

ELGAR COMMENTARIES

# COMMENTARY ON THE ENERGY CHARTER TREATY

Second Edition



Edited by  
**Rafael Leal-Arcas**



# COMMENTARY ON THE ENERGY CHARTER TREATY

SECOND EDITION

*Edited by*

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# ARTICLE 20

## TRANSPARENCY

Gloria Alvarez

- (1) Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the GATT and relevant Related Instruments.
- (2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor.
- (3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above-mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request.<sup>1</sup>

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### COMMENTARY

#### A. Structure and scope

- 20.01** The structure of Article 20 is divided into three sections and addresses transparency in the context of laws, regulations, judicial and administrative decisions applicable to

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<sup>1</sup> See Art 32(1), p. 79 and Annex T, pp. 113 and 128.

trade and energy and which are issued by an ECT Contracting Party. Paragraph (1), refers to transparency of laws, regulations, judicial decisions and rulings which can affect trade in Energy Materials and Products. Paragraph (2), mentions, more generally transparency of laws, rules and decisions which might affect investments covered under the ECT. Most importantly, Paragraph (2) sets out the requirement of prompt publication for the benefit of informing energy investors protected under the ECT. Paragraph (3) addresses the designation of enquiry points where the information and communication of the above-mentioned laws and decisions should become available.

## B. Notion of transparency in the ECT

The inclusion of the notion of transparency in different forms of international investment agreements aims to promote the inclusion of transparent practices at the host-state national level. There are general considerations and previous analysis from the OECD which highlights the positive effects of transparency in the public sector as it creates effective channels of communication –and expectations – between a foreign investor and the host-state.<sup>2</sup> 20.02

The Energy Charter Treaty (ECT) refers to the notion of transparency only in the context of specific national measures. These measures are: legislative, judicial and administrative decisions made by a Contracting Party which could affect foreign trade and investments in the energy sector, and which are protected under the ECT. The ECT is silent on the context of transparency of the arbitration process to resolve investment disputes between ECT disputing parties; where arbitration rules might be more specific by offering concrete provisions related to the scope and notion of transparency in the investment arbitration process.<sup>3</sup> There is, however, under the Model Intergovernmental and Host Governmental Agreements for Cross-Border Pipelines, reference to the obligation of making available a copy of the final award which should be deposited with the ECT Secretariat.<sup>4</sup> Moreover, the ECT Secretariat has further explained and clarified the notion of transparency in the context of the scope of ECT 20.03

<sup>2</sup> OECD, Public Sector Transparency and the International Investor (2003).

<sup>3</sup> ICSID Convention, Art 48 (5) See also *Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006) para 121, *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No. ARB/14/24, Decision on Respondent Application for Provisional Measures (12 May 2016) para 112 and *Border Timbers Ltd, Border Timbers International (Private) Ltd and Hangan Development Co. (Private) Ltd v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Application for Provisional Measures (17 March 2016) para 35.

<sup>4</sup> Giuseppe Bianco, 'Article 2. Publication of information at the commencement of arbitral proceedings' in Dimitrij Euler, Markus Gehring and Maxi Scherck, *Transparency in International Investment Arbitration: A Guide to UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (Cambridge University Press 2015) 86 and Energy Charter Treaty Secretariat, Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines (Second Edition), <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ma2-en.pdf> accessed 12 February 2018.

Article 20, where transparency is a vehicle to remove barriers to energy investments and therefore promote a more predictable and stable energy sector at a national level.<sup>5</sup>

- 20.04** In commercial arbitration, for example, confidentiality is an essential characteristic during all the arbitration process.<sup>6</sup> This is, however, quite different in the context of international treaty practice and in particular in investment arbitration. The involvement of a state in international law and – more concretely – according to the wording of the ECT, requires that the investor-state relationship remains transparent at all stages of the investment made by an ECT investor in another Contracting Party.
- 20.05** The ECT does not generally define the notion of transparency nor refers to transparency in the particular context of investor-state arbitration. The absence of a definition on transparency in the ECT is perhaps the intention of the ECT drafters to not have a limited notion, hence avoiding the ECT's concept of transparency to become outdated or irrelevant. In the context of the ECT arbitration practice, disputing parties and arbitration tribunals have rarely referred to Article 20 and therefore this provision has not been subject to review and comments by investment arbitral tribunals so far. The only reference to the provision was made obiter dictum in the *Yukos* cases where the tribunal merely cited that "[t]ransparency would have been of little value to the investor and would add nothing to Article 20 ECT".<sup>7</sup> More substantively, the *Plama* tribunal observed that transparency is an elemental part of the protection of fair and equitable treatment in particular in the context of the investor's legitimate expectations at seeking a stable legal framework.<sup>8</sup>
- 20.06** More broadly, paragraph 1 of ECT Article 20 refers to the transparency disciplines of GATT and relevant Related Instruments, where according to the World Trade Organisation, transparency is: 'the degree to which trade policies and practices, and the process by which they are established, are open and predictable...'.<sup>9</sup> There are however, other definitions of transparency in the context of international investments, and although there is no common definition of transparency there are some characteristics in relation to the notion of transparency in relation to the public sector. For example, for contracting states in an investment agreement, transparency obligations relate to

5 See for example Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines (*Second Edition*), <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ma2-en.pdf>, accessed 12 February 2018.

