

ECT Modernisation Perspectives: Modernisation of the Energy Charter: The Long Story Told Short

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Modernisation of any multilateral treaty is a category of tasks on its own. There are several prerequisites which shall be in place, apart from obsolete language and provisions. The most crucial element is a steady political will of a critical mass of countries based on the strong motivation, which will break inertia and create new dynamics among its contracting parties.

In the Energy Charter Process, the starting point of the reflections on potential modernisation was the decision of the Russian Federation to withdraw from the provisional application of the Energy Charter Treaty back in 2009. The Energy Charter Conference in Rome in December 2009 discussed some of the consequences and adopted the Joint Statement. The Rome Statement included the notion of modernisation of the Energy Charter Process and the creation of the Strategy Group for examining the possible options of modernisation of the Energy Charter Process for consulting on possible enhanced legal frameworks for energy cooperation, also taking into account other proposals on future cooperation in the energy field with left significant ambiguity for its interpretation.

While the Russian Federation was calling for modernisation of the Energy Charter Treaty, the rest of the ECT's constituency was reluctant to embark upon the endeavour and referred to the *Modernisation of the Process* instead. The Russian Federation proposed in April 2009 a complete replacement of the Energy Charter Treaty by the Conceptual Approach to the New Legal Framework for Energy Cooperation, pointing out, *inter alia*, the uselessness of the Treaty during the gas transit crises and the failure of Ukraine to live up to its transit obligations. This attempt of 'modernisation by replacement' was not successful, despite important efforts of Russian energy diplomacy promoting it bilaterally and in all relevant international fora. The main reason for their failure was not so much its content – the similarity to the Energy Charter Treaty went up to copying such details like including sawdust and wood scrap as the types of energy materials covered by it. The key problem was the non-acceptance by any potential partner of the replacement of the existing Energy Charter Treaty by the negotiation of a new legally binding text, even if according to the Russian draft only three countries would have been needed for the multilateral instrument to enter in to force. Russia didn't find two more countries ready to accept it.

In November 2010, the Energy Charter Conference approved The Roadmap for Modernisation of the Energy Charter Process referring to the Russian Conceptual Approach. The Roadmap emphasised the focus on concluding negotiations of the Transit Protocol, targeted expansion of the ECT geographical coverage, complementing the effectiveness of the ECT provisions given major trends affecting investments into the energy sector, enhanced cooperation with other organisations on energy efficiency and promoting Policy Dialogue within the Energy Charter Process. The document was short of explicitly mentioning future modernisation of the Energy Charter Treaty.

As the modernisation roadmap was gradually being implemented, it became obvious that while part of the objectives of the Roadmap could be achieved through improving operational measures by the Secretariat in close coordination with Members, some others would need major efforts to complete existing negotiation mandates from the past and for the rest of the objectives of amendment of the ECT to be at least considered. In 2012, through a series of consultations with Contracting Parties and Signatories^[fn]In 2012, five original Signatories of the ECT from 1994 have not ratified the Treaty yet: Australia, Belarus (applied ECT provisionally), Iceland (ratified ECT in 2015), Norway and

Russian Federation (withdrew from the provisional ECT application in 2009).[/fn] of the Energy Charter Treaty, the modernisation process was organised in phases taking into account the instruments needed to achieve its objectives. The first phase of the modernisation, embodied in the Warsaw Mandate, was focused on the Modernisation of the European Energy Charter of 1991 (the political, legally non-binding foundation of the process). The second phase was intended to improve internal processes, addressing all existing and pending negotiation mandates (namely the Transit Protocol and the Supplementary Treaty) and identifying objectives, which could be resolved without amendment of the ECT by soft law instruments. The third, ultimate phase of the modernisation, was again not defined by substance, but by an understanding that if the objectives of the Modernisation would prove not to be achievable without addressing the text of the ECT, a discussion about possible ECT modernisation could be launched.

