Energy Charter Treaty as a Model Treaty for Energy Trade in South Asia

University of Eastern Finland

Law School

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Abstract

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Title

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Abstract

Energy Trade within South Asia is lagging behind from trade in other commodities in the region and also in comparison to regional energy trade in other regions. The thesis analyses the current situation of the energy supply, generation and consumption in each of the South Asian states that are also the member of the South Asian Association of Regional Cooperation (SAARC), and it further looks into the future energy trade projects that are being executed in the region.

The thesis besides analyzing the current energy scenario in South Asia and the regional SAARC laws makes the Energy Charter Treaty (ECT) as the model on which to frame an energy trade and investment agreement for the region. The thesis makes the transit, investment and dispute resolution provisions the main scope of the study besides some other relevant provision. The main provisions are discussed and analyzed in the scope of regional context of geopolitics, domestic and regional laws relevant to energy and energy trade. The analysis also provides how the certain provision would be adopted and put in to action and what would their possible effect be.

The thesis concludes that the transit provision is the most important for having a viable energy trade within the region. The investment provision providing the investors with security of their investment and also the investors has been seen to be compensated for their investments in other BITs in the region. The two different dispute resolution provisions provide for an investor to take the state to arbitration for breach of investments provisions and the second provides for states to resolve dispute between themselves emerging out of treaty interpretations and implementation. Hence the adoption of the main provision besides other would prove the South Asian region with a better framework for energy trade and investment.

Keywords

Energy Charter Treaty, Energy Trade, South Asia, SAARC, Investment, Transit, Arbitration

CONTENTS

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ABBREVIATIONS

ADB	Asian Development Bank
BIT	Bilateral Investment Treaty
CP	Contracting Party
ECT	Energy Charter Treaty
GDP	Gross Domestic Product
ICSID	International Centre for Settlement of Investment Disputes
LDC	Least Developed Country
LNG	Liquefied Natural Gas
MT	Model Treaty
MW	Megawatt
SAARC	South Asian Association for Regional Cooperation
SAC	South Asian Country
SAFTA	South Asian Free Trade Area
SARCO	SAARC Arbitration Council
SOE	State-Owned Enterprises
UN	United Nations
UNCITRAL	UN Commission on International Trade Law
UNCLOS	UN Convention on the Law of the Sea
WTO	World Trade Organisation

FIGURES

1 INTRODUCTION

1.1 Problem Statement

Energy[1] is a vital element for growth and providing consistency to economic system of nations. It fuels the industry, transportation, lighting and heating in households and all other sectors, and thus its absence or shortfall results in pecuniary loss causing impediment to economic growth. To avoid negative economic and social impacts due to energy shortage, an energy security policy has to be in place.

Energy security can be defined as 'the uninterrupted availability of energy sources at an affordable price',[2] security of supply being one of the main elements of energy security. For a state to ensure security of supply, it has to diversify its energy sources, energy suppliers and energy routes. Thus, a state that has an effective international and in specific regional energy trade to secure its energy demands will be energy secure.

South Asia is almost inhabited by one-third of the world's population and home to upcoming world economic powers like India, hence having great energy needs for its progress. South Asian region despite bordering energy resource rich Iran and Central Asian states faces energy shortfall. One way of resolving these issues of energy shortfall is to way have common energy trade policy and infrastructure, which would allow to better share energy regionally sourced from internal and external regions.

'South Asian countries' (SACs)[3] at present mostly do energy trade on bilateral basis, and there is an absence of multilateral framework for regional energy

[1] Energy in this thesis discussed for trade purposes, as being in the form of fossil fuels (oil, natural gas and coal), nuclear energy and electricity.
[2] IEA, what is energy security?
[3] Compromising of Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka. Also member of SAARC.

trade. Thus, this thesis study's the Energy Charter Treaty (ECT) and how it can be adopted and implemented for growth of regional energy trade in South Asia. The importance of ECT for South Asian regional energy trade has already been highlighted by reports from 'South Asian Association for Regional Cooperation' (SAARC) and 'Asian Development Bank' (ADB). Where they state that ECT's adoption can lead to minimisation of risks associated with energy related regional investments and trade, as ECT aims to strengthen rule of law in energy sphere by providing a level playing field of rules to be obeyed by all the contracting states.[4]

1.2 Research Questions

In order to resolve the problem identified, the thesis delves on the following research questions:

i. The present energy profiles, energy trade and regional energy projects in the SACs.
ii. What is/are the present legal regime/s for energy trade in South Asia and their efficacy?
iii. Analysis of the main provisions of the ECT in the regional context.
iv. Adoption of a new legal regime (based on ECT and other relevant international and regional laws) for regional energy trade, and its influence.

1.3 Methods

The employment of ECT provisions to formulate a new energy trading legal regime for a specific geographic region (in this case South Asia), which has its own set of legal, economic and political realities requires utilisation of different type of methods to the answers questions posed in this master's thesis.

The legal analysis of the ECT in the context of South Asia and framing of a new regional energy trade regime in this thesis makes the use of de lege ferenda research method and law in context method.

[4] ADB Energy Trade in South Asia 2012, p.94
SAARC, Regional Energy Trade Study 2010. p.126

The Latin term de lege ferenda means law that is proposed to be made based on a present law.[5] The method leads to improvement of an existing law, replacing it with a better one or deriving a new law from it.[6] The method has been chosen as present regional and national laws that are related to trade in South Asia, are lacking in the sphere of energy resources trade. The choice of the ECT as the basis for lex ferenda for energy trade in the region is very relevant as it provides for provisions that directly cater to specific nature of energy resources. Thus in this thesis the relevant provisions (including transit, investment and dispute settlement) of the ECT along with relevant regional laws are analysed with the purpose of proposing a new energy trade regime that meets the specific needs of the region and carry's international standards and principles of international trade and investment law at its crux.

The second method of law in context focuses on the law's current context with a specific field or area of study, and is a method of comparative research.[7] *Van Hoecke* states that the law in context method focuses on the "law's current societal context, including, where appropriate, culture, economy…"[8] In this thesis the ECT's provisions are analysed in the context of regional energy trade within South Asia, energy profiles of the SACs, regional energy projects, geopolitics, and domestic and regional laws related to energy and trade. Taking all of the aforesaid subject areas into context while analysing the ECT provisions would provide for a blueprint for new regional energy trade regime that is specific to the needs and requirements of South Asia. The law in context method thus being the appropriate method alongside de lege ferenda for reaching a conclusion to the research questions posed in this thesis.

[5] Lex Ferenda in International Law, p.7
[6] Ibid.
[7] Van Hoecke 2015, p.8
[8] Ibid., p.29

2 ENERGY AND ENERGY TRADE

2.1 Energy

Energy is term in physics that is defined as a property of matter manifested as capacity to perform work e.g. causing motion or the interaction of molecules.[9] And it may exist in kinetic, thermal, electrical, chemical, nuclear and many other forms.[10] In this thesis energy is discussed in the context of trade and refers to energy resources such as petroleum, gas, coal and electricity.

Energy consumption has had a steady growth in the last two decades and to meet the demand so has the energy generation (see Figure 1.1).[11] Energy sources are still dominated by coal, oil, natural gas and electricity with renewable energy sources having a negligible share in overall consumption. But in recent times with advent of new technology adoption of renewable energy sources such as wind and solar have picked up pace.[12]

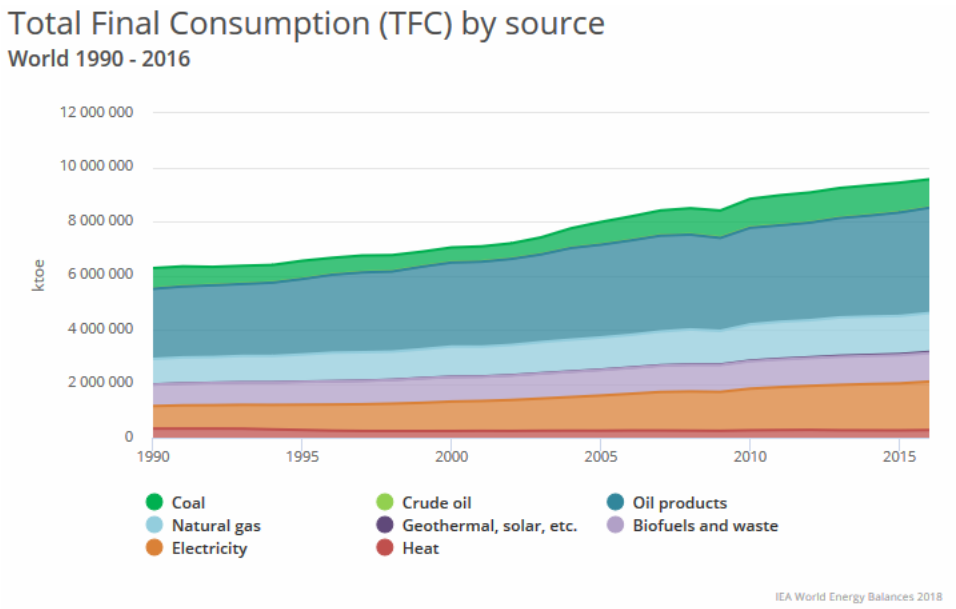

Figure 1.1 Total energy consumption by source

[9] Oxford English Dictionary definition
[10] Encyclopaedia Britannica, Energy
[11] Energy consumption: 627, 0990 ktoe in 1990 and 955, 5323 ktoe in 2016 (statistics from IEA, https://www.iea.org/statistics/)
[12] IEA Statistics 2016: -Wind Generation 1990: 3880 GWh, 2016: 957, 694 GWh
-Solar 1990: 87 GWh 2016: 328, 038 GWh

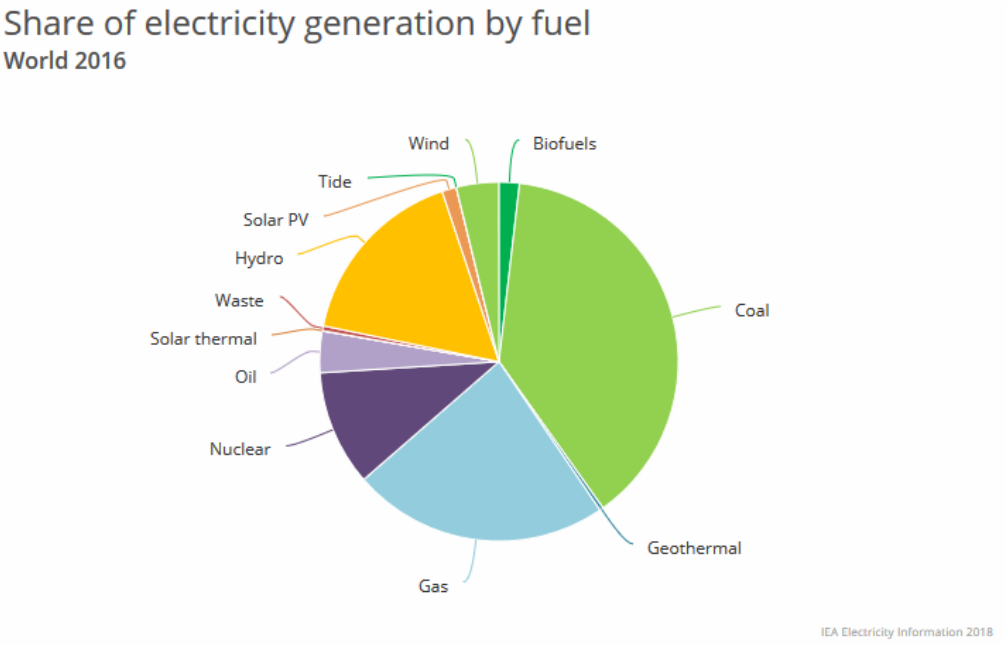

Figure 1.2 Share of electricity generation by source

Electricity as an energy source relays on other energy resources for its generation. And its' generation is dominated by fossil fuels (coal, natural gas, and oil), which make up almost two-third of the share of the electricity generation pie (see Figure 1.2). After the fossil fuels, renewable energy resources (hydropower being the main source among this category) take the second largest share of the electricity generation pie. And nuclear energy having almost ten percent share of the pie.

Energy consumption has its own pattern in South Asia, with each state within it relying on different forms of energy. The choice of energy resources is dictated by their local and regional availability, delivery and transport, price, environmental effect among other elements. India and Bangladesh source more than seventy-five per cent of their energy needs from coal and natural gas respectively. Countries like Pakistan and Sri Lanka rely on oil, natural gas and hydropower, with each energy resource almost having equal share. Nepal and Bhutan because of having mainly mountainous terrain and rivers, source almost all of their energy needs from hydropower. And Maldives being a nation comprising hundreds of islands and having negligible natural resources has to rely on imported oil for majority of its energy needs.[13]

[13] IEA Statistics 2016 (Available at https://www.iea.org/statistics/)

2.2 Energy Trade

Under the previous heading energy was defined and global and regional share of energy resources was presented. Fossil fuels lead the way being the main source of global energy consumption and electricity generation. The aforesaid realities lead to the fact that majority of the states around the world rely on fossil fuels to meet their energy demands, and in absence of local energy sources they have to import it (from energy resource rich states). Thus international energy trade is vital for the functioning of modern economies.

Energy trade and its regulation are affected by the nature of energy that is being traded. Trade in energy resources like natural gas and electricity can only be made through fixed infrastructure like pipelines and transmission wires. Trade in oil and coal on the other hand can be made with less constrains as their transport doesn't mandate fixed infrastructure. Majority international trade in oil is made through oil tankers and on a lesser degree by oil pipelines. Natural gas until recent times was only economically feasible to be transported internationally through pipelines, the advent of liquefied natural gas (LNG) changing that. LNG has been imported by states to diversify their energy mix and hence also ensuring better energy security.[14] Coal being solid in nature is easiest to be transported and handled among the fossil fuels and also the cheapest, explains it popularity in power generation despite it being the largest source of carbon dioxide in the atmosphere.[15]

Energy trade has generally been made bilaterally between states under national and international trade provisions or multilaterally according to common energy trade policy and law (e.g. energy trade between US and Canada under the North American Free Trade Agreement [16] and Energy Community[17]). World Trade Organisation (WTO) being a principle global regulatory framework for trade in goods and services is also of relevance here, even if it does not directly focus on energy trade. Its obligations of non-discrimination do apply to energy trade and its dispute settlement system can be employed to resolve issues related to energy trade.[18]

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[14] Global gas trade 1.2 Tcm in 2017, LNG accounting for 32.9% of global gas trade. (IEA Natural Gas Statistics)

[15] Global Energy & CO^2 Status Report(https://www.iea.org/geco/emissions/)

[16] The United States and Canada are each other's largest energy trading partners as measured by the value of energy commodity trade, which in 2017 stood at US $ 95 billion.

