

**The Energy Charter Treaty**

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CHAPTER

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3. The Energy Charter Treaty: The Background and the Negotiating History

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Abstract

This chapter traces the negotiating history of the Energy Charter Treaty. The genesis of the Treaty goes back to a European Council meeting held in Dublin in June of 1990. At that meeting, the Dutch Prime Minister at that time, Mr. Ruud Lubbers, presented a proposal for the creation of a European Energy Community. During 1991, the text of the ECT was negotiated and drafted by the Conference on the European Energy Charter. The Charter recognized the need for a legally binding agreement for co-operation in the energy sector. Delegations from more than fifty States were involved in the negotiations, including the USA, Russia, and most members of the Organisation for Economic Co-operation and Development (OECD), including its non-European members—Australia, Canada, Japan, and New Zealand. The various drafts of the ECT are divided into three categories: Basic Protocols; Basic Agreements; and ECT Drafts. The first ECT draft was presented on March 15, 1993. It must be kept in mind, however, that the ECT was negotiated under time pressure, as a consequence of which the language is sometimes ambiguous and unclear, bearing the hallmarks of the ambition to create a comprehensive treaty covering the entire energy sector to be agreed by a large number of participants.

Keywords: [ECT \(Energy Charter Treaty\)](#), [International trade](#), [Arbitration](#), [Negotiations and consultation](#)

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A. Background

On 17 December 1994 the Energy Charter Treaty was signed in Lisbon. It entered into force on 16 April 1998. As of 1 January 2019 fifty-four States have signed and ratified the ECT, in addition to the European Communities as a Regional Economic Integration Organization, pursuant to the definition in Article 1(3) of the ECT.¹

The ECT is a unique treaty in that it covers all forms of international co-operation in the energy sector in one multilateral document: investment, trade, transit and energy efficiency. In addition, there are several dispute settlement mechanisms for the enforcement of rights and obligations under the ECT. In the trade area, the Treaty essentially introduces WTO rules for those parties to the Treaty which are not yet members of the WTO.

The ECT is also a complex treaty. The text of the ECT consists of eight Parts and fifty Articles. In addition, there are 14 Annexes and five Conference Decisions which form an integral part of the Treaty. There are also a number of Understandings, Declarations, and Chairman's Statements, i.e. statements made by the Chairman of the European Energy Charter Conference. These additional documents must also be taken into account, albeit to varying degrees, when trying to understand the provisions of the ECT.

p. 14 The ECT has been described in the following way:

In form, the Energy Charter Treaty is an untidy, 'user unfriendly' package comprised of eight 'Parts' and fourteen 'Annexes', which are subject to five Conference 'Decisions' and to numerous 'Understandings',

‘Declarations’ and interpretations that were made in connection with its adoption. It also contains various exceptions and exclusions, some fairly general while others are quite specific.²

The text of the ECT was negotiated and drafted during 1991–4 by the Conference on the European Energy Charter. Delegations from more than fifty States were involved in the negotiations, including the USA, Russia, most members of the OECD, including its non-European members Australia, Canada, Japan, and New Zealand.

The genesis of the Energy Charter Treaty goes back to a European Council meeting in Dublin in June 1990. At that meeting the Dutch Prime Minister at the time, Mr. Ruud Lubbers, presented a proposal for the creation of a European Energy Community. This was the time when Europe was still divided into two. Like Germany, the European Continent consisted of two parts which were called East and West, the origin being the 1945 Yalta Conference and its monument, the Berlin Wall until its fall in November 1989. This remarkable event, which was ultimately the consequence of the reforms—usually referred to as *glasnost* and *perestroika*—introduced by Mikhail Gorbachev in the Soviet Union. These reforms were soon to influence developments not only in his own country but also in the rest of Eastern Europe, catapulting the transformation process in this part of the world into thitherto unknown directions.

