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# Energy Charter

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A multilateral process for  
managing commercial  
energy relations

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## IN-DEPTH ANALYSIS

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This paper explores the main developments and bodies created by the Energy Charter process, and outlines the legal framework established by the Energy Charter Treaty. It compares investment arbitration proceedings under the Energy Charter Treaty, analyses the deterioration of relations with Russia, outlines the current strategic goals of the Energy Charter and highlights some of the main challenges faced by the Secretariat. It also looks at the engagement of the European Union in the Energy Charter process and considers the positions of the European Parliament.

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## EXECUTIVE SUMMARY

The Energy Charter process has generated two key multilateral political declarations, the European Energy Charter (1991) and the International Energy Charter (2015), and developed the binding legal framework of the Energy Charter Treaty. This treaty was signed in December 1994 and entered into force in December 1998.

The Energy Charter Treaty has significant legal and financial implications for commercial energy relations between member countries, above all concerning investment, trade and transit. It applies to all forms of energy and all stages of production and consumption. Its remit also extends to issues of competition, environment and energy efficiency, but has less binding force in these areas. The Energy Charter Treaty sets out formal mechanisms for dispute resolution, based on international arbitration, which have been widely used in disputes between states and private investors, but rarely used in inter-state disputes. The Energy Charter Treaty also set up bodies to manage the Energy Charter process, in particular a multinational Secretariat and an intergovernmental decision-making body (the Energy Charter Conference).

The Energy Charter process has suffered from deteriorating relations with Russia, a key signatory state that never ratified the Energy Charter Treaty. Russia then withdrew in 2009 for several reasons, including use of the Energy Charter Treaty framework by former Yukos investors seeking damages for illegal expropriation of their assets by the Russian state. Since Russian withdrawal, the Energy Charter process has been re-oriented to focus on a broader global strategy, consolidating and expanding its membership. The Secretariat faces some financial challenges prompted by the withdrawal of Russia, and more recently Italy, from the Energy Charter Treaty, which have led to reductions in staffing and somewhat limited its scope for action. However, this has not prevented the development of a more globally oriented focus.

The European Union and its Member States are actively involved in the Energy Charter process. The European Commission represents the Union at the Energy Charter Conference and supports the work of the Secretariat, including through financial contributions on an ad hoc basis. The Energy Charter has been strongly supported by the European Parliament in various resolutions, which have also urged Russia to resume its energy dialogue under the Energy Charter Treaty framework.

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**List of main acronyms used**

<b>CONEXO</b>	Energy Charter strategy since 2012 (Consolidation, Expansion, Outreach)
<b>ECC</b>	Energy Charter Conference
<b>ECOWAS</b>	Economic Community of West African States
<b>EEC</b>	European Energy Charter
<b>ECT</b>	Energy Charter Treaty
<b>G7</b>	Group of 7 (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States)
<b>G8</b>	Group of 8 (G7 plus Russia, currently suspended)
<b>G20</b>	Group of 20 (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom and United States, along with the European Union)
<b>IEA</b>	International Energy Agency
<b>IEC</b>	International Energy Charter
<b>IRENA</b>	International Renewable Energy Agency
<b>MENA</b>	Middle East and North Africa
<b>PEEREA</b>	Protocol on Energy Efficiency and Related Environmental Aspects (of ECT)
<b>REIO</b>	Regional economic integration organisation
<b>WTO</b>	World Trade Organization

## 1. What is the Energy Charter?

### 1.1. Process and membership

The origins of the Energy Charter process can be traced to a proposal made by Dutch Prime Minister, Ruud Lubbers, at the Dublin European Council in June 1990, to create a European Energy Community. This led to the signature of the **European Energy Charter** (EEC) in December 1991, a political declaration that paved the way for the binding legal framework of the **Energy Charter Treaty** (ECT) together with the attached **Protocol on Energy Efficiency and Related Environmental Aspects** (PEEREA). The ECT and the PEEREA were signed in December 1994 and entered into force in April 1998, after they had been ratified by the first 40 **signatory states**.<sup>1</sup>

The most substantial revision of the ECT was the **Trade Amendment** (see Section 1.3, 'Main provisions of the Energy Charter Treaty'). The Energy Charter process has entered a new phase with the signature of the **International Energy Charter** (IEC), at The Hague in May 2015. The IEC is a non-binding political declaration that updates the original goals of the EEC, seeks to reflect transformations in the nature of global energy markets, and aims to reach a broader geographical membership than the EEC and the ECT were so far able to achieve (see Section 4.2, 'International Energy Charter').

