



## *Background Paper*

### *The Proposed Luanda Declaration: Towards an Atlantic Basin Charter for Energy Governance*

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#### **Energy Growth and Investment**

Energy provides the foundation for economic growth. Furthermore, in most contexts, an improvement in the level and quality of human life remains influenced -- perhaps more than any other factor -- by the imperative to increase both energy consumption and energy efficiency. Indeed, economic development remains impossible without appropriate parallel developments in the supply, transportation, distribution and consumption of energy.

Energy growth requires the undertaking of large investments in electricity generation, other forms of energy production, and in transportation and distribution networks. In the end, it will not be possible to provide for sufficient energy – of any type – for all of the world’s citizens in a dignified way without unprecedented investment outlays in new energy supply and infrastructure.

In addition, a number of environmental realities – including an ever-tightening carbon constraint – continue to circumscribe the world’s potential energy futures. While such constraints are often expressed in terms of social justice or ethical imperatives, they are now also recognized and subscribed to by a large majority of countries within the international community through a number of transnational commitments to significantly reduce greenhouse gas emissions, expand investment in renewable and low-carbon energy, and to implement effective energy efficiency policies.

#### **Regulatory and Legal Risk as Barriers to Energy Finance**

The construction of energy infrastructure requires adequate instruments of finance. Many economies in the Atlantic Basin, however, find such investments impossible when relying solely upon national budgets or even on the existing stock and future flows of strictly national savings. Mobilization of international finance will be essential, then, in order to attract the necessary funds for the required infrastructures across the energy supply and demand chain, particularly in developing or reconstructing countries.

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In addition to the fiscal and financial constraints limiting the capacity of developing countries, high levels of regulatory risk and, in particular, significant legal insecurity continue to undermine the rate of investment and the channeling of available international finance. Unless investors and financial entities have recourse to legal instruments and mechanisms which overall ensure a stable regulatory and legal environment for their investment, it is unlikely that the optimum level, nature and distribution of energy infrastructure deployment will ever take place in a cooperative, efficient and sustainable fashion.

### **Transnational Energy Governance: Lever for Energy Investment and Finance**

The countries of the Atlantic Basin have developed very different energy policies, regulatory regimes, and energy models. However, the countries of the Basin do share a number of intersections of common and unique interest in the realm of energy, and many compatible guiding principles upon which to explore a new space for a new transnational governance.

The entire Atlantic Basin faces at least a similar broad energy challenge: that of restructuring the current model, while maintaining growth and decreasing (particularly energy) poverty, into an energy system capable of both ensuring energy security (of supply and/or demand) while avoiding the worst manifestations of climate change.

While the formula of common Atlantic interest and collaborative Atlantic potential expresses itself differently in distinct zones within the Basin, such that the weightings of the distinct variables (ie, energy poverty, climate vulnerability, emissions profile, fossil fuel or import dependence, income per capita etc) oscillate significantly from one geographic point in the Basin to another, all Atlantic Basin countries face the need for unprecedented levels of investment into the future – regardless of which aspects of the transformation particular countries (developed, emerging, developing) find more challenging.

In the face a global market for capital – primarily fueled by the North, at least deep into this century -- all Atlantic countries will feel the need to compete for collaboration, technology and finance through the maintenance of relatively secure investment environments. This national imperative translates into a need for reform and institution-strengthening which, in turn, translates into an incentive to explore transnational collaboration, if not governance, in the region.

Even adequate energy regulatory regimes around the Atlantic Basin – appropriately crafted or reformed – would not by themselves guarantee the quality of legal security required by investors and financial managers (even among NOCs and sovereign funds) given that the potential conflicts covered by such regimes would be purely national. The exclusively national reach of such regimes -- which remain insufficient to deal with the range of potential conflicts that might stem from large investments in energy projects with an increasingly international footprint -- represents an important limitation on the rate of future investment. In too many cases, international investors will consider unviable projects which are only backed by the proper functioning of their own national regulatory and property rights regimes.

## **Precedent and Model: The Energy Charter Treaty process**

Some countries within the Atlantic Basin have entered into international treaties which serve as a legal basis for international energy operators and investors undertaking investment projects in the energy sector. However, many international treaties, given their content or territorial scope, often fail to provide a sufficient rules-based framework as an implicit guarantee of fair play and stability for investment in energy and its infrastructure, transit and trade. For such reasons it would be mutually beneficial to explore the potential for such an Atlantic Basin energy governance process, focused on the various segments and sectors of the Atlantic Basin energy system, an increasingly dense and autonomous interactive economic web across the Atlantic energy space.

