ad hoc tribunal; fall back on UNCITRAL)	Art. 26 At investor's -ICC Stockholm -ICSID -UNCITRAL
	Trade (WTO; when non WTO members involved: Art 29 plus Trade Amendment)	Non-discriminatory conditions of trade based on WTO	Art. 29 + TA (WTO like) - if at least one party to dispute is non-WTO member (otherwise: WTO panel)	
	Transit (Art 7 + draft TP)	Facilitation of transit, Protection of existing transit flows	Art. 27 + Art. 7 conciliation	
Sector reform	Sovereignty over energy resources (Art 18)	Recognition of state sovereignty over natural resources + facilitate access	Art. 27	
	Environmental aspects (Art 19 +PEEREA)	Minimisation of harmful environmental	Energy Charter Conference (peer pressure)	



Transit Emergencies: Existing ECT / draft TP obligations

Obligation to cooperate

ECT Art 7.2 ECT /dTP: Art 12 (standards), art 14 (Metering and measuring)

Possible: Monitoring of implementation

Cooperation to mitigate effects of interruption:

ECT Art 7 (2) (c),

Art 16 dTP (Accidental interruption, reduction or stoppage of Transit)

Possible: (Ad hoc) monitoring

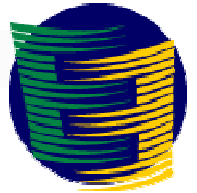
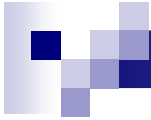
No unauthorised interruption of established transit flows

ECT Art 7.5 and 7.6

Art. 6 dTP (Prohibition of unauthorised taking)

Art 21 dTP refers to Art 27 ECT

Art 5 (3) dTP: domestic laws provide effective means for the assertion of transit claims



Existing ECT / draft TP: existing implementation mechanism

Dispute settlement under art. 27 (State to State arbitration)

To be triggered by an affected CP (one case so far: settled amicably)

Parallel commercial procedures

Long duration of arbitration procedures / fast track possible?

Settlement by payment

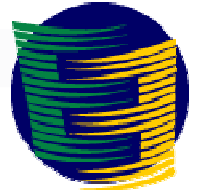
Same for dispute settlement under draft TP (art. 21)

conciliation under 7.7.

Intricacies of procedure under 7.7

Probably designed as a “fast track” procedure targeted at tariff disputes

But: no preventive character, not necessarily suitable to solve operational dispute components



Possible new roles in case of transit flow interruption

**Major issue: break of legal obligations and stop of transit flows;
dispute settled ex post by arbitration / compensation for damage caused /
but NO reestablishment of interrupted transit flows
Instruments to re-establish flows needed, independent of possible later arbitration**

Crisis prevention, transparency (Art 7.2 cooperation):

**Option: defining minimal standards (technical and information) for operation of Energy transit
Facilities used for transit and verification of implementation (e.g. by Conference declaration,
possibly a protocol)**

Crisis settlement /mitigation:

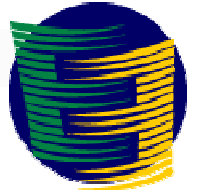
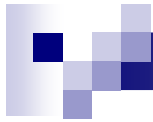
Neutrality

Mechanism can not intervene with policing power into a sovereign country

Major approach: transparency and peer pressure (and burden of proof for later arbitration)

Options:

- **Emergency council based on art. 7.5 / 7.6**
- **Mediation mechanism with expert fact finding mission and recommendation**
- **Ad hoc monitoring / collection of evidence during emergency situations**



Energy Charter and the Conceptual Approach

ECT remains a binding legal instrument of international law, even if regionally confined.

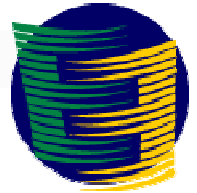
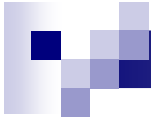
Similar issues will end with similar solutions; a parallel legal instrument risks to create confusion and uncertainty for investors

Any new legal instrument should be consistent with ECT (if ECT members should participate)

Potential dimensions to modernize the Energy Charter Treaty process:

- Geographic coverage
- Coverage on substance (e.g. looking for instruments to secure energy security)
- Additional / Different implementation mechanisms
- More specific rules / clarification of specific provisions (e.g. Transit)

Energy Charter of 1991 and its principles (G8 St. Petersburg)



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.

■ **Conference in Rome 9 December 2009**