The Energy Charter process now encompasses a range of legal documents and political declarations (see Annex for a timeline). The European Energy Charter has been signed by 66 states across the world, plus the EU, Euratom, and Palestine. The vast majority of signatories are located in Europe or Central Asia, reflecting the origins of the Energy Charter as a way to link the interests of energy investors and consumers in Western Europe with energy-producing countries in the former USSR. Yet the process has always been open to other regions – indeed Turkey, Japan and Australia are among the original signatory states, the most recent signatories were Niger and Chad in 2015. All Energy Charter Treaty member countries have signed the EEC, but not all EEC signatories have gone on to sign and ratify the ECT. The USA signed the EEC in 1991 but later withdrew from the ECT process, maintaining that US investments were better protected by bilateral investment treaties. Australia and Norway have signed the ECT but not ratified it. Belarus and Russia chose to apply the ECT provisionally pending full ratification, but Russia withdrew entirely from it in October 2009. All EU Member States have signed and ratified the ECT, although Italy withdrew from it in 2016.<sup>2</sup> The precise reasons for Italy's withdrawal remain unclear.<sup>3</sup> A total of 49 countries plus the EU and Euratom currently

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<sup>1</sup> Countries that were not original **signatory states** of the ECT and PEEREA in 1994 but joined later are known as **acceding states**. Acceding states must fully comply with the terms of the ECT and PEEREA at the time of joining (including any revisions made to the original ECT), and do not have the option of provisional application of the ECT, which was (and remains) available only to the original signatory states.

<sup>2</sup> Countries that have ratified or acceded to the ECT can end their membership 12 months after notification of withdrawal. Italy notified its decision to withdraw in December 2014, and this decision took effect from January 2016. By contrast, countries that had signed and provisionally applied the ECT can withdraw their membership with only 60 days' notice. Russia communicated its decision to withdraw from the ECT in August 2009 and this took effect from 18 October 2009.

<sup>3</sup> [Several motivations](#) have been hypothesised with regard to Italy's withdrawal from the ECT. The official explanation is cost savings linked to the austerity drive: by leaving the ECT, Italy no longer has to finance the Energy Charter budget. Another concern for the Italian government has been the recent increase in the number of dispute settlement proceedings against Italy under the ECT. Yet the degree to which Italy can withdraw from its ECT obligations remains unclear. Italy remains liable until 2035 for regulatory actions undertaken during the time it applied the ECT (i.e. 1998-2015). And since the EU as a whole remains a

apply the ECT, making them **contracting parties** to the agreement (see box below). Several other countries are in the process of negotiating accession to the ECT, with ratification pending in Burundi, Jordan, Mauritania, Pakistan and Yemen.

#### **Contracting parties to the Energy Charter Treaty (as of 2017)**

**Europe:** *Albania, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Euratom, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, The Netherlands, Norway\*, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, former Yugoslav Republic of Macedonia, United Kingdom.*

**Former USSR:** Armenia, Azerbaijan, Belarus<sup>°</sup>, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan

**Asia:** Afghanistan, Japan, Mongolia

**Other:** Australia\*, Turkey

<sup>°</sup> have not ratified the Energy Charter Treaty but apply it provisionally

\* have not ratified the Energy Charter Treaty but participate in the ECC

*Italics* = EU Member State

## **1.2. Bodies of the Energy Charter**

The daily work of the Energy Charter is carried out by a small multinational **Secretariat**, headquartered in Brussels (see Section 4.3, 'Resources and personnel'). It is led by a Secretary-General, currently Urban Rusnák (Slovakia), who has been in post since January 2012. The main decision-making body is the **Energy Charter Conference (ECC)**, composed of representatives from countries that have signed the ECT, together with a wide range of observer states and regional/international organisations. The ECC meets annually, and its hosting rotates among the member countries. The 27th Meeting of the Energy Charter Conference took place in Tokyo, Japan on 25-26 November 2016, where the organisation adopted the [Tokyo Declaration](#), expressing its support for the clean energy transition and commitment to the goals of the Paris Climate Change Agreement.<sup>4</sup> The next ECC meetings will be chaired by Turkmenistan (2017) and Romania (2018).

Decisions are taken by consensus, and published on the Energy Charter website. The ECC sets the strategic direction of the Energy Charter process, guides the work of the Secretariat, approves the annual budget and work plan, decides on accession of new countries, approves revisions to the ECT framework, adjudicates in some trade disputes between member countries (see Section 1.3, 'Main provisions of the Energy Charter Treaty'), and appoints the Secretary-General for a (renewable) five-year term. The ECC can create **subsidiary bodies** to prepare detailed policy input for the Energy Charter process, and manage its relationship with stakeholders. Subsidiary bodies are composed primarily of representatives from member countries, but can include representatives from international organisations or the private sector. At present the Energy Charter has a Strategy Group (chaired by Elzbieta Piskorz, Poland) and an Implementation Group (chaired by Sergey Katyshev, Kazakhstan), as well as two committees responsible for the budget and legal advice. The Industry Advisory Panel (established in 2004) ensures a

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contracting party to the ECT, some aspects of future Italian legislation may be subject to the ECT legal framework, especially any legislation that can be directly linked to EU competences in the energy field.

<sup>4</sup> [27th Meeting](#) of the Energy Charter Conference, Tokyo, 25-26 November 2016.



structured dialogue with key companies in the energy sector, and acts as a consultative board to the ECC and the subsidiary groups. The Legal Advisory Task Force provides input into the Energy Charter process from senior lawyers in the energy sector. This has been crucial in developing model agreements for cross-border oil and gas pipelines, and more recently, has started to advise on investment agreements in the energy sector and improvements to ECT dispute settlement mechanisms.