While the multilateral rules of the World Trade Organization, in theory, cover trade in energy goods, in practice there is no specific global multilateral rules-based order for energy. There exists one notable exception to the general rule that the world lacks international energy governance structures; this exception, the Energy Charter Treaty, also provides an important precedent for any Atlantic Basin energy governance process.

The European Energy Charter Declaration of 1991 and the Energy Charter Treaty of 1994 established the first and (so far) only set of multilateral rules governing energy activity across the international energy supply-demand chain. With over 50 signatory countries, the ECT process covers investment protection and dispute settlement, among other procedures and protections for energy production, trade, transit, etc., across much -- if not most -- of the Eurasian space.

Conceived of at the end of the Cold War as an answer to Europe's long-term security of supply concerns, and developed during a time of low prices and increasingly open and liberal markets, the Energy Charter Treaty has more recently seen attempts to deepen and broaden the scope of its multilateral commitments fail to gain sufficient momentum during times of high international prices and a more central repositioning of the state within energy relations and geopolitics globally. Indeed, an impasse seems to have been met between at least two, and perhaps more, competing visions of transnational energy governance, that of the European Union and that of Russia, and with some scattered others which for their own reasons have decided to remain aloof of the ECT process in recent years.

Some might question an appeal to the precedent of the Energy Charter Treaty, given the numerous recent setbacks the process has faced -- even if largely provoked, at least indirectly, by the latest (high) swing of the price cycle. Precisely because of frustrating ECT reversals, now is the time to reconsider transnational energy governance, to take stock of the ECT's weaknesses and enduring strengths, and to fashion strategies to promote transnational energy governance in that part of the globe where the ECT was never able to reach: the Atlantic Basin. It is precisely because of the failings of the ECT -- and widespread sentiment across its notional Eurasian space that the treaty process has lost its momentum, despite a recent 'modernization' of the ECT process -- that a fresh approach should be initiated in the Atlantic Basin. More importantly, the collective

incentive to embed collaborative transnational energy relations will not erode so long as the imperative for investment in energy supply, human development and environmental sustainability does not fade. The lack of collaborative transnational energy relations does not change this, but rather only makes the imperative that much more difficult to satisfy.

### **The Need for an Atlantic Basin Energy Governance Process**

A number of reasons justify initiating an exploratory process for Atlantic Basin energy governance, even despite the state of affairs with the ECT. First, the ECT process has often been criticized – justifiably or not -- as too imbalanced in favor of the interests of the consumers and net consumer countries – and at the strategic expense of net producer and transit countries. This could be one explanation for the relative lack of producer countries in the ECT. Until recently, the main concentration of potential producer country ECT members would have been the oil and gas producers of the Middle East. However, such countries still felt more connected with a global market rather than with any Eurasian regime. The other candidates would have been from the Atlantic, and therefore more appropriate for participation in a new Atlantic Basin Energy Charter (ABEC) process.

#### ***Value-added from an ABEC Process: Address Concerns of Producers – Security of Demand***

But now there are also a number of producers in the Atlantic Basin. A new transnational energy governance process in the Atlantic, enveloped around a nascent yet coalescing Atlantic Basin energy system, would necessarily need to appeal more to producers than has the ECT. On the other hand, the producers of the Atlantic Basin are more equitably distributed around the Basin, with a number in the developed north (Norway, Canada, the US, the UK, Holland) and many (traditional and new) producers in the developing south (Mexico, Nigeria, Venezuela, Colombia, Trinidad and Tobago, possibly Guyana, Brazil, Argentina, South Africa, Namibia, Angola, Gabon, Congo Brazzaville and Kinshasa, Equatorial Guinea, Sao Tome and Principe, Ghana, Guinea, Sierra Leone, Mauritania, and maybe one day even Morocco). Many Atlantic producers have until recently been net importers – and therefore typically in the camp of the consumers) – but now as net exporters also share the naturally perspective of the producers.

An Atlantic Basin energy governance process would be a more balanced equation between the interests and perspectives of producers and consumers than that of the ECT. It would offer value-added with respect to the ECT process by providing a fresh context and collaborative space in which the energy governance concerns of producer states, actors and agents might at least be imaginatively reconsidered the actors and a, as indeed the agents of producer states will possess enough critical mass to exert protagonism.

The Atlantic Basin process could start with the producers' perceived need for 'security of demand,' Such security literally demands a certain level of perceived necessary income in the short, middle and long runs – income stabilities which are threatened not just by the volatility of price and investment, but also by any structural governance changes in favor of consumers. But 'insecurity of demand' masks a fear of the resource curse, an underlying anxiety that even security of income will not by itself overcome the

obstacles to real sustainable development on the ground, all the more challenging in a developing country producer state.

