

INTRODUCTION¹

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The Energy Charter Treaty (ECT) is an international agreement which aims to provide a ‘multilateral framework for energy cooperation’ based on the principles of ‘open, competitive markets and sustainable development’.² By binding governments to commitments that guarantee open markets, non-discrimination and access for foreign investment,³ the ECT aims to strengthen the global rule of law on energy issues and thereby reduce the risks associated with energy-related investments and trade.⁴ The ECT itself rests on five primary areas: investment protection;⁵ trade;⁶ transit;⁷ environmental protection;⁸ and dispute settlement;⁹ while there are optional protocols on various topics, including energy efficiency and the environment.¹⁰

In 1990, at a European Council meeting in Dublin, Ruud Lubbers, the Dutch Prime Minister, who, at the time, presided over the Council, called for more institutionalized relations with the energy-rich economies in Eurasia following their collapse in order to benefit from their consequent opening-up and orientation towards the global market-based economic order. This led to the adoption of the 1991 European Energy Charter, which is a non-legally binding political declaration embodying key principles of international energy cooperation. The 1991 European Energy Charter paved the way for the

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- 1 This introduction draws from R. Leal-Arcas, R. *et al.*, *International Energy Governance: Selected Legal Issues*, Edward Elgar, 2014, pp. 346–50. For further details, Chapter 6.
 - 2 *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004, p. 13.
 - 3 Francis McGowan, ‘Can the European Union’s Market Liberalism Ensure Energy Security in a Time of ‘Economic Nationalism’?’ (2008) 4(2) *Journal of Contemporary European Research* 90, 97.
 - 4 *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004, at 14.
 - 5 Part III of the ECT.
 - 6 Part II of the ECT.
 - 7 Article 7 of the ECT.
 - 8 Article 19 of the ECT.
 - 9 Part V of the ECT.
 - 10 Protocol on Energy Efficiency and Related Environmental Aspects (PEERA), 1994.

negotiation and eventual adoption of the ECT¹¹ and the Energy Charter Process.¹² Prior to the advent of the ECT, Western industrialized states attempted to have an energy-sector specific agreement adopted within the context of the General Agreement on Tariffs and Trade (GATT), but this effort ultimately foundered.¹³ In that sense, the advent of the ECT was a success for multilateralism, given the political difficulties in having such an agreement adopted within the multilateral trade system.

The ECT's fundamental purpose was to promote open energy markets, predicated on, chiefly, investment protection, in the energy-significant, yet economically depressed, Eurasian economies following the geopolitical and geo-economic re-shuffle in Eurasia as a result of the collapse of the Soviet Union. A more critical reading of the ECT and the events that led to its adoption would suggest that, beyond the official rhetoric, its actual aim was to enhance the energy security of developed European economies by, among other things, laying down norms to promote the eventual opening-up of those economies, and their energy sectors, to external exploitation, and to thus promote access for the industries of the developed European economies to the energy resources in those economies.¹⁴ In that sense, with such ostensible foundational links to the EU, the ECT regime presents an inherent bias towards EU industrial and energy interests.¹⁵ While there is legal equality between ECT parties, the fact that their economies are so disparate means that the benefits of ECT membership – such as investment protection in the energy sectors – are likely to accrue in an asymmetric manner that favours those economies with developed energy exploration (upstream) sectors. The European Communities is a foundational *sui juris* party to the ECT, as are those EU Member States that were part of the European Communities at the time of the ECT's adoption.¹⁶

11 34 ILM 360 (1995). The official historiography is contained in the *Final Act of the European Energy Charter Conference*. For the official account, see *Final Act of the European Energy Charter Conference (Lisbon, 1994)* in *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, Brussels: Energy Charter Secretariat, 2004 (at pp. 23–4).

12 The Energy Charter Process is a forum to exchange best practices with third parties and refers to all Energy Charter-related activities.

13 See T. Wälde, T. *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, London: Kluwer Law International, 1996, for a fuller analysis on the ECT, its history, and for a more critical perspective.

14 *Ibid.*

15 For an EU perspective account of the European Energy Charter, the Energy Charter Treaty, and its relationship to the EU, see http://europa.eu/legislation_summaries/energy/external_dimension_enlargement/127028_en.htm, accessed 2 July 2018.

