



**MVV310K International and
EU Energy Law**

Session 1

**Department of Energy
Law**

**Masaryk University
2020**

Department of Energy Law

- ❖ Research on Energy Law
- ❖ FDI Moot Court
- ❖ Courses at the Faculty of Law and Faculty of Social Studies
- ❖ Team:
 - ❖ Mgr. Martin Švec
 - ❖ Mgr. Tomáš Ciprovský (EPH)
 - ❖ Mgr. Martin Pospíšil (US)
 - ❖ JUDr. Kateřina Eichlerová, Ph.D. (CUNI)
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MVV310K International and EU Energy Law

Course objective:

From an individual's perspective, we all depend on energy in our daily lives. From a state perspective, the economic and societal development of a state depends on its ability to control, regulate and use natural resources efficiently to meet its populations demands. Given the important economic, political and social dimension of energy, it is no surprise that the energy sector is highly regulated. The course aims to provide students with an in-depth and comprehensive study of international energy law and EU energy law. The course addresses traditional sources of energy, such as oil and gas as well as issues around the renewable and low carbon sector. Special attention is to be given to **the role of international/EU law in ensuring that that energy resources are lawfully protected, exploited and traded**. Special attention is to be given to **international energy disputes**.

MVV310K International and EU Energy Law

❖ **A. International Energy Law**

1. Introduction to International Law
2. Permanent Sovereignty over Natural Resources
3. International Energy Security
4. International Trade and Transit in Energy
5. International Protection of Investments in the Energy Sector
6. Climate Change: Implications for the Energy Sector

❖ **B. EU Energy Law**

1. Introduction to EU Energy Law
2. The Internal Energy Market
3. The External Dimension of the EU Energy Policy
4. The Security of Energy Supply in the European Union
5. EU International Climate Commitments, The Emissions Trading Scheme and EU Clean and Renewable Energy Law

MVV310K International and EU Energy Law

Course organization:

The colloquium will be awarded upon an online test with open questions (min. 60% correct answers) and successful completion and defence of a paper analysing in detail selected decision.

Literature

- ❖ SCHERER, Maxi, ed. International arbitration in the energy sector. Oxford: Oxford University Press, 2018. ISBN 978-0-19-880578-6.
- ❖ COOP, Graham, ed. Energy dispute resolution: investment protection, transit and the energy charter treaty. Huntington: Juris, 2011. ISBN 978-1-933833-79-8.
- ❖ SCHRIJVER, Nico J. Sovereignty over Natural Resources: Balancing Rights and Duties. Cambridge: Cambridge University Press, 1997, 484 s. ISBN 978-0521562690.
- ❖ DOLZER, Rudolf a Christoph SCHREUER. Principles of international investment law. 2nd ed. Oxford: Oxford University Press, 2012. ISBN 978-0-19-965179-5.
- ❖ TALUS, Kim. Introduction to EU Energy Law. Oxford University Press. 2016, 194 s. ISBN 9780198791812.
- ❖ TALLUS, Kim, et al. Research Handbook on International Energy Law. Edward Elgar Pub, 2015, 704 s. ISBN 978-1783478903.
- ❖ WOUTERS Jan; LEAL-ARCAS, Rafael. Research Handbook on EU Energy Law and Policy. Edward Elgar Publishing, 2017, 576 s. ISBN: 978 1 78643 105 9.
- ❖ PEREIRA, Richardo. The Exploration and Exploitation of Energy Resources in International Law. In: MAKUCH, Karen; PEREIRA, Richardo. Environmental and Energy Law, First Edition. Blackwell Publishing Ltd, 2012, 676 s. ISBN 9781405177870
- ❖ LEAL-ARCAS, Rafael; FILIS, Andrew; ABU GOSH, Ehab S. International Energy Governance. Edward Elgar Pub, 2015, 576 s. ISBN 978-1784711498.

Energy Law

❖ COMPLEXITY

ENGINEERING

POLITICS

ECONOMICS

GEOGRAPHY

ENVIRONMENT

LAW

Dynamic, multi-disciplinary a complex.

International Law



Introduction to International Law (IL)

- ❖ **Britannica:** “Law, the discipline and profession concerned with the customs, practices, and rules of conduct of a community that are recognized as binding by the community. Enforcement of the body of rules is through a controlling authority.”