### 1.3. Main provisions of the Energy Charter Treaty

The ECT provides a **multilateral legal framework** for commercial energy relations between member countries, based on the rule of law and fair treatment of both investors and states. To this end, it provides various mechanisms for **binding dispute resolution**. It was the first and only binding intergovernmental agreement applicable to all forms of energy (fossil fuels, nuclear, renewables etc.) and all stages of the supply chain (extraction, production, transit and consumption). Nevertheless, there are well-defined limits to the scope of the ECT. It is not applicable during the pre-investment phase of energy production, with negotiations on a supplementary treaty covering pre-investment in the 1990s proving too difficult for member countries to reach agreement.

The ECT explicitly recognises the right of member countries to decide how they manage their natural resources, and does not mandate third-party access (in contrast to the EU rules for its internal energy market). Crucially, it imposes no obligation on member countries to open up their energy sectors to foreign investment, and even allows the right to expropriation, provided this is done in a legal manner with due compensation at fair market value. Yet once a member country does allow **foreign investment** in its energy sector, then such investors have the right to fair treatment under the ECT framework, with the possibility to seek legal redress through international arbitration.<sup>5</sup> Investors can submit their dispute against states to any of three **recognised arbitration procedures**, which proceed to setting up an ad hoc tribunal that determines a binding final award.<sup>6</sup> The ECT also contains provisions for state-to-state dispute settlements in a range of areas, but in practice this mechanism has never been brought to conclusion, with any such disputes ultimately resolved through diplomatic channels. **Investor-state disputes** account for virtually all cases of investment arbitration under the ECT framework (see Section 2, 'Investment Arbitration under the Energy Charter Treaty').

ECT provisions on **trade** comply with the framework of the World Trade Organization (WTO) and apply the key WTO concepts of 'most favoured nation' (treating all imports from ECT countries equally) and 'national treatment' (treating foreign investors or products no worse than domestic investors or products). These are part of the overarching **principle of non-discrimination** in international trade. A trade-related amendment to the ECT was approved by member countries in 1998, and entered into force in January 2010 after ratification by the first 30 signatory states.

The **Trade Amendment** recognises application of the WTO framework to the ECT; expands the scope of the ECT to cover trade in energy-related equipment (i.e. not only energy materials and products); and develops a mechanism for trade dispute settlement

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<sup>5</sup> To launch a dispute resolution process, they must prove they are based in a contracting party to the ECT.

<sup>6</sup> The three recognised arbitration procedures are the International Centre for the Settlement of Investment Disputes (ICSID) in Washington DC; a sole arbitrator or ad hoc arbitration tribunal established under the UN Commission on International Trade Law (UNCITRAL) Arbitration Rules; or the Arbitration Institute of the Stockholm Chamber of Commerce.



for non-WTO countries. Countries that apply the ECT must also eliminate quantitative restrictions on the import or export of energy materials, products and related equipment. As yet, the ECT has no binding commitments on the level of customs tariffs applied by its contracting parties, although it is working towards this goal.<sup>7</sup>

Energy trade disputes between countries that belong to *both* the WTO and the ECT must be resolved under the existing WTO framework of international arbitration. Only in cases where one or more countries involved are *not* part of the WTO, then an ad hoc panel is created under the ECT, which applies WTO principles to resolve the dispute.<sup>8</sup> The panel decision is brought before the ECC, which must adopt it by a three-quarters majority for the decision to become binding. This is an aspect which diverges somewhat from WTO practice, introduces an element of political judgement, and encourages trade disputes among ECT member countries to be settled either out of court or through diplomatic channels.<sup>9</sup> Most ECT member countries have now joined the WTO, so the ECT mechanism for trade dispute settlement is rarely used.<sup>10</sup> Nevertheless, the key 'principle of non-discrimination' remains relevant not just strictly for trade in energy, but also for broader ECT investment arbitration, such as assessing the fair treatment of foreign investors.

The ECT contains guiding principles to regulate energy **transit** between states, with disputes to be resolved either through diplomatic negotiations or by using a formal mechanism provided for under the ECT (which has not been used, so far). ECT member countries had initially reached draft agreement on a more detailed **Transit Protocol**, which was particularly sought after by Russia during its negotiations over ECT ratification (see Section 3, 'Relations with Russia'). The eventual withdrawal of Russia from the ECT in 2009 made the transit provisions of the ECT much less relevant. Russia is the largest energy producer in the Eurasian region, controls much of the oil and gas transit infrastructure, and is the leading exporter of gas, oil and coal to Europe.

The ECT framework for **energy efficiency** is covered in the PEEREA, but on the whole remains loosely binding on member countries. Yulia Selianova notes that the PEEREA 'obliges the participants to formulate policies for improving energy efficiency and reducing adverse negative environmental impact of energy production... the emphasis is not on legal obligations but rather on practical implementation of a political commitment to improve energy efficiency'.