[17] Energy Community aims to create an integrated pan-European energy market between the EU and its neighbours.

[18] Wüstenberg 2018, p.16

Regional energy trade results in a number of benefits for the states involved in it. It can balance mismatch between energy demand and natural resource endowments in the region. Provide better energy security for the states by relying on trade, diversifying forms of energy and access sources, which might lower the average cost of supply. Enable smaller states with large energy resources, to develop and export the resources to other markets. Aid in avoidance, reduction or postponement of expensive capital investment in energy production facilities and thus free up funds to be invested in other spheres of economy. Nurture public-private partnership projects and providing more roles to private parties in the energy sector. Environmental benefits can also be gained by states by substitution of higher carbon emission projects with lower ones in an interconnected electric power grid.[19]

[19] ADB, Overview of Energy Cooperation in South Asia. 2013, p. 24

3 ENERGY TRADE IN SOUTH ASIA

3.1 South Asia and SAARC

3.1.1 South Asia

South Asia- a region ranging from Afghanistan to the Bay of Bengal, Himalayan states of Bhutan and Nepal and the island nations of Sri Lanka and Maldives- covers 3 percent of the world's land surface and holds 22 percent of the world's population. The total gross domestic product (GDP) of the region amounted to US$ 3.34 trillion in 2017, but made up only for 4 percent of the world's total GDP.[20] On the other hand, it is one of the fastest growing regions in the world. It experienced an average annual GDP per capita real growth rate of 6 percent from year 2000-2017.[21] Country such as Bhutan has developed at even higher per capita GDP growth rates of 6.8 percent. This economic growth is expected to facilitate the alleviation of widespread poverty in the region.[22]

The region's biggest economies of Bangladesh, India and Pakistan were one country known as British India up to 1947, which resulted in all of the aforesaid possessing a common legal base, socio-economics structure and history. The aforesaid states along with others are emerging economies and thus need constant and a stable supply of energy for smooth running of their industries. The SACs lay near energy rich Central Asia states[23], Iran and the Arabian Peninsula. For example, Afghanistan being a landlocked country, neighbour's energy rich Central Asian states, and could the play role of energy transit state to its eastern neighbours Pakistan and India, and in return could use their sea ports and communication network for import of fossil fuels. Besides the trade of fossil fuel commodities, there can also be trade of energy in the form of electricity by connecting the electricity transmission systems of the SACs, thus if there is surplus energy production in one region of a country it can be exported to neighbouring country's energy deficient region.

The SACs are all part of the WTO (except Bhutan)[24], and some also have bilateral treaties for trade between each other, and on regional level are a part of SAARC. Within SAARC's ambit they are also signatories to Agreement on South Asian Free Trade Area. In the area

[20] WB, Data for World, South Asia
[21] WB, GDP per capita growth (Annual %)
[22] ADB, Energy Trade in South Asia. 2012, p.1-2
[23] Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan
[24] World Trade Organisation, Bhutan.

of energy trade, SACs signed 'Framework Agreement for Energy Cooperation (Electricity)' (Framework Agreement). But there is an absence of a concrete multilateral agreement between the SACs for energy trade, whose void could be filled by the SACs relying on the ECT for guidance and drafting their own regional energy trade treaty. Afghanistan is the only contracting state to the ECT, and Bangladesh and Pakistan having an observer status (in their capacity as signatories to the European Energy Charter and International Energy Charter respectively), from among the SACs.[25]

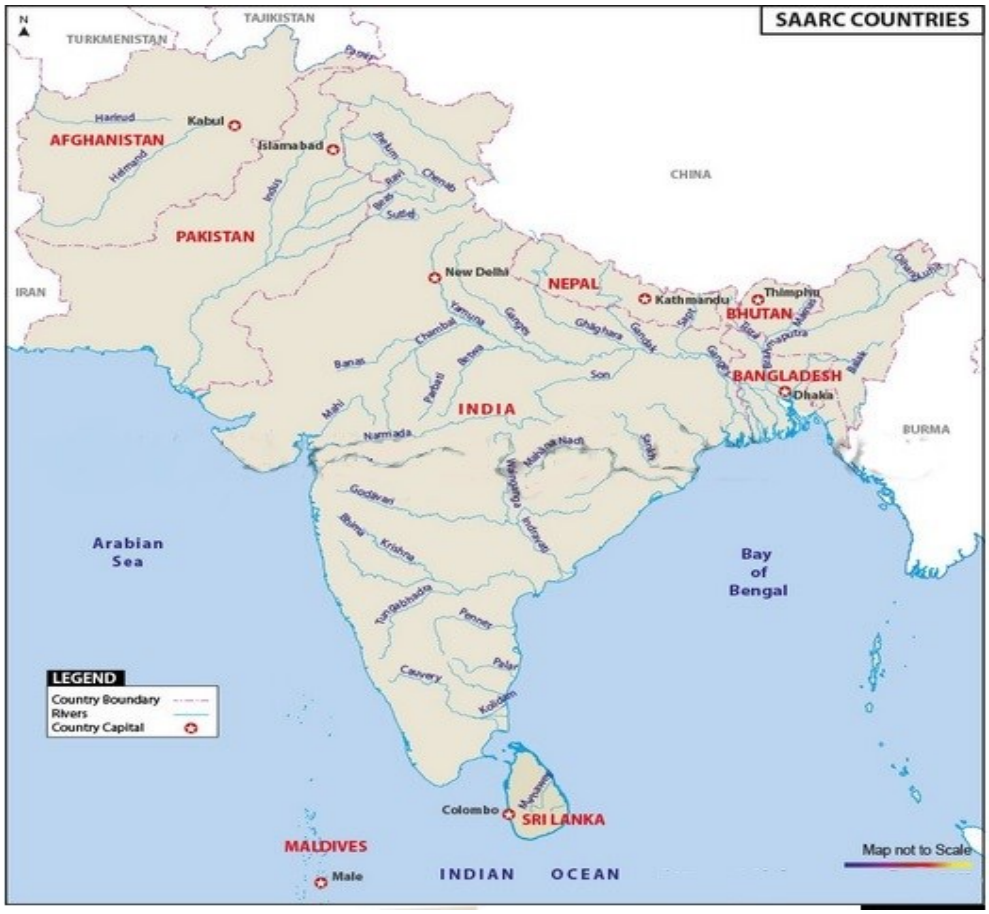

Figure 3.1: South Asia region and SAARC members

3.1.2 SAARC

SAARC was established by the seven South Asian states[26] (with Afghanistan joining in 2007) in December 1985, with the signing of the SAARC Charter.[27] It was established with the main aim of increasing economic, social, cultural, technical and scientific progress and

[25] Energy Charter Secretariat, Members and Observers to the Energy Charter Conference
[26] Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka

[27] SAARC, About SAARC
SAARC Energy Centre, About us.

growth through mutual collaboration and cooperation on international and regional stage to support common interests. The cooperation aimed to complement the already placed bilateral and multilateral obligations between them, keeping in mind the respect to each other's national sovereignty and political independence.[28] And adhering to principle of United Nations (UN) Charter to achieve and promote peace, stability, amity and progress in South Asia.

SAARC's endeavour into regional energy cooperation got its beginning through the establishment of technical committee on energy in 2000. And in 2004, a 'Working Group' on energy was formed aimed with achieving cooperation in the sphere of energy information exchange, renewable energy and creation of regional power grid. To facilitate and ease the operation of the Working Group, the SAARC Energy Centre was created in 2005 for achieving the aim of establishment of energy ring in South Asia, by executing studies and energy trade and cooperation initiatives. In 2009, Working Group on energy established 'Expert Groups' on oil and gas, electricity, renewable energy and technology and knowledge sharing. And in 2014 the SAARC members signed the Framework Agreement with the objective of increasing regional trade in electricity (discussed in more detail under section 3.5).[29] The incentives of SAARC in regional energy trade have been also supported by the ADB under the auspices of its Central Asia Regional Economic Cooperation and South Asia Sub-regional Economic Cooperation programs.[30]

3.2 **Energy Profile of South Asian Countries**

3.2.1 Afghanistan

Islamic Republic of Afghanistan is landlocked country with a population of 32 million bordered by Central Asian states of Turkmenistan, Uzbekistan and Tajikistan to its north, China to its north east, Iran to its west and Pakistan to its South and East.[31] It sources two-thirds of its energy supply needs from imported oil, with locally sourced natural gas contributing just two percent (having

[28] Article I and II of SAARC Charter

[29] SAARC, Energy, Transport, Science and Technology
World Bank, Potential and Prospects for Regional Energy Trade in the South Asia Region. 2008, p.29

[30] Details about the SASEC and CAREC programs available at 'https://www.sasec.asia/index.php?page=what-is-sasec' and 'https://www.carecprogram.org/?page_id=31'.

[31] Afghanistan Central Statistics Organization, Population.

production of approx. 450,000 cubic meters of natural gas per day)[32] in the overall mix.[33] It has installed electrical energy capacity of 519MW**,** importing majority of its electricity from its neighbouring Central Asians states and Iran, in tune of total 500 MW. [34]

The ministries of 'energy and water' and 'mines and petroleum' are responsible for the policy making in the energy and electricity sector and oil, gas and other natural resources respectively. And the electricity generation, transmission and distribution are managed by one public sector vertically integrated utility company, 'Afghanistan Electricity Company'. Afghanistan Gas Enterprise being responsible for the same aforesaid activates in the natural gas sector.

Afghanistan is working on two international power projects to import electricity and one project to import natural gas to further export the surplus to Pakistan, thus in process achieving better levels of energy security and earn much needed foreign investment. The first project of TUTAP (acronym of the participating states of Turkmenistan, Uzbekistan, Tajikistan, Afghanistan and Pakistan), aims to provide electricity and also unify and connect the power grid of Afghanistan which to date operates as nine separates power islands. The second project of CASA-1000 aims to supply 1300MW from Kyrgyzstan and Tajikistan to Afghanistan and Pakistan.[35] And the third project (TAPI gas pipeline) plans to provide Afghanistan with 500 million cubic meters of natural gas in first ten years of the project. [36]

3.2.2 Bangladesh

Bangladesh is bordered by India and Myanmar and has a population of approximately 150 million, making it the eighth most populous country in world. It has the Asia-Pacific region's lowest level of per capita primary energy supply along with the fifth largest

[32] This production level is minute considering; Afghanistan's proven gas reserves of 15.7 trillion cubic feet that have yet to be exploited.
[33] SAARC Energy Centre: Energy Profile Afghanistan , 2013

[34] ADB, Afghanistan Sector Assessment (Summary): Energy
[35] ADB, Power Interconnection Project to Strengthen Power Trade between Afghanistan, Turkmenistan, Pakistan. 2018
[36] ToloNews, All You Need To Know About TAPI Project. 2018

population. Energy is clearly a primary challenge in the development of the country, which also has one of the lowest levels of GDP per capita.[37]

Majority of Bangladesh's overall energy supply requirement is sourced from locally produced natural gas, biofuels and imported oil.[38] 76 percent of its population has access to electricity,[39] with installed electrical energy generation capacity of 20,430 MW. Fossils fuels (with natural gas making up about 80 percent of the share) make up 91.8 percent of the electrical energy mix followed by renewable energy at 1.5 percent and 6.7 percent is imported energy.[40]

3.2.3 Bhutan

Kingdom of Bhutan is also landlocked country, nestled in the eastern Himalayas and sandwiched between its two giant neighbours- China to the North and India to the south and east of it and having a population of approx. 700,000.[41] Bhutan had an average GDP growth rate of 7.5 percent from the period 2006-2015.[42]And power exports from its hydro resources have been a major contributor to the GDP (11-21 percent from 2003-2013). Bhutan is gifted with a large potential of hydropower generation sources of up to 23 GW, of which it only utilises 1.6 GW, [43] but is energy deficient in other energy resources and is totally reliant on imports from India to meet it needs.

Bhutan exports 4000-5000 MW of electricity to India annually, and thus is the only SAC which has surplus electricity but has to import it from India in winters/dry season due to low hydro generation capacity. Bhutan and India electric energy trade provides for example of efficient and effective use of bilateral agreements. The two have setup several inter-governmental hydropower projects. The bilateral cooperation agreement signed

[37] Asia Pacific Energy Portal, Bangladesh.2017

[38] IEA Statistics 2018
[39] World Bank Statistics 2016
[40] Bangladesh Power Development Board, Present Installed Generation Capacity (MW) as on 28 October, 2018

[41] Bhutan 2005 National Census
[42] World Bank Blogs, How does Bhutan's Economy Look?
[43] International Hydropower Association, Bhutan. 2016

between the parties in 2006 planned five hydropower projects that envisioned 10,000 MW of energy export by 2020. [44]

3.2.4 India

Republic of India is the largest country by size and population in South Asia, and the second largest in the world by population (1.2 billion) after China. It is bordered by Pakistan to the west, China, Nepal and Bhutan to the North, and Bangladesh and Myanmar to its east. India economy is the seventh largest in the world by nominal GDP and had an average growth rate of 7 percent in the last two decades.