6 Markus Gehring and Dimitri Euler, 'Public interest in investment arbitration' in Euler, Gehring and Scherer, *supra* note 4, 7–27.

7 *Hulley Enterprises Ltd v Russian Federation*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009) para. 94, *Yukos Universal Ltd v Russian Federation*, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) and *Veteran Petroleum Ltd v Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility (30 November 2009) para. 94.

8 *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) para. 178.

9 World Trade Organization (WTO), Glossary [https://www.wto.org/english/thewto\\_e/glossary\\_e/transparency\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/transparency_e.htm), accessed 29 January 2018.

the effective communication of laws, regulations, practices, judicial and administrative decisions. This effective communication should be informed promptly and timeously which enables the foreign investor to act and operate their investments accordingly.<sup>10</sup>

ECT Article 20(1) imposes an obligation to Contracting Parties to issue energy-trade related laws, regulation and judicial decisions with certain level of transparency according to GATT. Therefore, the scope of application for transparency refers to 'law, regulation, judicial and administrative rulings in relation to trade'.<sup>11</sup> The relationship between transparency and a Contracting Party's autonomy to exercise their own judicial and legislative trade decisions has always been a relevant institutional concern to be addressed. Therefore, ECT drafters wanted to explicitly include and ensure that the inclusion of transparent judicial and legislative processes related to Energy trade. Transparency in national trade decisions has been used as a vehicle to address national concealed protectionism and inefficiencies.<sup>12</sup> ECT Article 20(2) is a section which was influenced by NAFTA and applies to acts affecting energy investments.<sup>13</sup> 20.07

Moreover, Article 20(3) requires the designation of enquiry points which shall be addressed with requests for information regarding the existence of laws and regulations affecting foreign energy investment. Interestingly, according to ECT Article 32(1) its Contracting Parties listed in Annex T may temporarily suspend the full compliance with Article 20(3). A number of states, including the Russian Federation, have suspended the compliance with Article 20(3) and have not designated entry points.<sup>14</sup> These enquiry points, according to the OECD, enable clarification of the government rules and the way these rules should be implemented by a foreign investor. In addition, one of the advantages of having enquiry points as part of the promotion of transparency in the public sector is to cut down the costs for investors as they have a specific place where they can request information about laws and regulations, hence securing the effective compliance and implementation of the host-state's legislative changes and other type of decisions (i.e., judicial and administrative). In the context of foreign direct investments, it has also been suggested that enquiry points could also be a place for the dissemination of specialized publications and registers. These points of enquiry 20.08

<sup>10</sup> OECD, *Public Sector Transparency and the International Investor* (2003) 7–12.

<sup>11</sup> Mirian Omalu, *NAFTA and the Energy Charter Treaty: Compliance With, Implementation, and Effectiveness of International Investment Agreements* (Kluwer International 1998) 178–9.

<sup>12</sup> Joel Trachtman, *Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation* in Aaditya Matoo and Pierre Sauve (eds), *Domestic Regulation and Service Trade Liberalization* (Oxford University Press 2003) 27–42.

<sup>13</sup> Omalu, *supra* note 11, 178–9.

<sup>14</sup> C.P. Andrews-Speed and T.W. Walde, *Will the Energy Charter Treaty help international energy investors?*, (1998) 5(3) *Transnational Corporations* 31–60.

could also include the adequate use other platforms such as communication technologies, including websites.<sup>15</sup>

### C. Transparency in ECT Secretariat Model Agreements

- 20.09** Foreign investors expect transparency in some of the most fundamental functions of the host-state. These fundamental functions include the effective communication of legislative, administrative and fiscal functions. Effective transparency enables foreign investors to reduce risk and uncertainties as well as identify how to respond to these legislative, judicial and administrative measures. There are many public measures that could affect an investor's investment which includes taxation, investment incentives, intellectual property, social and environmental requirements, among others. In the particular context of ECT Article 20, the Energy Charter Secretariat has proposed different approaches to promote transparency in relation to specific legal requirements arising from international and national legal systems.
- 20.10** As mentioned above, there are two model agreements: the Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines both published by the ECT Secretariat aiming to provide present practices in the areas of cross-border pipeline construction, operation and investments. These model contracts include the transparency of land rights and tax-related measures. For land rights, it is required that activities are performed under a fair, transparent, legal, enforceable and clear terms. In relation to tax measures, states commit to cooperate at ensuring a fair and transparent application of tax measures with respect to investors, shippers and contracts in respect to any part of a specific project and activities.<sup>16</sup>

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15 OECD, *supra* note 2, 3 8-43.

16 Energy Charter Treaty Secretariat, *supra* note 5.