

# External Dimension of the EU Energy Policy II (ED EEP)

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# Conceptualizing the policy field

- 1) Energy security or foreign energy policy
- 2) External dimension of the EU internal energy market
- 3) Intersection between energy policy and other foreign-policy aims

*What kind of international actor was EU emerging as?*

EU as a traditional power?

EU as a market power?

EU as a normative power?

# External dimension of the EU internal energy market

## EU as a market power?

- Aim: the creation of a common energy regulatory space with third countries
- The main idea: a liberalized and de-monopolized energy sector is the best guarantee for efficient and reliable supplies of energy
- Examples: Energy Charter Treaty (ECT), European Energy Community Treaty (EnC)...

# Energy Charter Treaty

<b>European Energy Charter</b>	Dec 1991	political commitment – not legally binding Sets out principles and objectives to govern East/West negotiations on energy issue Context: End of Cold War
<b>Energy Charter Treaty (ECT)</b>	Dec 1994	52 states + EU and Euratom – legally binding entered into force April 1998
<b>International Energy Charter</b>	May 2015	Same universal principles for new challenges New observer countries from all continents

*„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“*

(Bonafé & Piebalgs 2017: 3)

# Energy Charter Treaty

- ECT = The international standards on investment promotion and protection, cross-border trade and transit became enforceable through dispute settlement mechanisms.
- The ECT 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 ECT provides protection to investor interests.
- The ECT does not necessarily obligate its members to liberalise their energy markets
- The ECT does not mandate inward flows of foreign investment
- The ECT does not provide energy exploitation contracts to all ECT parties on a non discriminatory basis

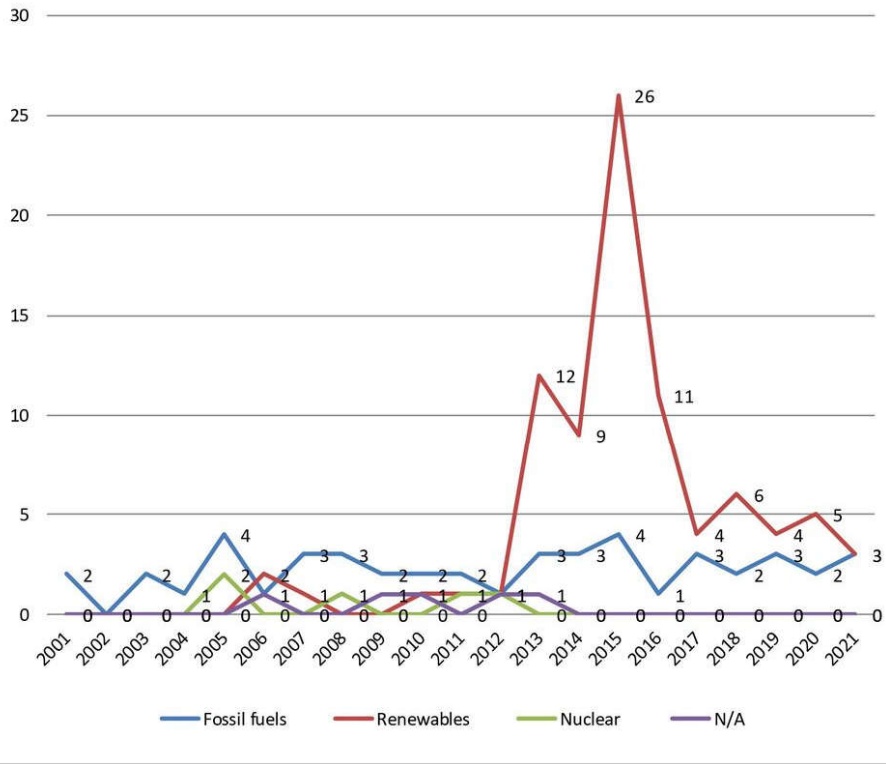
# Neutrality of the ECT

- *„The ECT is technologically neutral and has a holistic approach on the energy sector.“*
  - Fuels protected by the ECT include coal, oil, gas and nuclear.
  - Investments in renewables are only indirectly covered through the protection of foreign investments in electricity production, distribution and trade.
  - Investments in reducing energy demand are not protected under the ECT regime