The energy efficiency objectives of the ECT are instead to be delivered by peer reviews and benchmarking that promotes best practice, including through the publication of country reviews and thematic reports. Questions of **competition** in energy markets and the impact of energy use on the **environment** also fall within the remit of the ECT. But its role in these areas is relatively limited – they cannot be subject to investment arbitration proceedings, any inter-state disputes are to be settled by diplomatic channels

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<sup>7</sup> Steivan Defilla, 'Energy Trade under the ECT and Accession to the WTO', *Journal of Energy and Natural Resources Law*, Vol. 21(4), 2003, pp.428-446.

<sup>8</sup> The Energy Charter Secretariat is responsible for proposing names of experts to serve on the panel, but is otherwise not involved in the process of adjudicating trade disputes between member countries.

<sup>9</sup> In contrast, WTO panel reports are automatically adopted unless disapproved by consensus, and there is the possibility for legal appeal (which does not apply under the ECT procedure).

<sup>10</sup> Only seven ECT member countries are not members of the WTO: Afghanistan, Azerbaijan, Belarus, Bosnia-Herzegovina, Kazakhstan, Turkmenistan and Uzbekistan. Although Russia left the ECT in 2009, it joined the WTO in 2012, so in principle investors can pursue energy-related trade claims under the WTO.

or non-binding consultation mechanisms developed by the Secretariat, and the final verdict on competition issues is to be delivered by competent national authorities.

## 2. Investment arbitration under the Energy Charter Treaty

Investment arbitration is a distinctive and prominent feature of the Energy Charter. Under the ECT, investment disputes are to be resolved by ad hoc arbitration tribunals applying the relevant legal provisions. Neither the Secretariat nor the ECC play any formal role in investment dispute settlement. Nevertheless, the Secretariat provide 'good offices' to interested parties to help them resolve disputes informally, and has opened a Conflict Resolution Centre for this purpose. Some diplomatic issues meanwhile could be resolved in the decision-making framework of the ECC.

The Secretariat maintains a list of the 101 known **dispute settlement cases** concerning the ECT, all of which involve investor-state disputes. According to the Energy Charter's 2016 Annual Report, 60 of these cases are still pending a final verdict. Final awards were determined in 35 cases, with around half finding in favour of investors and the other half finding in favour of states.<sup>11</sup> Some legal scholars have sought to compare the outcomes of investment arbitration under the ECT and identify ways in which the jurisprudence has evolved. They found that cases of discriminatory conduct, such as the expropriation of Yukos investors by Russia, have tended to favour investors. However, in several cases brought on the grounds of adverse regulatory measures, the authors find that:

*tribunals have been reluctant to hold contracting states to a duty to regulate at some minimally acceptable level, or to make contracting states financially liable to foreign investors for governmental regulatory omissions and failures.*

On most other grounds, such as direct expropriation, breach of contractual obligations or denial of justice, the picture is rather mixed: some ECT tribunals ruled in favour of investors, while others ruled in favour of states, depending on the specifics of the case.<sup>12</sup>

Many recent cases brought to ECT tribunals concern the withdrawal of government support schemes for renewables, particularly in the EU. Spain is the country with the most dispute settlement cases (32) and almost all concern regulation and support schemes for renewable energy. All seven cases against Italy were brought by investors in renewable energy. Most cases concerning renewables are ongoing and few final settlements have been awarded, so it remains difficult to assess whether they will tend to favour investors or states. Based on similar cases, some scholars doubt that ECT tribunals will consider the roll-back of renewable energy investment incentives as being equivalent to indirect expropriation under the ECT.<sup>13</sup>

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<sup>11</sup> More specifically, in eleven of the 35 cases a breach of the ECT was recognised and damages were awarded, in two cases a breach of the ECT was recognised but no damages were awarded, in four cases an award was embodied in a settlement agreement, in nine cases there was no breach of the ECT found, and in eight cases there was considered to be no basis for jurisdiction under the ECT.

<sup>12</sup> Stephen Jagusch, Anthony Sinclair and Philip Devenish, 'The Energy Charter Treaty: The Range of Disputes and Decisions', in D. Bishop and G. Kaiser (eds.), *The Guide to Energy Arbitrations*, London, Law Business Research, 2015.

<sup>13</sup> Charles Patrizia, Joseph Profaizer, Samuel Cooper and Igor Timofeyev, 'Investment disputes involving the renewable energy industry under the Energy Charter Treaty' in D. Bishop and G. Kaiser (eds.), *The Guide to Energy Arbitrations*, London, Law Business Research, 2015.

The use of the ECT to resolve investment disputes highlights the value of its binding multilateral framework. Moreover, the fact that proceedings have ruled in favour of both states and investors implies it is broadly balanced. Nevertheless, the proliferation of cases in recent years, as well as their concentration in particular countries, could undermine political support for the ECT among some signatory states. Even if a country withdraws from the ECT, investors can still bring cases for a further 20 years, so long as these concern events that took place while the country was a full signatory. Withdrawal from the ECT does admittedly protect a country from potential litigation around future regulatory or investment choices, but it also removes ECT protection for that country's companies from adverse future actions by other ECT member countries. In any event, dispute settlement cases can still be brought on the basis of national laws, EU law, international law or any bilateral investment treaties signed between the countries concerned, so withdrawal from the ECT does not insulate from legal contestation.