International Law

- ❖ **PUBLIC INTERNATIONAL LAW:**

- ❖ **Adopted by states/international organisations.**
- ❖ **Adjudicatory organs: arbitral tribunals or international courts (International Court of Justice (ICJ)/international courts (ICC International Criminal Court), international tribunals (ITLOS International Tribunal for the Law of the Sea).**
- ❖ **Binding norms: international treaties and customary international law.**
- ❖ **Enforcement: (?)**

Why do states tend to comply with International Law

- ❖ Legitimacy (internal and external)
- ❖ Future cooperation

International Law

Definition: “International law, also called public international law or law of nations, the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors.”

Objectives:

- ❖ peace,
- ❖ international coexistence,
- ❖ international cooperation



International Law: ACTORS

- ❖ **Actors:**
 - ❖ states (primary subjects)
 - ❖ international organisations (secondary subjects)
 - ❖ Individuals, including corporations (under certain circumstances)



Public International Law v. Private International Law

- ❖ **Public International law:**
 - ❖ legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognised as international actors.
- ❖ **Private International law:**
 - ❖ governs the choice of law to apply when there are conflicts in the domestic law of different countries related to private transactions. Issues addressed by Private International Law include what jurisdiction applies - choice of court, forum selection, choice of applicable law recognition or enforcement of a foreign judgment.



Private International Law

Private international law is a body of rules used to resolve legal disputes between **private** individuals who cross **international** boundaries.

Example: *Naftogaz v. Gazprom*

Private International Law determines:

- ❖ Applicable law.
- ❖ Jurisdiction.

Parties to a dispute can choose **applicable law**.

Parties to a dispute **can choose an arbitrator**.

Private International Law (Example)

- ❖ **Naftogaz** (Ukraine) and **Gazprom** (Germany) entered into a long-term contract for the purchase and sale of natural gas for the period 2009-2019 dated 19 January 2009 (the “Gas Sales Contract”).
- ❖ **Applicable law? Forum selection - Public International Law:**
 - ❖ The contract was governed by Swedish law, with disputes to be resolved by arbitration in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
- ❖ The main issues in dispute resolved under the **applicable law – Swedish Law (chosen by the parties)**
 - ❖ Naftogaz claimed an adjustment of the price payable under of the Gas Sales Contract, and retroactive compensation for historic overpayments dating from 2011.
 - ❖ Naftogaz claimed that certain provisions of the Gas Sales Contract should be declared invalid or ineffective - specifically the volume and take-or-pay provision, the destination clause, the unilateral suspension right clause and the mandatory sales clause of the Contract.
 - ❖ Gazprom denied that Naftogaz was entitled to relief
- ❖ Tribunal found that:
 - ❖ Naftogaz had a right to price revision.

International Law

- ❖ **Key principle: Sovereignty**
- ❖ **Internal sovereignty refers to the supreme authority within a territory or the ultimate power within that territory.**
- ❖ **External sovereignty - the principle of sovereign equality** ([i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed)
- ❖ **EXCEPTION_IUS COGENS:**
 - ❖ **States can be bound through objective legal norms they have not consented to, or cannot derogate to imperative norms even if they want to. // peremptory norms accepted by the international community of states as a norm from which no derogation is permitted (prohibition of genocide)**



International Law

- ❖ **Key principle: Sovereignty**
- ❖ **Origins of the sovereign equality of states in international law can be traced to the Peace of Westphalia (1648)**
- ❖ Emerich de Vattel: “a dwarf is as much as man as a giant is; a small republic is no less sovereign state than the most powerful kingdom”.
- ❖ Article 2 of the UN Charter: the organization is based on the principle of the sovereign equality of all its members.
- ❖ **States should not intervene in the internal affairs of other states.**



International Law

- ❖ Decentralised system.
- ❖ UNGA resolutions are not legally binding.
- ❖ Dispute settlement: consent is required (ICJ).
- ❖ UNSC, peace and security (legally binding resolutions).



International Law

- ❖ Sources:
 - ❖ international treaties
 - ❖ customary international law derived from the practice of States
 - ❖ general principles of law recognised by civilised nations



Customary international law

- ❖ **Customary law is not a written source of law.** A rule of customary law, e.g., requiring States to grant immunity to a visiting Head of State, is said to have two elements:
 - ❖ **First, there must be widespread and consistent State practice** – i.e. States must, in general, have a practice of according immunity to a visiting Head of State.
 - ❖ **Secondly, there has to be what is called “opinio juris”, usually translated as “a belief in legal obligation; i.e. States must accord immunity because they believe they have a legal duty to do so.** As the ICJ has put it:- ‘Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation.’ (North Sea Continental Shelf cases, ICJ Reps, 1969, p. 3 at 44)



International Law

- ❖ **There is no hierarchy of sources or rules.**
- ❖ **Exception:**
 - ❖ **Priority of obligations arising from the UN Charter (Article 103):**
 - ❖ “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the UN Charter shall prevail.”



