

SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 2

10 March 2014

BACKGROUND NOTE ON THE ENERGY CHARTER TREATY

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INTRODUCTION

1. In this second note of the *Series of Notes on the Energy Charter Treaty*, MENA Chambers Energy Team considered it appropriate to provide a brief background note on two important issues that are directly relevant to the forthcoming notes of the *Series*. The first is the negotiating history¹ and the designation of the *travaux préparatoires* documents of the Energy Charter Treaty (“ECT”).² The second issue is the nature, scope and purpose of the ECT.

A BRIEF SUMMARY OF THE NEGOTIATIONS AND THE DESIGNATION OF THE TRAVAUX PRÉPARATOIRES DOCUMENTS IN RESPECT OF THE ECT

2. The initiative, which led to the European Energy Charter and the ECT was first proposed by the Dutch Prime Minister, Mr. Ruud Lubbers, at the European Council in June 1990. He pointed out that there was a natural complementarity between the vast energy resources of the East,

¹ For a chronological summary of the history of the birth and progress of the Energy Charter process and the ECT until its entry into force, please see **Annex 1**.

² It is to be noted that no systematic archiving of the *travaux préparatoires* was envisaged by the negotiators of the ECT. The existing compilation of the so-called *travaux préparatoires* kept at the Secretariat was initiated and executed by the Legal Affairs Department of the Secretariat in 2001. Therefore, it might not be entirely accurate to think of this existing collection of documents as representing the entire negotiating history of the ECT.

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particularly the now former USSR, and the resources of business skills, technology and the significant capacity of private investment available in the West. Mr. Lubbers' proposal was that these strengths should be brought together in a new East-West co-operation, which could act as a driving force for economic recovery in the East. Mr. Lubbers suggested that the damaging economic consequences of the disintegration of the Communist bloc could be halted through co-operation in the energy sector.

3. The other European Communities heads of governments present at the European Council welcomed Mr. Lubbers' proposal and asked the European Commission to study ways to put his idea into action. In February 1991, the Commission proposed the idea of a European Energy Charter. As a result, the European Communities called together an international conference to discuss the proposal with other states. The Charter Conference met for the first time in July 1991 and was attended by all the countries of Europe, including the USSR as it then was, as well as non-European countries of the OECD such as the United States, Canada, Australia and Japan. This conference launched the negotiations on a European Energy Charter.
4. The "Conference on a European Energy Charter" formed several Working Groups. Thus, Working Group I developed the European Energy Charter ("EEC"), which was intended to be a mere political declaration (signed on 19 December 1991). The EEC sets out the objectives of the participants in the field of energy investment and trade, and calls for co-ordinated action to attain those objectives. The EEC negotiators agreed to negotiate various protocols pertaining to several aspects of the energy sector.
5. Working Group II was mandated to negotiate a "Basic Protocol". This term was later changed to "Basic Agreement" in October 1991. This Basic Agreement was meant to contain relevant fundamental principles of investment, trade and dispute settlement mechanisms.
6. Three other Working Groups were established to negotiate the rules applicable to oil and gas, nuclear energy and energy efficiency. Little progress was made by the last three groups.
7. As a result, in the summer of 1992 emphasis shifted towards concentrating the negotiations in Working Group II with the aim of focusing on one single wide-ranging agreement. In the spring of 1993, the primary negotiating responsibility moved from Working Group II to the

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European Energy Charter Conference meeting in Plenary Session, which began addressing the “Basic Agreement” as the “Energy Charter Treaty”. The last formal meeting of the Conference Plenary was held in June 1994.

8. The system of document designation used in the negotiations reflects these stages. After the initial issuance of several “BP” designated documents (i.e. “Basic Protocol”); documents referring to the “Basic Agreement” bore the “BA” designation. Documents of the Conference Plenary were “CONF” followed by a number and, if the particular “CONF” document was a draft treaty text, it also bore a serial “ECT” number. Notes and reports produced by the Legal Sub-Group (established in 1992) were designated as “LAG”.
9. Negotiations and discussions revolved around draft treaty language prepared by the Chairman of the Working Group II or by the provisional Energy Charter Secretariat. Draft textual language that had not been agreed upon was presented within square brackets and underlined, or sometimes only underlined; other proposed amendments were contained in footnotes to each draft article. Amendments proposed during meetings were normally named “Room Document” (“RD”), and commonly found their way into a subsequent draft version of the ECT text. In certain cases, the Chairman of Working Group II or the Chairman of the Conference Plenary introduced a “Chairman’s compromise” draft treaty text, which constituted the focal point of negotiations.