### 3. Relations with Russia

The Energy Charter process was initially conceived as a way to deepen Eurasian cooperation on energy investment, trade and transit. Countries of the former USSR were among the principal signatories of the ECT, including Russia as well as key transit countries like Ukraine and Belarus, because the process would facilitate Western investment in their large but under-funded energy sectors. Although Russia did not swiftly ratify the ECT, it participated fully in the ECC and its subsidiary groups, and made annual financial contributions to support the work of the Secretariat. Russia also chose to provisionally apply the ECT until ratification was complete, although this option was by no means obligatory and was viewed by some experts as binding Russia to ECT obligations without the full investment protection that would ensue from ratification.<sup>14</sup>

Relations between the Energy Charter and Russia deteriorated in the 2000s with the consolidation of the Putin regime. Nevertheless, negotiations continued with Russian ministries and the parliament (*Duma*) over ECT ratification, which Russia had then sought to link to negotiation of a **Transit Protocol** that would address some of its concerns about the ECT. Following the second Russia-Ukraine gas crisis in 2009, Russia withdrew entirely from the ECT by 18 October 2009. Russia ceased making financial contributions to the Energy Charter after 2009, but only withdrew its experts from subsidiary groups in 2015.

Academic authors have put forward numerous reasons for the detachment of Russia from the Energy Charter process.<sup>15</sup> Some attribute it to a general suspicion of Western initiatives under the Putin regime, together with a more independent and aggressive

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<sup>14</sup> With the withdrawal of Russia in 2009, Belarus is the only remaining state to provisionally apply the ECT. The other signatory states that did not subsequently ratify the ECT (Australia, Norway, Iceland) chose not to provisionally apply the ECT, with the exception of Part VII which concerns participation in the Conference and regular annual financing of the Secretariat and its activities. Iceland later ratified the ECT in 2015.

<sup>15</sup> This paper draws on several academic studies that have mapped the deteriorating relationship between Russia and the Energy Charter, and sought to analyse the motivations on all sides. The relevance of transit disputes with Ukraine and the Commission's insistence on an REIO clause is emphasised by Katja Yafimava in her monograph, *The Transit Dimension of EU Energy Security*, Oxford, Oxford University Press, 2011. Similar points are made in an article by Andrei Belyi, '[International Energy Governance: Weaknesses of Multilateralism](#)', *International Studies Perspectives* (2014) 15, 313-328. However, Belyi places more emphasis on broader changes in Russia's geopolitical approach, driven by the security-driven attitude adopted by the Putin regime since 2000. Many of these issues are also addressed in the articles by Yulia Selianova and by Tatiana Romanova (see 'Main References').

position in international affairs. More specific and somewhat technical problems also arose in negotiations over the Transit Protocol. According to Tatiana Romanova,

*Moscow was concerned that the ECT would force it to open its pipelines for natural gas transit from Central Asia or that it would be forced to accept the construction of new transit pipelines across its territory.*<sup>16</sup>

For its part, the European Commission had come to adopt the position that the ECT framework for transit should only apply outside EU territory, and insisted on a Regional Economic International Organisation (REIO) clause in the Transit Protocol, which would recognise that there was no transit (only *transmission*) of energy within the EU single market. Russia was concerned that such an **REIO clause** would weaken the intergovernmental agreements on transit and other issues it had signed with individual EU countries, an area where the Commission has consistently sought greater powers of scrutiny and revision.<sup>17</sup> Several authors consider that the Commission's insistence on an REIO clause in the Transit Protocol contributed to the broader failure of these multilateral negotiations, which were formally suspended in November 2011.

From the Russian perspective, another weakness of the ECT was that it did not help to resolve the major gas transit disputes with Ukraine in 2006 and 2009. Russia chose not to invoke ECT transit provisions against Ukraine, most likely for fear of legitimising the claims of former Yukos investors that the Russian state was liable under ECT investment arbitration (see box). At the same time, neither the EU nor any of its Member States chose to invoke the ECT against Ukraine, despite suffering directly in terms of interrupted gas supplies, because they perceived the gas disputes as being more about Russian geopolitical objectives than the narrow issue of gas transit via Ukraine. Yet the Yukos affair constitutes perhaps the largest obstacle to improving relations between the ECT and Russia, and may have contributed significantly to the decision to withdraw from the ECT in 2009.

