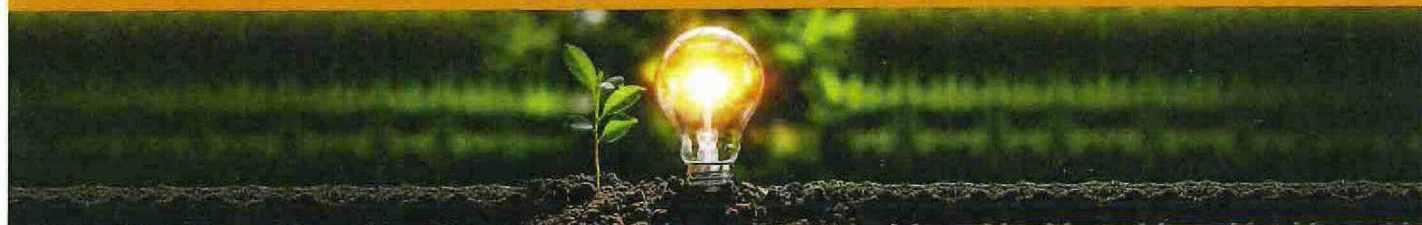


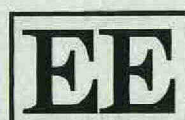
ELGAR COMMENTARIES

COMMENTARY ON THE ENERGY, CHARTER TREATY

Second Edition



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PREAMBLE

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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 co-operation 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 liberalize 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 liberalization of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the General Agreement on Tariffs and Trade and its Related Instruments 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 related equipment, technologies and services;

Looking to the eventual membership in the General Agreement on Tariffs and Trade of those Contracting Parties which are not currently parties thereto 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 parties to the General Agreement on Tariffs and Trade and its Related Instruments;

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 non-proliferation obligations or understandings;

Recognizing 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

Recognizing 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:

COMMENTARY

- P.01** The Energy Charter (“ECT”) is a multilateral treaty, provided with binding force, to secure long-term cooperation in the energy field between the Contracting Parties.¹ It creates a multilateral framework for energy cooperation, based on the principle of open and competitive energy markets, covering five sectors: (i) trade; (ii) transit; (iii) protection and promotion of foreign investments; (iv) environmental protection; (v) energy efficiency.² It is a sector-specific treaty that harmonizes different fields in international law, including international economic law – covered by legal standards of GATT and WTO provisions – international investment law, and international environmental law.
- P.02** With its preamble, the ECT provides a framework for its interpreters, stating the principal goals of the agreement and picturing the international background that inspires it. In international treaty law, a preamble to a treaty serves as a key for interpretation. The Vienna Convention on the Law of Treaties of 1969³ (VCLT) provides a clear framework, defining in Article 31⁴ the general rules. Article 31(1) states that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Article 31(2) narrows down the context, as it shall include its preamble, for the purpose

1 The ECT counts with the membership of 53 countries, primarily from Europe and Central Asia, as well as the EU and the European Atomic Energy Community.

2 See Kaj Hobér, *The Energy Charter Treaty: A Commentary*, 321 (Oxford University Press, 2020).

3 Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties (1969), 1155 UN Treaty Ser. 331, 339.

4 VCLT, Art 31 (‘General rule on interpretation’).

of the interpretation of a treaty. Therefore, it is paramount for interpreters to picture a treaty in its context and to use the preamble as their bearing.⁵

The individual paragraphs of the ECT preamble are listed below:

P.03

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;

Since the early 1990s, Eastern and Western European countries have discussed strategies to secure energy cooperation in the region. On the one hand, Eastern European countries, along with Russia, were experiencing a copious energy supply, but with no investment opportunities. On the other hand, Western European Countries were trying to foster diversification in their energy supply chain, with a look to their neighboring countries. This geopolitical framework sparked an inter-State dialogue to create a commonly accepted ground for energy cooperation that led to the signature of the Energy Charter Treaty in December 1994, and its entry into force in April 1998.⁶

P.04

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;

⁵ The object and purpose of a treaty are usually embedded in its preamble. See generally Barry E. Carter and Allen S. Weiner, *International Law*, 86 (Wolters Kluwer, Aspen Casebook Series, 6th ed. 2011); see also United States Nationals in Morocco, ICJ Reports, 183, 184 (1952).

⁶ See Kaj Hobér, 'The Energy Charter Treaty: An overview', (June 2007) 8(3) *The Journal of World Investment & Trade* 323, 324, reconstructing the historical background that allowed the signature of the ECT and its related Protocols.

P.05 The European Energy Charter of 1991 represents a stepping stone in the process of the adoption of the ECT. Even if the latter was not a binding document, it allowed developing the guidelines and the general principles that currently provide the ECT with a solid architecture. Among them, the ECT aspires to economic growth, along with liberalization of investments and trade in energy, aiming at the implementation of full national treatment and most-favored-nation treatment.

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;

P.06 In 1998, with the progressive corroboration of the World Trade Organization (WTO)⁷ system in the international arena, ECT Contracting Parties decided to harmonize the ECT regime with WTO standards, approving the so-called Trade Amendment. Based on the principles of non-discrimination, transparency, and a commitment to the progressive liberalization of international trade, the Trade Amendment fostered the evolution of the ECT line with rules and practices of WTO. Moreover, this process has been revealed to be particularly relevant in easing the conditions for ECT Contracting Parties to obtain a WTO membership.

Having regard to competition rules concerning mergers, monopolies, anti-competitive 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 non-proliferation obligations or understandings;

⁷ The WTO is the only global international organization dealing with the rules of trade between nations. Recently the WTO Director-General Roberto Azevêdo upheld that there are several areas where the WTO and the Energy Charter 'can work more closely together to improve governance', in order to ease access to energy and foster sustainability. See 'Azevêdo seeks further cooperation with Energy Charter to support access to energy', in *WTO News*, available online at: https://www.wto.org/english/news_e/spra_e/spra55_e.htm (accessed 5 February 2018).

