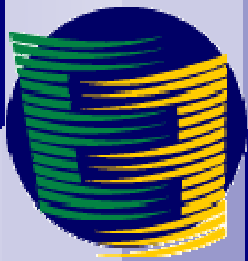


The significance and merits of ECT

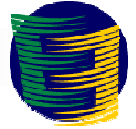
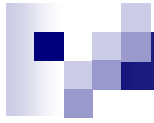


# The development of the ECT and investment protection

*Graham Coop*  
General Counsel

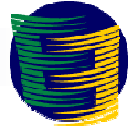
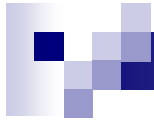
[Graham.Coop@encharter.org](mailto:Graham.Coop@encharter.org)  
Energy Charter Secretariat

Energy Workshop hosted by the Ministry of Foreign Affairs of Japan  
Tokyo, 30 March 2009



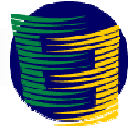
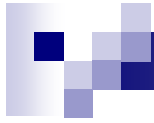
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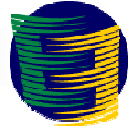
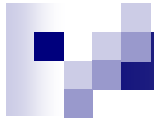
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# Historical and political background to the ECT

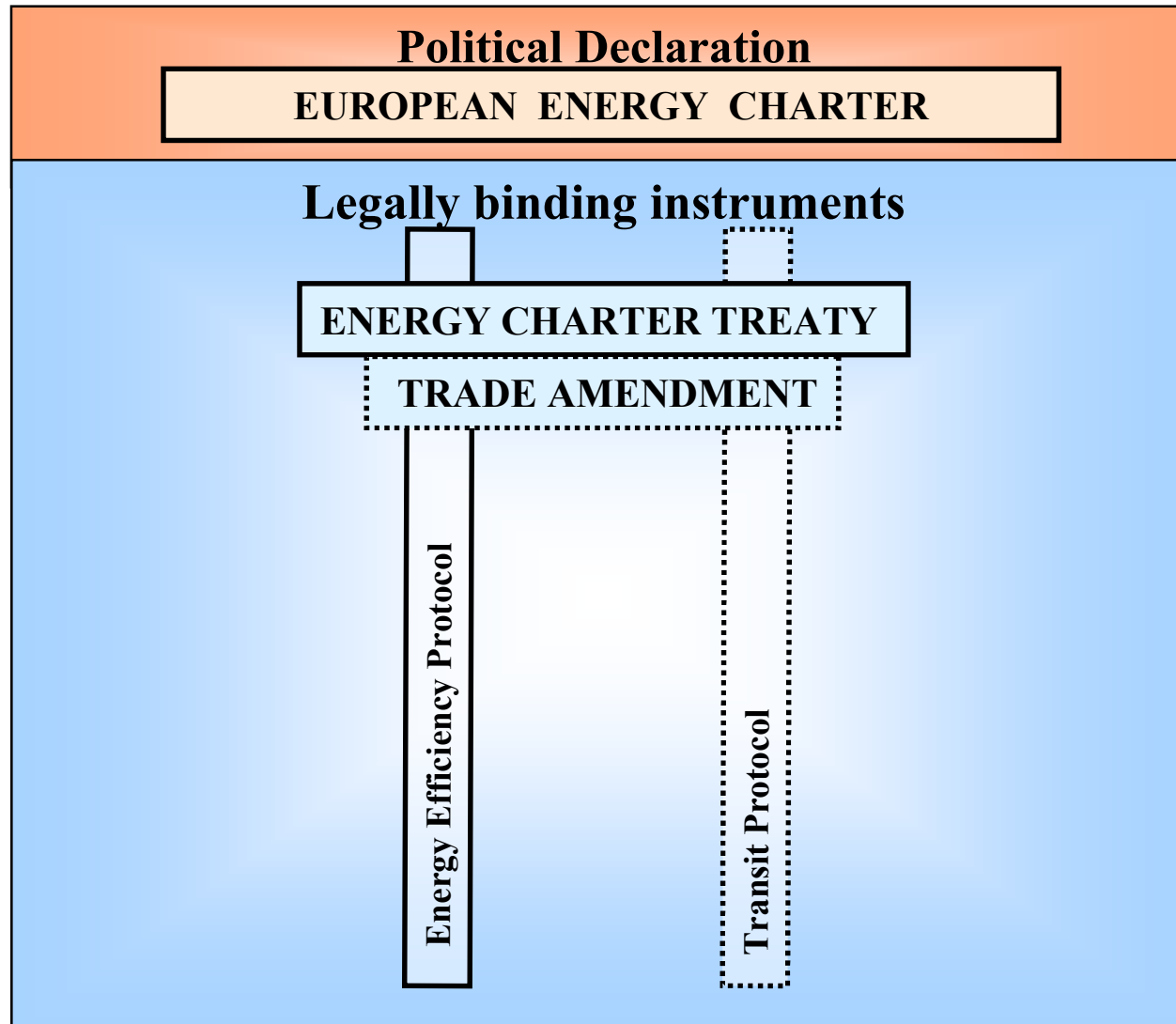
- Common interest in energy cooperation between CIS and western world in post-Cold War era
- Inter-governmental framework was needed to provide legal stability for investments and to secure trade and transit of energy
- Promote energy market reforms (re-structuring and commercialisation, energy price reforms)
- Promote higher energy efficiency