India's energy demand is primarily met by coal, oil, and gas (gas being equally sourced from domestic and foreign avenues).[45] The aforesaid energy resources also dominate the (electric) power generation mix at 64 percent followed by renewable energy sources at 34 percent (hydro, biomass, urban and industrial waste power, solar and wind energy) and nuclear at 2 percent.[46]

The power generation in 1947 (at time of independence from the United Kingdom) stood at 1.3 GW and as of March 2019 was 350 GW.[47] The growth of electricity demand has outpaced the power supply. Peak demand for 2017-18 was at 164 GW and is estimated to grow to be around 542 GW by 2031-32.[48]

India neighbour's most of the South Asian countries and thus has energy trade with all of them on different capacities levels (for example it supply's the entire demand of oil and petroleum products in Bhutan and Nepal). India's energy (electricity in specific) trade with its neighbours is discussed in the following paragraphs.

i. India-Bangladesh

Bangladesh borders India and is also in proximity with Bhutan and Nepal. India exported 660 MW of electricity to Bangladesh before 2018, when 500 MW more was added to the supply in line with an agreement signed between the two states in 2013.

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[44] Inter-Governmental Agreement between the Royal Government of Bhutan and the Government of the Republic of India concerning development of Joint Venture Hydropower Projects through the Public Sector Undertakings of the two Governments. 22.04.2014

[45] IEA Statistics 2018.
About Natural Gas, Indian Ministry of Petroleum and Natural Gas

[46] Ibid. As on 18-03-2019

[47] India Ministry of Power, Power Sector at a Glance-All India. 2019

[48] Ibid. 17th power survey

ii. India-Bhutan

Electricity trade between India and Bhutan started in 1970 and currently there are three existing cross border interconnections between the two. A 2006 agreement for cooperation in hydropower aimed to achieve 10,000 MW by 2020.[49] And an inter-governmental agreement was signed between the two states for development of four hydropower power projects in 2014, totalling generation capacity of 2120 MW.

iii. India-Nepal

Electricity trade between India and Nepal started in 1970s, and a number of treaties between the two states regarding rivers gave birth to electricity trade. In a most recent initiative taken from both sides in 2014 was the approval of India-Nepal Agreement on "Electric Power Trade, Cross-Border Transmission Interconnection and Grid Connectivity".[50] The aforesaid agreement was signed with aim that it will result in more electricity flow between the two states, with Nepal importing 500 MW (37 percent of its energy) from India and exporting surplus energy to India.[51]

iv. India-Pakistan

As of date, cross-border inter-connections for electricity trade between India and Pakistan does not exist. Plans were made to export 500MW of electricity in 2014 from India to Pakistan. However no bilateral agreement between the two states in this regard could be reached with the advent of new government coming to power in India in later part of 2014 that froze all bilateral talks with the precondition of restarting them only if Pakistan addressed India's concern related to Kashmir separatists.[52]

v. India-Sri Lanka

There is no cross-border inter-connection between India and island nation of Sri Lanka as they are divided by the Palk Strait. A grid interconnection of 285 km to export 500 MW

[49] Intergovernmental Agreement between the Government Of The Republic Of India And the Royal Government Of Bhutan concerning Development Of Joint Venture Hydropower Projects Through the Public Sector Undertakings Of The Two Governments
[50] Nepal Ministry of Energy, Water Resources and Irrigation, Treaty, MOU and Agreements.
[51] A Year in Review Annual Report 2017/18. Nepal Electricity Authority
[52] The Economic Times, Pakistan's plan to get electricity from India stalled.

from India to Sri Lanka has been proposed by laying down of submarine cable under the Indian Ocean but no progress be made on this project.

3.2.5 Maldives

Maldives is an archipelago in the Indian Ocean, comprised of 1,190 sparsely populated islands, and being the smallest nation by size and population in Asia (having an area of 330 km^2 and population of 341,356 as of 2014 census). Due to its geography, Maldives does not have a national grid, and each populated island is powered by its own power plant that runs on imported fossil fuel, thus ensuring electricity supply to vast majority of the population. Electricity generation for the capital, Male accounts for around 60 percent of the total electricity generation of all the inhabited islands.

Due to its negligible natural resources and geographical distance from mainland South Asia, Maldives is totally reliant on import of petroleum products for its sustenance and hence highly affected by fluctuations in international prices. In this cause development of renewable energy (wind and solar) is needed to meet energy demand and have better energy security (renewable energy was contributing just 6 MW out of total 220 MW available capacity by the end of 2016)[53].

3.2.6 Nepal

Nepal is the other Himalayan landlocked country located between China and India having a population of around 26 million (according to the 2011 census). Nepal has economy mainly based on agriculture, which employs 70 percent of its populace and has 37 percent share in the GDP. Nepal had an average GDP growth rate in the last five years of 6 percent. [54]

Nepal primary energy resources are biomass, oil, coal and electricity (from hydro).[55] Natural gas is non-existent in the energy mix as the country does not produce and it only imports liquefied petroleum gas for domestic purposes on a smaller scale.[56]

[53] Island Electricity Data Book 2017. Maldives Ministry of Environment and Energy
[54] Trading Economics, Nepal GDP Annual Growth Rate
[55] IEA Statistics, Nepal 2016
[56] SEC Energy Profile Nepal 2013

Nepal has current available electricity capacity of 1400 MW of which one-third is sourced from hydropower.[57] And possess the lowest per capita electricity generation in the world. Nepal predicts peak demand of 5622 MW by 2032 and is hence investing heavily in hydropower plants and plans to develop 10,000 MW by next 10 years and about 25,000 MW in 25 years. 3820 MW worth of hydropower projects and related transmission systems are being pursued under the project development agreement between Nepal and India. These projects aim to meet energy requirements for domestic and export purposes.

3.2.7 Pakistan

Pakistan is second largest country by size and economy in South Asia, after its eastern neighbour India. Afghanistan and Iran lie to its west and China to its North East. It has population of about 200 million and possessed GDP in tune of $312.5 billion (as of 2017).[58] [59]

Almost of half of the country's energy supply is made up of domestically produced natural gas followed by oil and biomass.[60] The supply of natural gas to industry, transportation and power generation sector in the recent decade could not cope with demand and had to be supplemented by imported LNG starting in 2015.[61]

Electricity access has been made possible to 99 percent of its population.[62] And Pakistan has available generation capacity of 28,704 MW, fossil fuels making up majority of the capacity followed by hydropower (which makes up the majority in the renewable energy mix at 95 percent, followed by biofuel, wind and solar) and nuclear energy.

The country geographical location next to energy rich Iran and Central Asia could provide it to play a major role in transit of energy to further other states in South Asia.

[57] A Year in Review: Annual Report 2017/18. Nepal Electricity Authority
[58] Pakistan Bureau of Statistics, Population Census
[59] World Bank Data Bank, Country Profile: Pakistan.
[60] IEA Statistics 2018
[61] Petroleum Economist, Pakistan gagging for more gas. 2018

[62] Asia Pacific Energy Portal, Pakistan

3.2.8 Sri Lanka

Sri Lanka is an island nation located south east of India in the Indian Ocean. Having a GDP growth rate of 6 percent from 2000 to 2017, exhibiting strong performance by the industry and service sector.[63] Sri Lanka had total installed energy capacity of 3877 MW in 2017 and peak demand was at 2406 MW, and is predicted to grow to be estimated 6,461MW by 2032.[64] 94 percent of the island population have access to electricity, with generation mix comprising thermal at 72 percent, hydro (and other renewable energy sources) at 28 percent. Sri Lanka having no proven fossil fuel resources has to rely on imports to run its thermal power generation plants, transports and industry.

To meet its domestic energy needs Sri Lanka planned to import 500 MW from India as discussed under 'section 3.2.4 paragraph v' above via submarine link. Figure 3.2 illustrates the project's connection layout.

Figure 3.2 India-Sri Lanka Transmission Link

The possible completion of the plan would result in Sri Lanka's grid getting connected to India, and resultantly in future also to the any possibly planned South Asian energy grid and allow it to participate in electricity trade within the region. Further it would provide Sri Lanka with better energy security situation.

[63] World Bank, World Development Indicators: Growth of output. 2017.
[64] Generation Performance in Sri Lanka Report-2016

3.3 Regional Energy Trade in South Asia

In 2010, total intra-regional energy trade was less than 5 percent of the total trade taking place among the SACs.[65] The previous section provided with energy profiles of the SACs and summary of their energy trade with their neighbouring states, with India neighbouring the most SACs and as a result having energy trade with majority of them. This section would delve into the policies, actions and law that can be put in place a better regional energy trade framework and infrastructure.

Some primary steps are required by SACs for betterment and growth of energy trade. The SACs should start with cooperating more closely on integration of their energy markets (electricity and gas interconnections), give open and competitive access to transmission networks, concur on unified rules/protocols, and minimise energy trade related transaction by agreeing on standardised transaction rules.[66]

An Asian Development Bank Study provided with a list of recommendations that it suggested was necessary for putting in action regional cooperation in energy trade.[67] The suggestions were to develop in it words a 'SAARC regional energy trade and cooperation agreement', 'harmonize legal and regulatory framework', develop a detailed energy database, recognize options for private sector participation, and 'augment regional institutional capacity'. [68]

The Study suggested that regional energy trade agreement would provide policy objectives and framework conditions for development of regional energy trade and in this regard SACs can take reference from the 'Greater Mekong Sub-region'[69] program policies adopted for regional energy trade. The aforesaid program's policy objectives in context of South Asia are listed as below: [70]

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[65] ADB Energy Trade in South Asia 2012, p.37
[66] ADB Energy Trade in South Asia 2012, p.92
[67] Ibid. p.93
[68] Ibid.
[69] ADB supported Greater Mekong Sub-region Economic Cooperation Program supports the implementation of high-priority projects in the six nations (Cambodia, China (specifically Yunnan Province and Guangxi Zhuang Autonomous Region), Laos, Myanmar, Thailand, and Vietnam) that share the Mekong River.

[70] ADB Energy Trade in South Asia 2012, p.93-94 (Direct Quotation)

(a) Promote efficient development of the SAARC energy sector;
(b) Promote opportunities for economic cooperation between SACs in the energy sector;
(c) Facilitate the implementation of priority energy sector projects;
(d) Address technical, economic, financial, and institutional issues relevant to SAARC energy sector development; and
(e) Protect and improve the environment through the adoption of appropriate technologies and plans.

Further of 'harmonization of legal and regulatory frameworks' is of utmost importance to, as each individual SAC's energy markets are governed by their own legal, regulatory and policy frameworks, and this inconsistency in laws and policies can lead to impediments in regional energy trade resulting in economic loss to investors, undue increased cost of doing business and slow processing of investment. The SACs already have in place institutional structure, in this case energy regulatory bodies that can coordinate between each other and facilitate the harmonisation process.[71] The first step for the SACs in this regard would be to a have a similar market structure in the energy sector. Further the SACs would have to put in place energy regulatory bodies that have similar rules and roles in each state and would be responsible for coordinating with its counterpart in other SACs. This can be followed by SACs having a national framework that enables regional trade and the SACs agreeing to have one regional energy regulatory agency that would have the role liaising and coordinating between the national agencies and giving recommendations. The SAARC Secretariat being of importance here, as it can initiate and oversee all this process with the support of the SAARC Energy Centre.

Some important points that need to be noticed and addressed for harmonisation of legal and regulatory framework for regional energy trade are of issuing and recognising energy trade licences (generation, distribution or transmission licences) for cross border trade; opening access to transmission system and coordinate its planning thus increase competition in the regional power market and develop adequate capacity for power exchange; have coordination in operation of power system by having a standardised grid code; inclusion of agenda of regional energy trade in energy policy of all the SACs; have

[71] ADB An Overview of Energy Cooperation in South Asia 2013, p.31

lax or exemption from tax and duties for regional energy trade and finally have dispute resolution mechanism in place for issues arising out of regional energy trade.[72]

The harmonisation of laws would lead to a great stimulus for investors to fund projects in regional energy trade as they would a have clear, unified and stable set of rules for doing business in any of the SACs.

Regional trade in electricity can also be increased by employing the concept and structure of a regional power market. The employment of regional power market will result in trading of electricity between the SACs and resolve its shortage and over supply issues in national networks. The graduation to a regional power market needs to be done in a phased manner and thus interconnection between SACs would have to be increased incrementally. The regional power market's efficient supervision and control will best be served by having in place a central regional power exchange.[73]

Having a regional power market offers many benefits, including efficient use of energy resources, decrease in investment in new generation capacity, lower cost of electricity due to competition in the market, reduction in overall environmental impact and an outlet for energy resource rich state to export its electricity. [74] India already has in place two operational national electricity exchanges (India Energy Exchange and Power Exchange India Limited), that allows bilateral and competitive electricity trade. The Indian power exchanges can play the role of providing energy producers and consumers from other SACs that connect to the Indian electricity grid a forum for regional electricity trade. [75]

3.4 Interregional Energy Trade Projects

Currently energy trade between South Asia and rest of the world covers mostly importation fossil fuels like oil, LNG and coal. Regional trade within South Asia in recent times revolved mainly India and its energy trade (of different commodities) with its neighbours. New trade options in the shape of projects to import energy especially in the form of gas and electricity are being pursued and are discussed below.

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[72] Ibid.
[73] ADB Energy Trade in South Asia 2012. p53

[74] Ibid.
[75] Ibid.

3.4.1 Electricity

i. Central Asia–South Asia Power Transmission Project (CASA-1000)

CASA- 1000 project was born in May 2006, with the aim of constructing 1,222 kilometre power transmission line to export 1300 MW of electricity from Kyrgyz Republic and Tajikistan (hydropower rich states)[76] to Pakistan via Afghanistan. Funding and support coming from World Bank and ADB, the project costing US$ 997 million and planned to be completed by the year 2023.[77] Tajikistan would be the consolidator of power, buying energy from Kyrgyz Republic, and selling power to consumer through a 'power purchase agreements'. To date construction of transmission lines has commenced in Tajikistan and bids had been opened for construction of transmission lines and allied projects in Afghanistan and Pakistan.[78]

Figure 3.3: CASA-1000 Transmission Network Map

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[76] The Central Asia Republics, including Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan, is well endowed with energy resources, including hydropower and natural gas, and formed a strong electricity trading group in the past via interconnection through a common 500 kV power transmission ring. With the demise of the Soviet Union, much of this trade disappeared due to decreased electricity demand and drive for self-sufficiency in the CAR, but a significant interdependence still existed among them.
[77] World Bank, Projects & Operations, Central Asia South Asia Electricity Transmission and Trade Project (CASA-1000).
[78] CASA-1000, Home.