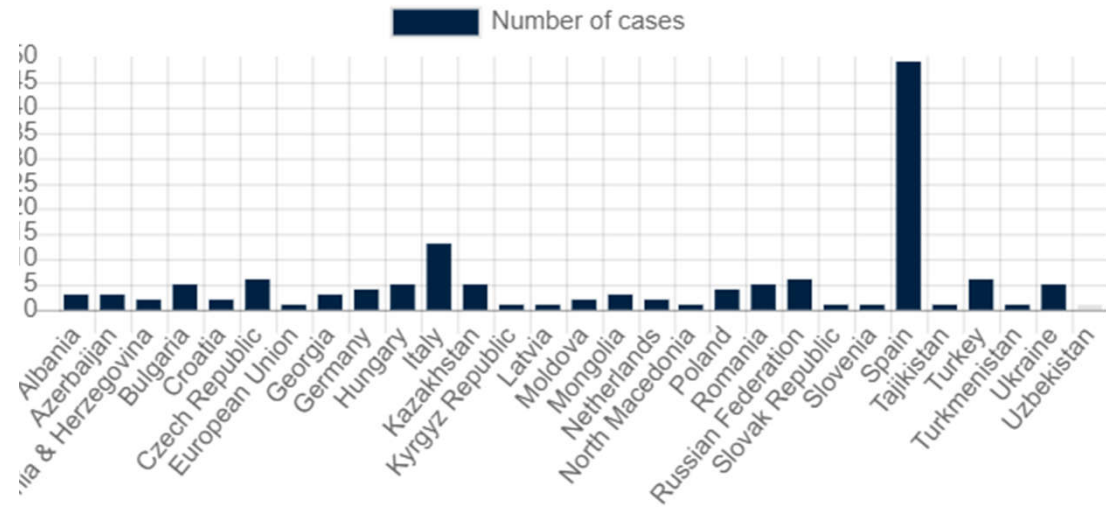
# Energy Charter Treaty and Investment Dispute Resolution

- Investment Dispute Resolution as a key issue of the ECT
  - ? neutrality, professional competence and efficiency of domestic courts in the Eastern countries at the beginning of 90ties => The ECT has a full system of international dispute resolution!
- The ECT 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;
  - an early warning mechanism (NEW);
  - investor-state dispute settlement (ISDS) clause.
- The ECT arbitration institutes:
  - 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);
  - the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

### Distribution of Arbitration Cases under the ECT by Energy Sources Involved: 142 cases\*



### Respondents: 142 cases



Fossil Fuels		Renewables		Nuclear		N/A	
Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded
approx. EUR 12 billion + the Yukos cases (EUR 84 billion)	approx. EUR 500 million + the Yukos cases (EUR 41 billion)	approx. EUR 22 billion	approx. EUR 1 billion	approx. EUR 5 billion	approx. EUR 74 million	approx. EUR 543 million	approx. EUR 11 million



# Russia's attitudes toward the ECT

- ECT is consumer-friendly and 'EU-sponsored Treaty'
- Misunderstandings and Misinterpretations? (e.g. TPA)
- **Transit protocol**
  - REIO clause
  - Access to pipeline and tariff-setting procedure
  - right-of-first-refusal on renewal of transit terms for existing users.
- Investment protection (Yukos cases)
- Dispute settlement mechanism (Art. 7)