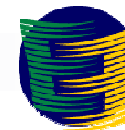


## Energy Charter key dates

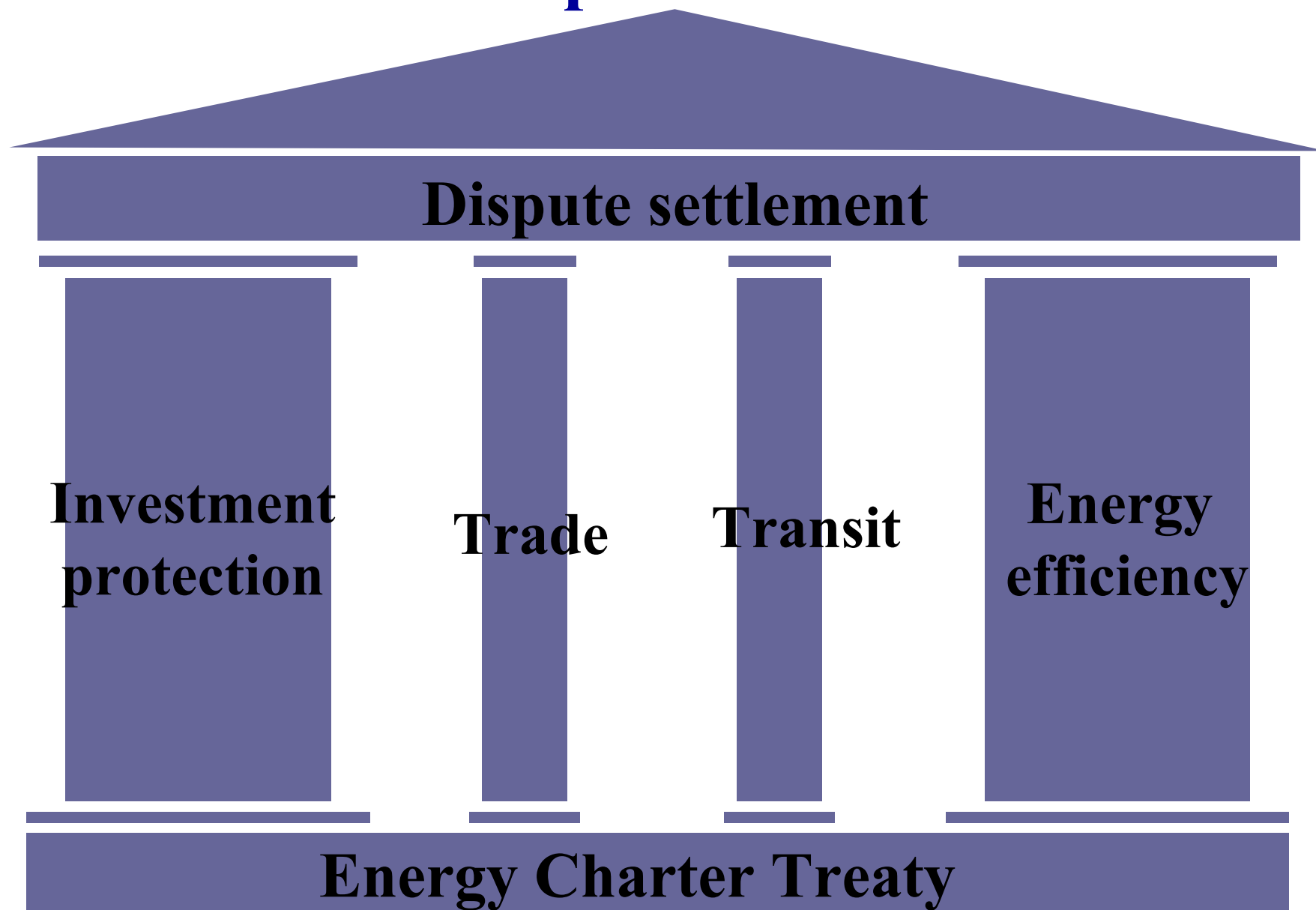
<b>June 25, 1990</b>	<b>Dutch initiative presented in Dublin</b>
<b>December 17, 1991</b>	<b>European Energy Charter signed</b>
<b>December 17, 1994</b>	<b>Energy Charter Treaty (ECT) and Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) signed</b>
<b>April, 1998</b>	<b>ECT came into force</b>
<b>Currently</b>	<ol style="list-style-type: none"><li><b>1. ECT signed by 51 states + European Union</b></li><li><b>2. ECT ratified by 46 states. Not yet ratified by: Russia, Belarus, Iceland, Australia, and Norway</b></li><li><b>3. Russia: provisional application, together with Belarus</b></li></ol>