3.4.2 Gas

i. Iran-Pakistan (IP) Gas Pipeline Project

The IP Project was originally born as trilateral project between Iran, Pakistan and India but after India exiting from the project in 2009 it became a bilateral one.[79] Iran having significant natural resources of oil and gas (oil reserves in tune of 132 billion barrels and natural gas reserves of 27.5 trillion cubic metres)[80] has a potential to be large scale energy exporter and energy partner of SACs. It initially planned to supply 55 billion cubic metres per year (BCM/y) of (natural) gas. However, the gas volume to be supplied was later revised down to 8.7 BCM/y. The estimated project cost was in the order of $7 billion in 2005. Iran has constructed the required natural gas transmission facilities from Asalouveh to the Iran-Pakistan border including a 172 km pipeline. Pakistan according to the agreement agreed with Iran (on January 30th, 2013) had to commence the laying of 700 km long pipeline to transport volume of up to 0.03 BCM/d from the Iranian border to Nawabshah city in Pakistan.

Iran signed a natural gas export contract with Pakistan on 13 June 2010 to export 0.03 BCM/d of natural gas to Pakistan from 2014 on the basis that Pakistan would have its section of pipeline commissioned by then. The model proposed for funding the pipeline section in Pakistan was based on an integrated project structure with the Government of Pakistan or a strategic investor taking a lead role in implementing the project. [81] But to date there has been no progress on Pakistani side, one of the main reasons being US Sanctions on the Iranian government, which has resulted in local and international companies to avoid working on the project.[82]

[79] United Press International, Pakistan gas pipeline is Iran's lifeline. 2010
[80] ADB Energy Trade in South Asia 2012. p.46

[81] ADB An Overview of Energy Cooperation in South Asia 2013. p.23

[82] DAWN, IP gas project in limbo: Pakistan wants Iran to interpret sanctions. 2.01.2019

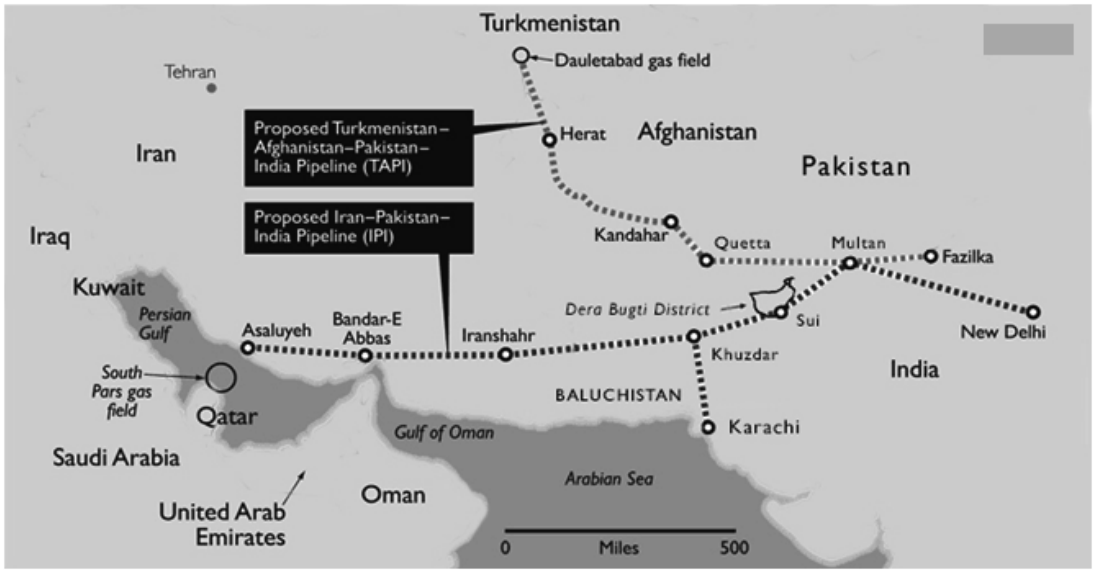

Figure 3.4: IP and TAPI Natural Gas Pipelines

ii. Turkmenistan Afghanistan Pakistan India (TAPI) Gas Pipeline

The TAPI gas pipeline project is ADB financed project that plans to bring natural gas from energy rich gas fields of Turkmenistan to Afghanistan, Pakistan and India. Turkmenistan is estimated to have the fourth largest gas reserves in the world at about approximately 14 trillion cubic meters, exports most of its gas to Russia, which is further sold to Europe.[83] The project envisions a 1680 km, 0.09 BCM/d, pipeline from Turkmenistan through Afghanistan and Pakistan to the Pakistan-India border. The estimated cost of the project was stated at $7.6 billion in 2008. The project was initiated in December 2015 and aimed to be completed by 2020, with work commencing in Afghanistan in 2018 and in Pakistan in 2019.[84] The TAPI parties agreed to share the gas in amount of 37,524 mcm each for India and Pakistan and 14,160 mcm to Afghanistan.[85]

A gas pipeline framework agreement was signed in April 2008 by the respective ministers and an intergovernmental agreement on the pipeline was signed on December 2010. Bilateral gas sale and purchase agreement between Turkmenistan-Pakistan and Turkmenistan-India were signed in May 2012 and between Turkmenistan-Afghanistan in

[83] ADB Energy Trade in South Asia 2012. p.50

[84] Trend News, President of Turkmenistan: construction of TAPI swiftly underway. 21.5.2019.
[85] Reuters, TAPI gas pipeline to move forward after decades of delays. 13.11.2018.
Inter State Gas Systems, Turkmenistan – Afghanistan – Pakistan – India Gas Pipeline (TAPI).

July 2013.[86] Afghanistan is expected to earn about $400 million per year in natural gas transit fees when the TAPI project commences operation.[87]

The TAPI network passes through extremely demanding terrain, and further 830 km of its section passes through Afghanistan that is a highly volatile region and thus can cause possible limitations in construction and operational phases. [88]

3.5 SAARC Laws and Energy Trade

The preceding sections provided introduction to energy profiles of SACs along with their present and future regional energy projects, and discussed laws and policies that can be implemented with objective of growth and improvement of regional energy trade. The present section sheds light on important laws under the ambit of SAARC that relate to free trade of goods, arbitration and electricity trade and their relationship with energy trade within the region. The analysis of SAARC laws' provisions would also provide a better understanding of how these laws will complement the ECT provisions (ECT analysis also keeping SAARC laws in context discussed in Chapter 4) and add to framing of a Model Treaty for energy trade in South Asia.

3.5.1 South Asian Free Trade Area

'Agreement on South Asian Free Trade Area' (SAFTA Agreement) came into force in 2006, superseding the SAARC Preferential Trading Arrangement of 1993. The SAFTA Agreement aims to promote and increase trade and economic cooperation between the SACs.[89] The SAFTA Agreement also affirmed that the SACs would abide by their rights and obligations to each other under WTO and other agreements between them and is also a WTO notified[90] regional trade agreement.[91] The SAFTA Agreement having the main ambit of free movement of goods through elimination of tariffs and non-tariff restrictions on the

[86] Ibid
[87] ToloNews, All You Need To Know About TAPI Project. 23.2.2018.
[88] ADB, An Overview of Energy Cooperation in South Asia 2013. p.51

[89] SAFTA Agreement, Article 2: Achieving cooperation through concessions and guarantees given under it
[90] WTO Notification (available at http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=188, enabling clasue 4(a), Decision of 28 November 1979 (L/4903), (https://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm) 20.08.2019
[91] SAFTA Agreement, Article 3(2)(b)

movement of goods. It directly refers to Article III of WTO GATT and the principle of national treatment stated in it and its application to the member states.[92]

The SACs also agreed to take into consideration simplification of banking rules, establishing transit facilities for intra-SAARC trade (the main beneficiaries being the land-locked states of Afghanistan, Bhutan and Nepal), fair competitive rules for vibrant market, and development of transport and communication network.[93] The aforesaid aims of the SAFTA Agreement also align with the objectives of the ECT namely of establishing and supporting development of energy transit and transport facilities and having effective competition policy in place.

The SAFTA Agreement (under Article 11) also provides for special and differential treatments for its members that are classified as a 'Least Developed Country' (LDC) by the UN Economic and Social Council.[94] Five member states of SAARC are classified as LDCs namely, Afghanistan, Bangladesh, Bhutan, Maldives[95] and Nepal. Member states have to take in special regard to the situation of LDCs when contemplating application of anti-dumping and or countervailing measures. The LDCs are also provided with flexibility in continuing quantitative and other restrictions on imports from other member states for a provisional time period. And member states agreed to compensate the LDCs provisionally for predictable loss of their customs revenue due to trade liberalisation under the SAFTA Agreement.

General exceptions to taking actions or adoption of measures for the enforcement or contravention of provisions of the SAFTA Agreement are in case of protection of national security, public morals, human, animal, plant life and health and articles of artistic, historical and archaeological value.

SAFTA also provides for a dispute settlement mechanism (under its Article 20), with a Committee of Experts made responsible for settling the dispute between the states. The Committee of Experts gives a recommendation that can be appealed to the SAFTA Ministerial Council.[96]

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[92] Ibid., Article 6
[93] Ibid, Article 8
[94] UN Economic Analysis and Policy Division, LDCs at a Glance.
[95] Maldives given the status of the LDC by SAARC under Article 12 to the SAFTA Agreement.
[96] The organisational structure and mandate of the Committee of Experts and SAFTA Ministerial Council are defined under Article 10 to the SAFTA Agreement.

-Trade Liberalisation Programme

The SAFTA Agreement implementation is made possible through a number of stated instruments, one of them being 'Trade Liberalisation Programme' that is of relevance of here in energy trade context.[97] The Programme provides for a schedule of tariff reductions by non-LDCs[98] and LDCs over a defined period of time.[99] The non-LDCs having to make higher tariff reductions than the LDCs. Further the Programme provides for members to the SAFTA Agreement to exclude its application to goods included by them in the sensitive list (integral part of the SAFTA Agreement). The sensitive list has to be reviewed every four years with aim of reducing goods on the list.

The sensitive list has been identified as one of the major reason besides other reasons for the overall ineffectiveness of the SAFTA Agreement in reaching its full potential. Sensitive list has been identified as being responsible for restricting 35 percent of the intra-SAARC imports as recent as 2015.[100] This is in contrast to neighbouring free-trade region of 'Association of Southeast Asian Nations'; where on average countries have zero import duty on 96 percent of the imports.[101]

All the SACs have different nature and number of goods on their sensitive lists, which also in some cases have energy resources listed. The energy resources listed in each SAC's sensitive list vary. The adoption of ECT provisions would necessitate the SACs reviewing their sensitive lists and deleting energy resources from the list, where necessary. In the following paragraphs the SACs listing of energy resources in their sensitive list is briefly analysed.

Afghanistan lists energy resources like coal, oil, natural gas and electricity on the sensitive list; meaning that if Afghanistan was to import energy from other SACs it would attract application of equal tariffs as on energy from non-SAFTA Agreement countries. To date Afghanistan imports energy from Iran and its Central Asian neighbours and will provide transit to electricity and gas to Pakistan. If in future Afghanistan plans to import energy

[97] SAFTA Agreement Article 4
[98] Non-LDCs being India, Pakistan and Sri Lanka
[99] SAFTA Agreement Article 7: Trade Liberalisation Programme
[100] A Glass Half Full, p.98
[101] World Bank Blogs, How South Asia can become a free trade area.

from other SACs it would have to remove the energy resources from the sensitive list to fulfill objective of the SAFTA Agreement.

Bangladesh has only has listed petroleum oil derived from bitumen on its sensitive list, meaning all other energy resources fall under the trade liberalisation programme. Bangladesh imports electricity from India, that benefits from reducing tariffs over a period of time according to the programme.

Bhutan has only listed coal on its sensitive list. It imports all its oil and related products, and gas needs from India that benefit from reduced tariffs.

India does not have any major energy resource on its sensitive list and only applies 5 percent duty on energy resources imported from the other SACs. Its main energy import being in the form of electricity from neighbours, Bhutan and Nepal.

Maldives does not include energy resources on the sensitive list and has zero percent duty. This being explainable because of geographically isolated location and being totally reliant on imported fossils fuels to meet it majority of its energy needs. But to date it does not import any energy resources from other SACs, and all its energy imports are from United Arab Emirates, Malaysia and Singapore. [102]

Nepal has majority of the energy resources on the sensitive list with the exception of bitumen and electricity. Nepal sole energy trade partner is India, which supplies it with all its oil and gas needs and also electricity in winter season.

Pakistan has no energy resources included on the sensitive list and percentage of duty on energy resources decreasing yearly. The can be explained by Pakistan's requirement for huge amount of energy to meet its energy shortfall. Pakistan in the near future is only planning to get electricity and gas from Central Asia via Afghanistan.

Sri Lanka lists all energy resources on the sensitive list. To date it imports 40-50 percent of diesel oil from India for use in power generation and transport sector and does not have any energy imports from other SACs. [103]

The overview of the SAC's sensitive list makes its evident that for energy trade to prosper between the SACs they have to remove energy goods from the sensitive list or consult to

[102] SAARC Energy Outlook 2030, p.162
[103] Ibid. p.227

have a common tariff that would also be in compliance with the future provisions of treaty based on the ECT.