Six years after the European Council meeting, Mr. Lubbers made the following reflection:

In the spring of 1990, the world had scarcely recovered from its surprise about the events of 1989 in Eastern Europe. The drastic changes to follow in subsequent years, such as the collapse of the Soviet Union and the tragedy in former Yugoslavia, were still hidden in the future. In that period, the European Council was searching for the political response to the dramatic changes in Europe, a response that was required to give unequivocal support to the process of change and facilitate the switch from centrally controlled economies to market economies. Awareness of this need was broadly perceived, but the exact reply needs was the subject of heated debate. And it was so as a matter of course—say now with the benefit of hindsight—for we were living in a period without precedence.³

The proposal to create a ‘European Energy Community’ with Eastern Europe and the Soviet Union was well received. It was widely believed that for Eastern Europe and the Soviet Union such an international document could facilitate access to Western capital, expertise, and technology which in turn could improve the performance of their own energy sectors. Some East European countries probably saw such a document as a possibility to decrease dependence on energy supplies from the Soviet Union.

West European countries saw the ‘European Energy Community’ as an opportunity to gain access to East European and Soviet markets for investments in the energy sector, including oil, gas, and nuclear power. In addition, in Western Europe such an arrangement was seen as holding out the prospect of security in long-term energy supplies, primarily from the Soviet Union.

p. 15 Also, as indicated by Mr. Lubbers, throughout Europe, there was a genuine desire to support the transition and restructuring efforts which were under way in Eastern Europe and the Soviet Union at the time.

A first draft of the European Energy Charter was prepared by the European Commission, and presented for discussion, in February 1991. Initially the European Energy Charter was perceived as a European project, involving only European countries. Eventually the negotiations included also all the non-European OECD countries. When the European Energy Charter was signed 16–17 December 1991, it had fifty-six signatories. Today the following States have signed it: Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chad, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein,

Lithuania, Luxembourg, Malta, Mauritania, Moldova, Mongolia, Montenegro, Morocco, The Netherlands, Niger, Norway, Pakistan, Palestine, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, United States, Uzbekistan, Yemen.

The European Energy Charter is a non-binding political declaration.⁴ The Charter represents a commitment to co-operation in the energy sector, based on the principles of open and efficient energy markets. It is intended to promote the creation of conditions that will stimulate private investment and the participation of private enterprise on a non-discriminatory basis. The Charter also confirms the principle of respect for state sovereignty over natural resources. It recognizes the importance of environmentally sound and energy-efficient policies.

Article 2 of the ECT, entitled 'Purpose of the Treaty', refers to the 'objectives and principles of the Charter' which are thus to be taken into account when interpreting the purpose of the ECT.⁵

B. The Negotiations

The Charter recognized the need for a legally binding agreement for co-operation in the energy sector. The negotiations on the ECT started in late 1991, even before the European Energy Charter had been signed.⁶ The ECT was eventually signed three years later — on 17 December 1994.

The negotiations took place in parallel with the Uruguay Round of negotiations (1968–94) within the GATT system which resulted in the establishment of the WTO in 1995. In addition, the negotiations coincided with dramatic and radical political and economic changes in Eastern Europe and the Soviet Union, including the dissolution of the Soviet Union in late December 1991, resulting in fifteen new sovereign States, and consequently fifteen new participants in the negotiations.

p. 16 Whilst most delegations from Eastern Europe and the former Soviet Union seem to have accepted the basic principles and philosophy underlying the objectives of the future ECT, many delegations had difficulties in understanding basic legal concepts underpinning a market economy. In addition, it eventually became apparent that many delegations from Eastern Europe and the former Soviet Union would not be able to sign up to central commitments envisaged in the ECT because this would have required radical changes in their respective internal legal system which were simply not realistic in the short term.

All these factors contributed to the fact that it took approximately three years to finalize the text of the ECT, as opposed to in the summer of 1992, which was the initial hope.⁷

The negotiations seem to have been led by five key individuals, *viz.*, Dutch ambassador Charles Rutten, who was the chairman of the European Energy Charter Conference; Mr. Clive Jones, Deputy Director of the European Commission's Energy Directorate, who served as Secretary-General of the Energy Charter Secretariat; Mr. Sydney Fremantle, Department of Trade and Industry of the UK, who was the Chairman of Working Group II of the Conference; and Leif Ervik, of Norway, a staff member of the Energy Charter Secretariat.