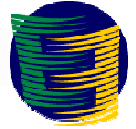
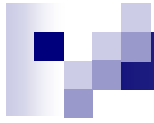
# Framework of the Energy Charter Process





# The four pillars of the ECT





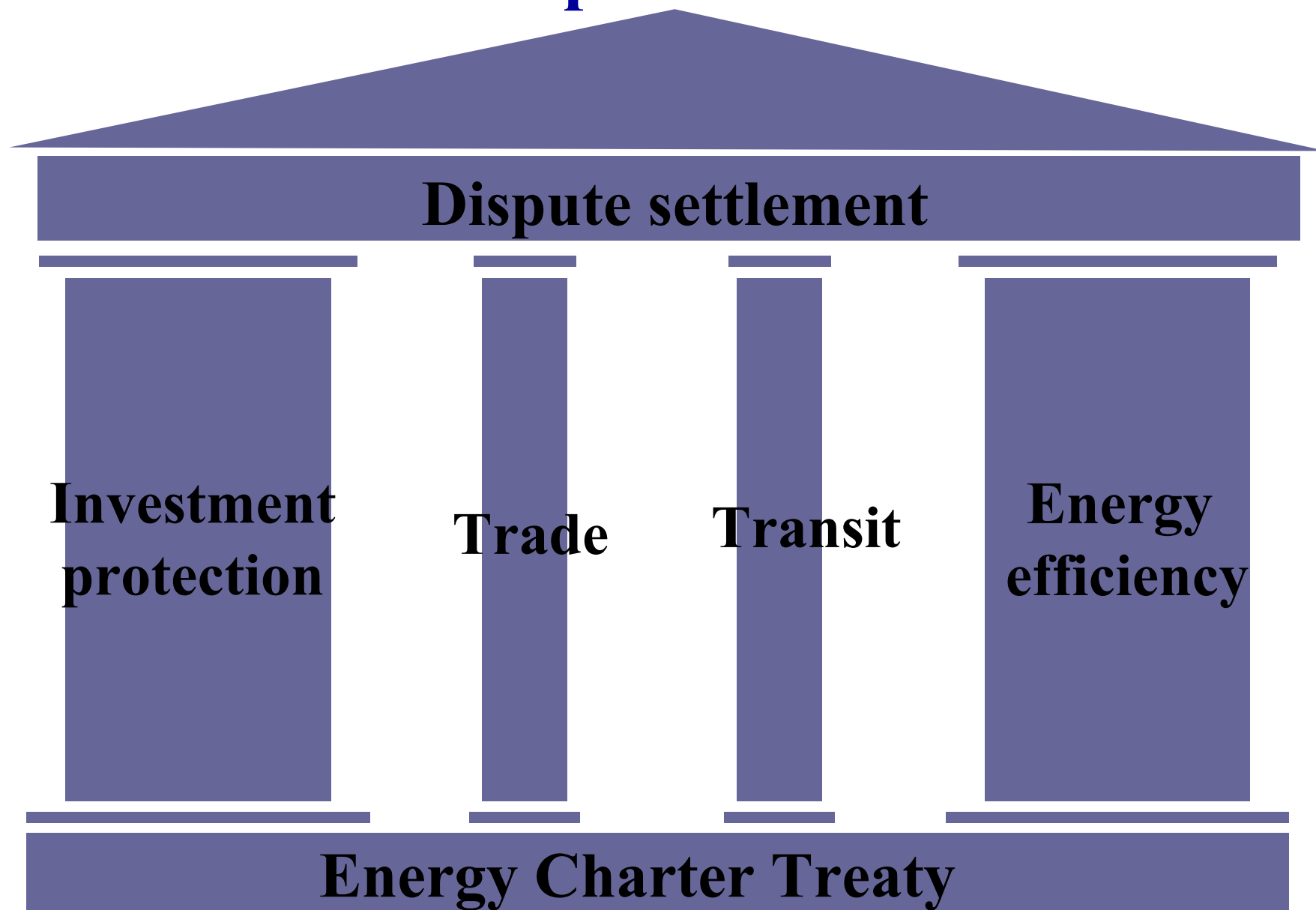
# The ECT – a pioneer in its field

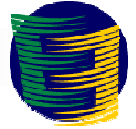
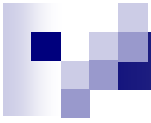
- Unique in covering trade, transit, energy efficiency and investment
- Offers intermediary step towards WTO membership
- Establishes inter-governmental forum to discuss energy cooperation issues





