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THE ENERGY CHARTER TREATY: A COMMENTARY. HOBÉR, K.

by

MARTIN ŠVEC*

Hobér, K. (2020) The Energy Charter Treaty: A Commentary. Oxford: Oxford University Press, 688 p.

This book examines the *Energy Charter Treaty*, one of the most important sources of international energy law. The Energy Charter Treaty (referred to also as “ECT” or “Treaty”) provides a multilateral framework for energy cooperation that is unique under international law. It was signed in December 1994 and entered into force four years later, in April 1998. Being inspired by the *European Energy Charter*, a declaration of political intent to promote East-West energy cooperation,¹ the ECT is based on the principles of open and competitive energy markets. The ECT covers five broad areas in the energy sector: trade; transit; protection and promotion of foreign energy investments; environmental protection and energy efficiency. Moreover, the Treaty aims to create conditions favourable to private investment. The Treaty includes mechanisms for the resolution of state-to-state and investor-to-state disputes. To date, the ECT has been signed or acceded to by 53 states (European and Asian) as well as the European Union and *Euratom*. Due to its complexity and geographical coverage, the ECT is a document unique in its kind.

The Energy Charter Treaty: A Commentary, published under the *Oxford University Press*, represents an in-depth, article-by-article commentary on all aspects of the Treaty. The book provides a thorough analysis of all ECT’s provisions, relevant case law, arbitral awards, and academic scholarship. Its

* svec.martin@yahoo.com, Department of Energy Law, Institute of Law and Technology, Faculty of Law, Masaryk University, The Czech Republic.

¹ Konoplyanik, A., Walde, T. (2006) Energy Charter Treaty and Its Role in International Energy. *Journal of Energy & Natural Resources Law*, 24 (4).

author, *Kaj Hobér*, is an Associate Member of 3 *Verulam Buildings*, a barristers' chambers, and Professor of International Investment and Trade Law at *Uppsala University*. As an arbitrator, *Prof. Hobér* has been appointed to panels in more than 200 international arbitrations, commercial as well as treaty based, across a variety of tribunals.²

The Energy Charter Treaty has gained increasing attention in recent years. First, the use of the ECT investor-state dispute settlement mechanisms (referred to also as "ISDS") has been increasing rapidly.³ It is worth acknowledging that the Energy Charter Treaty is currently the most often-invoked investment agreement worldwide.⁴ Second, a backlash against ISDS encompassing criticism of both the system of investment treaty arbitration and criticism of its specific aspects (e.g. transparency, inconsistency of awards),⁵ is likely to affect an ongoing modernisation of the ECT.⁶ Third, the *Court of Justice of the European Union* (referred to also as "CJEU") in its judgment of 6 March 2018 in Case C-284/16, *Achmea v. Slovakia* held that the investor-state arbitration clauses in international investment agreements concluded between EU member states were not compatible with EU law. Although the Court did not address the ECT, most of the EU member states are of the opinion that the ECT's investor-state arbitration clause is also incompatible with EU law.⁷ However, to date, in all publicly known arbitral awards rendered since 6 March 2018, tribunals found that they had jurisdiction and rejected the argument that the Energy

² 3 Verulam Buildings. (2020) 3VB. [online] Available from: <https://www.3vb.com/our-people/associate-members/prof.-dr.-kaj-hober> [Accessed 1 September 2020].

³ As of 15 July 2020, the total number of publicly known ISDS claims has more than doubled over the last six years and reached 131. See Energy Charter Treaty. (2020) [online] Available from: <https://www.energychartertreaty.org/cases/list-of-cases/> [Accessed 1 September 2020].

⁴ Verburg, C. (2019) Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement. *The Journal of World Investment & Trade*, 20 (2–3), pp. 425–454. [online] Available from: <https://doi.org/10.1163/22119000-12340144> [Accessed 1 September 2020].

⁵ Hobér, K. (2015) Investment Treaty Arbitration and Its Future – If Any. *Yearbook on Arbitration & Mediation*, 7 (8). [online] Available from: <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1030&context=arbitrationlawreview> [Accessed 1 September 2020].

⁶ The EU aims to reform the ECT's investor-to-state dispute settlement mechanism in line with the EU's work in the ongoing multilateral reform process in the *United Nations Commission on International Trade Law (UNCITRAL)*. See European Commission. (2020) *Commission presents EU proposal for modernising Energy Charter Treaty*. Publications Office of the European Union. [online] Available from: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148> [Accessed 1 September 2020].

⁷ Declaration of the Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection. (2019) [online] Available from: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en [Accessed 1 September 2020].

Charter Treaty is not applicable between EU member states.⁸ It is worth mentioning that the compatibility of the ECT's investor-state arbitration clause with EU law is currently contested before a national court – *Svea Court of Appeal* in Sweden.⁹ However, the court rejected the request to obtain a preliminary ruling from the CJEU.¹⁰ Fourth, the EU aims to ensure that the ECT contributes to the objectives of the *Paris Agreement* and better reflects climate change and clean energy transition goals, and facilitates a transition to a low-carbon energy system.¹¹ Against the background of recent developments in EU law and international law, a thorough legal analysis of the ECT's provisions and recent case law is more than timely. *The Energy Charter Treaty: A Commentary* will be undoubtedly a helpful resource for practitioners, academics, and policymakers.