International Treaties

- ❖ A leading source of international law since 19. century.
- ❖ Advantage: predictability.
- ❖ Bilateral treaties
- ❖ Multilateral treaties
- ❖ Regional treaties
- ❖ Sector-specific treaties



International Treaties: Vienna Convention on Law of Treaties

- ❖ **Vienna Convention on Law of Treaties (VCLT)**

Article 1 restricts the application of the Convention to written treaties between States, excluding treaties concluded between the states and international organizations or international organizations themselves.

International Treaties: Conclusion and entry into force of international treaties

- ❖ **Every state possesses capacity to conclude treaties.**
- ❖ **ADOPTION OF THE TEXT:** The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up.
- ❖ **AUTHENTICATION OF THE TEXT:** The text of a treaty is established as authentic and definitive.
- ❖ **THE CONSENT OF A STATE TO BE BOUND BY A TREATY** may be expressed by signature, exchange of instruments constituting a treaty, **ratification**, acceptance, approval or accession, or by any other means if so agreed.
- ❖ A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a **reservation**.
- ❖ A **TREATY ENTERS INTO FORCE** in such manner and upon such date as it may provide or as the negotiating States may agree.
- ❖ The **TERMINATION** of a treaty or the **WITHDRAWAL** of a party may take place: (a) In conformity with the provisions of the treaty; or At any time by consent of all the parties after consultation with the other contracting States.



PARIS AGREEMENT

Article 20

1. This Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention. It shall be open for signature at the United Nations Headquarters in New York from 22 April 2016 to 21 April 2017. Thereafter, this Agreement shall be open for accession from the day following the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
2. Any regional economic integration organization that becomes a Party to this Agreement without any of its member States being a Party shall be bound by all the obligations under this Agreement. In the case of regional economic integration organizations with one or more member States that are Parties to this Agreement, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Agreement. In such cases, the organization and the member States shall not be entitled to exercise rights under this Agreement concurrently.
3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Agreement. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

PARIS AGREEMENT

Article 21

1. This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.
2. Solely for the limited purpose of paragraph 1 of this Article, “total global greenhouse gas emissions” means the most up-to-date amount communicated on or before the date of adoption of this Agreement by the Parties to the Convention.
3. For each State or regional economic integration organization that ratifies, accepts or approves this Agreement or accedes thereto after the conditions set out in paragraph 1 of this Article for entry into force have been fulfilled,

Subjects of International Law

State

- ❖ **The main and primary subjects of international law**
- ❖ **States are sovereign** = they do need not accept any authority from above or from anyone else.
- ❖ Article 1 of the Montevideo Convention on Rights and Duties (1933) reflects international customary law. It states that the state as an actor of international law should possess the following qualifications:
 - ❖ a. a permanent population;
 - ❖ b. a defined territory;
 - ❖ c. government; and
 - ❖ d. capacity to enter into relations with the other states.

International organization (IO)

- ❖ **Secondary subjects** of international law depending on the establishment by other subjects of law.
- ❖ IO are traditionally created by a treaty in order to exercise a task or function that states themselves are unable or unwilling to perform.
- ❖ Tasks: exercising collective security, regulation of international trade or promotion of economic development.
- ❖ The very first IO regulated transboundary communication (postal traffic, telegraph messages, railway traffic).
- ❖ International organisation *sui generis* - European Union (transfer of competences, EU law's supremacy over law of individual states).

Individuals

- ❖ **Human rights treaties**
- ❖ **International humanitarian law**
- ❖ **International investment law**
- ❖ **Direct effect of norms of international public law**

Dispute Settlement

The sovereignty of states makes any attempt to hold them accountable very challenging.

States are reluctant to subject themselves to the jurisdiction of international adjudicatory bodies.

The UN Charter obliges states to settle their disputes peacefully.

Article 33 of the UN Charter:

- **Negotiation** (two parties trying to talk things through)
- **Mediation** (a third party is involved)
- **Inquiry** – a third party is entrusted with a fact-finding task
- **Conciliation** – a third party plays even more intensive role acting almost like a tribunal, hearing evidence, reading memorials and presenting a recommendation based on the evidence. However, such recommendation is not binding.
- **Arbitration**
- **Judicial settlement**

Dispute Settlement

Arbitration

- In the 19. century becomes an attractive dispute settlement mechanism.
- At the first Hague Peace Conference in 1899 the PCA was established
- (a list of available arbitrators and procedural rules applicable)
- Parties exercise some influence on the arbitration panel composition (they typically appoint one arbitrator)
- Arbitration leads to a final and binding decision.