The head of the Legal Sub-Group, Mr. Craig S. Bamberger, has referred to these individuals as constituting the 'management team'.⁸

Mr. Bamberger has described the negotiations in the following way:

The management team kept the Legal Sub-Group under tight control. Articles or more commonly specific paragraphs or provisions of the draft Energy Charter Treaty were made available

selectively for legal review, or questions were posed to the Legal Sub-Group about them by the management team or on behalf of delegations, and the management team decided case by case whether the Legal Sub-Group's formal reports should be issued to all of the negotiating parties (members of the Legal Sub-Group did routinely receive copies, even if the reports were not issued generally). Some subjects never were referred to the Legal Sub-Group for comprehensive review, and often it was made clear that the formulation of particular provisions was considered extremely sensitive politically so that material changes should be avoided if possible. In time I was called upon to give private advice and drafting assistance to the Conference management team.

This close management of the legal advisory function was reflective of a progressively increasing sense of urgency on the part of the management team to bring to a conclusion the extremely ambitious negotiation of an unprecedented sectoral treaty of great breadth and complexity, that was pursued aggressively out of what turned out to have been an exaggerated concern over the parlous condition of the energy sectors in the formerly Communist countries. Perhaps the ease with which the conferees arrived at a non-binding European Energy Charter within six months misled them into thinking that a binding agreement could be achieved within a comparable timeframe.⁹

Initially the plan was to draft the text of the ECT simultaneously with three related protocols, viz., a protocol concerning nuclear issues, a protocol on hydrocarbons; and a protocol on energy efficiency. In the end, the only protocol which was agreed by 17 December 1994, was the protocol on energy efficiency.¹⁰ As far as nuclear issues relating to the EU and the former Soviet Union are concerned, they were separated out of the ECT on the understanding that separate agreements were to be signed with respect to these issues.¹¹ As far as the hydrocarbons protocol is concerned, it was eventually agreed ↵ that issues intended to be covered in the protocol went to the heart of some of the fundamental principles of the entire ECT, and that they were therefore better dealt within the general negotiations concerning the ECT.

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At the initial stages of the negotiations, the focus was very much on non-discrimination of foreign investors, particularly in relation to the principle of national treatment. Most parties seemed to have agreed that national treatment should constitute the basic principle for all stages of the investment process, i.e. both for granting investors access to markets, as well as for treatment of investments once they have been made, in other words as a standard of protection for investments. The principle of pre-investment national treatment was particularly important to the US delegation, which took the view that this principle was the best method of encouraging investment.

Other delegations—mostly European ones, including Belgium, France, and Norway—were less enthusiastic about pre-investment national treatment. Some delegations worried that acceptance of this principle would require substantial modification of existing municipal legislation. Others emphasized, that the principle could be seen as militating against state sovereignty over natural resources—another fundamental principle underlying the ECT.¹² In the case of France, it is possible that the negative attitude towards the US insistence on pre-investment national treatment could be explained by the differences of opinion between France and the USA which surfaced during the Uruguay Round negotiations concerning the WTO, which were conducted at the same time as the ECT negotiations.

These difficulties, combined with the fact that it became increasingly clear that the Russian Federation, as well as other East European countries and former Soviet republics would find it difficult to accept some of the basic commitments in the ECT, considerably complicated and slowed down the negotiations in mid-1993. This coincided with turbulent political developments in the Russian Federation culminating in the storming of the Russian Parliament in October 1993.

In order to overcome these difficulties, it was proposed to negotiate a two-stage treaty whereby some of the leading actors—such as the EU, the US, and the Russian Federation—would sign a full treaty to which other countries could accede when they were ready to do so.

This approach was not, however, implemented, primarily because the Russian Federation itself was not able to accept many of the central articles in the treaty. The EU then put forward a new two-stage approach according to which the question of pre-investment national treatment would be postponed for a three year period. During this time-period market access was to be based on the most-favoured-nation principle. National treatment would only apply to the post-investment stage. This proposal was based on the idea that the Russian Federation, other former Soviet republics and East European countries would have sufficient time during the three-year period to amend municipal legislation so as to make pre-investment treatment possible in a second treaty which was envisaged.

The new EU proposal was welcomed by most European delegations—East and West European—as well as by the Russian Federation. Other delegations, notably those of Norway, Japan and the USA were sceptical.

p. 18 The US delegation repeated its concern that the EU proposal did not provide the access to market guarantees necessary in its view to promote investment in the energy sector. Other delegations raised doubts that a second treaty would ever be concluded.