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,

Pictured in the historical framework of the first half of the 1990s, the last part of the preamble echoes the most salient topics in the international agenda of that time. **P.07**

First of all, it upholds the respect to competition standards, which, in those years, had a primary rule in the Maastricht Treaty of 1992,⁸ enhancing fair and equitable conditions within the Community. **P.08**

Second, it brings into analysis the Treaty on the Non-Proliferation of Nuclear Weapons, which still represents the only binding multilateral treaty that commits to nuclear weapons' disarmament. Even if the Treaty was opened for signature in 1968, and entered into force in 1970, it went through a long negotiation process, until it was extended indefinitely in the mid-1990s.⁹ **P.09**

Third, the United Nations Framework Conventions on Climate Change (UNFCCC), started in 1994, is recalled as it represents a global framework to give a twist on climate change.¹⁰ Since then, the Convention has acquired a solid role in international policymaking, setting ad hoc principles in international climate negotiations, within an integrated process of multilateral management.¹¹ **P.10**

Similarly, the ECT recalls the Convention on Long-Range Transboundary Air Pollution, in force since 1983, as it intends to protect the human environment against air pollution. It aims at developing policies and strategies to combat the discharge of **P.11**

8 Title V of the Maastricht Treaty regulated 'Common Rules on Competition, Taxation and Approximation of Law'. European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, OJ, C 325/5; 24 December 2002, available at: <http://www.refworld.org/docid/3ae6b39218.html> (accessed 5 February 2018).

9 On 11 May 1995, at the NPT Review and Extension Conference, the Treaty was extended indefinitely. Today, 191 States have joined the Treaty, including the five nuclear-weapon States. The information is available online at: <https://www.un.org/disarmament/wmd/nuclear/npt/> (accessed 5 February 2018).

10 The United Nations Climate Change Convention (UNFCCC) today is composed of 197 parties, including the major contributors to climate change, and it represents a global framework for the whole international community. Information available at: <http://unfccc.int/2860.php> (accessed 5 February 2018).

11 See Jenni Kaupilla, 'Transnational advocacy networks in international climate policy: The challenge of raising the voices of the marginalised effectively without compromising their legitimacy', in Thoko Kaime (ed.), *International Climate Change Law and Policy: Cultural Legitimacy in Adoption and Mitigation*, 138, 138 (Routledge, 2014).

air pollutants through its gradual reduction and prevention, including at long-range transboundary level.

- P.12** Pictured in this framework, the interpretation of the ECT is to be carried out following endogenous and exogenous elements of the energy sector. Hence, the agreement seeks to secure energy requirements between its Contracting Parties, in line with the goals and priorities of the international agenda, both in the UN and EU context.
- P.13** As the ECT was framed in a post–Cold War era to promote and protect investments between energy producing and consuming countries, it became increasingly outdated on environment protection policies, while representing one of the most litigated investment treaties.¹² For this reason, aiming at modernizing the agreement in the spirit of its preamble, from 2017, Contracting Parties sought to promote a comprehensive review, in order to balance investment protection with environmental and climate goals, in line with their commitments to the Paris Agreement on Climate Change.¹³ The modernized framework seeks to further, through a flexibility mechanism, the exclusion of new fossil-fuel related investments from investment protection, while phasing out protection of the already existing ones.¹⁴
- P.14** The modernization process reached an agreement in principle at the Energy Charter Conference, on 24 June 2022,¹⁵ which is currently under scrutiny.¹⁶ Contracting Parties have engaged in debates to decide whether to endorse the modernized text, remain bound by the old version, or withdraw from the agreement. Whether or not the reformed ECT will enter into force, its modernization process has ignited debate among governments regarding the future of ISDS regulation vis-à-vis international environmental goals, in order to strike a balance between investment protection and energy transition.¹⁷

12 Since its entry into force, in 1998, the ECT gave rise to at least 150 investment arbitrations, registered by the Secretariat, so much so that it is considered one of the most frequently invoked agreements in international law. A list of the arbitration cases registered by the ECT Secretariat is available at: <https://www.energychartertreaty.org/cases/list-of-cases/>.

13 Among EU countries, the modernization process of the ECT was meant to be in line with the goals of the Paris Agreement on Climate Change, in order to ease clean energy transition. See European Commission, Commission presents EU proposal for modernizing Energy Charter Treaty (May 27, 2020); see also Lukas Schaugg, 'The Energy Charter Treaty hinders climate action', *Afrik*, 21 (22 May 2023).

14 The flexibility mechanism allows Contracting Parties to list in Annex NI investments not meant to be treated as economic activities in the energy sector for the purpose of the ECT. Under modernized rules, existing fossil fuel investments are meant to be phased out within ten years after the reformed treaty enters into force, or at least until the end of 2020, while new investments after nine months. EU and UK have opted for this mechanism. See Sven Volkmer and Taylor Gillespie; Energy Transition and Modernized Energy Charter Treaty, White and Case (23 September 2022).

15 The official information regarding the negotiations of the agreement in principle reached by the Contracting Parties is available at: <https://www.energychartertreaty.org/modernisation-of-the-treaty/>.

16 See *infra*, Article 42: Amendments.

17 See Bart-Jaap Verbeek, 'The Modernization of the Energy Charter Treaty: Fulfilled or broken promises?', *Business and Human Rights Journal*, Vol. 8, No. 1, 97, 99 (2023) (addressing whether governments should continue using a legal framework that prioritizes investment protection or start recurring to new legal tools to boost energy transition).