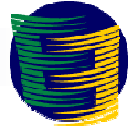
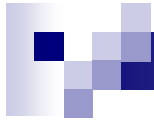
# The four pillars of the ECT





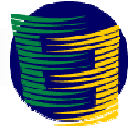
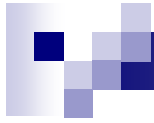
# Trade provisions

- A bridge to WTO membership
- In 1998 (entry into force of ECT) 19 of 51 member countries were non-WTO members
- Currently 9 of the ECT member countries are non-WTO members (all but one are negotiating accession)
- WTO rules are applied by reference for energy products and equipment
- Most Favoured Nation Clause (MFN)
- Dispute settlement



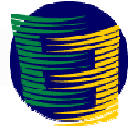
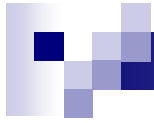
# Transit

- The Treaty (Art. 7)
  - ❑ Freedom of transit
  - ❑ Non-discrimination
    - ✓ not less favourable than conditions for national import or export transportation
  
- Objectives of the negotiated Transit Protocol
  - ❑ To be legally binding
  - ❑ To clarify and strengthen the ECT Transit provisions
  - ❑ To make the ECT Transit provisions more operational and measurable



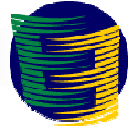
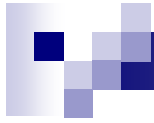
# Energy efficiency

- An international cooperative effort
- Separate Protocol, not legally binding
- Exchange of experience in policy development and implementation
- Supported by
  - ❑ Country reviews and country reporting
  - ❑ Secretariat analysis
- Specific issues
  - ❑ Development of energy efficiency institutions
  - ❑ Development of policy instruments (taxation, subsidies, third party financing)
  - ❑ Overcoming barriers to investments in energy efficiency
  - ❑ Links to climate change policies
  - ❑ Role of district heating and cogeneration



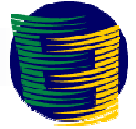
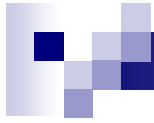
# Investment protection

- The first multilateral investment agreement
- Energy sector-specific
- Principle of non-discrimination/national treatment for established investments
- Best endeavour clause for investments in the making
- Confirms national sovereignty over natural resources
- An ongoing discussion forum for energy-related investment issues



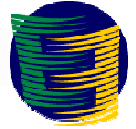
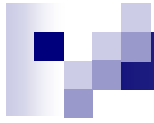
## Popular myths concerning the ECT

- Implementation of the Energy Charter Treaty means mandatory third party access to pipelines and energy networks.
- The Energy Charter Treaty requires unbundling/privatisation of state-owned energy assets.
- The Energy Charter Treaty undermines a system of energy supply based on long-term contracts.
- Russia has not signed the ECT and so the ECT is not in force for Russia.
- The ECT imposes compulsory arbitration in relation to all energy disputes (including supply agreements).
- The ECT forbids energy suppliers from cutting off supplies.