16 See for background <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998D0181:EN:HTML>, accessed 2 July 2018.

Currently, there are 54 ECT signatories (including each EU Member State and the EU in its own right), out of which four ratifications are still pending (Australia, Belarus, Iceland, and Norway).¹⁷ Russia signed the ECT and was applying it provisionally until 18 October 2009, but has not ratified it, arguably because it was concerned about the potential loss of its monopoly access to its vast domestic pipeline network that ratification – and thereby subjection to the non-discrimination principle – would entail.¹⁸ Russia notified the Energy Charter Secretariat that it would withdraw from the ECT's provisional application from that date.¹⁹ This has implications for EU energy interests, given the volume of EU-bound energy flows from Russia. Russia's unwillingness to ratify the ECT, combined with the non-participation of other major economies such as the United States and China, arguably significantly undercuts the ECT's effectiveness in a globally accepted energy framework from an EU standpoint and from the standpoint of other Western energy-importing economies.²⁰

ECT parties that have ratified may withdraw after the conclusion of the first five years following ratification.²¹ Additionally, ECT parties that had ratified before communicating their intention to withdraw from the ECT remain bound by ECT investment protection obligations for a further 20 years following withdrawal.²² For those parties who have signed but not ratified the ECT – as in the case of Russia – it is possible to withdraw with effect within a shorter time-frame – namely 60 calendar days.²³

While the ECT expressly asserts state sovereignty over natural resources²⁴ – itself a *truism* under international law²⁵ – it provides robust protection for

17 Energy Charter Secretariat, 'Members and Observers', available at <http://www.encharter.org/index.php?id=61>, accessed 2 July 2018.

18 Lars-Christian U. Talseth, 'The EU-Russia Energy Dialogue: Travelling without moving' (Working Paper FG 5, German Institute for International and Security Affairs, April 2012) 8; for the exact order by which Russia expressed its intention to discontinue its observance of the ECT, see Government Ordinance 1055-r issued by Prime Minister Putin on July 30 2009; see also generally Andrei Belyi, 'Russia's Position on the Energy Charter' (Chatham House, April 2012).

19 See <http://www.encharter.org/index.php?id=61> (accessed 2 July 2018) in relation to membership, pending ratifications, and Russian position.

20 Andrei Belyi, 'Energy Charter Treaty: Attempting Multilateralism in Energy' (e-International Relations, July 2013).

21 Article 47 ECT.

22 Ibid.

23 Article 45(3)(a) ECT.

24 Article 18 ECT.

25 See M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., Cambridge: CUP 2004, where Sornarajah refers to the notion of permanent sovereignty over natural resources (PSNR) as: '[merely] assert[ing] a truism in international law that the sovereignty of a State includes control over all persons, incidents, and substances within a State unless such control has been removed by treaty' (emphasis added) (at p. 43); in other words, there must be previous state consent for any erosion of PSNR.

investor interests in the territories of ECT parties.²⁶ It does so by entrenching a legal right to compensation in cases where an ECT party carries out an expropriation or otherwise compromises investor interests in some legally significant manner. The ECT does not necessarily obligate its parties to liberalize their energy markets, it does not mandate inward flows of foreign investment, and it does not obligate its parties to provide energy exploitation contracts to *all* ECT parties on a non-discriminatory basis.²⁷ However, it does provide disciplines that benefit energy-sector investment interests once these have been welcomed by ECT parties into their territory. In sum, once investments take place within ECT party territories, ECT parties must provide indiscriminate treatment to foreign investors (in other words, they must treat all as if they were investors from their ‘most favoured nation’), and must not discriminate between foreign and domestic investors (in other words, they must provide ‘national treatment’ to foreign investors).

STRUCTURE OF THE BOOK

This book is a compilation of chapters written by different authors. Below is a list of the authors and their contributions to this Commentary on the Energy Charter Treaty:

- Introduction: Rafael Leal-Arcas
- Preamble: Antonio Morelli
- Article 1: Dylan Geraets and Leonie Reins
- Article 2: Leonie Reins
- Articles 3–6: Pierre Serra
- Article 7: Cătălin Gabriel Stănescu
- Articles 8–9: Beatriz Huarte Melgar
- Articles 10–13: Diego Mejía-Lemos
- Article 14: Francesco Montanaro
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26 See Part III ECT (Arts 10–17), which exclusively deals with obligations to protect foreign investment, thus elevating investor *interests* to legally protected *rights* flowing from the ECT. These include the right to compensation (Art 12(2) ECT), which embeds the *Hull formula* of compensation – i.e., that it be ‘prompt, adequate, and efficient’, named after Cordell Hull, the US Secretary of State in 1938, who articulated the US’s position in relation to the expropriations carried out by the Mexican state during the Mexican Revolution of 1910. The ECT also heavily restricts sovereign rights of expropriation so that expropriations may be permissible to the extent they are ECT-compliant (Art 13 ECT).

27 See *Final Act of the European Energy Charter Conference (Lisbon, 1994)*, Part IV (Understandings), in *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation*, at p. 25.

- Articles 18–19: Peter Vajda and Varvara Aleksić
Tina Hunter
- Articles 20–21: Gloria Alvarez
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- Articles 42–47: Antonio Morelli
- Articles 48–50: Leonardo Borlini and Marina Petri
- Appendix: Andrey A. Konoplyanik