#### Yukos affair and the ECT

Former private investors in the Russian energy company Yukos have been pursuing cases against the Russian state through various international and national courts, claiming illegal expropriation of their assets. In 2005, an ECT arbitration tribunal, set up under the Permanent Court of Arbitration in The Hague (Netherlands), began to hear three cases brought on the grounds that Russia had provisionally applied the ECT during the period in which these events took place (2003-2007). After long and complex litigation, an interim award was rendered in November 2009 (a month after Russia had withdrawn from the ECT), followed by a final award in July 2014 of US\$50 billion against the Russian state.<sup>18</sup> However, Russia appealed to the District Court of The Hague, which ruled in April 2016 that Russia was not bound by the ECT because it had not ratified the Treaty (the District Court did not re-assess the merits of the illegal expropriation). This judgment has suspended any enforcement of Yukos-related fines, pending a final appeal by investors to the Supreme Court of the Netherlands.<sup>19</sup>

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<sup>16</sup> Tatiana Romanova, 'Russian Energy in the EU market: Bolstered institutions and their effects', *Energy policy* 74 (2014), pp.44-53.

<sup>17</sup> In May 2017 a new EU Decision came into force that opens intergovernmental agreements to greater scrutiny by the European Commission. The latter would receive draft agreements and verify whether they are compatible with EU law. Details are discussed in Gregor Erbach, '[Intergovernmental agreements in the field of energy](#)', Briefing, European Parliamentary Research Service, European Parliament, May 2017.

<sup>18</sup> A legal summary of the ECT arbitration proceedings involving former Yukos investors is provided by Chiara Giorgetti in the *American Journal of International Law*, Vol. 109 (2), pp. 387-393.

<sup>19</sup> This view of non-applicability of the ECT to Russia is contentious. According to some authors cited in this paper, Russia would remain liable to the risk of arbitration proceedings until October 2029, so long as this

## 4. Towards a global strategy for the Energy Charter

### 4.1. CONEXO strategy

The withdrawal of Russia from the ECT prompted a deep reflection on the future of the Energy Charter process. This led to extensive discussions in subsequent ECCs and meetings of subsidiary groups, which generated ideas for a strategic change. Under the 'Warsaw mandate', the **CONEXO strategy** (Consolidation, Expansion, Outreach) was formulated in 2012. This envisages the Energy Charter becoming more involved in intergovernmental cooperation in the energy field: on a global level (e.g. G7/G8, G20); on a regional level (e.g. dialogue with ECOWAS in Africa, the League of Arab States or the Union for the Mediterranean), and with other international organisations in the energy field (e.g. IEA, IRENA). The Secretariat would develop common *global* goals for the Energy Charter process, and countries across the world would be encouraged to sign the EEC and accede in due course to the ECT. However, the CONEXO strategy also recognises that some countries would want to be involved in the Energy Charter process without immediately committing to the ECT, so the possibility of more gradual and variable integration over time is also envisaged. The organisation would focus on capacity-building and knowledge-sharing, through secondments to the Secretariat and active participation at international events, including fostering cooperation with regional and international bodies active in the energy field. Finally, there would be efforts to 'consolidate' the ECT by ensuring its ratification among signatory states that had not done so (Australia, Norway, Iceland, Belarus).

The CONEXO strategy is an ongoing process whose results are still too early to judge. The organisation has become more visible in global and regional energy cooperation, and has deepened its involvement in Asia, Africa and the Middle East. Ernesto Bonafé and Florian Encke highlight the potential value of the Energy Charter in the Middle East and North Africa (**MENA**) region, which includes many countries that supply energy to Europe, and could benefit considerably from the ECT framework.<sup>20</sup> Noriko Yodogawa and Alexander Peterson emphasise the potential value of ECT membership to **China**, which is making investments in energy across Asia and Africa, and could gain security from ECT legal protection.<sup>21</sup> The Secretariat has been active in promoting the benefits of the Energy Charter among **African countries**, especially those keen to develop their natural resources through foreign investment. The process of consolidation meanwhile has had one modest success (Iceland ratified the ECT in 2015) and one major loss (with Italy's withdrawal from the ECT in 2016). Expansion has seen a few new countries accede to the EEC and the ECT, notably Afghanistan (2013) and Montenegro (2015). Numerous countries are engaging with the Energy Charter process for the first time. Negotiations on acceding to the ECT are ongoing, albeit at different stages, with several countries in the MENA region (Pakistan, Yemen, Jordan, Morocco, Mauritania), sub-Saharan Africa

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concerns actions undertaken by the Russian state during the time it applied the ECT provisionally (i.e. between December 1998 and October 2009). It therefore remains to be seen whether the view of non-applicability of the ECT to Russia is maintained in the appeal to the Supreme Court of the Netherlands.

<sup>20</sup> E. Bonafé and F. Encke, 'Energy Community Treaty and Energy Charter Treaty: Working towards Efficient International Energy Markets' in D. Buschle & K. Talus (eds.), *The Energy Community*, Cambridge, Intersentia, 2015.

<sup>21</sup> N. Yodogawa and A. M. Peterson, 'An opportunity for progress: China, Central Asia, and the Energy Charter Treaty', *Texas Journal of Oil, Gas and Energy Law*, Vol. 8, pp.111-142, 2012.



(Burundi, Chad, Niger, Nigeria, Swaziland, Tanzania), Asia (Bangladesh, Cambodia) and south-eastern Europe (Serbia).