## The development of the ECT and investment protection

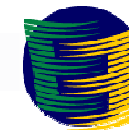
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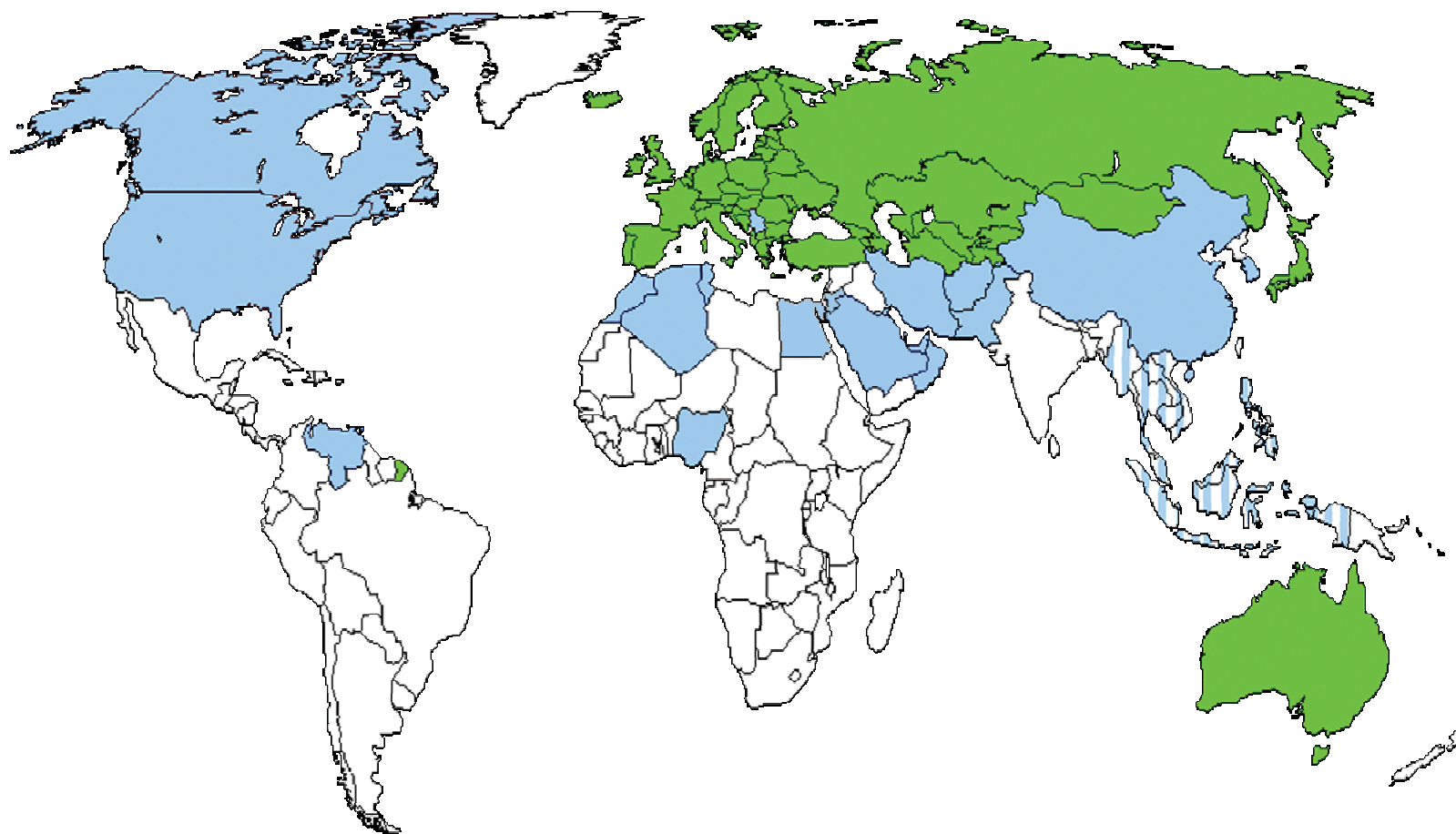
# Geographical scope of the ECT

- The geographical scope of the Energy Charter is Eurasian and Euro-Mediterranean
- Member countries favour targeted further expansion of the ECT, new supply and demand constellations, new regional challenges
- New observers: China (2001), Iran (2002), S. Korea (2002), ASEAN (2003), Nigeria (2003), Pakistan (2005), Afghanistan (2006), Jordan (2007), Egypt (2008), Palestinian National Authority (2008)





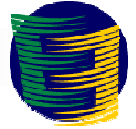
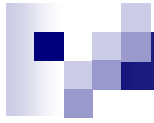
# Energy Charter Treaty constituency



■ Energy Charter Treaty Signatory States (1994)

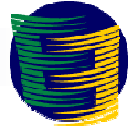
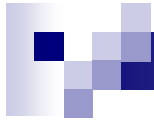
■ Observer States

■ Countries of ASEAN (observer status granted to ASEAN, represented by the ASEAN Centre for Energy)