NATURE, SCOPE AND PURPOSE OF THE ECT

10. The ECT was signed and applied provisionally on 17 December 1994. It entered into force on 16 April 1998 after having received the required thirty ratifications. As of 09 March 2014, forty-seven states (as well as the European Communities, now the European Union) have ratified or acceded to the ECT. Five signatories are still to ratify.³
11. It is to be noted that the ECT is far more than a typical investment treaty. In addition to provisions pertaining to the promotion and protection of investment in the energy sector (Part

³The five signatories that have not yet deposited instruments of ratification are: Australia, Belarus, Iceland, Norway and the Russian Federation. On 20 August 2009, the Russian Federation informed the Depository of the ECT that it intends to terminate its provisional application of the ECT (see **Annex 2**, the Government Decree of 30 July 2009, at the end of this note). Belarus applies the ECT on a provisional basis.

III, Articles 10-17), the ECT contains, inter alia, provisions covering trade, competition, access to capital, transfer of technology, environment and transit.

12. The main purpose of the ECT is set out in Article 2, which reads as follows:

This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the **Charter**.⁴

13. It is to be noted that the word “Charter” in Article 2 is a reference to the EEC.⁵ The relevant point for the purpose of this opinion is that the objectives and principles of the EEC have been incorporated into the ECT text by virtue of Article 2.
14. Under Title I, entitled “Objectives”, the signatories of the EEC undertook “[...] 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 [...].” The signatories were further “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.”
15. In terms of implementing the EEC objectives, under Title II (“Implementation”) the signatories (of the EEC) undertook “[...] to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial resources, and to facilitate co-operation between such enterprises or institutions from different countries, acting on the basis of market principles.” More importantly, “[i]n order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.”

⁴ Emphasis added.

⁵ Article 1(1) of the ECT defines “Charter” as “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.” The European Energy Charter is a political declaration, which provided the impetus for the subsequent ECT.

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16. Finally, the signatories to the EEC further affirmed that “it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security [...]”
17. To sum up, as noted above, one of the central objectives of the ECT is to provide a high level of protection for the Investments of Investors of a Contracting Party in the energy sector.⁶ This is so because the underlying aim of the whole Energy Charter process is to improve the “security of energy supply”: an aim that cannot be achieved without secure investments at all the various stages of the energy cycle. In other words, one of the core objectives of the ECT’s procedural and substantive guarantees is to ensure that potential political risks are minimised.⁷
18. It is with the above context and objectives in mind that the provisions of the ECT should be construed and, indeed, interpreted.

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⁶ For definitions, see Article 1 of the ECT.

⁷ The significance of investment guarantees of the ECT has been highlighted in the Article 47 of the ECT entitled “Withdrawal”. Article 47(3) reads as follows: “[t]he provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party’s withdrawal from the Treaty takes effect for a period of 20 years from such date.”

ANNEX 1

A SHORT HISTORY OF THE BIRTH OF THE ENERGY CHARTER PROCESS

25-26 June 1990

- The European Energy Charter initiative begins with a suggestion by the former Prime Minister of the Netherlands, Mr. Ruud Lubbers, at a European Council meeting of the heads of government of the twelve EC countries. He puts forward the idea that the best way to help the Soviet Union (as it then was) would be to establish a cycle of real economic activity in the East, rather than trying to deal with the economic problems of the former Soviet Bloc countries through massive amounts of international aid. He suggests that the right place to start would be the energy sector, where there was a natural complementarity between the very large energy resources and energy systems of the East, and the resources of industrial strength, technology and investment funds available in the west.
- Mr. François Mitterrand suggests more governmental involvement while Mrs. Thatcher is opposed to any government finance.
- Mr. Lubbers puts forward a Memorandum to create a “European energy community” (an updated memorandum was circulated in December 1990).