# ECT – dispute settlement – The Yukos Affair

- **90ties:** privatization in Russia -) Yukos privatized during so-called loans for shares auctions (Mikhail Khodokovsky)
- **Between 1996 and 2003** Yukos became one of the biggest and most successful Russian companies, producing 20% of Russia's oil output.
- **2003:** Khodorkovsky was arrested on charges of fraud and tax evasion.
- **2004:** Yukos was issued in stages with tax claims for \$27 billion. **BUT** Yukos' assets were frozen by the government at the same time!
  - Alternative attempts to settle by Yukos were refused, the company was unable to pay tax demands.
  - July 2004, Yukos' core asset, Yuganskneftegaz - producing 60% of the company's oil (= Iraq, Libya) and variously valued between \$14.7 to \$22 billion and \$30.4 billion - was confiscated
  - Baikalfinansgrup – Rosneft won the auction by bidding \$7.6 billion beating this way an offer from TNK - BP. . This acquisition boosted Rosneft from a medium-sized oil company to the country's second-largest, after Lukoil (!)
- **2007:** Yukos shareholders fire claim at Permanent Court of Arbitration (PCA)
  - The ECT does not prohibit governments seizing or nationalizing commercial assets, but requires investors to be fairly compensated.
  - Though Russia never ratified the full treaty, these clauses were still legally binding under both the treaty and Russian law until 2029

# ECT – dispute settlement – Yukos cases

- **2014:** The *Yukos* cases presented a paradigmatic example of the setting aside of international investment arbitral awards:
  - 3 ex-shareholders of the defunct OAO Yukos Oil Company have succeeded in obtaining three different parallel awards rendered by the Tribunal constituted under the auspices of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
  - The Tribunal ordered Russia to pay over 50.2 billion dollars for its violation of Article 13(1) of the ECT by taking a series of measures that amounted to a ‘devious and calculated’ indirect expropriation.
- **2016:** The District Court of The Hague set aside the award after finding Russia was not bound to provisionally apply the Energy Charter Treaty, which it had never ratified.
- **2020:** Appeal Court of The Hague squashed District Court's judgment and reinstated the PCA award, prompting Russia’s latest appeal
- **The Yukos legal saga continues?**

# Energy Charter Treaty

Main problems	European organization with global impact?
	Position of the U.S., Canada, etc.
	Withdrawals (Russia, Italy* Spain, France ...)

*\*Italy decided to withdraw from the Energy Charter Treaty as of 1 January 2016. But despite this, existing investments will remain protected until 2036 under the charter.*

## ECT Reform:

- EU and its member states have since 2019 been engaged in the wider multilateral process of “modernizing” the ECT.
- 11/2021: many non-EU contracting states remain reluctant to make significant changes, and no compromise has been reached.

# ECT and Paris Climate Agreement

- Does treaty gives special protection to fossil fuels?
  - For example:
    - RWE and Uniper are suing the Netherlands over coal phaseout
    - Rockhopper, a UK company, is suing Italy over a ban on offshore oil drilling close to the coast
    - Ascent Resources, also a UK company, is suing Slovenia for requiring an environmental impact assessment on fracking plans
    - TC Energy is suing the US over the cancellation of the Keystone tar sands oil pipeline

Company	Amount in US\$ <sup>2</sup>
RWE	1,652,000,000
Uniper	1,062,000,000
Keystone	15,000,000,000
Rockhopper	324,500,000
Ascent	118,000,000
<b>TOTAL</b>	<b>18,156,500,000</b>

Source: GJN

‘Either we kill it, or it will kill us’ (Sahep, 2021).

- The Survival Clause

# Is Green Deal under threat from Energy Charter Treaty?

- 81% of investments protected by the ECT are intra-EU investments.
  - ECT's compatibility with EU law (Belgium has asked the Court to clarify whether the draft modernized ECT is compatible with the European Treaties)
  - 9/2021 EU Court of Justice: *“the preservation of the autonomy and specific character of EU law precludes the Energy Charter Treaty from being able to impose the same obligations on the Member States among themselves.”* .... Decision *“must be interpreted as not applicable to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State”*.
- ECT Reform – EU point of view: ‘right to regulate’
  - climate change and workers’ rights



Source: Friends of the Earth Europe / Flickr

How to convince EU neighbours to  
„download“ EEP acquis communautaire?