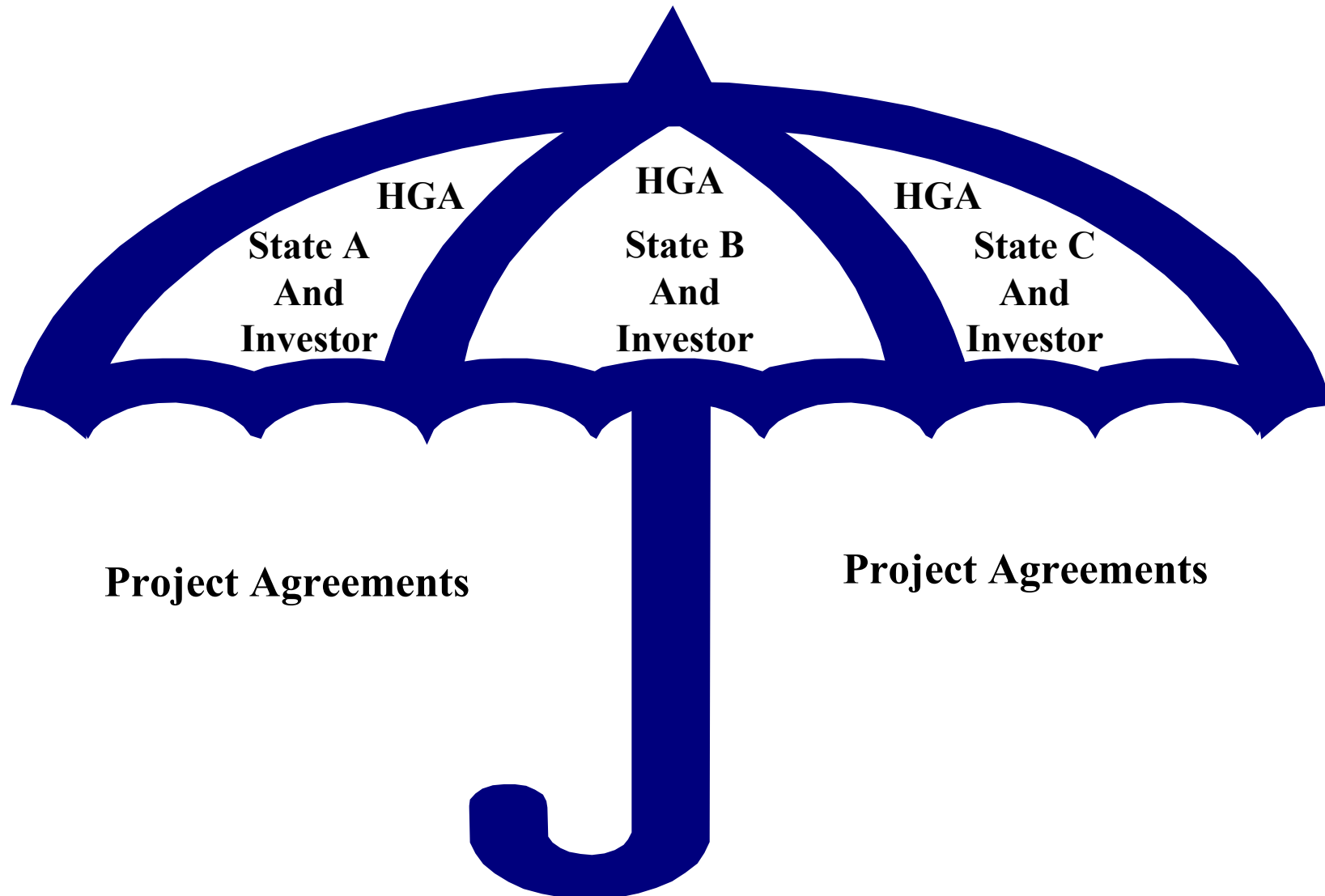
## Model Agreements for cross-border energy projects

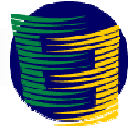
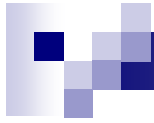
- Model Agreements (MA) – a guide to best practice
- Model IGA and HGA – a package approach
- Basis of the package approach:
  - IGA and HGAs are interdependent and linked
  - IGA is an international treaty
  - HGAs are State contracts
  - Entry into force of HGAs is conditional on that of the IGA
  - All agreements refer to one identified project with identified project investors



# IGA

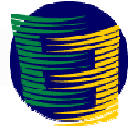
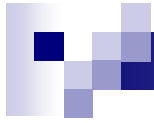
## States A, B & C





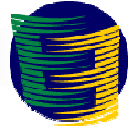
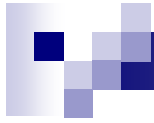
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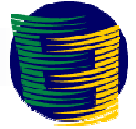
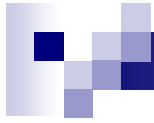
## Definition of “Investment” and “Investor”

- **Investment**: Every kind of asset (e.g. shares, claims to money, intellectual property, licences, concessions) owned or controlled directly or indirectly by an Investor
- **Investor**: natural persons of a CP (including permanent residents), and companies/organisations organised in accordance with the laws of a CP



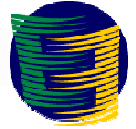
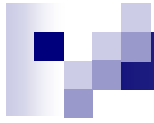
## ECT and investment disputes

- Both investor-state (Art 26) and state-state (Art 27) dispute resolution procedures
- Large place given to an opportunity for amicable settlement. Failing which:
- For investor-state disputes, international arbitration available under UNCITRAL, Stockholm Chamber of Commerce or ICSID Rules (ART 26)
- For state-state disputes, ad hoc international arbitration available (Art 27)
- Countries committed to ensure enforcement and carry out arbitral awards without delay