After two years of negotiations, the International Energy Charter was signed by participants of the Hague II Energy Charter Conference meeting of May 2015. The updated political declaration provided an essential boost to several objectives of the modernisation process, namely in the relations with non-European countries sharing the same values as the Conference members potentially interested in joining the Energy Charter Process. Many of them have been reluctant to subscribe to the European Energy Charter, as they considered it a rather Eurocentric document reflecting the early post-Cold War period.

The second phase of the modernisation yielded important efficiency gains by streamlining the number of Subsidiary Bodies, improving transparency of the Energy Charter Process by de-restricting Conference decisions, returning the political ownership to Members by introducing the rotating Chairmanship, to name only some of the improvements achieved to date. During the second phase of the Modernisation, it became obvious to some Contracting Parties that there were questions and concerns which could not be addressed within the existing text of the ECT. Neither has it been possible to resume negotiations of the Supplementary Treaty nor to conclude the Transit Protocol within the approved mandate.

The changing external context created additional reasons for opening internal discussion about the potential Modernisation of the ECT. Shifting global patterns in energy consumption from OECD to newly emerging economies, climate change challenges, public pressure on the existing system of investment protection and growing African thirst for modern forms of energy have been among most

important externalities.

But the internal drivers have been decisive for the opening of the discussion on Treaty's Modernisation. True, the Energy Charter Treaty was delivering what had been asked for: the promotion and protection for foreign investors in the energy sector, a reliable legal framework for energy transit, a transitional mechanism into WTO and a forum for energy policy. Russian withdrawal from the provisional application of the ECT in 2009 (when the arbitral tribunal in the *Yukos vs. Russian Federation* cases accepted ECT jurisdiction) and its effective cessation of participation in the Energy Charter Process in 2014 (after the *Yukos* award of USD 50 bn had been made public) could be traced to the impact of the Treaty. The combination of different factors led to the surge of claims by investors against several EU members in the period 2013-2016. This surge fuelled ongoing discussion on preventing the intra-EU application of investment protection treaties. The withdrawal of Italy added an additional confusion to the situation. Beyond the EU, there has also been some discontent with the ECT brewing for entirely different reasons. Groups of landlocked, energy-exporting countries from the Caspian region, have claimed that the Treaty, the only existing multilateral agreement with transit provisions, doesn't deliver protection of transit flows as expected. For this reason, Turkmenistan resorted to the UN General Assembly, where it initiated several political UN GA Resolutions related to stable and reliable transit.

As a consequence of the above, in December 2017, the Conference at its meeting in Ashgabat agreed to launch a process for discussing potential modernisation of the Energy Charter Treaty. To the surprise of the delegations engaged in the scoping exercise and many nay-sayers, in November 2019 the Conference established and mandated the new Modernisation Group to start negotiations on the basis of the list of 25 topics agreed in 2018. It was agreed to refer to this as the "Tirana Mandate" for ECT modernisation. The work of the group started in December 2019, and after solving all procedural aspects and technical challenges arising from COVID-19 pandemic, the first negotiation round was done in early July 2020.

At this stage, I cannot comment on any substantive aspects of the ongoing negotiation. Therefore I would like to limit myself to remind readers that negotiations started exactly 30 years after the first proposal of the Ruud Lubber's Plan on the creation of the 'European Energy Community' was made in Dublin in 1990. From this proposal, through the European Energy Charter (1991), the Energy

Charter Treaty (1994), the Trade Amendments (1998) and the International Energy Charter (2015), we have reached the point of the ECT modernisation. We are facing historical responsibility, and success cannot be taken for granted. However, we have all the elements for the future success on the table: the external and internal preconditions, the critical mass of Contracting Parties for modernisation, and the highly qualified Secretariat's team supporting it. I am convinced that the Contracting Parties will be able to raise the common denominator to make Energy Charter Treaty 2.0 fit for its purpose for the next 25 years, enabling energy cooperation during the ongoing energy transition and strengthening the level playing field. A modernised ECT would be, without any doubt, attractive to many newcomers and will lead to the gradual acceptance of its principles and rules as an ultimate universal standard for international energy cooperation for the 21st Century.

To read our coverage of the ECT Modernisation process to date, [click here](#).