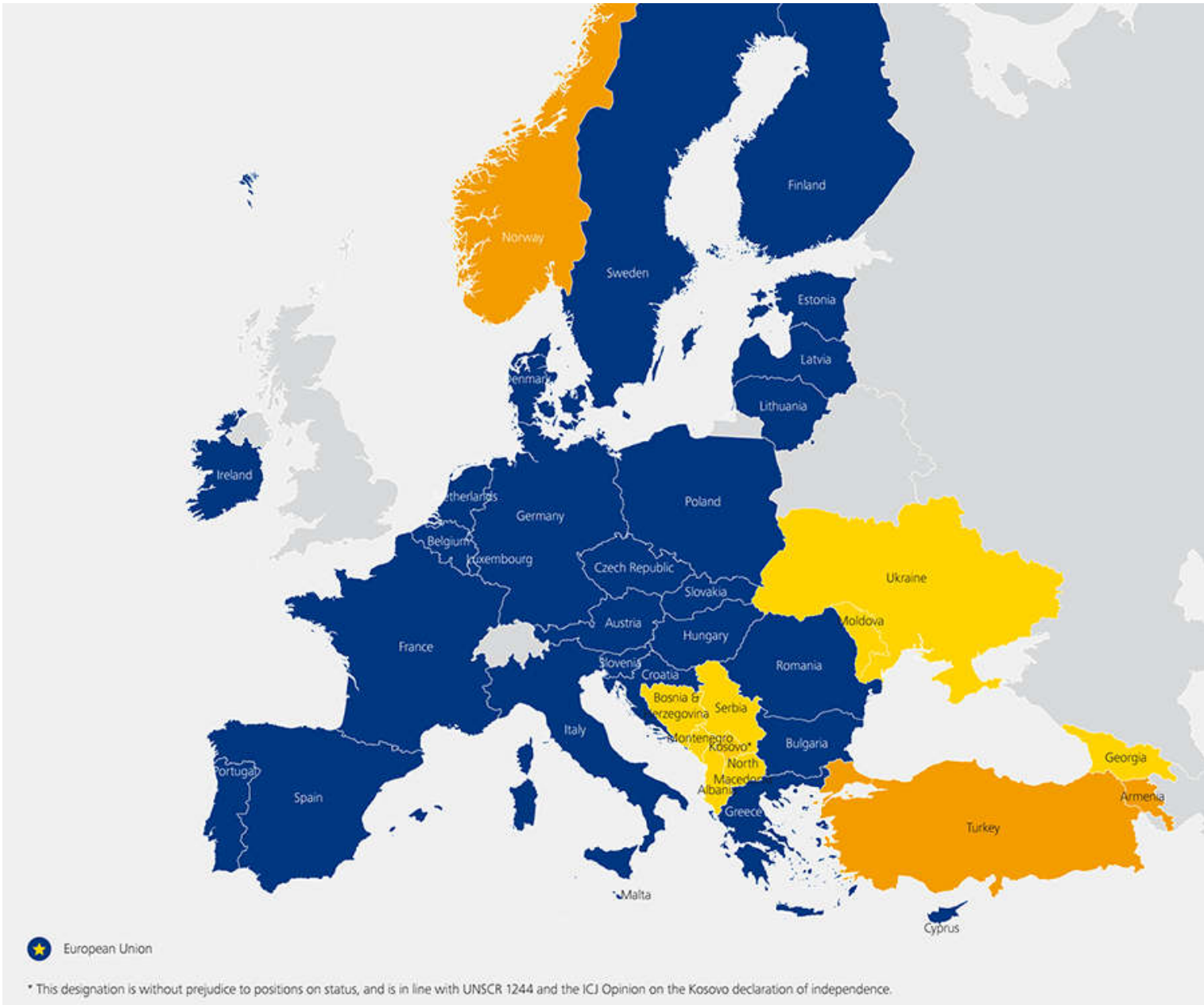
# Energy Community (EnC) – Key Assumptions

- Difficulties in developing an EU Energy Policy ;
- Energy Community as a means of achieving anticipatory or voluntary EU energy rule adoption;
- Europeanization research has shown that EU rule adoption and compliance cannot be taken for granted.