## 4.2. International Energy Charter

The most significant achievement of the CONEXO strategy so far has been the 2015 **International Energy Charter (IEC)**. The IEC has been adopted by 80 countries and six regional economic organisations (including the EU and Euratom), many of which had never signed the EEC or the ECT. The IEC has attained a truly global reach. Signatory states include the **USA** and **Canada**, several large countries in **Asia** (China, South Korea, Cambodia, Pakistan, Bangladesh) and **Latin America** (Chile, Colombia), as well as countries across **Africa** and the **MENA region** (including producer countries such as Iraq and Iran). Of the original ECT signatory states, all have signed the IEC except for Russia.

The IEC sets the stage for the Energy Charter to play an important role in global energy cooperation and engage new countries in its processes. New signatory states become **Observers** to the ECC and are encouraged to accede to the ECT in the longer run. Nevertheless, the IEC remains a non-binding political declaration. It is unclear how many countries that signed the IEC, particularly those of strategic importance in the energy sector, are later willing to bind themselves to the legal obligations of ECT membership. This offers protection to energy investments abroad but also makes domestic energy policies subject to independent arbitration, which may be viewed by some states as an excessive risk or an infringement of their national sovereignty. While the IEC has certainly improved the global reach of the Energy Charter, it has not directly addressed the financial difficulties faced by the Secretariat, which continues to depend on annual contributions from a handful of large industrialised countries (see Section 4.3, 'Resources and personnel').

## 4.3. Resources and personnel

Despite the ambitious global goals of the Energy Charter, its Secretariat operates with limited resources that impose some constraints on its actions. The Secretariat is financed by annual contributions from its signatory and acceding states, based on a UN scale. Countries that have signed but not ratified the ECT (Australia, Belarus, Norway) still make annual contributions and participate fully in the work of the ECC. Japan is the biggest contributor, and accounts for 22 % of national contributions. The other large contributors are Germany (15 %), France (12 %), United Kingdom (11 %), Spain (6 %) and Australia (4.5 %). The six largest member countries (in economic terms) now account for over 70 % of the annual budget. The withdrawal of Italy from the ECT led to a loss of around €300 000 in annual contributions (from the 2016 budget onwards). The withdrawal of Russia from the ECT meanwhile led to a loss of over €200 000 in annual contributions (from the 2010 budget onwards). These losses are significant because national contributions in 2016 amounted to less than €4 million. The Energy Charter has received ad hoc voluntary contributions from different bodies, including the European Commission, which have helped to address these unplanned shortfalls in the annual budget. Nevertheless, the Energy Charter budget fell by over 10 % in nominal terms in 2016 (compared to 2015 levels), with a cumulative reduction of over 17 % foreseen under the 2017 budget, obliging a significant administrative reorganisation.

Financial constraints make it more difficult for the Secretariat to maximise the potential of the Energy Charter process, and have necessitated reductions in staffing. This process has been facilitated by natural turnover, since the Energy Charter employs staff on fixed-

term contracts for a maximum of six years. Some management functions have been (or will be) merged, while the number of regulatory experts and administrative staff have been reduced. Only 15 of the 25 posts under the current establishment plan were filled in 2016, when several posts were suppressed and some new ones were created. The establishment plan has been streamlined to 18 positions from 2017, complemented by a range of staff working on temporary projects. This includes the EU4Energy programme,<sup>22</sup> covering the countries of the Eastern Partnership and Central Asia, which is funded by the EU and has the Energy Charter Secretariat as one of three implementing partners (together with the Energy Community and the International Energy Agency).

The Energy Charter Secretary-General's 2015 report had noted a 'situation of severe budgetary constraints' arising from a 'loss of confidence' within the organisation. Reduced staffing has obliged the Secretariat to focus on the most achievable goals under the CONEXO strategy, but has not prevented it from extending its global reach and attempting progress on many fronts. The 2016 International Energy Charter annual report paints a more upbeat picture, with little emphasis on resource constraints. Instead the 2016 report stresses that changes to the budgetary procedure, including the two-year planned budget and programme of work, now make it possible for the Secretariat to plan on a longer term basis and develop its actions accordingly.

## 5. European Union and the Energy Charter process

The EU remains extensively involved in the Energy Charter process. Twenty-seven Member States, as well as the EU and Euratom, are currently contracting parties to the ECT, accounting for a majority of members and close to two thirds of annual financial contributions. The main political declarations of the Energy Charter process – the 1991 EEC and the 2015 IEC – have been signed by all Member States, the EU and Euratom.

The EU is represented by the European Commission during the annual ECC and in its regular relations with the Energy Charter Secretariat. The Energy Charter forms part of a broader process of international energy cooperation in which the European External Action Service is also involved. The Council conclusions of July 2015 on energy diplomacy list modernisation and outreach of the Energy Charter as a key priority for the EU.<sup>23</sup> The Directorate-General for Energy of the European Commission has made ad hoc voluntary contributions to the Energy Charter budget, in particular a contribution of €200 000 in 2016. This helped to address some of the budget shortfall caused by the withdrawal of Italy (and earlier Russia) from the financing of the Energy Charter Secretariat.