Furthermore, the rulers of producer states now also know that hydrocarbons will carry at least a hidden carbon discount into the future (in economic development and geopolitical terms). Security of demand, therefore, easily translates into collaborative structures that strengthen the macroeconomic, monetary, regulatory and judiciary technocracies of producer states, so that they might attract sufficient investment while avoiding Dutch Disease and the oil curse, diversifying their economies successfully in a climate-resilient, increasingly low-carbon fashion.

Such collaborative structures – which could include adoption of best practices in macroeconomic management, extractive industry strategy and regulation, and climate change resilience cooperation – could be considered, during the exploratory process, as candidates for inclusion in any future Atlantic Basin Charter for Energy Governance. Given the Atlantic Basin's comparative governance advantage over the principal ECT zone of Eurasia (as it incorporates both abundant producers and consumers) and over the International Energy Forum (IEF), the world's principal dialogue between energy producers and consumers (as the Atlantic Basin remains relatively free of many of the ideological and geopolitical complications which limit Eurasian producers and consumers), such a new transnational energy governance process would be well placed to deal with a unique and multifaceted producer-consumer dialogue that might be capable of overcoming some of the traditional barriers to producer-consumer collaboration.

Such collaboration does not have to cross principles of free trade, but rather strengthen the technocratic and policy decision making capacity on the ground behind the borders so that any economic boon from energy exports might be sustainable.

### ***Value-added from an ABEC Process: Transnational Biofuels Governance***

Another area of value-added generated by an Atlantic Basin Charter for Energy Governance would be the potential for such a governance process to establish global standards for international biofuels production, trade, transit and consumption. The Atlantic is the cradle of the modern biofuels industry and home to well over four-fifths of current global biofuels production, trade and consumption. The only other biofuels producers are in Southeast Asia, where production has focused mainly on biodiesel and rising transportation fuel demand has easily swamped Asian supply. As a result, the Atlantic's current dominance in biofuels will be extended indefinitely into the future, as most expected future biofuels production will occur within the Atlantic Basin. Total global absolute output of biofuels is projected to triple by 2035 and account for one-third of all global primary energy by 2050 – but only if the necessary investment is deployed in a timely and efficient fashion. As a result, any Atlantic agreements or collaborative ventures in biofuels-related areas are likely to define the global governance of biofuels for decades to come. Furthermore, without Atlantic collaboration, global governance for biofuels will be long in coming.

Biofuels offer many potential vectors for transnational collaboration within the Atlantic Hemisphere. Because biofuels are located at the complex scientific and policy nexus of energy, agriculture, land-use, climate change and sustainable

development, much could be gained by deepening collaboration and sharing good practice across the Atlantic space, where both Africa and Latin America share emissions profiles dominated by agriculture and land-use, and where energy poverty reaches its highest regional levels.

Nascent Atlantic cooperation is already under way. Africa also holds enormous biofuels potential, which Brazil is exploring together with its African partners. Brazil and the U.S. have also been collaborating in the biofuels realm. These collaborative ventures offer an initial foundation for broader pan-Atlantic cooperative engagement that would include the EU -- the Basin's most important net biofuels importer -- as well as additional African, North and Latin American counterparts. Early progress on biofuels could be interpreted as early success for the Atlantic Energy Charter process.

### ***Value-added from an ABEC Process: Catalyst for ECT Reforms and Global Energy Governance***

An Atlantic Basin Energy Charter process would not only provide a corrective alternative model to the ECT process in Eurasia, and a natural catalytic framework for transnational biofuels governance; it would also offer value-added in the tactical and procedural domains. For example, a regional grouping can often be a superior 'second best' tool to the traditional ongoing diplomatic efforts at the global level, particularly if the latter have already stalled in lengthy deadlock, at least once.

While the ECT, in theory, is a 'global regime', open and available to all qualifying newcomers for their participation and compliance, at its notional Eurasian peripheries most countries have remained observers, or became members who now oppose the deepening of the Treaty's multilateral commitments (some have even formally withdrawn from the ECT process, at least for the moment, or even propose new alternative energy governance schemes). Given this current state of affairs, the countries of Atlantic -- producers or consumers -- will not likely enter into an ECT process which has stalled on the ambitions of the previous decade's rise of energy nationalism.

This is particularly true during a moment of global strategic reassessment -- a moment in which not only are the world's major and emerging powers experiencing a transformation of their respective (and collective) strategic horizons, but also one in which the traditional, post-World War II structures of global governance are together now in a stage of decline. Global governance is still in demand, and now more than ever; but the UN-Bretton Woods efforts of the past appear to also now have stalled.