As noted above, the Energy Charter Treaty is a sector-specific treaty. It comprises of provisions regulating the trade and transit of energy products and materials, providing for investment protection of energy investments, and promoting energy efficiency and environmental protection. In other words, the ECT comprises of legal standards having origins in different fields of international law, particularly international economic law, international investment law and international environmental law. As *Prof. Hobér* aptly points out, the ECT was not drafted in legal vacuum and legal fields whose instruments were incorporated into the ECT cannot be ignored.¹² As far as investment protection is concerned, there were in place several thousands of international investment agreements providing for

⁸ Švec, M. (2019) *The Energy Charter Treaty as a Key Instrument of International Energy Law: The 20th Anniversary of the Energy Charter Treaty's Entry into Force*. *Časopis pro právní vědu a praxi*, 27 (4), pp. 519–538. [online] Available from: <https://journals.muni.cz/cpvp/article/view/12525> [Accessed 1 September 2020].

⁹ See Decision by the Svea Court of Appeal, 25 April 2019, Case No. T 4658-18. [online] Available from: https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Court-of-Appeal/Court-of-Appeal/Court-of-Appeal/d_3646301-decision-by-the-svea-court-of-appeal-25-april-2019-case-no.-t-4658-18 [Accessed 1 September 2020].

¹⁰ Liebkind, A., Agrell, K. (2020) *The Swedish Court of Appeal again rejects Spain's request of a preliminary ruling from the Court of Justice of the European Union (CJEU)*. *Global Arbitration News*. [online] Available from: <https://jsumundi.com/en/document/decision/en-novenergia-ii-energy-environment-sca-grand-duchy-of-luxembourg-sicar-v-the-kingdom-of-spain-decision-of-the-svea-court-of-appeal-wednesday-27th-may-2020> [Accessed 1 September 2020].

¹¹ European Commission. (2020) *Commission presents EU proposal for modernising Energy Charter Treaty*. Publications Office of the European Union. [online] Available from: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148> [Accessed 1 September 2020]; Švec, M. (2019) *The Energy Charter Treaty as a Key Instrument of International Energy Law: The 20th Anniversary of the Energy Charter Treaty's Entry into Force*. *Časopis pro právní vědu a praxi*, 27 (4), pp. 519–538. [online] Available from: <https://journals.muni.cz/cpvp/article/view/12525> [Accessed 1 September 2020].

¹² See p. 1 of the book.

the protection of foreign investment in a manner very similar to the corresponding provisions which eventually found their way into the ECT. Regarding international economic law, the ECT explicitly incorporated legal standards of the *GATT* and the *WTO*. Hence, acknowledging significant volumes of legal commentary in relation to both international economic and international investment law, *Prof. Hobér* sought to elaborate only on general aspects of these two legal fields, which are particularly relevant for the ECT's provisions in question. By the same token, the book addresses only arbitration issues specifically concerning the provisions of the ECT. With respect to some general matters, the reader is referred to other scholarly publications. As stated in the book's *Introduction*, striking this balance has been a challenge.¹³

The book is composed of five introductory chapters presenting the Energy Charter Treaty as a source of international law and exploring its background as well as the negotiating history. Subsequent nine chapters offer an article-by-article commentary to the ECT. More specifically, Chapter 2 provides a brief introduction of the ECT, Chapter 3 explores the background and the negotiating history of the ECT, Chapter 4 presents general rules of interpretation enshrined in the *Vienna Convention on the Law of Treaties* and Chapter 5 is focused on rules of attribution. Chapters 6–14 provide a legal analysis of all provisions of the Energy Charter Treaty. In order to make the book's structure easy-to-follow, these Chapters are divided into following Parts: *The Preamble; Definitions and Purpose; Commerce; Investment Promotion and Protection; Miscellaneous Provisions; Dispute Settlement; Transitional Provisions; Structure and Institutions; and Final Provisions*. At the very end of the book the reader finds following documents: *Final Act of the European Energy Charter Conference; European Energy Charter; The Energy Charter Treaty; Decisions Relating to the Final Act of the European Energy Charter; Protocol on Energy Efficiency and Related Matters; Final Act of the International Conference; and Decision of the Energy Charter Conference*.

Chapter 4 is focused on the interpretation of the Energy Charter Treaty pursuant to the *Vienna Convention on the Law of Treaties* (referred to also as "VCLT"). However, although it is widely accepted that the VCLT reflects customary international law, the reviewer is of the opinion that the book

¹³ See pp. 1–2 of the book.

should explicitly notify that France, Iceland and Norway, contracting parties to the ECT, have neither signed nor ratified the VCLT.