### 5.1. Position of the European Parliament

The European Parliament has adopted several positions on the Energy Charter, which reflect continued EU engagement with this multilateral framework but are also indicative of broader shifts in EU and ECT relations with Russia.

The resolution of 26 September 2007, 'towards a common European foreign policy on energy' considers that 'the Energy Charter ... should be the cornerstone of the common European foreign policy on energy as it is the international community's most significant instrument for the promotion of cooperation in the energy sector, provides a basis for

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<sup>22</sup> [EU4Energy Programme](#)

<sup>23</sup> Council [conclusions](#) on energy diplomacy, 20 July 2015.



fair and equitable treatment, ensures security of investments and guarantees a right to compensation in the event of expropriation and/or nationalisation'.<sup>24</sup>

In the framework of EU-Russia relations, European Parliament resolutions have consistently mentioned application of the ECT and the need for its ratification by Russia. Even after Russia withdrew from the ECT in 2009, the EP resolution of 25 November 2010 on a new energy strategy for Europe 2011-2020 sought continued Russian engagement, and 'welcomes Russia's participation in the meetings of the Energy Charter Conference; calls on the Commission to work to extend the treaty to more countries and, in the forum of the Energy Charter Conference, to work towards a negotiated settlement leading to the full acceptance of the principles of the energy charter and its protocols by Russia'.<sup>25</sup>

The EP resolution of 6 February 2014 on the EU-Russia summit reinforces this view, by considering that the ECT should be a principle for EU-Russia collaboration in the energy field and 'is convinced that full acceptance of the principles of the ECT by Russia would have mutually beneficial effects on bilateral energy relations'.<sup>26</sup>

The EP resolution of 20 January 2011 on an 'EU Strategy for the Black Sea' asserts that the ECT and the WTO can provide the key principles for multilateral energy cooperation in the Black Sea region.<sup>27</sup>

The EP resolution of 12 June 2012 on 'Engaging in energy policy cooperation with partners beyond our borders' recalls the importance of the ECT on several occasions, and 'calls for the Energy Charter Treaty to be extended to more countries and for the participants at the Energy Charter Conference to work towards a negotiated settlement leading to the full acceptance of the principles of the Charter and its protocols by Russia'.<sup>28</sup> The same resolution 'calls on the Commission to underline the importance of the Energy Charter Conference and the need to support it, in order to make better use of the Energy Charter's potential in key areas such as trade, transit, investment and dispute resolution'.

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<sup>24</sup> European Parliament [resolution](#) of 26 September 2007, 'Towards a common European foreign policy on energy'.

<sup>25</sup> European Parliament [resolution](#) of 25 November 2010, 'Towards a new Energy Strategy for Europe 2011-2020'.

<sup>26</sup> European Parliament [resolution](#) of 6 February 2014 on the EU-Russia summit.

<sup>27</sup> European Parliament [resolution](#) of 20 January 2011 on an EU Strategy for the Black Sea.

<sup>28</sup> European Parliament [resolution](#) of 12 June 2012 on Engaging in energy policy cooperation with partners beyond our borders: A strategic approach to secure, sustainable and competitive energy supply.

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## 7. Annex

### Timeline of key events in the Energy Charter process

1990, June	●	Dutch Prime Minister Ruud Lubbers launches the proposal for a European Energy Community at a European Council meeting in Dublin
1991, December	●	The European Energy Charter political declaration is signed in The Hague
1994, December	●	The Energy Charter Treaty (ECT) and the Protocol on Energy Efficiency and related Environmental Aspects (PEEREA) are signed in Lisbon
1998, April	●	The Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects enter into force following ratification by the first thirty members
2009, October	●	Russia withdraws from the Energy Charter Treaty
2010, January	●	The Trade Amendment to the Energy Charter Treaty enters into force (adopted in April 1998)
2011, November	●	Adoption of the Road Map for the modernisation of the Energy Charter Process
2012, August	●	Adoption of the Energy Charter Policy on consolidation, expansion and outreach (CONEXO)
2015, May	●	The International Energy Charter political declaration is signed in The Hague
2016, January	●	Italy withdraws from the Energy Charter Treaty

Source: Energy Charter website.

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The Energy Charter Treaty (ECT) was originally conceived as a multilateral framework to facilitate commercial energy relations across the Eurasian continent. In order to secure sufficient investor protection, the ECT provides for the possibility of legal dispute settlement mechanisms. The outcome of such proceedings have been broadly balanced, although some states now perceive them as contrary to their national interest. The withdrawal of Russia from the ECT in 2009 was a major blow to the process, prompting a strategic shift and a focus on newer priorities. Member countries (including the EU and 27 of its Member States) together with the Energy Charter Secretariat have sought to adopt a more global outlook for the Energy Charter. This has already had a notable success in the form of the 2015 International Energy Charter, signed by 80 countries, which is the lynchpin of a broader process of global outreach and international engagement.

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