Despite these concerns, as per mid-December 1993 most delegations had agreed, as a matter of principle, to use the new EU proposal as the basis for finalizing the text of the EU. This notwithstanding, further differences of opinion arose during the plenary session in December 1993, relating, *inter alia*, to most-favoured-nation treatment at the pre-investment stage. The US delegation insisted on its position, including full national treatment, and generally took the view that it was preferable to continue to negotiate until the right result was achieved, rather than to bifurcate negotiations into two stages.

At this stage of the negotiations it started to become clear that there was a risk that the USA would not sign the treaty. This risk notwithstanding, most delegations were prepared to try to finalize the text of the treaty based on the EU proposal.

Concerns remained, however, in some delegations, in particular perhaps in the French delegation, with respect to the mandatory most-favoured-nation treatment at the pre-investment stage. As a result of further negotiations, it was agreed that the text would require parties to 'endeavour' to grant foreign investors national treatment, or most-favoured-nation treatment, whichever is better, at the pre-investment stage.

In addition to the question of national treatment at the pre-investment stage, the USA was opposed to a proposed article requiring sub-national authorities to observe the rules laid down in the ECT, since this was perceived as running counter the US federal structure. Another problem for the USA was the relationship between the ECT and the Jackson-Vanik amendment to the 1970 US Trade Act. Granting automatic most-favoured-nation treatment to countries in Eastern Europe and of the former Soviet Union would not have been compatible with the Jackson-Vanik amendment. Other delegations were not, however, willing to accept exceptions for the USA in this respect.

In the end, the USA did not sign the ECT. It was not until the signing ceremony in December 1994 that the USA officially disclosed that it was not going to sign the ECT.

There has been no official explanation of why the USA did not sign the ECT. It is reasonable to assume that all concerns mentioned above that the US delegation raised during the negotiations contributed to this decision, albeit perhaps to varying degrees.¹³

The following statement by Mr. Bamberger sheds additional light on the US position:

However, the ultimate US decision not to sign must be seen in light of the fact that it was a reluctant participant in the ECT negotiations that had been launched by the European Union. As I understand it, the US had identified little enthusiasm for the ECT negotiations among American firms, and believed it could achieve for its own investors bilaterally, protections at least as good as those that might result from a multilateral treaty. The (still unratified) U.S.–Russia BIT was mentioned in this vein. I think that the U.S. concluded somewhat defensively that it was not in its interest to stay uninvolved in the ECT negotiations, but rather, that it should try to help the negotiations conference arrive at a treaty that the U.S. could sign.¹⁴

p. 19 On 17 December 1994, forty-nine countries plus the EC signed the ECT. Neither Canada nor the USA signed the ECT. Subsequent to the signing in December another eight countries have signed the ECT.¹⁵

As per 1 January 2019, fifty-four States have signed or ratified the ECT.¹⁶

As per Article 46 of the ECT, no reservations can be made to the treaty.¹⁷

C. Preparatory Works

There are no official preparatory works of the ECT. The Energy Charter Secretariat keeps documents from the negotiation process leading up to the signing of the ECT. The different versions of the draft articles are available on the website of the Energy Charter Secretariat. This makes it possible to follow how the text of the articles changed during the negotiations.

There were five *Working Groups* established to produce the text for a binding multilateral treaty in the Energy Sector. Working Group I dealt with the negotiations of the European Energy Charter.¹⁸ Working Group II prepared the basic text of the Treaty, Working Groups III, IV, and V dealt with, respectively, the protocol for energy efficiency, hydrocarbons, and nuclear energy. In addition, there was a Legal Sub-Group, chaired by Mr. Craig Bamberger. The negotiations were conducted within the framework of the European Energy Charter Conference which had a Secretariat headed by Mr. Clive Jones.

The various drafts of the ECT are divided into three categories: Basic Protocols; Basic Agreements; and ECT Drafts. The first ECT draft was presented on 15 March 1993.

The fact that the ECT is a multilateral treaty makes the preparatory works less useful as a supplemental source of information for purposes of interpretation. With many States participating in the negotiations—but some of them neither signing, nor ratifying the Treaty—it is rather difficult to ascertain whether the stated position of one party has influenced the final text, and to what extent.

It must also be kept in mind that the ECT was negotiated under time pressure, as a consequence of which the language is sometimes ambiguous and unclear, bearing the hallmarks of the ambition to create a comprehensive treaty covering the entire energy sector to be agreed by a large number of participants.

The negotiators and drafters did not always have the time carefully to consider, from a purely legal-technical perspective, the choice of language, the interrelationships between, and consistency, of specific provisions.

