

6. The Preamble

The Contracting Parties to this Treaty,

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990;

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991;

Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalise investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organization and as otherwise provided for in this Treaty;

Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and Energy-Related Equipment, technologies and services;

Looking to the eventual membership in the World Trade Organization of those Contracting Parties which are not currently members thereof and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership;

Mindful of the rights and obligations of certain Contracting Parties which are also members of the World Trade Organization;

Having regard to competition rules concerning mergers, monopolies, anticompetitive practices and abuse of dominant position;

Having regard also to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear nonproliferation obligations or understandings;

Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and

Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,

HAVE AGREED AS FOLLOWS:

The *Charter of Paris for a new Europe* adopted in Paris on 21 November 1990 was the result of the Final Act of the Conference on Security and Co-operation in Europe which in turn led to the establishment of the Organization of Security and Co-operation in Europe (OSCE). In the Charter of Paris reference is made to ten principles which are to guide the signatories in their future work and co-operation. The principles include references to human rights, democracy and the rule of law, as well as to economic liberty and responsibility.

The Preamble draws heavily on the ideas and philosophy underlying the *European Energy Charter*.¹ The Charter constitutes a political commitment to co-operation in the energy sector based on the idea of open and efficient energy markets. It foresees the creation of conditions stimulating private investment based on non-discrimination and respect for state sovereignty over natural resources.

The signatories to the Concluding Document agreed to pursue the objectives and principles of the European Energy Charter and to transform them into binding international legal commitments which eventually lead to the Energy Charter Treaty.

Title I of the European Energy Charter lists the following objectives:

The signatories are desirous of sustainable energy development, improving energy security and maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimize environmental problems, on an acceptable economic basis.

Within the framework of state sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.

To this end, and in line with these principles, they will take action in the following fields:

1. Development of trade in energy consistent with major relevant multilateral agreements such as the WTO Agreement and its related instruments, where applicable, and nuclear non-proliferation obligations and undertakings, which will be achieved by means of:
 - an open and competitive market for energy products, materials, equipment and services;
 - access to energy resources, and exploration and development thereof on a commercial basis;
 - access to local and international markets;

¹ The European Energy Charter is reproduced at Appendix 2.

- removal of technical, administrative and other barriers to trade in energy and associated equipment, technologies and energy-related services;
 - modernisation, renewal and rationalisation by industry of services and installations for the production, conversion, transport, distribution and use of energy;
 - promoting the development and interconnection of energy transport infrastructure;
 - promoting best possible access to capital, particularly through appropriate existing financial institutions;
 - facilitating access to transport infrastructure, for international transit purposes in accordance with the objectives of the Charter expressed in the first paragraph of this Title;
 - access on commercial terms to technologies for the exploration, development and use of energy resources;
2. Cooperation in the energy field, which will entail:
- coordination of energy policies, as necessary for promoting the objectives of the Charter;
 - mutual access to technical and economic data, consistent with proprietary rights;
 - formulation of stable and transparent legal frameworks creating conditions for the development of energy resources;
 - coordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level;
 - facilitating the exchange of technology information and knowhow in the energy and environment fields, including training activities;
 - research, technological development and demonstration projects.
3. Energy efficiency and environmental protection, which will imply:
- creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market-based instruments;
 - promotion of an energy mix designed to minimise negative environmental consequences in a cost-effective way through:
 - (i) market-oriented energy prices which more fully reflect environmental costs and benefits;
 - (ii) efficient and coordinated policy measures related to energy;
 - (iii) use of new and renewable energies and clean technologies;
 - achieving and maintaining a high level of nuclear safety and ensuring effective cooperation in this field.

The principles of full national treatment and most-favoured-nation treatment are central to the Energy Charter Treaty. With respect to the protection and treatment of investments these principles are enshrined in Article 10 of the ECT.² The Preamble also refers to these principles in the context of Making Investments. The original plan was to negotiate a supplementary treaty incorporating these two principles as regards the Making of Investments, as defined in Article 1(8) of the ECT.³

As per Article 10(4) of the ECT such negotiations were to commence not later than 1 January 1995 with a view to concluding a treaty by 1 January 1998. No such treaty has been negotiated.