## Investor-to-state disputes (Article 26)

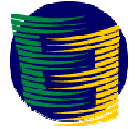
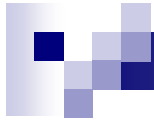
- Limited to Part III of the ECT
- “Cooling-off” period of three months
- Dispute resolution options
  - host state's courts or administrative tribunals
  - previously agreed dispute settlement mechanism
  - international arbitration



## Investor-to-state disputes (Article 26)

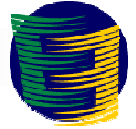
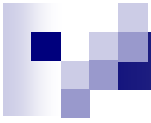
- International arbitration
  - ICSID or ICSID Additional Facility for the Administration of Proceedings rules
  - UNCITRAL
  - The Arbitration Institute of the Stockholm Chamber of Commerce





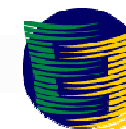
## Investor-to-state disputes (Article 26)

- Applicable law
  - ECT
  - International law
- Exceptions to states' unconditional consent to international arbitration
  - The "fork in the road" exception
  - The "umbrella clause" exception



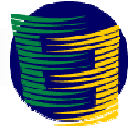
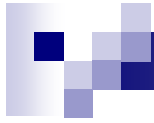
## Investor-to-state disputes (Article 26)

- Finality of arbitration awards
- Enforcement of arbitration awards
  - The New York Convention 1958
  - The Washington Convention 1965



Investor		State	Registration and procedure	Status
1	AES Summit Generation Ltd. (UK)	Hungary	2001 - ICSID	Settlement agreed by the parties
2	Nykomb Synergetics AB (Sweden)	Latvia	2001 - Stockholm	Award rendered on 16.12.2003
3	Plama Consortium Ltd. (Cyprus)	Bulgaria	2003 - ICSID	Award rendered on 27.08.2008
4	Petrobart Ltd. (Gibraltar)	Kyrgyzstan	2003 - Stockholm	Award rendered on 29.03.2005
5	Alstom Power Italia SpA, (Italy)	Mongolia	2004 - ICSID	Settlement agreed by the parties
6	Yukos Universal Ltd. (UK – Isle of Man)	Russian Federation	2005 - UNCITRAL	Pending
7	Hulley Enterprises Ltd. (Cyprus)			
8	Veteran Petroleum Trust (Cyprus)			
9	Ioannis Kardossopoulos (Greece)	Georgia	2005 - ICSID	Pending; decision on jurisdiction 2007
10	Amto (Latvia)	Ukraine	2005 - Stockholm	Award rendered on 26.03.2008
11	Hrvatska Elektroprivreda d.d. (HEP) (Croatia)	Slovenia	2005 - ICSID	Pending
12	Libananco Holdings Co. Ltd. (Cyprus)	Turkey	2006 - ICSID	Pending
13	Azpetrol (Netherlands)	Azerbaijan	2006 - ICSID	Pending
14	Cementownia “Nowa Huta” S.A. (Poland)	Turkey	2006 - ICSID	Pending
15	Europe Cement S.A. (Poland)	Turkey	2007 - ICSID	Pending
16	Liman Caspian Oil BV (Netherlands)	Kazakhstan	2007 - ICSID	Pending
17	Electrabel S.A. (Belgium)	Hungary	2007 - ICSID	Pending
18	AES Summit Generation Limited (UK)	Hungary	2007 - ICSID	Pending
19	Mercuria Energy Group Ltd. (Cyprus)	Poland	2008 – Stockholm	Pending
20	Alapli Elektrik B.V. (Netherlands)	Turkey	2008 – ICSID	Pending

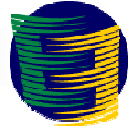
The information above was compiled from various public sources; while the Secretariat has made every efforts to ensure that this information is reliable, its accuracy and completeness cannot be guaranteed. For more details on the cases, please consult [www.encharter.org](http://www.encharter.org) 27



# Provisional application

## *ECT Article 45 (1)*

Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.



# Provisional application

## *Petrobart v. Kyrgyz Republic*

### Parties to dispute:

Petrobart Limited: company registered in Gibraltar.