D. The Trade Amendment

I. Introduction

Article 42 of the ECT provides for amendments to the ECT.¹⁹ There has been one amendment to the ECT, viz., the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, the so-called Trade Amendment.

p. 20 In 1998, the Energy Charter Conference—which is the highest decision-making body for the Energy Charter Process²⁰—adopted the Trade Amendment. After having been ratified by thirty-five Contracting Parties, the Trade Amendment entered into force in 2010.²¹

The ratifying Contracting Parties were: Afghanistan, Albania, Armenia, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, EU, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mongolia, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Ukraine, United Kingdom.

Iceland and Montenegro were added to the ratifying Contracting Parties in 2015.

The following Contracting Parties apply the Trade Amendment provisionally: Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

The ultimate purpose of the ECT trade regime is to extend the rights and obligations under the WTO Agreements to the energy sector of those Contracting Parties who are not yet members of the WTO. As of 1 January 2019, all Contracting Parties are members of the WTO, with the exceptions of, Belarus, Bosnia and Herzegovina, Turkmenistan, and Uzbekistan.²² When the ECT was concluded in 1994, the Marrakesh Agreement was not yet in force. The trade provisions of the ECT were therefore based on the trading regime of the General Agreement on Tariffs and Trade (GATT). The ECT incorporated those rules of GATT which were relevant to the energy sector. This integration was achieved by incorporating those rules by reference to a list enumerating the provisions of GATT which were not applicable in the ECT. This was the original Annex G of the ECT.²³ The only exception to this approach was Article 5 of the ECT on Trade-Related Investment Measures which set out the actual provisions of the relevant GATT Rules.²⁴

Whilst the WTO Agreements were not in force when the ECT was concluded in 1994, the drafters of the ECT envisaged the need to adapt the ECT to the WTO system. They therefore mandated negotiations to this effect in Article 30 of the ECT.²⁵

Article 30 reads:

Contracting Parties undertake that in the light of the results of the Uruguay Round of Multilateral Trade Negotiations embodied principally in the Final Act thereof done at Marrakesh, 15 April 1994, they will commence consideration not later than 1 July 1995 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference.

The negotiations resulted in the Trade Amendment, the text of which was adopted in 1998. After ratification it entered into force in 2010.

p. 21 Pursuant to the trade regime of the ECT—prior to, as well as subsequent to the Trade Amendment—Contracting Parties are obliged to follow the principles of non-discrimination between imported goods (most-favoured-nation treatment), as well as between domestic and imported goods after the latter have

crossed the border (national treatment). Most-favoured-nation treatment requires that all foreign products be treated equally with respect to all border measures (e.g. import and export duties, customs formalities, entry points, etc.). National Treatment requires that imports be treated not less favourably than domestic products with respect to all domestic regulations (e.g. taxes, domestic transportation charges, distribution channels, advertisement, etc.). Once imported goods have been cleared through customs, i.e. import duties have been paid, no additional protection against imported goods is allowed. The rationale is to avoid hidden trade barriers, such that legitimate expectations of exporters regarding market access, as reflected in the importing countries' tariff concessions, are not diminished through discriminatory regulatory practices.

Furthermore, regulation of trade under WTO and ECT requires the elimination of all quantitative restrictions on trade, be they in the form of quotas, licensing, or any other measures implying a quantitative limit. In principle, this applies also to exports. Exceptions are allowed, however, e.g. to alleviate shortages in the domestic market.

Neither the WTO nor the ECT trade regime prohibits protection of domestic goods through customs tariffs. The WTO trade regime also provides for a comprehensive system of ceiling bindings on customs tariffs, agreed item by item for each good and each country. In contrast to the WTO, the ECT trade regime does not contain a ceiling binding on customs tariffs.

A ceiling binding is the practice in the WTO of binding all, or large sections, of a tariff at a specified maximum level. Ceiling bindings are normally the result of negotiations. Countries that undertake to bind their tariffs are under a legal obligation not to increase applied customs levels above the bound levels, but they may at their discretion apply lower customs tariffs than their ceiling bindings.