When the ECT was concluded in 1994 the WTO Agreements were not in force and several States participating in the negotiations were not members of the GATT. The references to the WTO in the preamble illustrate the desire to adapt the trading provisions of the ECT to the WTO system. The trade regime of the ECT was amended by the so-called Trade Amendment, the text of which was adopted in 1998. After ratification it entered into force in 2010.⁴

² For commentary on Article 10, see p. 181 *et seq.*, *infra*.

³ See p. 136, *infra*.

⁴ See p. 19 *et seq.*, *supra*.

Also, today most ECT Contracting Parties are members of the WTO. This means that most trade-related issues in the energy sector are dealt with within the WTO system.

The references in the Preamble to other international instruments such as the Treaty on the Non-Proliferation of Nuclear Weapons, the United Nations Framework Convention on Climate Change, and others, illustrate the ambition of the drafters of the ECT to create a treaty addressing virtually all aspects of the energy sector.

Maybe it was this rather far-reaching ambition which led to Understanding 1 adopted at the concluding conference. It reads:

[UNDERSTANDING With respect to the Treaty as a whole

- (a) The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.
- (b) The provisions of the Treaty do not:
 - (i) oblige any Contracting Party to introduce mandatory third party access; or
 - (ii) prevent the use of pricing systems which, within a particular category of consumers, apply identical prices to customers in different locations.
- (c) Derogations from most favoured nation treatment are not intended to cover measures which are specific to an Investor or group of Investors, rather than applying generally.⁵

A. Article 1

As used in this Treaty:

- 1) 'Charter' means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.
- 2) 'Contracting Party' means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.
- 3) 'Regional Economic Integration Organization' means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.
- 4) 'Energy Materials and Products': based on the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM.
- 5) 'Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

⁵ Final Act of the European Energy Charter Conference, Understanding 1.

- 6) 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
- a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
 - b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or, business enterprise, and bonds and other debt of a company or business enterprise;
 - c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
 - d) Intellectual Property;
 - e) Returns;
 - f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat.

- 7) 'Investor' means:
- a) with respect to a Contracting Party:
 - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
 - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
 - b) with respect to a 'third state': a natural person, company or other organization which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.
- 8) 'Make Investments' or 'Making of Investments' means establishing new investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.
- 9) 'Returns' means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.
- 10) 'Area' means with respect to a state that is a Contracting Party:
- a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

- b) subject to and in accordance with the international law of the sea: the sea, seabed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.

- 11) a) 'GATT' means 'GATT 1947' or 'GATT 1994', or both of them where both are applicable.
 - b) 'GATT 1947' means the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.
 - c) 'GATT 1994' means the General Agreement on Tariffs and Trade as specified in Annex 1A of the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified.

A party to the Agreement Establishing the World Trade Organization is considered to be a party to GATT 1994.

- d) 'Related Instruments' means, as appropriate:
 - (i) agreements, arrangements or other legal instruments, including decisions, declarations and understandings, concluded under the auspices of GATT 1947 as subsequently rectified, amended or modified; or
 - (ii) The Agreement establishing the World Trade Organization including its Annex 1 (except GATT 1994) its Annex 2, 3 and 4, and the decisions, declarations and understandings related thereto, as subsequently rectified, amended or modified.
- 12) 'Intellectual Property' includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.
- 13) a) 'Energy Charter Protocol' or 'Protocol' means a treaty, the negotiation of which is authorized and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of co-operation pursuant to Title III of the Charter.
 - b) 'Energy Charter Declaration' or 'Declaration' means a non-binding instrument, the negotiation of which is authorized and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.
- 14) 'Freely Convertible Currency' means a currency which is widely traded in international foreign exchange markets and widely used in international transaction.