September – December 1990

- Mr. Lubber’s Memorandum receives initial support from the United Kingdom, Italy and Germany.

November 1990

- President of the European Commission, Mr. Jacques Delors, brings up the idea of a European energy community in the Paris Summit of the Conference on Security and Co-operation in Europe (CSCE). He develops the Commission’s view of the content of a possible European Charter.

14-15 December 1990

- The Rome Summit asks the Commission to prepare the initiative.

January 1991

- Mr. Delors presents the idea of a European energy community at the Davos Economic Summit, supported by Gro Harlem Brantland, Primer Minister of Norway. Mr. Gorbachov, the President of the Soviet Union, had been consulted and was supportive of the idea.

09 January 1991

- Commissioner Cardoso e Cunha launches an internal communication on the “pan-European energy charter”. This is the first complete proposal for a charter. It contains the idea of specific protocols and mentions:
 - nuclear and nuclear safety
 - carbon technologies
 - efficient utilisation of energy

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- conditions for the developments of renewable energy
 - gas exploration and transportation (in high pressure pipelines)
 - rehabilitation of electricity systems, interconnection and transportation through high voltage lines
 - petroleum exploration, transportation and refinery rehabilitation
 - technology transfer
- Remaining political questions:
 - geographical coverage
 - who can sign the Charter (OECD, North Africa)
 - negotiation procedure (Commission/Council)

19 January 1991

- Mr. Krenzler (Director General for External Relations) supports the proposals but:
 - proposes that the Secretariat is independent and not tied to and financed by the Commission
 - suggests that the “non-Europeans” shall be invited not only to sign but to negotiate

30 January 1991

- In preparation for the G-24 High-Level meeting the issue of geographical coverage is highlighted as the main controversial issue and the Commissioners are advised not to ‘second guess’ the outcome from the Council meeting.

14 February 1991

- Communication from the Commission on “European Energy Charter”.

March – April 1991

- Japan makes a very strong plea that all non-European countries are treated on an equal footing
- Australia makes a strong representation (to Mr. Krenzler) on participation
- United States and Canada take it as a given that they will be invited

15 April 1991

- General Affairs Council discusses remaining issues based on work by an ad hoc group. The problem of how the initiative should relate to existing international organisations (in particular, the International Energy Agency (IEA)) is raised for the first time

June 1991

- A Secretariat is under establishment
- Invitations to participate in the Opening Conference, on 15 July 1991, sent to:
 - European states (including Turkey), USSR, remaining OECD states
 - And to the following observers: EBRD, EIB, IAEA, IEA, OECD, World Bank, UN-ECE, North African States, Gulf States

28 June 1991

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- Provisional Secretariat debates a proposal on “Emissions to Greenhouse Gases in the All European Area” to cover “Environmental Aspects” under Working Group III. Proposed draft discontinued.

10 July 1991

- European Council agrees on the proposed European Energy Charter.

11 July 1991

- First proposal of European Energy Charter circulated to the invited states and organisations.

15 July 1991

- Opening Conference – Dutch Presidency – Mr. Rutten opens the Conference:
 - invitation the signing of the European Energy Charter in The Hague in December 1991
 - consensus on substance, majority on procedure
 - not a big practical split between participants and observers
 - international Secretariat established by seconded officials and headed by Secretary General (Mr. Clive Jones)
 - cost funded by the European Commission, reimbursed by participants
 - Establishment of a Conference Bureau and a number of Working Groups (WG):
 - WG I: European Energy Charter
 - WG II: The Basic or Implementing Protocol (later renamed as the Energy Charter Treaty)
 - WG III: Energy Efficiency including Environmental Aspects
 - WG IV: Nuclear including Nuclear safety
 - WG V: Oil and Gas

17 July 1991

- First meetings of WG I and WG II (investment issues negotiated by the latter).

12 August 1991

- The list of horizontal issues (i.e. principles covering more than one sector) is vented with USSR and United States. They include: investment protection, intellectual property rights, trade, policy, sovereignty over natural resources, non-discrimination, competition, transparency procurement and other areas.
- It was envisaged that the horizontal provisions would come into operation for each sector when the relevant sector protocol was agreed, and form a minimum common position, which can be extended by each protocol. The reason for this design was to encourage quick negotiations and agreement of the sector protocols.