Under the ECT, there is only a soft law, or best-endeavour, commitment of Contracting Parties not to increase their tariffs beyond a certain level.²⁶ ECT Contracting Parties, which are also WTO Members, made the 'best endeavor' pledge that they would not increase their import duties above their respective WTO bound duty rates, while those ECT Contracting Parties which are not yet WTO Members, undertook a 'best endeavor' pledge not to raise their import and export tariffs above their applied levels. These commitments are characterized as soft law because nothing prevents ETC Contracting Parties from increasing their duties above the pledged ceilings provided that they notify in advance their tariff increases and hold consultations with interested parties (Article 29(5)).²⁷ The only obligation of an ECT Contracting Party with respect to customs duties is to respect the MFN principle for all its import or export tariffs from or to all ECT Contracting Parties.

The Trade Amendment consists of the Final Act of the International Conference and Decision of the Energy Charter Conference adopted in 1998. The Final Act in turn contains three Understandings and two Joint Declarations related to the Amendment; Annex 1 to the Final Act is the Amendment itself which consists of seven Articles; Annex 2 to the Final Act contains two Decisions.²⁸

p. 22 Article 1 of the Amendment (Annex 1 to the Final Act) contains the current text of Article 29 (Interim Provisions on Trade-Related Matters) which has replaced the original ECT.

Article 2 contains other consequential amendments to the ECT (except the amendments to Annexes D and G).

Article 3 sets forth amendments to Annex D of the ECT (trade-related dispute settlement mechanism).

Article 4 is the text of Annex W (application of provisions of the WTO Agreement) which replaces Annex G of the ECT.

Article 5 contains the new trade-related Annexes to be inserted in the ECT Annexes EM II, EQ I, EQ II, BR, and BRQ.

Article 6 is the provisional application provision of the Amendment.

Article 7 makes the Decisions an integral part of the ECT.

The Trade Amendment expands the ECT trade regime to cover Energy-Related Equipment. The Trade Amendment replaces the GATT 47 references and terms with the relevant WTO references and terms.

The text of Article 29 of the ECT—which is set out in Article 1 of the Trade Amendment—provides for a best endeavours tariff commitment for both Energy Materials and Products (Annex EM I) and Energy-Related Equipment (Annex EQ I) (see paragraphs (4) and (5)). This is complemented by the possibility to move to a future legally binding commitment for agreed items which are presently subject to the best endeavours commitment (see paragraphs (6) and (7)).

Accordingly, there is provision for moving items to the level of a legally binding tariff commitment at a later date by a Conference decision requiring a unanimous vote, without having to go through a formal amendment procedure. That procedure is reflected in Article 2 of the Trade Amendment through the amendment to ECT Article 34(3) (new subparagraph (o)) and Article 36(1) (new subparagraph (g)).²⁹

The present Annex EM of the ECT on Energy Materials and Products becomes Annex EM I (see Article 2 renaming Annex EM). Energy-Related Equipment is listed in the new Annex EQ I (see Article 5 of the Amendment). Energy-Related Equipment is defined in the same manner as Energy Materials and Products (see Article 2 of the Amendment inserting a new Article 1(4bis) in the ECT). Items subject to a legally binding tariff commitment will be listed in Annexes EM II and EQ II, both of which are empty until the Conference decides otherwise.

Understanding No. 3 provides for annual reviews by the Charter Conference concerning the possibility to move items to a legally binding commitment.

This Understanding was issued with respect to Articles 29(6)³⁰ and 7³¹ and 34(3)(o)³² and reads:

The Charter Conference shall conduct an annual review with respect to any possibility of moving items of Energy Materials and Products or Energy Related Equipment from Annexes EM I or EQ I to Annexes EM II or EQ II.³³

p. 23 The Charter Conference when deciding to move items to the legally binding commitment, will also decide on the listing of countries in Annexes BR/BRQ. This is provided for in Article 29(7) and in Article 2 of the Amendment, including a new provision (n) in Article 34(3). Understanding No. 2 deals with commitments of non-WTO members listed in Annexes BR and BRQ. Decision No. 1 provides an opting out mechanism for countries which are not applying the Amendment, and which are not listed in the afore-mentioned annexes, when the Charter Conference takes a decision to move items to a legally binding tariff commitment.

As indicated in the foregoing, the Trade Amendment brings about three major changes in the trade provisions of the ECT:

- (1) Technical adaptation of the references to incorporated rules in order to reflect the changes from a GATT to WTO-based trade regime (ECT Art. 30);
- (2) Inclusion of Energy-related Equipment in the list of goods to which the ECT applies (ECT Art. 31) and
- (3) Possibility for the Energy Charter Conference to progressively replace the soft law customs tariffs pledges by a binding customs duty standstill regime (ECT Art. 29(6)).