3.5.2 SAARC Arbitration Council

SAARC Arbitration Council (SARCO) was established in 2005 by signing of the 'Agreement for Establishment of SAARC Arbitration Council' on November 13, 2005 at Dhaka with the objective of providing a legal framework for settlement of commercial, investment and other disputes referred by parties to it, through the medium of conciliation and arbitration and also act as coordinating agency in the SAARC dispute resolution system.[104]

SARCO provides for any business entity or entities from the SACs to approach for resolving their dispute under its aegis if the agreement between the parties provides recourse to it in case of a dispute. The SARCO in this regard provides for a 'model arbitration clause' that can be added to an agreement. Thus one of the parties can initiate arbitration by filing a request with SARCO for it. After the claimant party's notice and the respondent's party reply to it, they have to appoint an arbitrator or a panel of three arbitrators. The parties have to agree on the appointment of arbitrator/s that they are free to choose from 'panel of arbitrators' (made up of arbitrators exclusively from the SACs) kept with the SARCO, or any other arbitrator/s they find appropriate. In case of disagreement between the parties, the SARCO can appoint arbitrator/s. SARCO is obliged to give an award within six months, which can be extended by consent of parties. The dispute brought before SARCO can be of regional or domestic nature.

The SARCO Agreement provided for enactment of rules on conciliation and arbitration under it. Thus, the SAARC Rules for Arbitration and Conciliation were enacted in 2016, based on the UNCITRAL Model Law[105], and in specific UNCITRAL Arbitration and Conciliation Rules.[106] The SAARC Rules provide for a necessary mechanism for effective and efficient carrying out of arbitration/conciliation proceedings. [107]

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[104] SARCO Agreement Article II

[105] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006.

[106] UNCITRAL Arbitration Rules(with new article 1, paragraph 4, as adopted in 2013)
UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

An arbitration award given under the Arbitration Rules is final and binding on the parties and they are to give it effect without undue delay (Article 36 of the Rules). Employment of Arbitration Rules for resolving dispute provides with effective enforcement and compliance of the decision/award as the parties are signatories to SARCO Agreement and SACs are also signatories to the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[108]

Further SARCO Agreement and Rules can also a play a vital role in supporting dispute settlement mechanism under SAFTA, and it also is provided as option for dispute settlement option for issues arising around Framework Agreement (discussed in the section below in more detail). The SARCO Agreement can be provided as an alternate option under SAFTA Agreement for dispute settlement by its inclusion or adoption into the aforesaid (in compliance with Article 3(2)(a) and Article 4(6) of SAFTA Agreement that allow adoption of additional rules and protocols).[109] [110]

3.5.3 SAARC Framework Agreement for Energy Cooperation (Electricity)

SAARC Framework Agreement for Energy Cooperation (Electricity) (Framework Agreement) was signed at the 18th SAARC Summit held in Nepal in November 2014 by all the SACs with the objective of promoting cross border electricity trade between them that would result in energy efficiency and conservation, better energy security and resultant economic cooperation in related industries.

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[107] SARCO Rules available at http://sarco.org.pk/arbitration-rules/ and http://sarco.org.pk/conciliation-rules/

[108] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, United Nations, Treaty Series , vol. 330, p. 3.

[109] Article 3: Objectives and Principles

> 2. SAFTA shall be governed in accordance with the following principles:
>
> a) SAFTA will be governed by the provisions of this Agreement and also by the *rules, regulations, decisions, understandings and protocols* to be agreed upon within its framework by the Contracting States;

Article –4: Instruments

> The SAFTA Agreement will be implemented through the following instruments: -
>
> 6. Any other instrument that may be agreed upon.

[110] Agarwal 2018, p.11-15.

The use of the term 'framework' signifies the agreement's nature of being foundational in nature, which is further evidenced by the language used in its' provisions. The language of the provisions being in most parts non-imperative that allows the SACs freedom to abide or not by the obligations. The Framework Agreement would hence require to be supplemented by more comprehensive legal texts/agreements having enforceable and imperative obligations.

As highlighted above the Framework Agreement's objective is to promote cross border electricity trade, which the member states are obligated to do on 'voluntarily basis'.[111] Thus aforesaid objective stated in Article 2 to the Framework Agreement provides the party with the liberty to participate or not in bilateral or multilateral projects concerning electricity trade.

The Framework Agreement follows with provisions that encourage and promote electricity trade. It provides for SACs to work towards having exemption from duties and taxes, and non-discriminatory access to transmission grids, for electricity trade.[112] SACs may facilitate companies to enter in agreements with transmission providers and also start the process of opening the national electricity markets for competition.[113] Plan cross border grid interconnections between each member states transmissions agencies and implement these through bilateral or multilateral agreements.[114] Enable joint development of coordinated network protection systems and coordination procedures to ensure reliability and security of interconnected grids.[115] Encourage knowledge sharing and joint research, on electricity related issues.[116] SACs shall develop the structure, functions and institutional mechanisms for regulatory issues related to electricity exchange and trade.[117]

It also provides a dispute settlement provision that states that if a dispute arises around 'interpretation and/or implementation' of the Framework Agreement then the SACs will resolve the issues amicably and if unresolved than they may choose to refer to arbitration

[111] Framework Agreement, Article 2
[112] Ibid., Article 4 and Article 12
[113] Ibid., Article 9 and Article 6
[114] Ibid Article 7
[115] Ibid Article 10 and Article 11
[116] Ibid Article 14
[117] Ibid Article 15

under SARCO.[118] As identified by *Kevin Lee* the provision provides an obligation for dispute settlement but is missing on a full-scale dispute settlement mechanism.[119]

To fill the void of full-fledged dispute settlement mechanism, the SAARC commissioned a study that would develop a dispute settlement mechanism for the Framework Agreement. The study highlights a number shortcomings and uncertainties in the Article 16 to the Framework Agreement dispute settlement framework provision. Firstly the provision is silent on the time period that would be available to resolve the dispute before referring to SARCO. Secondly the provision does not provide the applicable procedure or requirements for a party to refer the dispute to SARCO. Thirdly it leaves the question open for the dispute settlement method that SARCO (arbitration and conciliation being available) will employ and how the parties can choose between them. And finally the provision is silent on a number of important procedural and substantive legal issues that arise in inter-state dispute settlement. E.g. what would be substantive law applicable to dispute, procedure for different phases of dispute resolution and mandate of adjudicators.[120]

The study keeping the above mentioned shortcomings in scope produced a template dispute settlement mechanism (annexed to the study) that could be adopted by SAARC. The template could be applied by SACs for settling of disputes arising out of Framework Agreement and supplement Article 16, its application being made possible by adopting it as an international agreement under SAARC. The template could also be utilised more generally by the SACs for resolving of inter-state disputes. [121]

The final provisions of the Framework Agreement provide that any SAC can withdraw from it at any time, with the withdrawal being effective six months from the day the written notice is received by the SAARC Secretariat. But the withdrawing SAC being liable to participate in any on-going proceeding they are involved in.[122] Amendments can also be made to the Framework Agreement by any SAC submitting an amendment recommended by consensus of the meeting of SAARC Energy Ministers to the SAARC

[118] Ibid Article 16
[119] Lee 2017, p.111
[120] Ibid, p.114-115
[121] Ibid. p.117-118
[122] Framework Agreement, Article 17

Secretariat. The amendment would become effective upon being accepted by the SAARC Secretary General.[123]

[123] Ibid., Article 19

4 MODEL TREATY

The ECT has its genesis in the European Energy Charter (1991), that signified a political intent to promote energy cooperation between western European states and the recently independent (energy resource rich) Eastern European states.[124] The ECT came into force in 1998 being the only international multilateral treaty that regulated energy trade between its signatories and also complied with the WTO rules.[125] The ECT provisions focus on mainly five areas of providing protection and promotion of energy investment; free trade of energy; freedom of energy transit, energy efficiency; and dispute settlement mechanisms for disputes between investor and state and between state and state. [126]

The main provisions and elements within the ECT that are relevant for adoption into a Model Treaty (MT), are analysed and discussed in the following sections (in the context of energy trade in South Asia).The main focus of the analysis being on energy transit, investment protection and dispute settlement.

Energy transit provision requires perusal as presently energy trade in South Asia is regulated by national laws and bilateral agreements that do not specifically cater towards energy transit. Further the growth of energy trade within the region would require energy to be transited through more than one state (e.g. the TAPI gas project envisions natural gas transiting through Afghanistan and Pakistan to India) and having an effective transit regime in place would be crucial.

Besides energy transit provision, investment protection as also of importance as energy infrastructure ranging from power generation to gas transit pipelines are capital intensive and proper investment regime would provide investors with assurance that their investment would be financially and physically protected. Further investment protection regime is also relevant in South Asia, where there is sometimes high risk of political instability and tensions escalating between neighbouring state and its presence would improve investor confidence to invest in the region. And the dispute settlement provisions provides avenue for investors for protection of their investment and states to resolve disagreement between them on treaty interpretation and implementation. The Article 26 of the ECT providing for

[124] Konoplyanik-Wälde 2006, p.523-558

[125] Some of ECT's main provisions being based on WTO GATT and also NAFTA.
[126] Konoplyanik-Wälde 2006, p.523-558

investor to protect their investment by taking recourse to dispute resolution arbitration options. And the second dispute settlement provision of Article 27 to the ECT on the contrary provides for states' to take their dispute regarding treaty implementation and interpretation to an ad-hoc tribunal setup under the auspices of the Permanent Court of Arbitration at The Hague. Thus the ECT caters to both disputes relating to investment and treaty interpretation in separate provisions.

4.1 Definitions and Objectives

4.1.1 Definitions

Important concepts related to energy sector are defined in the Article 1 to the ECT that would also be relevant for the MT. The ECT provides the terms of 'Energy Materials and Products' and 'Energy-Related Equipment' for energy goods which come in different natural states, and also materials and tools used for energy's storage, transportation, exploration and other related usages.[127] 'Energy Materials and Products' list downs energy resources under the headings of nuclear energy, coal, natural gas, petroleum and petroleum products, electrical energy and other energy, which are further elaborated under the each of the respective headings. These aforesaid headings cover all major form of energy goods that are internationally traded. 'Energy-Related Equipment' has much longer list covering common known energy storage and transportation items such as pipes, tubes, cables and storage tanks to specialised apparatus (e.g. polarimeters, refractometers and spectrometers) to analyse energy materials.

Natural gas and electricity are the most common 'energy materials and products' being traded presently and would also be in future in South Asia as highlighted by the projects in previous chapters 3.2 and 3.4. Further the employment of technology and materials for constructing gas pipeline and electricity grid projects would also find mention under the heading of 'Energy-Related Equipment'. Thus the adoption of the ECT terms for energy goods and related equipment would provide the MT with comprehensively defined terms.

[127] Article 4 Annex EM I or II: Energy Materials and Products
Article 4bis Annex EQ I or II : List of Energy-Related Equipment
The two above stated terms are defined by relaying on items listed in 'Harmonised System of the World Customs Organization', and are annexed to the ECT.

On the subject of energy investments, the ECT defines the terms 'investor' and 'investment'.[128] Investor is defined as being a natural or legal person from a Contracting Party (CP) to the ECT or a third state.[129]And investment is defined in broad terms as 'every kind of asset, owned or controlled directly or indirectly by an investor' in the area of CP and associated with an economic activity in the energy sector.[130] Inclusion of the definition for terms related to investments in the MT is elemental as the one of its focus areas would be on protection of energy investment.

The concept of area is important one in realm of energy trade and transit and is defined as territory (land, internal water and territorial sea) over which a CP has sovereignty. The territorial sea is defined in reference to the UN Convention on the Law of the Sea (UNCLOS)[131].[132] The definition of area in the ECT would also be applicable to the MT especially in regards to the territorial sea as five of the SACs have access to sea.[133] States have sovereignty over their territorial sea and hence can carry out exploration and exploitation of any energy resource within it. Further construction of projects like under sea pipelines or cables in a state's territorial sea for transporting natural gas or electricity would require the respective state's permission and abiding by its rules . The planned project of supplying electricity to Sri Lanka from India (see section 3.2.8) via undersea cable would also cross the two countries territorial sea and respective laws would apply.

4.1.2 Objectives

The 'objective and principles' of the ECT are not stated in it, and reference is made objective and principles contained within Title I of the European Energy Charter. The objectives of the ECT are development of open and efficient energy markets; creation of conditions favourable for energy investment by private parties; security and diversification energy supply; provide energy related policy and legal framework assistance to countries in economic transition. The principles of ECT are non-discrimination between parties that

[128] ECT in Article 1(6) and 1(7)
[129] ECT Article 1(7), Natural person: national, citizen or permanent resident and legal person: company or an organisation.
[130] ECT Article 1(6), The term of asset is stated to include among others economic concepts property, company, shares, claims, returns etc.
[131] United Nation Convention on the Law of the Sea Montego Bay, December 10 1982, in force November 16 1994.
[132] ECT Article 1 (10)

[133] Coastlines of SACs: Bangladesh 580 km, India 7000 km, Maldives 644km, Pakistan 1046 km, Sri Lanka 1340 km.

is based on the 'national treatment' and 'most-favoured nation' treatment; openness (of international energy markets); transparency; and confirmation of the principle of sustainable development and state sovereignty over natural resources.[134]

The purpose (objectives and principles) of the ECT broadly align and overlap with the objectives and principles of SAARC legal framework. The SAARC Charter agreed to the objectives of accelerating economic growth in the region based on mutual trust, while also recognising the principles of sovereign equality and mutual benefit being the basis for cooperation, and the cooperation being complement to and consistent with bilateral and multilateral obligations.[135] Further the SAFTA Agreement provided the SACs to strengthen intra-SAARC economic cooperation, respecting principles of sovereignty, equality, independence and territorial integrity of the states involved. Its objectives and of mutual trade and economic cooperation, elimination of trade barriers, facilitation of movement of goods between areas, and fair competition and trade. Application of SAFTA rules applied on principles of reciprocity and mutuality of advantages to benefit all parties equally.[136] And the SAARC Framework Agreement recognizes the importance of electricity in economic growth, and thus the need to promote regional power trade, energy efficiency, energy conservation, and knowledge sharing.

The objectives and principles of ECT and SAARC rules highlighted above would provide for solid base for any legal regime to be formulated for energy trade. And there adoption (in the form of legal agreement) by SACs would provide for the much needed impetus for regional energy trade growth on solid foundations The principles of non-discrimination, free market, transparency, sovereignty over natural resources among others are necessary for attracting investment and providing a level playing field to all parties involved. Further the objectives provide the parties with agenda to achieve by formulating the necessary policy and laws.