Mid August 1991

- Attempted coup in Moscow. All activities postponed.

22 – 23 August 1991

- Moscow coup fails. Heavy workload to be accelerated. The schedule called for 16 meetings over the 4 months, each lasting on average 3 days and with a multitude of informal meetings (including one Ministerial and 3 Plenary Conferences).

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August – December 1991

- Extensive contacts with industry and relevant institutions. European Commission had in a parallel activity started liberalisation of gas and electricity sectors. The confusion between the two initiatives created a significant amount of problems with industry.

9 September 1991

- First circulated proposal for a Basic Protocol (later the Energy Charter Treaty).

17 July 1991 – 17 December 1994

- Negotiations.
- The Energy Charter Treaty signed 17 December 1994

16 April 1998

- The Energy Charter Treaty enters into force.

ANNEX 2



ПРАВИТЕЛЬСТВО РОССИЙСКОЙ ФЕДЕРАЦИИ

РАСПОРЯЖЕНИЕ

от 30 июля 2009 г. № 1055-р

МОСКВА

1. Принять предложение Минэнерго России, согласованное с МИДом России и другими заинтересованными федеральными органами исполнительной власти, о направлении уведомления о намерении Российской Федерации не становиться участником Договора к Энергетической Хартии, а также Протокола к Энергетической Хартии по вопросам энергетической эффективности и соответствующим экологическим аспектам, подписанных от имени Российской Федерации в г. Лиссабоне 17 декабря 1994 г.

Одобрить проект соответствующей ноты Российской Стороны (прилагается).

2. МИДу России направить Правительству Португальской Республики ноту, указанную в пункте 1 настоящего распоряжения.

Председатель Правительства
Российской Федерации



В.Путин

1135060.doc

Проект

НОТА
об уведомлении

Посольство Российской Федерации в Португальской Республике свидетельствует свое уважение Министерству Иностранных Дел Португальской Республики и имеет честь сообщить следующее.

На основании подпункта "а" пункта 3 статьи 45 Договора к Энергетической Хартии, подписанного в г. Лиссабоне 17 декабря 1994 г., Российская Федерация настоящим заявляет о том, что она не намерена становиться участником указанного Договора. Российская Федерация также подтверждает, что в соответствии с пунктом 1 статьи 45 Договора Российская Федерация не применяла временно любое положение Договора в той степени, в которой временное применение такого положения противоречило Конституции, законам или нормативным актам Российской Федерации.

Российская Федерация не намерена также становиться участником Протокола к Энергетической Хартии по вопросам энергетической эффективности и соответствующим экологическим аспектам, подписанного в г. Лиссабоне 17 декабря 1994 г.

Таким образом, в соответствии с пунктом "а" статьи 18 Венской конвенции о праве международных договоров 1969 года Российская Федерация не считает себя связанной обязательством не предпринимать действий, которые лишили бы указанные Договор и Протокол их объекта и цели.

Посольство пользуется случаем, чтобы возобновить Министерству Иностранных Дел Португальской Республики уверения в своем высоком уважении.

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Проект

НОТА
об уведомлении

Посольство Российской Федерации в Португальской Республике свидетельствует свое уважение Министерству Иностранных Дел Португальской Республики и имеет честь сообщить следующее.

На основании подпункта "а" пункта 3 статьи 45 Договора к Энергетической Хартии, подписанного в г. Лиссабоне 17 декабря 1994 г., Российская Федерация настоящим заявляет о том, что она не намерена становиться участником указанного Договора. Российская Федерация также подтверждает, что в соответствии с пунктом 1 статьи 45 Договора Российская Федерация не применяла временно любое положение Договора в той степени, в которой временное применение такого положения противоречило Конституции, законам или нормативным актам Российской Федерации.

Российская Федерация не намерена также становиться участником Протокола к Энергетической Хартии по вопросам энергетической эффективности и соответствующим экологическим аспектам, подписанного в г. Лиссабоне 17 декабря 1994 г.

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Посольство пользуется случаем, чтобы возобновить Министерству Иностранных Дел Португальской Республики уверения в своем высоком уважении.

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