II. Technical Adaptation of References

When the ECT was concluded in December 1994, the Marrakesh Agreement establishing the WTO was not yet in force. This explains why the ECT originally incorporated only the pre-WTO rules of the multilateral trading system. The Trade Amendment, adopted on 24 April 1998, three years after the entry into force of the WTO Agreement, takes account of the relevant changes in the multilateral trade rules resulting from the Uruguay Round and the creation of the WTO. The Trade Amendment replaced the GATT provisions of the ECT with those of the WTO. The amendment has used the same legal technique as the original Treaty: it incorporated 'by reference' all those WTO rules on trade in goods that are energy relevant. The changes entailed the replacement of the previous negative list referring to non-applicable GATT provisions (Annex G) with a new negative list referring to non-applicable WTO provisions (Annex W). This resulted in a much longer list of exceptions simply due to the extended scope of the WTO. The scope of the ECT did not change as a result of this technical replacement.

The technical adaptations of the ECT trade regime from GATT to WTO involve detailed changes in the wording of Annexes, but in reality only minimal changes of material scope. Even the most important adaptation of scope—which in fact is still a *de minimis* change—concerns the dispute settlement system of the amended ECT (modified Annex D). This has been adapted such that its GATT-like diplomatic character, rather than WTO-like judicial settlement of trade disputes, has been maintained. As under the GATT system, a trade dispute is to be adjudicated in the first place by a 'panel' before its ruling is considered by the Charter Conference. To put in place the dispute settlement system, the Charter Conference adopted a roster of panellists from which, in the event of a trade dispute, three persons are chosen by the Secretary-General to serve on a panel. Individuals on the roster are legal experts nominated by member Governments and persons who have served as panellists on GATT or WTO dispute settlement panels.

At the same Conference, consensus was reached regarding the implementation of the ECT trade rules as a whole, that despite the co-existence of two trade regimes, i.e. the original ECT trade regime and that of the Trade Amendment, there would be one implementation system based on the regime of the Trade Amendment.

p. 24 For Contracting Parties, who have not yet ratified the Trade Amendment, there remains a certain degree of legal uncertainty in the case of a dispute with a Contracting Party who has ratified it. This uncertainty results from divergences between GATT procedural rules applied on pre-Trade Amendment basis and the procedural rules applied under the Trade Amendment.

III. Energy-Related Equipment

In addition to making technical changes to reflect the transition of the multilateral trading system from GATT to WTO as explained above, the Trade Amendment introduced an extension of the product coverage of the ECT: it extended the application of the trade rules to energy-related equipment. As a result, the ECT trade regime now covers not only 'Energy Materials and Products' listed in the renumbered Annex EM I, but also a list of items of energy-related equipment, which are exhaustively described in the new Annex EQ I based on tariff headings of the Harmonized System (HS) of the World Customs Organization that is also in use in the WTO. Annex EQ I include a great variety of industrial products used in the energy sector. For example, the Trade Amendment added pipelines, electric cables and towers, drilling platforms, nuclear reactors, central heating boilers, heat pumps, refrigerators, freezers, electrical transformers, accumulators, and even certain types of motor vehicles to the scope of the ECT trade regime.

The aim of adding Annex EQ I to the ECT was to increase the relevance of the ECT for investors in the energy sector. Creating a favourable trading climate for the entire energy sector requires extending the trade regime to energy equipment used as inputs to energy production. By extending the ECT trade regime to

energy equipment, the Trade Amendment promotes technology export and technology transfer from developed countries to energy producing emerging economies needing such technologies.

IV. Possibility to Create a Binding Customs Tariffs Regime

With respect to customs duties, whilst the Trade Amendment has maintained the ‘best endeavours’ system described above (now also applied to energy-related equipment), it has introduced the possibility progressively to replace the soft law customs tariffs pledges by a binding customs tariff standstill regime (amended Article 29(6) of the ECT). In the negotiations of the Trade Amendment, efforts to replace the ‘soft law’ tariff provisions generally and immediately by a new legally binding tariff regime were unsuccessful. Instead, a compromise was found that allows moving items gradually, one by one or collectively, from Annexes EM I and EQ I into Annexes EM II and EQ II, respectively, where a legally binding tariff standstill on applied customs rates would apply on imports and exports. The Energy Charter Conference is required to examine in annual reviews whether such moving of item is possible. For a given item to be moved to Annex EM II or EQ II where legally bound tariffs apply, a Conference decision by unanimous vote is necessary.