4.2 Sovereignty over Energy Resources

The concept of sovereignty is defined by *Jennings* and *Watts* as of "comprising power of state to exercise supreme authority over all persons and things within its territory,

[134] Leal-Arcas 2018, p.54.

[135] SAARC Charter.: Article I- Objectives and Article II- Principles
[136] SAFTA Agreement :Article 3 -Objectives and Principles

sovereignty involves territorial authority" and also not subjugating to authority of another state.[137] Further in specific energy sovereignty can be defined as the ability of a state to have the authority to control, regulate and manage its own energy resources.[138]

The ECT (in Article 18) also recognises the concept of a state having sovereignty and sovereign rights over its natural resources that is well embodied in international law.[139] The sovereignty over energy resources covers both land and sea based energy resources.[140] It also further obligates the CPs to 'facilitate' access to their energy resources in a non-discriminatory manner for the purpose of exploring, exploiting or extracting to the investors.[141] The inclusion of this provision in ECT provides the clarification that the provisions of the ECT would not interfere or prejudice with a state's right to manage its 'property ownership of energy resources'. And thus the investors cannot use the ECT provisions to encroach on to a state's sovereignty over its energy resources.

The concept of state sovereignty over natural resources has also been codified in constitutions of modern day states. The constitutions of the eight SACs likewise directly or indirectly refer to the state sovereignty over natural resources, using different legal language but referring to the same concept. Afghanistan's constitution asserts that all 'subterranean resources' shall be property of the state and their management and utilization regulated by law. [142] Bhutan's constitution provides that 'mineral resources' are vested in and are property of the state;[143] and also all are minerals underlying the land or ocean (territorial waters or continental shelf).[144] The constitutions of India and Pakistan also provide for the state having ownership of minerals within the territorial waters or continental shelf. [145] India further also mentions having ownership of minerals found within the exclusive economic zone, and Maldives' constitution likewise provides that all

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[137] Jennings, Robert–Watts, Arthur (eds), Oppenheim's International Law, Vol.1. Peace, 9th edition. Longman 1992, p.382-384.

[138] Ariza-Montobbio, Pere. Energy sovereignty: politicising an energy transition.

[139] Which can been evidenced in UN General Assembly Resolutions No.1803 (XVII), 3171 (Paragraph 1 affirmation of sovereignty over waters supported by UNCLOS Article 2(1)), 3281 (XXIX) (Paragraph 2) and 3201 (S-VI) (Paragraph 4 (e)).

[140] UNCLOS being of importance in sea based resources

[141] ECT Article 18(4)

[142] Constitution of Afghanistan 2004, Article 9

[143] Constitution of Bhutan 2008, Article 1, para.12

[144] Constitution of Bangladesh 1972, Article 143

[145] Constitution of India 1949, Article 297. Constitution of Pakistan 1972, Article 172.

natural resources (including petroleum and gas) within the exclusive economic zone vest in the state. [146] Sri Lankan and Nepalese constitutions make indirect reference to the concept of state sovereignty over natural resources, and the concept is found mentioned in implied terms. In Sri Lanka only the state parliament has the prerogative to legislate in the matter of "oil fields and mineral oil resources, petroleum and petroleum products", and in Nepal 'management, excavation and exploration' of mines and mineral falls under the shared jurisdiction of state and regional governments. [147] The aforesaid jurisdiction given to the parliament and state structures over natural resources in Sri Lanka and Nepal are evidence of the concept in implied terms in the constitutions.

The presence of the concept of state sovereignty over energy resources in the SACs constitutions as highlighted above already makes the constitutions in sync with the ECT sovereignty provision. The inclusion of the sovereignty provision in the MT will re-stress the concept at a regional level between the SACs, and provide the them with the liberty on managing their resources within their territories by deciding the area to explore and develop, the exploitation rate, rate of royalty, and environmental and safety regulations. Further the coastal SACs (with constitutions of Bangladesh, India, Maldives and Pakistan making direct references to submarine natural resources) have also sovereign rights over the energy resources within the continental shelf, territorial sea, contiguous zone and exclusive economic zone backed by the UNCLOS, the ECT sovereignty provision adopted in to the MT and their respective constitutions.

4.3 Transit

The Article 7 provision on 'transit' is one of the most innovate and important elements of the ECT and of great relevance to the international and regional energy trade.[148] The transit provision refers to principles of 'freedom of transit' and non-discrimination, and is based on Article V of GATT. While GATT Article V does not explicitly refer to covering energy

[146] Constitution of Maldives 2008, Article 248
[147] Constitution of Sri Lanka 1978, List II.Reserved List of the Ninth Schedule.
Constitution of Nepal 2015, Schedule 5 to 9. Power between federal, state and local level
[148] Selivanova- Ehring 2012, p.82.

transit that happens via fixed infrastructure or grid bound energy transport, the ECT expressly refers to the aforesaid under the term of 'energy transport' facilities.[149]

ECT defines transit as carriage through an area of an ECT party, of energy materials and products originating in the area of another state and destined for the third state. For ECT it is enough the transit state and one of the other state is CP to the ECT.[150] Article 7(10) also covers carriage of energy through a one CP's area, that originated and is destined for another CP's area. This is the case being where the same country is the origin and destination state. E.g. Transit through Kyrgyzstan of Uzbek transit routes.

Article 7(1) requires government to take 'necessary measure to facilitate' energy transit, without distinction based as to origin, destination or ownership of such energy or pricing on such distinction. This provision gives little excuse to the state to deny permission and support to investor to build new facilities if they are in compliance with the local obligations.[151]

Article 7(2) states that CP's 'shall encourage relevant entities' to cooperate in modernizing, developing and operation of energy transit facilities and take measure to mitigate effect of interruption of supply. This provision's legal effect is soft in nature, while providing enough enforcement and being flexible in requiring solid results.[152] The presence of this provision in MT, would allow organisations involved in the energy sector across the South Asian region to cooperate, and provide under-developed markets with much needed economic and technical input.

Article 7(3) states the transit state provisions relating to energy transit and use of energy facilities shall treat energy in transit in 'no less favourable manner than its provisions treat such energy originating in or destined for its own area'. This aforesaid provision is more clearly defined by *Selivanova* as requiring 'non-discrimination of transit as compared to the treatments of imports or exports and also compared to transportation between domestic locations'. And holding the view that Article 7(3) is more ambitious and different standard

[149] 'Energy transport facilities' are defined as consisting of 'high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling energy'.[ECT Article 7(10)(b)]

[150] ECT Article 7(10)
[151] Selivanova- Ehring 2012, p.84
[152] Ibid, p.85.

of national treatment type non-discrimination than GATT transit provision.[153] In the case of South Asia, electricity transiting through Afghanistan from different Central Asian states has to be treated on equal terms between themselves and locally transported electricity.

Further Article 7(4) obligates the transit state not to put hindrances in construction of new facilities to supplement existing energy infrastructure and cannot refuse just on the basis of origin, destination or ownership. The transit state is also not obliged to allow new or modification of transit infrastructure or new or additional transit through existing network if it would endanger security and efficiency of energy systems and security of supply.[154] Thus in other terms the Article 7(5) provision acknowledges sovereign rights of any CP both over energy infrastructure and right to regulate by national law, any aspect concerning environment protection, land use etc.[155] This provision in South Asian context is of great relevance, where volatile political relationship between neighbouring countries especially India and Pakistan can lead obstacles to development of cross border energy infrastructure. Thus this obligation to not place hindrances based on origin, destination or ownership provide the energy infrastructure owner and energy consumer with assurance of constant supply of energy and earnings.

Article 7(4) is complemented by Article 7(9) that states that transit state is not obligated to take any measure for a certain type of energy facility if it does not have it in existence, while being obligated to abide by Article 7(4). Thus new facilities can only be setup if they are in compliance with Article 7(4) and 7(1). E.g. If a state does not have a LNG facility, and its local laws don't allow it and apply equally to local and foreign investor, then a foreign investor cannot make use of the Article 7(4) or 7(1).

4.3.1 Conciliation Procedure under Article 7(7)

Article 7 provides for its own specific conciliation procedure to resolve disputes relating to energy transit and for parties to refer the dispute or related issue by notification to the Secretary General of the ECT Energy Charter Secretariat, which will appoint a conciliator

[153] Ibid. p.91
[154] ECT Article 7(5)
[155] Leal-Arcas 2018, p.105

with consultation of all parties. The conciliator has ninety days to reach resolution agreement between parties and if unsuccessful than recommends a resolution unilaterally and decides the interim tariffs and other terms and conditions to be observed for the transit. The CPs are obligated to observe and also ensure the observance by entities under their control to interim decision for 12 months following conciliator's decision.

The conciliation procedure to date has not been employed in any transit dispute. During the Russia-Ukraine gas dispute in 2009, the conciliation procedure was not used by the parties even when its option and use and appointment of a conciliator was offered by the Secretary General of the Energy Charter Secretariat.[156] The dispute was rather resolved through political means. This failure of the conciliation procedure, when adopting the provision for South Asia could be mitigated by having a reference to be made to SARCO or the SAARC Secretariat by the parties to resolves dispute.

The Conciliation procedure bears a character of mitigation rather than adjudication, and provides an intermediate solution to dispute, rather than a permanent decision one gets from arbitration mechanisms.[157] Major initiative for using conciliation provision is that it applies only after exhausting of all relevant contractual or other dispute resolution mechanisms agreed by parties.

4.3.2 Transit Protocol

Transit Protocol (Protocol) was negotiated by ECT CP's to supplement the Article 7 transit provision but has been in draft form since 2003, when negotiations over it were suspended. The three main issues that led to suspension and were left unresolved were related to long-term capacity booking, congestion management (tariffs cost and auctions), and inclusion of the clause that would have the effect of the Protocol not applying within the European Union.[158]

The Protocol's objectives were to ensure 'secure, efficient and unimpeded transit' (highlighting the principle of security of supply), promotion of transparency and non-discrimination in providing access to available transit capacity, facilitating construction of

[156] Pirani-Stern-Yafimava 2009, p.16.

[157] Selivanova- Ehring 2012, p.92.

[158] Energy Charter Secretariat, Transit Protocol. 10.4.2015

energy facilities, while keeping environmental impacts to minimum and providing effective dispute settlement. [159]

Some of the main provisions of the Protocol are examined in proceeding passages. The Protocol obligated the transit state to prohibit unauthorised taking or interfering of energy materials in transits.[160] CPs were required to have in place 'objective, transparent and non-discriminatory' authorization procedures as to the origin, destination and ownership for the construction, expansion, extension, re-construction, and operation of transport facilities the measures being no less favourable than measures used for internal transportation.[161] The aforesaid obligation thus ensured level playing field for local and foreign in the realm transit facilities.

The Protocol in Article 10 also delved on the subject of transit tariffs that are usually the most contentious issue relating transit disputes.[162] CPs were obligated to ensure that transit tariffs were 'objective, reasonable, transparent and did not discriminate on the basis of origin, destination or ownership of energy materials', to ensure that tariffs not affected by market distortions, in particular those resulting from abuse of a dominant position by any owner or operator of transport facilities. Further tariffs should be based on operational and investment costs, including a reasonable rate of return and determined by means including regulation, commercial negotiations or congestion management mechanisms. The transit tariff provision thus provides the consumers with a fair market value for energy prices and the energy supplier a tariff rate that is not discriminatory or effected by unfair competition.

Article 15 of the Protocol could read in conjunction with Article 7(6) ECT. It obliges the CP to ensure that no owner of energy in transit under its control refuses to negotiate in good faith, on the basis of transparent and non-discriminatory procedures to supply energy to the transit state and failure of negotiations should not lead to refusing to or reducing transit volumes, or access to available transit capacity.

[159] Draft Transit Protocol, Article 2
[160] Draft Transit Protocol, Article 6
[161] Ibid., Article 9
[162] Selivanova- Ehring 2012, p.96

Besides the Transit Protocol discussed above the Energy Charter Conference also has drafted model agreements related to cross-border pipelines and electricity projects that can be adopted for state to state and investor to state agreements.[163]

4.3.3 Adoption of Transit Provision into the Model Treaty

The transit provision as highlighted above is a crucial part of the ECT and adopting it in to the MT would be elemental. Transit provision in the MT could also adopt provisions present in the Protocol especially relating to transit tariffs. The conciliation procedure provided under Article 7(7) provides for quick resolution to transit disputes than the other dispute resolution options but its non-adoption to date by any party highlights its non-existent efficacy in the matter. Thus, the MT can replace the conciliation procedure with its own mechanism e.g. In the case of transit dispute arising, parties can refer the dispute to arbitration under the aegis of SARCO or to the Secretary General of SAARC, who could play the role of mediator between the parties. The mediation process under the SAARC Secretary could also involve representative of other member states of SAARC. The mediation process thus would be less formal and lead to faster resolution of transit dispute. The 2009 Ukraine gas dispute is a good example of dispute being resolved in short period of time using a direct and political forum.