# Energy Community

- *...‘to extend the EU internal energy market to South-East Europe and to contribute to energy security supply not only in the EU but in the wider Europe as well.’*
- The Energy Community is a multilateral institution established by the Energy Community Treaty.
- Signed on 25 Oct 2005
- Entered into force on 1 Jul 2006
- Duration of ten years
- In October 2013 decision to extend the duration of the Treaty for another ten years (until 2026).



# EnC– Principles I.

- EU cannot achieve its energy policy objectives (security of supply, climate change etc.) without cooperating with its neighbours
- Energy Community Contracting Parties are an integral part of the EU's internal energy market
- Energy Community has become an EU foreign energy policy tool
- Non-EU countries benefit from adopting a tried and tested legal framework to reform their energy markets, attracting investment, securing energy supply and raising citizens' welfare in an environmentally sustainable way

## EnC– Principles II.

- Modelled after the European Coal and Steel Community
- A pan-European sectorial market on the basis of EU energy regulations including non-EU countries
- Stabilise South-Eastern Europe by providing a framework for financial aid in energy networks
- Prepare the countries for eventual EU membership
- Sectorial regional integration

# EnC - Goals

- 1. Attract investment in power generation and networks in order to ensure stable and continuous energy supply;
- 2. Create an integrated energy market allowing for cross-border energy trade and integration with the EU market;
- 3. Enhance the security of supply;
- 4. Improve the environmental situation in relation with energy supply in the region;
- 5. Enhance competition at regional level and exploit economies of scale.

# EnC - Acquis

- Gas (Second, Third package) (2 Directives, 2 Regulations) + Regulation 994 /2010 on Security of Gas Supply
- Electricity (Second, Third package) (2 Directives, 3 Regulations)
- Environment (5 Directives: Large Combustion Plants Directive, Industrial Emissions Directive, Environmental Impact Assessment Directive, Sulphur in Fuels Directive, Wild Birds Directive)
- Competition (some provisions of the Treaty: prohibition of anti- competitive agreements, dominant positions, and state aid)
- Renewable energy sources (RES Directive)
- Energy efficiency (4 Directives: Energy Efficiency Directive, Energy Services Directive, Energy Performance of Buildings Directive, Energy Labelling Directive, 9 Technical Regulations)
- Statistics (1 Directive, 3 Regulations)
- Oil Stocks (1 Directive)
- Infrastructure (1 Regulation)
- Memorandum of understanding on Social Impact of the Treaty

# EnC– Challenges

- Decrease the gap between implementation commitments and reality in Contracting Parties.
- The Community does not provide a supranational surveillance authority that can act where countries do not deliver on their pledges in due course.
  - In practice, EnC enforcement is of a political nature.
- Overcome existing obstacles to interconnectivity and create a truly pan-European energy market
- Continue to harmonise legal frameworks (adoption of new acquis)
- Increase investor confidence in the Contracting Parties

# Intersection between energy policy and other foreign-policy aims

- EU as a normative power?
- Aim: to reconcile or achieve synergies between energy and broader foreign-policy aims, such as fighting climate change, promoting democracy and development.
- Main idea: energy dependency is impairing the EU's autonomy as a foreign-policy actor and, in particular, its ability to uphold its 'normative' objectives
- Examples: energy–environment nexus, energy–development nexus, energy–good governance nexus



**Thank you for your attention!**

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