Judicial settlement

- The first more or less universal court was PCIJ
- Truly universal court is the ICJ
- ITLOS, WTO Appellate Body, ICC
- ICJ can adjudicate claims on all sorts of topics, ranging from maritime delimitation to violations of the law of armed conflict, from environmental claims to claims involving financial issues.

Dispute Settlement

JURISDICTION - CONSENT

- Due to the sovereignty of states, there is no such thing as truly compulsory jurisdiction in international law.
- **A state cannot be subject to the jurisdiction of any court without its consent to the jurisdiction.**
- States can accept the jurisdiction of a court before a dispute occurs or after it occurs.

Energy in International and Domestic Law

Different Stakeholders

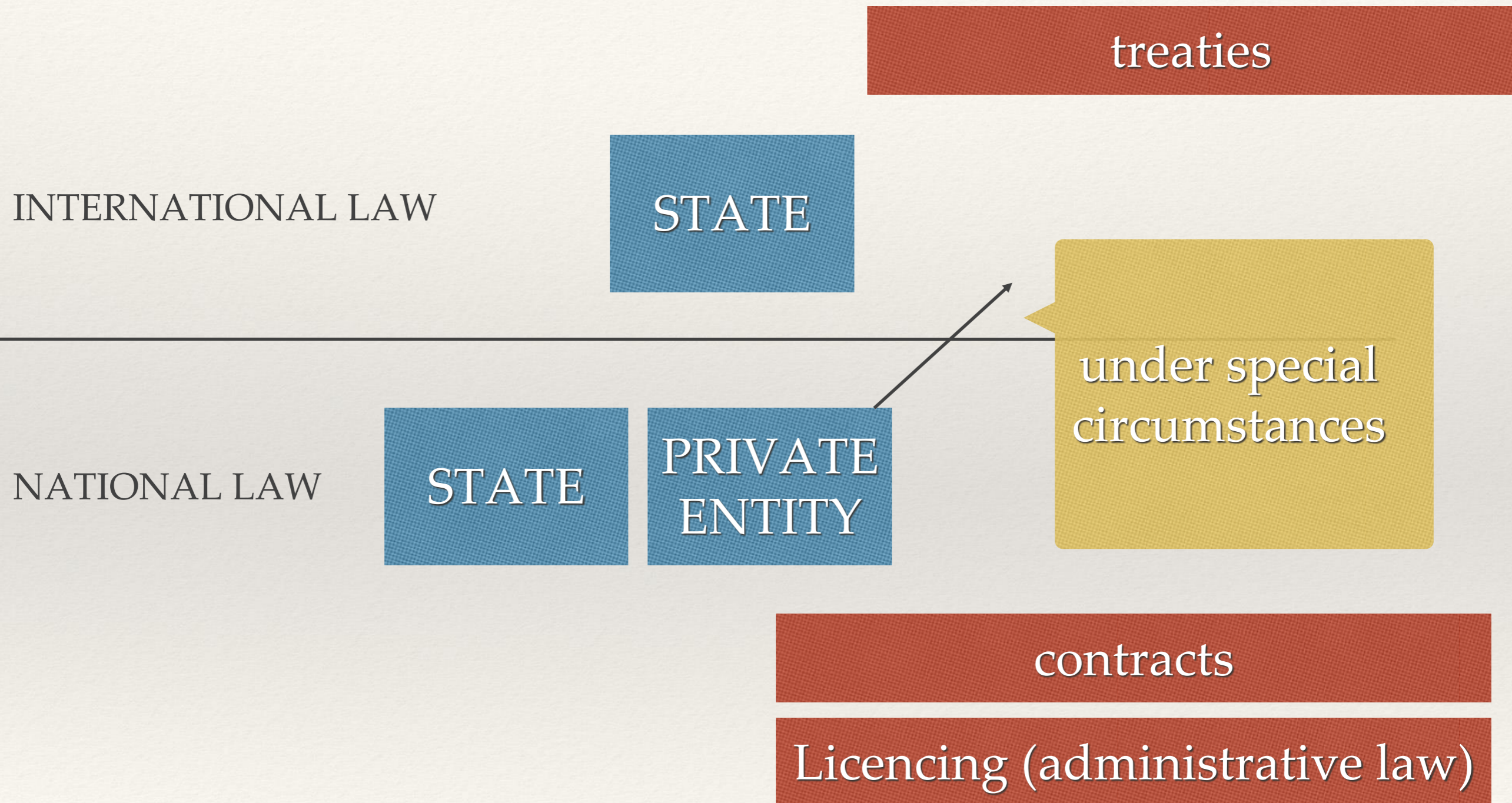
STATE

Permanent sovereignty over natural wealth and resources: States set forth conditions under which natural resources are to be utilized.