Transit provisions would also provide uniform transit law for regional energy projects in South Asia that are under construction and until now are being governed by bilateral agreements or domestic laws. E.g. gas to be supplied under the TAPI project transiting three states before reaching India would benefit from the uniform transit provision in place; in this case Turkmenistan and Afghanistan are already parties to the ECT.[164]

4.4 Investment

The main part of the ECT deals with investment protection (Part III to the ECT), and breach of the investment obligations can only exclusively be resolved under the arbitration

[163] Energy Charter Model Agreements available at https://energycharter.org/what-we-do/trade-and-transit/model-agreements/

[164] Energy Charter Secretariat. Members and Observers to the Energy Charter Conference. 17.10.2018

provision of Article 26 of the ECT brought forward by an investor. The investment protection provisions only provide protection for investment made in the energy sector.[165]

The objective of the investment provisions is to establish equitable conditions for investment in the energy sector with the objective of limiting and reducing the non-commercial risk associated with energy investments.[166] The equitable conditions are created by the host state treating investments on the principle of non-discrimination, national treatment and most-favoured nation in comparison to investments from national entities or other CP states. The ECT divides investments into two phases providing different levels of protection under each. The first phase of pre-investment has soft law obligations that are flexible and broad in nature. And the second phase of post-investment has hard law obligations that are binding in nature and the main obligations for investment protection under the ECT.[167]

The post-investment hard law obligations are set out in Article 10 to the ECT, which embody a number of basic principles and standards for treatment and protection of investments, also found in bilateral investment treaties (BITs) and investment arbitral awards.[168]

The SACs have also numerous BITs in force with the outside region and between themselves making the SACs already aware of the basic principles and standards of investment.[169] Between the SACs there are five BITs in force. Three were signed by India with Bangladesh (2009), Nepal (2011) and Sri Lanka (1997), and two were signed by Pakistan with Bangladesh (1995) and Sri Lanka (1997). All the five aforementioned BITs provide investments with the fair and equitable treatment, national and most-favoured nation treatment, non-discrimination, compensation for losses and protection against expropriation among others. And in the case of a dispute arising, recourse to the 'International Centre for Settlement of Investment Disputes' (ICSID)[170] or an ad-hoc tribunal setup under the rules of UNCITRAL. The aforesaid BITs define 'investment' in general terms and thus investments in energy sector would not enjoy the level of protection

[165] ECT Article 1(6)(f)
[166] Hober 2007, p.327
[167] Ibid. p.328
[168] Konoplyanik - Wälde 2006, p.534
[169] BITs available at : https://investmentpolicy.unctad.org/international-investment-agreements
[170] ICSID established pursuant to the Convention on the Settlement of Investment Disputes Washington, 18 March 1965.

provided under the ECT regime. The adoption of investment definition (discussed under section 4.1.1) along with its investment protection provisions of the ECT into the MT would provide the SACs with an energy relevant investment regime.

The basic principles and standards of investment found in Article 10 to the ECT are discussed below.

4.4.1 Principles and Standards of Investment Protection

i. Fair and Equitable Treatment

The obligation provides for fair and equitable treatment at all times to an investment.[171] The scope and meaning of the fair and equitable treatment is broad and in its application relays on factual assessment and employment of standards of good-government conduct to the case. The principle of fair and equitable treatment has been found to include principles of legitimate expectations from the investor of stable business and legal environment by the host state, transparency, good-faith, due process, proportionality and the prohibition on arbitrariness.[172] The principle has resulted in investors being awarded compensation for non-transparency and excessive interference by governments in investments.[173]

ii. Protection and Security

Article 10 also provides that investment "shall enjoy" constant protection and security. The standard includes state's duty to give police protection in case of attacks on the investment and provide a safe environment for the investment to operate normally.[174] In *Electrabel* the tribunal was of the view that the standard requires due diligence from the state to prevent physical harm to investors and their investment caused by a third-party within the state's territory. And in another tribunal (*Liman Caspian*) the standard requires the obligation from the state to protect investments against interference by use of force.[175]

[171] ECT Article 10, second sentence
[172] Hober 2007, p.329-330
[173] Konoplyanik - Wälde 2006, p.538
[174] Hober 2007, p.330
[175] Investment Arbitration under the Energy Charter Treaty 2015, p.4

iii. Discrimination

The host is obligated not to take any discriminatory or unreasonable measures that impede "management, maintenance, use, enjoyment or disposal' of the investment. [176] This obligation overlaps with the principle of fair and equitable treatment. In *Nykomb* the tribunal found Latvia in breach of obligation not to discriminate against foreign investment by offering higher tariff to local energy companies only.[177]

iv. National and Most-Favoured Nation Treatment

Article 10(7) expresses the principle of national treatment and most-favoured nation treatment and there application to investments and related activities, from the two treatments the most favourable being applied. This means that a host state cannot favour a national or foreign investor over investor from a CP state. Practices that can lead to investor seeking support of the principles can be favourable tax treatment for local entities,[178] hindrances in the investor getting access oil and gas pipelines or electricity transmission grid, problems in customs clearance.[179]

v. Principle of Pacta Sunt Servanda

The last sentence of Article 10(1) enshrines the principle of pact sun servanda as obligation for the CP to observe its contractual obligations to the investor and or his investments and also serves as an umbrella clause.[180] It means that a claim can be brought against a CP for failure to perform commercial contracts. In *Al-Bahloul* the tribunal found that Tajikistan breached the umbrella clause by its failure to perform its contractual obligation to issue licences for geological exploration.[181]

[176] ECT Article 10, second part of third sentence
[177] Hober 2007, p.330
[178] ECT Article 21(Taxation) safeguards the host state's right to freely regulate its taxation measures and not be obligated by the ECT provisions, with the exception of provisions on transit, national treatment and most-favoured nation, and expropriation.
[179] Konoplyanik - Wälde 2006, p.535
[180] Hober 2007, p.330
[181] Investment Arbitration under the Energy Charter Treaty 2015, p.4

4.4.2 Expropriation and Compensation

Investment protection regime under the ECT also provides for protection against expropriation of investment and compensation for investment losses that are fundamental to it. The principle of full compensation for expropriation is stated in Article 13 to the ECT that is also found in majority of similar BITs.[182]

In present decade BITs signed by a number of SACs have led to disputes and the tribunals finding the states in breach of expropriation and other standards of investment protection. Bangladesh and Pakistan are two such states that the ICSID tribunals have held liable for expropriation of investments in cases related to energy and natural resources sector. In *Tethyan Copper v. Pakistan* the tribunal found the state in breach of fair and equitable treatment standard, protection and security standard, impairing with enjoyment and disposal of investment and expropriation. The claim arose out of decision by the state to not issue a mining lease to the company for a copper-gold mine. The dispute was brought on the basis of breach of Australia-Pakistan BIT (1998) before ICSID, and the tribunal in 2019 awarded damages to Tethyan Copper Company in the sum of 5.8 billion US dollars. In another ICSID tribunal award (*Karkey Karadeniz v. Pakistan*) in 2017 the Pakistani state was held liable for expropriation and hindering with the transfer of funds and was ordered to pay approx. 800 million US dollars to the investor. The dispute had arisen when a Turkish company's rental power contracts were terminated by the Supreme Court of Pakistan, which was supplying electricity through power generation plants installed on ships.[183] And in *Saipem v Bangladesh* , a dispute that arose out of a construction contract for gas pipeline, the ICSID tribunal in 2009 awarded against the state for expropriation caused by the action of state's judicial system, and ordered to pay the investor approx. sum of 6.2 million US dollar.[184] The aforesaid tribunal awards are evidence of the effectiveness of investment protection standards in protecting investment in South Asia and the adoption of expropriation and compensation provision of the ECT into the MT would play a similar and important role.

Expropriation is defined as nationalisation, expropriation or measures having equivalent effect to the two aforesaid terms of investments.[185] Elements for assessing expropriation

[182] Hober 2007, p.332
[183] The dispute based on the provisions of Pakistan-Turkey BIT (1995)
[184] Claim brought forward based on the Italy-Bangladesh BIT (1990)
[185] ECT Article 13(1)

are the degree of deprivation, permanence of conduct & irreversibility of its effect and extent of economic loss of investor.[186]

It also includes a CP state expropriating assets of company in its area, in which an investor has equity through shares.[187] But it may in some cases considered expropriation where the CP states action affects the use or economic value of an investment, without interfering with ownership or assets of the company. [188]

The protection provided under Article 13 applies whether the expropriation is lawful (under conditions of Article 13) or unlawful, and entitles the investor to "prompt, adequate and effective compensation". [189] An expropriation by the CP state is lawful when it is made for public interest purpose, is non-discriminatory, follows due process of law and is accompanied by compensation.[190] The compensation being valued before expropriation took place and inclusive of interest. Besides the investor having recourse to arbitration proceedings under Article 26 of the ECT against expropriation, they can also review the exportation under the law of the CP state before a judicial or competent authority.

The Investors are to be provided with compensation for the loss of their investment, if it caused due to 'war or armed conflict, state of national emergency, civil disturbance, or similar event' and unnecessary requisition or destruction of the investment of CP state's forces or authorities.[191]

4.4.4 Investment Dispute Settlement

Disputes related to energy investments can be brought under Article 26 by investors against a CP state for breach of any of the obligations under the investment protection regime (Part III of the ECT).[192]

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[186] Plama, para 19.
[187] ECT Article 13(3)
[188] Electrabel, para 6,62).
[189] Hober 2007, p.333
[190] ECT Article 13(1)(a)-(d). The conditions for lawful expropriation including principle of non-discrimination and due process, overlapping with the standards and principles of investment protection stated under Article 10 to the ECT.
[191] ECT Article 12. No awards of ECT arbitral tribunals on subject matter of Article 12 till date. (31.05.2019)

[192] Applicable law to arbitrations under ECT includes general international law, prominently customary international law (e.g. law of treaties VCLT, law of state responsibility 'Articles on Responsibility of States for Internationally Wrongful Acts'). General Principal of laws such as good faith may also be applicable to ECT arbitration. *(ECT Commentary p.167-168)*

The Article 26 procedure provides that in case of a dispute arising between an investor and a CP where the investment has been made, the parties can first try to solve the dispute amicably within three months without referring it to dispute settlement mechanism. After the aforesaid time period has passed parties have the option to resolve the dispute in the courts/tribunals of the CP where the investment has been made or refer to a dispute settlement body that has been previously agreed between the parties or to options provided under the ECT. If the investor submitted dispute to national courts or previously agreed dispute settlement mechanism, then arbitration proceedings cannot be brought under the ECT.[193]

The dispute can be submitted to ICSID, arbitrator or tribunal setup under the Arbitration Rules of UNCITRAL, or to Arbitration Institute of the Stockholm Chamber of Commerce. The issues in the dispute would be resolved under the light of ECT provisions and relevant international laws.[194] *Wälde* being of the view that ECT and arbitration rules of ICSID and UNCITRAL become fully applicable in, case of conflict, and have supremacy over national law. [195]

The award of the arbitration proceedings under Article 26 is final and binding on the parties to the dispute. [196] But ECT does not provide for review of awards, but review is possible if the arbitration method chosen (e.g. ICSID) allows it.[197] Review may also be possible by national courts called for enforcement of award if national law or international obligations (e.g. New York Convention 1958) allow such a review. [198]

Article 26 as dispute settlement provision can be wholly adopted into the MT with minor amendments. SARCO can be added as an option for arbitration besides the above mentioned arbitration avenues, as it would be an economical option and provide SARCO with important place within the South Asian energy trade dispute settlement. And for the dispute to settled amicably the parties can use the office of SAARC Secretary General, who can play the role of a mediator before they refer the dispute to courts or arbitration.

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[193] ECT Article 26(3)(b)(i)
[194] ECT Article 26(6)
[195] Wälde-Thomas, Investment Arbitration under the Energy Charter Treaty, from dispute settlement to treaty implementation. Arbitrartion Interntional Vol.12(4) 1996, p.438.
[196] ECT Article 26(8)
[197] Wälde p.458
[198] Wälde p.458-9

4.5 Dispute Settlement between States on Treaty Interpretation

Article 27 to the ECT provides settlement of disputes between two CPs concerning the interpretation and application of ECT provisions. ECT provides that if the dispute is not settled between the parties in a 'reasonable period' of time then the dispute should be submitted to an ad hoc tribunal setup under Article 27 of the ECT.[199] The ad hoc tribunal is made up of three members, third member serving as the president of the tribunal. The Permanent Court of Arbitration at Hague, which would serve as seat for tribunal as default of decided otherwise. The UNICTRAL rules will be default rules in absence of previously agreed arbitration rules. The dispute would be decided under the ECT and relevant International law, the tribunal award/decision is final and binging on the parties. To date these is no official record of dispute brought under Article 27 of the ECT.

For dispute arising around the MT, the SACs can incorporate from the Article 27 dispute settlement provision. They can replace the choice of Permanent Court of Arbitration with SARCO as a default avenue for arbitration or keep both the options with further having the freedom choose besides the two. Or the MT can adopt a full-fledged dispute settlement agreement template (titled 'SAARC Inter-State Dispute Settlement Mechanism Template') that was drafted for supplementing the dispute settlement provision found in the Framework Agreement and annexed to the study (discussed in the section 4.3). The adoption of the dispute settlement agreement template would provide with a more detailed and effective dispute settlement provision.

The viability of the inter-state dispute settlement provision being able to resolve the dispute between SACs concerning MT, can be gauged from looking at international disputes resolved in past.[200] Two recent inter-state disputes in that concerned natural resources, the *Indus Waters Kishenganga* dispute (2013) between Pakistan and India, and the *Bay of Bengal maritime delimitation* dispute (2014) between Bangladesh and India were resolved through international arbitration before the Permanent Court of Arbitration at The Hague. The arbitral awards were accepted by the states and complied with, this despite being the disputes having a highly sensitive nature. The two disputes provide a

[199] In ECT Article 27(2) 'reasonable period of time' not defined. But can be assumed to be as in other International Investment Agreements of not exceeding usually six months.

[200] Lee 2017, p.117

good evidence of inter-state dispute settlement being effective even when the states are hostile to each other and bodes well for any inter-state disputes arising around the MT.