As referred above,³⁴ the Trade Amendment provides for exceptions with respect to Contracting Parties who do not wish to make commitments at the same time as other Contracting Parties. The Charter Conference may authorize requesting Contracting Parties to be listed in Annex BR or BRQ.

Notes

- 1 For commentary on Article 1(3) of the ECT, see pp. 61–63, *infra*. The following States have signed and ratified the ECT as of 1 January 2019: Afghanistan, Albania, Armenia, Australia*, Austria, Azerbaijan, Belarus**, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, North Macedonia, Norway*, Poland, Portugal, Romania, Russian Federation*, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Yemen***.
 - * The ECT is in force for all members except for Australia, Norway and Russia.
 - ** Belarus applies the full ECT provisionally
 - *** The ECT entered into force for Yemen on 29 January 2019; see <https://energycharter.org/who-we-are/members-observers/>
- 2 Bamberger, ‘The Negotiation of the Energy Charter Treaty’ in Coop & Ribeiro (eds.) *Investment Protection and Energy Charter Treaty* (2008) xiv.
- 3 Lubbers, Foreword, in Wälde (ed.), *The Energy Charter Treaty. An East-West Gateway for Investment Trade* (1996) xiii.
- 4 The European Energy Charter is reproduced as Appendix 2.
- 5 For commentary on Article 2 of the ECT, see pp. 142–144, *infra*.
- 6 The first draft of the ECT was presented in September 1991; it was then referred to as the Basic Protocol (8/91-B 2).
- 7 Bamberger, ‘The Negotiation of the Energy Charter Treaty’ in Coop & Ribeiro (eds.) *Investment Protection and Energy Charter Treaty* (2008) XLI.
- 8 Bamberger, *op. cit.*, at xxxix–xl.
- 9 *Ibid.*, at xli.
- 10 See discussion at pp. 351–352, *infra*.
- 11 See discussion at pp. 319–320, *infra*.
- 12 See discussion at p. 347 *et seq.*, *infra*.
- 13 Cf. Doré, ‘Negotiating the Energy Charter Treaty’, in Wälde (ed.) *op. cit.*, at 137 *et seq.*; Fox, *The United States and the Energy Charter Treaty*, in Wälde (ed.) *op. cit.* at 194 *et seq.*
- 14 Bamberger, *op. cit.*, at xlviii–xliv.

- 15 Hungary (27 February 1995); Lithuania and Uzbekistan (5 April 1995); Czech Republic (2 June 1995); Bosnia-Herzegovina, and Turkmenistan (8 June 1995); Japan and Norway (14 June 1995).
- 16 The States are listed in footnote 2 at p. 19.
- 17 For commentary on Article 46, see p. 530 *et seq.*, *infra*.
- 18 See pp. 13–17, *supra*.
- 19 For commentary on Article 42, see p. 511 *et seq.*, *infra*.
- 20 See p. 500 *et seq.*, *infra*.
- 21 This follows from the procedure laid down in Articles 42 and 44 of the ECT; for commentary, see pp. 511 *et seq.* and 512 *et seq.*, *infra*.
- 22 See https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.
- 23 Annex G has been replaced by Annex W, see p. 604, *infra*.
- 24 For commentary on Article 5, see p. 147 *et seq.*, *infra*.
- 25 For commentary on Article 30, see p. 494, *infra*.
- 26 This follows from Article 29(4); for commentary see p. 484 *et seq.*, *infra*.
- 27 See commentary at p. 484 *et seq.*, *infra*.
- 28 The entire Trade Amendment is reproduced in Appendix (TA).
- 29 For commentary on Articles 34 and 36 see pp. 498–499, and 501, respectively, *infra*.
- 30 For commentary, see p. 489 *et seq.*, *infra*.
- 31 For commentary, see p. 153 *et seq.*, *infra*.
- 32 For commentary, see pp. 498–500, *infra*.
- 33 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 3.
- 34 See pp. 20–22, *supra*.