With respect to Chapter 5, the reviewer strongly disagrees with the author's conclusion that only states can be responsible for any breaches of the ECT. In fact, an important distinctive feature of the ECT is that not only states but also regional economic integration organisations (REIOs) may become contracting parties to the Treaty. Accordingly, the author should have implied that even international organisation can be responsible for breaches of the ECT. Hence, Chapter 5 should have dealt with both the *ILC Articles on Responsibility of States for Internationally Wrongful Acts* and the *ILC Articles on Responsibility of International Organisations for Internationally Wrongful Acts*. Such analysis would be particularly helpful in the context of an investment arbitration against the EU under the Energy Charter Treaty recently initiated by *Nord Stream 2 AG*.¹⁴

With respect to Chapters 6–14, the commentary on each article follows the same structure. The author first establishes the object, purpose and meaning of each provision, relevant parts of the *travaux préparatoires* are referred to when necessary. What makes the book extraordinarily useful are detailed references to relevant case law and jurisprudence, i.e. to arbitral awards rendered on the basis of the ECT as per 1 January 2019 and which were in the public domain as per such date.¹⁵

The Energy Charter Treaty: A Commentary, authored by Prof. Hobér, represents the second commentary on the Energy Charter Treaty published in recent years. In contrast to *The Commentary on the Energy Charter Treaty*, edited by Rafael Leal-Arcas, published by *Elgar Commentaries* in 2018, Prof. Hobér's book is more than just another article-by-article commentary. His book also covers the context of the negotiations of the ECT and discusses its interpretation. The reviewer particularly appreciates detailed, logical and comprehensive analysis of ECT's provisions accompanied by references to relevant case law and jurisprudence.

All that being said, Prof. Hobér's commentary will undoubtedly become an important and helpful book for anyone dealing with international energy law. Nonetheless, the reviewer regrets that the author did not discuss the present challenges the ECT has been facing, particularly the ECT's role

¹⁴ *Nord Stream 2 AG v. The European Union*, PCA Case No 2020-07, pending. [online] Available from: <https://www.italaw.com/cases/8187> [Accessed 1 September 2020].

¹⁵ See p. 1 of the book.

in the effort to hold the increase in global average temperature below 2° C above pre-industrial levels. The underlying policy rationale of the ECT is to be neutral as to the sources of the energy. In other words, fossil-fuel investments are treated no differently to renewable energy investments.¹⁶ Hence, international obligations arising from the ECT, such as the obligation to accord fair and equitable treatment to energy investments and to compensate for direct or indirect expropriation may discourage governments to decarbonize their energy sector. The energy sector is the largest contributor to global GHG emissions and regulatory chill can be major obstacle for the successful implementation of the *Paris Agreement*.¹⁷ Potential use of the ECT's investor-state dispute settlement mechanism by the fossil fuel industry may effectively stall action on climate change.¹⁸ Therefore, the EU aims to ensure the ECT better reflects climate change and clean energy transition goals and facilitates a transition to a low-carbon energy system.¹⁹

In addition, since the book is more than just an article-by-article commentary and the author explores the background and the negotiating history of the ECT, the reviewer would appreciate some remarks on the ongoing efforts to modernise the ECT. More specifically, in 2017 a subgroup on ECT modernisation was established in order to conduct discussions on the potential modernisation of the Treaty.²⁰ In November 2018, the *Energy Charter Conference* approved the list of topics for the discussion on the modernization of the ECT, including pre-investment; definition of charter; definition of economic activity in the energy sector; definition of investment; definition of investor; right to regulate; definition of fair and equitable treatment; MFN clause; clarification of most constant protection and security; definition of indirect expropriation; compensation

¹⁶ Bernasconi-Osterwalder, N., Brauch, M. D. (2019) *Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition*. Transnational Dispute Management. [online] Available from: <https://www.transnational-dispute-management.com/article.asp?key=2632> [Accessed 1 September 2020].

¹⁷ Tienhaara, K. (2018) Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*, 7 (2), pp. 229–250. [online] Available from: <https://doi.org/10.1017/S2047102517000309> [Accessed 1 September 2020].

¹⁸ *Ibid.*

¹⁹ European Commission. (2020) *Commission presents EU proposal for modernising Energy Charter Treaty*. Publications Office of the European Union. [online] Available from: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148> [Accessed 1 September 2020].

²⁰ International Energy Charter. (2020) *Modernisation Group*. [online] Available from: <https://www.energycharter.org/who-we-are/subsidiary-bodies/modernisation-group/> [Accessed 1 September 2020].

for losses; umbrella clause; denial of benefits; transfers related to investments; frivolous claims; transparency; security for costs; valuation of damages; third party funding; sustainable development and corporate social responsibility; definition of transit; access to infrastructure; definition and principles of tariff setting; regional economic integration organisation; and obsolete provisions.²¹

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²¹ International Energy Charter. (2020) *Approved topics for the modernisation of the Energy Charter Treaty*. [online] Available from: <https://www.energychartertreaty.org/modernisation-of-the-treaty/> [Accessed 1 September 2020].

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