4.6 State-owned Enterprises' Obligation

State-owned and privileged enterprises (SOE) and their obligation to follow the ECT provisions are dealt within Article 22 to the ECT.[201] The provision's role is to ensure impact and influence of SOEs is no greater than private enterprises, and the state does not use the SOE to dominate or monopolise the energy market.[202] Thus the provision implies that SOEs violation of ECT can be attributed directly to the state. In the *Nykomb case*, the tribunal agreed to the claim that Latvenergo (a Latvian SEO) activities were attributable to the state.[203] In *Salini v Morocco* the tribunal stated that a state's control and participation through the SOE can be gauged by identifying the company's structure (shareholders) and function (objectives of company).[204]Further the Article 22 of the ECT also reiterates the customary international law of state responsibility, which has been codified by International Law Commissions' in articles on 'Responsibility of States for Internationally Wrongful Acts' in 2001.[205]

This provision is also important in context of South Asia, as SOE's dominate the energy sector in the region.[206] All the eight countries have different level of energy market structure, from vertically integrated to totally unbundled SOEs present in the electricity sector, and mainly vertically integrated SOEs present in the natural gas sector. The SEOs are also involved at present in electricity trade between India and its neighbours. And the

[201] No definition of SOE provided in the ECT or an agreed international definition of SOE present.
[202] Leal-Arcas 2018, p.312
[203] Ibid. p.313
[204] Ibid. p.302
[205] Ibid. p.306
[206] Afghanistan : Afghanistan Electricity Company,

Bangladesh: Bangladesh Power Development Board, Petrobangla, Bangladesh Petroleum Corporation

Bhutan: Bhutan Power Corporation, Druk Green Power Company

India: GAIL, India Oil Cooperation, ONGC, NTPC, Bharat Petroleum

Maldives: State Electric Company Limited, Maldives National Oil Company

Nepal: Nepal Electricity Authority, Nepal Oil Corporation

Pakistan : Pakistan State Oil, Sui Gas Companies, Water and Power Development Authority

Sri Lanka :Ceylon Electricity Board, Lanka Electricity Company, Ceylon Petroleum Corporation

under development regional energy projects of CASA-1000, TAPI and IP gas are also being handled by SEOs of the respective countries.[207]

Half of the SACs namely Afghanistan, Maldives, Nepal and Sri Lanka have vertically integrated SEOs in the electricity market meaning generation, transmission and distribution of electricity is managed by one major SEO in each of the respective states.[208] In Bangladesh and Bhutan the SEOs are partially unbundled, meaning one of the operations is divided between the different SEOs or other relevant private entities. In Bangladesh one SEO (Bangladesh Power Development Board) is responsible for both generation and distribution of electricity and a separate SEO (Power Grid Company of Bangladesh) is solely for transmission. On the contrary in Bhutan one SEO (Bhutan Power Cooperation) is responsible for both transmission and distribution and another SEO (Druk Green Power Company) only for generation. Finally, India and Pakistan are the only two SACs where electricity sector operations are unbundled but still the separate segments are dominated by SEOs, especially in transmission.

In the natural gas sphere Bhutan, Maldives, Nepal and Sri Lanka have no local reserves of natural gas, and import LPG for domestic use through SEOs. Bangladesh, India and Pakistan having local gas reserves explore gas through their SEOs and the transmission and distribution is also handled by SEOs. Afghanistan having proven reserves of natural gas but having done no substantial exploitation has also two SEOs responsible for natural gas importation, exploration and distribution.

As identified in the above paragraphs, South Asia energy markets are dominated by SEOs, so to attract investment and giving level playing field to new entrants the inclusion of the Article 22 provision would ensure that a SAC would not abuse its position in energy market through its SEOs and if it does it would be held liable for its conduct.

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[207] SEOs in CASA-1000: Afghanistan DABS , Pakistan: National Transmission Dispatch Company.
TAPI and IP: Afghanistan Gas Enterprise, Pakistan: Inter State Gas.

[208] Electricity SEOs in Afghanistan: Afghanistan Electricity Company, Maldives: State Electric Company Limited and FENAKA , Nepal: Nepal Electricity Authority, and Sri Lanka :Ceylon Electricity Board.

4.7 Other Relevant Provisions

4.7.1 Application of WTO Rules

The ECT like the SAFTA Agreement also incorporates WTO rules by reference.[209] Article 4 to the ECT provides that the states would not derogate from provisions of WTO in fulfilling their obligation under the ECT. It further provides that ECT CPs, who are not WTO members will have to abide by Annex W to the ECT that functions as an ad hoc trade regime and contains provisions from the WTO Agreement.[210] Among the eight SAARC member states, Bhutan is the only country that is not a member of the WTO and to date has accession negotiations going on.[211] Thus in the case of adoption of Article 4 of the ECT provision into the MT, would mandate Bhutan to be partially bound by the WTO provisions by reference. This would provide a foundation for Bhutan to be familiar to WTO provisions and in specific their working in international energy trade. The indirect incorporation of WTO law would also incorporate the 'fundamental principles of international trade law'[212].

ECT besides obligating states not to derogate from the WTO provisions also obligates them to not apply trade related investment measures[213] that are inconsistent with the provisions of Article III (national treatment on internal taxation and regulation) or XI (general elimination of quantitative restrictions) of the GATT.[214] The aforesaid obligation is a partial adoption of WTO's 'Agreement on Trade-Related Investment Measures'. The provision related to trade related investment measures would also be an important addition to the MT, and measures taken in hindering regional energy trade contravening the important international trade law principle of national treatment and quantitative restrictions in the form measures like quotas and licences would be prohibited. As evidenced in the '*India Solar Cells'* [215]dispute before the WTO having this provision

[209] The WTO rules (GATT and GATS) apply to tradable energy goods such as extracted oil, coal and natural gas.

[210] ECT Article 29(2)(a)
[211] World Trade Organisation, Bhutan.
[212] MFN, NT and elimination of quantitative restrictions
[213] A trade related investment measure is not defined in the TRIM Agreement, but a methodology to establish a measure as a trade related investment measure is given in the *Indonesia-Autos (*WTO Panel Report: Indonesia — Certain Measures Affecting the Automobile Industry, WT/DS54/R , WT/DS55/R , WT/DS59/R , WT/DS64/R, 2 July 1999)

[214] ECT Article 5
[215] In '*Case DS456 India Solar cells'* the WTO Panel Report found that domestic content requirement in production of solar cells and modules and sale to government agencies was inconsistent with national

would provide investor with further protection and fair treatment when investing in the energy sector. Thus larger South Asian economies like India or Pakistan would not be able to put measures in place that would disadvantage investors from smaller SACs.

4.7.2 Exceptions to Application of Treaty Provisions

CPs to the ECT are allowed to adopt or enforce a number of measures that might hinder with energy trade and investment, but are exempted from provisions of the ECT with the exception of compensation and expropriation of investments provisions.[216] The measures exempted from ECT provisions application are of measure necessary to protect human, animal or plat life or health;[217] to acquire energy resources in case of shortage, but not discriminate in divisions of the resources (between other CPs and discontinue the policy as soon as the shortage is gone); and of protecting essential security interests, implementing national policies related to non-proliferation of nuclear weapons, and maintenance of law and order. But the states are not allowed to take measures that are disguised or hidden restrictions on energy transit under the guise of protection of security interests and maintenance of law and order.[218]

This provision providing exemption from application of ECT in case of protection of human, animal or plant life or health is also present in Article 14 to the SAFTA Agreement. The addition of exemption of measures under Article 24(3) would also provide states with keeping national security at the forefront without being concerned about ECT or the MT application. In South Asia, where countries are still in conflict or recovered from it recently this provision provides them to pursue energy investment and trade friendly policy, while also keeping national security and public order in check.

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treatment obligation under Article III of GATT and therefore also with Article 2(1) of Agreement on Trade-Related Investment Measures'.

[216] ECT Article 24. The provision found inspiration from GATT.
[217] ECT Article 24(2 (i). This provision being similar in nature to GATT Article XX

[218] ECT Article 24(2)(ii) and Article 24(3)

4.8 Summary and Adoption of the ECT provisions in to the Model Treaty

The relevant provisions of the ECT were discussed with comparison to SAARC laws and other relevant international law provisions in the context of energy trade in South Asian region. In this section the elements necessary for the MT are summarised and its implementation discussed.

The objectives and principles of ECT highlighted in section 4.1 would serve as a firm foundation for the formulation of the MT's ambit and reach and result in the achieving closer working of the SACs in the energy sector. The 'energy material and products' and 'energy related equipment' definitions in the ECT provide comprehensive list of aforesaid, and the inclusion of these definitions in the MT would be integral to the understanding of the energy commodities and infrastructure used to trade them. Further the definitions for economic activity, and investments and related terms also require inclusion in the MT, as the MT would also be focusing on energy investments.

Transit provision's inclusion along with draft Transit Protocol in the MT would be an integral and the most important part of the MT and provide the SACs with standard transit rules for present and future regional energy trade. The investment protection provisions inclusion in the MT would provide the investors from the region incentive to invest knowing that their investments would be treated fairly and on equal terms, and compensated in case losses or expropriation, similar provisions in other BITs (see section 4.4.2) have shown the effectiveness of the investment protection regime.

The inclusion of dispute settlement provisions in the MT can have a similar or different approach from the ECT. In transit disputes the conciliation procedure could be replaced by a different dispute resolution mechanism procedure stated in section 4.3.3. The dispute settlement between investor and states could include the Article 26 of the ECT with the addition of SARCO as one of the options for arbitration provision. Lastly the dispute settlement between states on the interpretation of the MT could be resolved through the procedure provided in Article 27 ECT or adoption of dispute settlement procedure template drafted for the Framework Agreement.

The Model Treaty can be implemented by the SACs under the auspices of SAARC or as a stand-alone treaty. Bringing the MT under the umbrella of SAARC would supplement the SAFTA Agreement and also the SAARC Framework Agreement.

5 CONCLUSIONS

The previous chapters went over the energy situation and energy market structure of each SAC, the present and forthcoming intra-regional and inter-regional energy trade dealings and projects in South Asia, laws relevant to energy trade in the region, analysis of the ECT keeping in context the aforesaid issues, and providing analysis on how the ECT and other relevant law provisions can be adopted into MT.

South Asia having had average annual GDP growth rate of 6 percent (from 2000-2017) and holding within it 22 percent of the world's total population requires great amounts of energy, stable supply and diversification of energy resources to maintain its growth rate and bring economic prosperity across the region. As stated in Chapter 2 the region is rich in natural resources and it borders energy rich Central Asian states and Iran. Bhutan and Nepal have large hydropower generation potential that has yet not been utilised to its full potential. Afghanistan although being rich in natural resources to date has not been able to develop its energy exploration and exploitation infrastructure mainly due to poor law and order situation and resultant negligible foreign investment in the country. India, Bangladesh and Pakistan have sizeable domestic energy resources but they are not sufficient to meet the total energy demand of the huge population and growing economy. Sri Lanka has local hydropower generation and the rest demand is met by energy imports and Maldives being totally reliant on energy imports as it has no domestic energy resources.

Besides the deficiency in energy sector identified in the region, there are examples of successful electricity trade between India with Bhutan and Nepal, which is further to increase under bilateral agreements between the countries. And the construction projects to supply electricity and gas from Central Asian states transiting through Afghanistan to the east. These isolated trade projects could lay down the foundation for interconnecting the electricity and gas transmissions system of the SACs in future that would allow to access energy from different corners of the region.

The study of the energy situation in the region and the fact that energy trade within the region makes up less than 5 percent of the total trade within the region,[219] leads one to look

[219] ADB Energy Trade in South Asia 2012, p.37

at regional laws that regulate trade on a regional level and how they affect trade in energy resources. The SAFTA Agreement analysed (under section 3.5.1) above provides trading regime for the region complaint with the WTO rules, to trade goods at lower tariffs among themselves. The trade liberalisation under the SAFTA has not filtered down to trade in energy resources, and also trade in other goods have been hindered by the provision that provides exception to trade liberalisation provided for in the SAFTA Agreement. Besides that failure of regional laws another issue is of domestic energy sector legal and regulatory frameworks in place that vary in nature across the region and are impediment to energy trade and investment.

The above paragraphs cleared the picture of energy trade situation within the region and answering the first two research questions for this thesis. Thus this would require alleviating the energy trade situation from its present state and as the ADB Study recommended one of the option was to put in action a regional cooperation in energy trade, and one way of enhancing the cooperation could be achieved via the development of a 'SAARC regional energy trade and cooperation agreement' that could be modelled on the ECT.[220] The thesis also found that the ECT is a suitable instrument for a modelling an agreement for energy trade in South Asia after analysing its provisions in the regional context.

The third and fourth research questions being of intertwined nature were answered under Chapter 4 that required analysing the ECT and how the ECT's provisions adoption into MT would affect energy trade in the region. The ECT was chosen for adoption as it is the sole international treaty specific to energy trade, transit and investment and has been in force for about 20 years with sizeable number of signatories, and has been tested in field which could be evidenced by the workings of the Energy Charter Conference and arbitrations awards made under the ECT.

The ECT like the SAFTA Agreement abides by WTO rules by making reference to them, and hence the MT could concurrently run with the SAFTA Agreement, but with the need to amend it to apply full trade liberalisation to trade in energy goods. The transit provision being the most important element of the ECT and its adoption is necessary for success of regional energy trade. Adopting the transit provision would highly beneficial as it would provide for a stable and common transit regime that protects transit infrastructure and

[220] Ibid. p.93-34

treats all investor be they domestic or international equally. The transit regime would provide a platform that would allow electricity to flow from Bhutan and Nepal to transit from India to its western and eastern neighbours, and natural gas and electricity from Central Asia to transit from Afghanistan to its eastern SACs. Further the transit provision would provide the impetus for the energy systems of SACs to be interconnected and results in the SACS having a better security of supply situation than before.

The investment protection regime under the ECT is another important element as it obligates the host state to treat foreign investments in a non-discriminatory manner and abide by a number standards and principles, and provides protection against expropriation and recourse to neutral dispute settlement options. The investment protection regimes presence would be attractive element of the MT in occasions where the local governance and judicial systems tend to be unreliable or corrupt in some cases and in some parts of the region there can be sudden political or social instability that could result in damage and loss of an investment. The study of awards under BITs (in section 4.4.2) that compensated investors for their losses is a good example of the investment protection regime of similar to the MT being effective when enforced in South Asia. The investors have recourse to international arbitration under ICSID, UNCITRAL, Stockholm Chamber of Commerce and regionally designed and based SARCO, and the parties can make reference to and rely on a number of arbitral awards that are already been awarded under the ECT for guidance.

The MT adoption would result in having uniform laws for energy trade projects and related services all over the region resulting in lower cost of doing business than before. Further the MT would require to be backed up by an appropriate domestic policy and law for its effective enforcement domestically and harmonisation of technical aspects related to energy trade.

The adoption of the MT would serve the important purpose of providing a new framework that would encourage and lead to growth in energy trade and being a future linchpin in the South Asian energy trade governance structure.