But the countries of the Atlantic Basin -- most never seduced by the ECT process -- might now consider the exploration of new basin-wide energy governance possibilities. Typically, it is easier to contemplate shared commitments with neighbors, as opposed to with distant allies. Therefore, a collaborative process to explore transnational energy governance potential is likely to work best in the Atlantic space.

The ABEC would be the first transnational energy governance process that would span from South to North. It would be built on its own sine qua non -- northern investment for southern supply and climate-resilient sustainable development (or security of demand for legal security of investment) -- and its own *raison d'être* -- the articulation of

the Atlantic energy space. The Atlantic Basin represents the new intersection of geopolitical interests at the end of the unipolar moment when the traditional global governance structures no longer wield sufficient credibility.

Indeed, an Atlantic Basin Energy Charter process -- representing an attempt at rebalancing the structure of incentives and protections once articulated under the ECT by taking advantage of a unique Atlantic Basin energy system configuration -- could lend renewed impulse to the ECT, providing for the real possibility of global energy governance in the long run.

### **The Atlantic Basin Energy Charter Process: the Way Forward**

The Atlantic Basin Charter for Energy Governance – and, first, the exploratory process which this Declaration inaugurates -- should aspire to resolve the following prerequisites, essential for the abundant flow of international finance into the many crucial energy sectors of the Basin.

First, the acceptance and implementation of legal principles to which the countries of the Atlantic Basin would commit themselves, including the *principles of non-discriminatory treatment, the principle to uphold existing regulatory commitments, and a guarantee to just compensation in the case of expropriation.*

Second, the establishment of *a clear and precise international arbitration procedure which would allow parties to obtain, in the case of a justified claim, the right to measures which adequately safeguard their rights.*

Finally, the Atlantic Basin Energy Charter exploratory process will aspire to generate *broad reforms* in the direction of adequately reliable normative frameworks that: (1) respect the *principles of freedom of transit, market access, and the protection of international investments and exchanges*; (2) *promote a more profound dialogue between suppliers and consumers capable of generating increased stability for international energy transactions and a more optimally-functioning balance of international markets*; (3) provide for more consistent stimulus – through adequate incentives, compensations and funding -- of sustainable, clean energy; and (4) *generate deeper exchange among policymakers and strategic thinkers transnationally that might lead to the adoption of codified legal frameworks, based on internationally-recognized best practices, and a more complete development of global energy possibilities.*

In light of the context and arguments outlined above, the Eminent Persons Group of the Atlantic Basin Initiative should adopt the accompanying declaration (***The ‘Luanda Declaration’ -- Towards an Atlantic Basin Charter for Energy Governance***) calling for the initiation of an Atlantic Basin Energy Charter process and the creation of a new ***Atlantic Energy Forum*** (AEF) dedicated to the study, elaboration, debate and eventual adoption of an Atlantic Basin Charter for Energy Governance.

The main purpose of this Luanda Declaration is to establish a common and agreed framework for the promotion of the an Atlantic Basin Charter for Energy Governance that would embody the commonly accepted principles outlined in the this document and

help to develop the immense existing potential of joint-collaboration within the energy sectors of the different countries of the Atlantic Basin through the creation and maintenance a stable framework for demand and supply of energy.

The ABEC process should be open to stakeholders from all Atlantic Basin countries. It will be directed by the EPG of the ABI and aspire to catalyze the adoption of an Atlantic Basin Charter for Energy Governance that would embody the commonly accepted principles outlined above and harness the multifaceted potential of an ‘Atlantic Basin energy system,’ recognized by the EPG to represent increasing economic, environmental and geopolitical potential.

The ABEC will be supported by a small provisional Secretariat, housed initially in the CTR, which shall be composed of such minimum staff as consistent with the Secretariat tasks.

The Secretariat’s function will include:

- Creation of an Atlantic Energy Forum (a Governance Task Force of private experts and public actors) to support the Secretariat in technical and policy terms. The AEF’s central task will be to advise and support the Secretariat in the articulation of the content of the Atlantic Basin Charter for Energy Governance. The Task Force will also help the Secretariat prepare the content and discussion points of future EPG meetings dealing with the Atlantic Energy Charter Process.
- Preparation of an Atlantic Basin Charter for Energy Governance draft to be submitted to the EPG.
- To organize and administer meetings of the Task Force and the EPG.
- To support the EPG during its debate and negotiation within the context of the Atlantic Basin Energy Governance process.
- To be in charge of any energy governance publication issued by the EPG.

The ABEC process need not depend on complete and unanimous Atlantic Basin participation. Exploring the potential for new common governance structures can be pushed from different sides of the Basin at different times. No Charter is ever considered final, but rather open to amendment over time. Nevertheless, the more diverse the initial set of stake holders in the process, the more likely that a common and sustainable vision for Basin energy governance can be created.