States pursue public interests such as the protection of environment.

PRIVATE ENTITY

Different Stakeholders

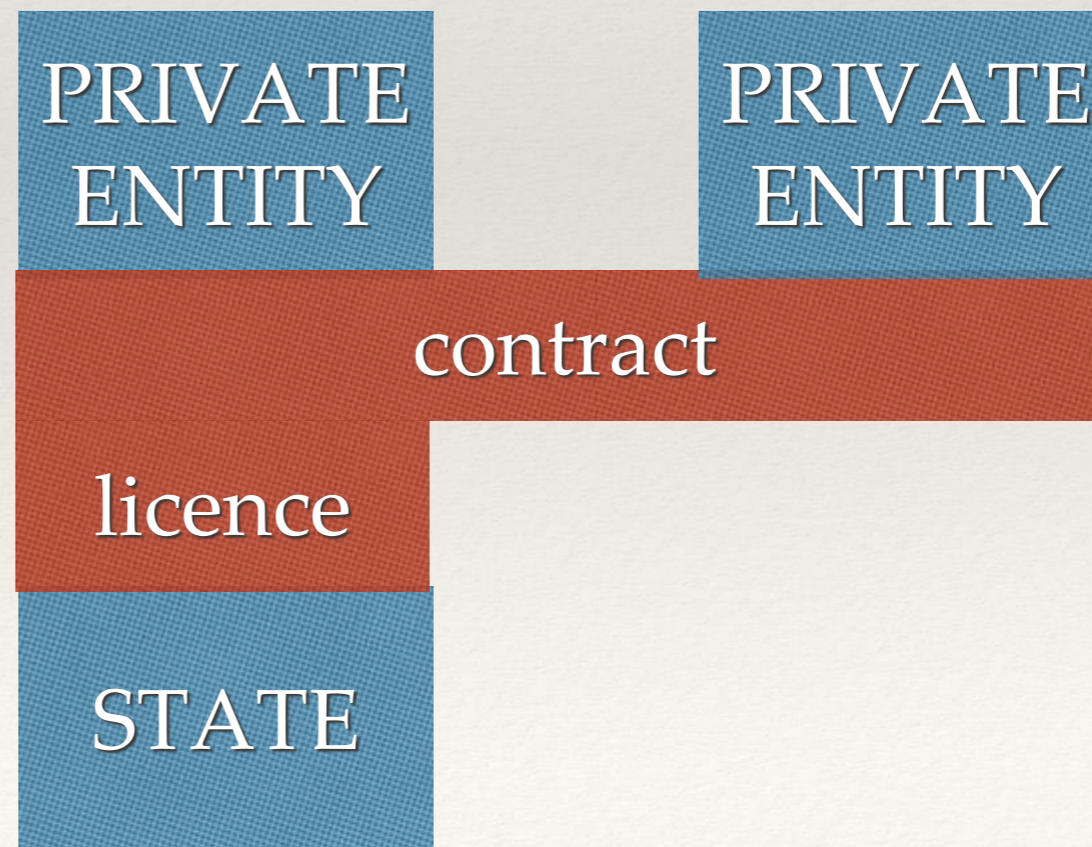


Different Stakeholders

INTERNATIONAL LAW



NATIONAL LAW



Different Stakeholders

dispute: violation of a treaty

INTERNATIONAL LAW

STATE

STATE

NATIONAL LAW

PRIVATE
ENTITY

PRIVATE
ENTITY

dispute: breach of contract

Different Stakeholders

Germany v. Russia

INTERNATIONAL LAW

STATE

STATE

NATIONAL LAW

PRIVATE
ENTITY

PRIVATE
ENTITY

RWE v. Gazprom

Need for International regulation

ENERGY SECURITY: **EUROPEAN UNION, ECT,**

TRANSIT: **ECT**

TRADE: **ECT, WTO**

PROTECTION OF ENVIRONMENT: **UNFCCC**

INVESTMENT PROTECTION: **ECT, BITs, FTA**

NATURAL RESOURCES: **UNCLOS**

COOPERATION: **EUROPEAN UNION**

International regulation

There is **no single international organization** dealing with global energy issues and governance.

There is **no single agreement** dealing with energy in a **comprehensive manner**.

There are **multitude of instances of interstate cooperation** that touches upon energy.