Kyrgyzgazmunaizat (“KGM”): state joint stock company in the Kyrgyz Republic

### The dispute:

#### Dates:

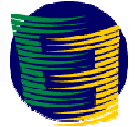
- 23 February 1998: Supply contract concluded between Petrobart and KGM for the supply and transfer of stable gas condensate
- February and March: failure to pay supply – interruption of delivery
- 1998-1999: proceeding before domestic courts
- 2000-2003: UNICTRAL Arbitration
- 2003- 2005: SCC arbitration

#### Claim:

- Violation of Article 10 (1) ECT
- Jurisdiction

### The arbitration:

1 September 2003: Petrobart’s request for arbitration against the Kyrgyz Republic submitted to the Arbitration Institute of the Stockholm Chamber of Commerce  
23 May 2005: award rendered



# Provisional application

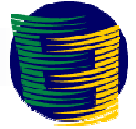
## *Petrobart v. Kyrgyz Republic*

(extracts from Final Award dated 29 March 2005)

... The United Kingdom, at the time of the signature of the Treaty on 17 December 1994, made a declaration under Article 45(1) of the Treaty [that] its provisional application ... of the Treaty should extend to ... Gibraltar.... Gibraltar was not mentioned in the instrument of ratification (p. 62).

According to Article 45(1) of the Treaty, provisional application of the Treaty undertaken by a signatory shall be valid “pending its entry into force for such signatory” (p. 62).

The Arbitral Tribunal has found ...that the Treaty should be considered to continue to apply provisionally to Gibraltar, and the law of Gibraltar must in this context be regarded as being part of the law of one of the Contracting Parties, i.e. the United Kingdom. Petrobart therefore satisfies the condition of being an investor under Article 1(7) (p. 70).



# Provisional application

## *Kardassopoulos v. Republic of Georgia*

### Parties to dispute:

Mr Ioannis Kardassopoulos: Greek investor.

Republic of Georgia

### The dispute:

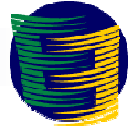
#### Dates:

- 1991-1992: Joint venture formed in Georgia and negotiations entered into with Georgian government
- 28 April 1993: 30-year concession granted to joint venture
- 12 July 1995: Georgia deposited instrument of ratification of ECT
- 20 February 1996: alleged expropriation took place
- 4 September 1997: Greece deposited instrument of ratification of ECT

### The arbitration:

3 October 2005: Mr Kardassopoulos's request for arbitration against the Republic of Georgia registered by ICSID

6 July 2007: Decision on Jurisdiction rendered



# Provisional application

## *Kardassopoulos v. Republic of Georgia*

(extracts from Decision on Jurisdiction dated 6 July 2007)

There is, nevertheless, in the Tribunal's view a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion. Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred (p. 58).

An inevitable consequence of a provisional application clause in a complex treaty is that some of the treaty's language, which will have been drafted with the intention of providing for the permanent situation which would exist upon and after the treaty's definitive entry into force, may not fit precisely with the situation created by its provisional application.... The other remedy is to leave the treaty as it stands and to rely on an implicit acceptance of the need to apply it (provisionally) on a *mutatis mutandis* basis (p. 58).





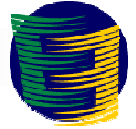
# Provisional application

## *Kardassopoulos v. Republic of Georgia*

(extracts from Decision on Jurisdiction dated 6 July 2007)

So long as the intention of the negotiating States clearly shows that they intended the treaty to be provisionally applied, it cannot be accepted that that clear intention could be undermined by an insistence on applying the terms of the treaty in their strictly literal form (p. 59).

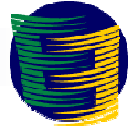
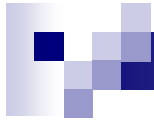
For all the foregoing reasons the Tribunal is satisfied that, properly interpreted in accordance with international law, the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so, and that the language used in Article 1(6), particularly its use of the term “entry into force”, is to be interpreted as meaning the date on which the ECT became provisionally applicable for Georgia and Greece (p. 59).



## Provisional application

*Yukos International*  
*Hulley Entreprises*  
*Veteran Petroleum Trust* } v. *Russian Federation*

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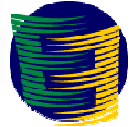
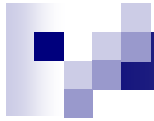


# Mailbox companies

## *ECT Article 17*

Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised....



# Investment protection and the EU

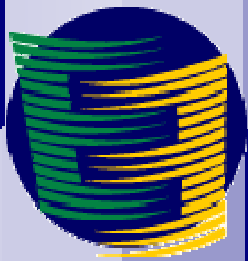
## *Eastern Sugar BV v. Czech Republic*

(extract from Partial Award dated 27 March 2007)

[T]he Arbitral Tribunal is of the view that the BIT and the EU Treaty are not *incompatible*.

Free movement of capital and protection of the investment are different, but complementary things (p. 36).

The significance and merits of ECT



# The development of the ECT and investment protection

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Energy Workshop hosted by the Ministry of Foreign Affairs of Japan  
Tokyo, 30 March 2009