Benefits of Ukraine’s Participation in the Energy Charter Process

By Inna Shcherban

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Summary

1. The aim of the Energy Charter Treaty (ECT) is to establish a legal framework to promote long-term cooperation in the energy sector. The key provisions of the ECT concern the protection of investment, trade in energy materials and products, transit, energy efficiency and dispute settlement. Ukraine is a founding member of the Energy Charter process. Having signed the International Energy Charter in May 2015, Ukraine reconfirmed its commitment to the Energy Charter and its continuing interest in its further development.

2. The ECT is the only multilateral agreement that seeks to directly address the complex political, economic and legal problems associated with energy transit. The Treaty promotes the principles of freedom of transit and of non-discrimination, includes an obligation to provide national treatment for energy in transit, and prohibits interruption of flows and the placing of obstacles to construction of new energy transport facilities.

3. For Ukraine, as for the main energy transit countries in Europe, the provisions on transit are of particular importance. The ECT transit provisions include a conciliation procedure for the settlement of transit disputes. The procedure aims to ensure the continuity and stability of supply of energy materials and products.

4. The negotiations of a Multilateral Framework Agreement on Transit of Energy Resources will resume in 2016-2017. This instrument will provide mechanisms of coordination of interests between producers, transit countries and consumers of energy in the most sensitive segments of their relationship.

5. The Model Energy Charter Early Warning Mechanism (EWM), adopted by the Conference in Astana in 2014, is of particular interest for Ukraine in the context of the Russia-Ukraine-EU transit issues. The objective of the EWM “is to provide for a non-binding framework aimed at preventing and overcoming emergency situations in the energy sector related to the transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines.”
6. The ECT investment provisions aim at the creation of the congenial investment climate, which Ukraine needs. The Treaty protects foreign investors against the most important political risks, such as discrimination, expropriation and nationalisation, breach of individual investment contracts, and unjustified restrictions on the transfer of funds. The dispute settlement provisions of the Treaty, covering both state-to-state arbitration and investor-state dispute settlement, reinforce these investor rights. By reducing the political risks that foreign investors face in the host country, the Treaty seeks to boost investor confidence and to contribute to an increase in international investment flows.

7. The Treaty gives the possibility to settle investment disputes amicably. In this respect, the Energy Charter Secretariat could provide its ‘good offices’ as a neutral and independent third party.

8. The Energy Charter process is carried out by thematic Working Groups and the Energy Charter Conference. The Conference is the governing and decision-making body. The Conference has created various subsidiary bodies, which report to the Conference and deal with particular issues in greater detail. They include: the Strategy Group, the Investment Group, the Trade and Transit Group (with the Ukrainian representative as Vice-Chair), the Working Group on Energy Efficiency, and many others. The Groups represent a forum for dialogue for ECT Contracting Parties.
I. Background information

The 1991 European Energy Charter

9. The origins of the Energy Charter go back to the early 1990s, the end of the Cold War. The then Dutch Prime Minister, Mr Ruud Lubbers, believed that the best way to help the countries of the former Soviet Union would be to establish a cycle of economic activity in the East. Furthermore, he proposed that the best place to start was 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 in the West.

10. This led to the signing of the European Energy Charter, a political declaration in The Hague in December 1991. The Energy Charter of 1991 represents a political commitment to cooperate in the energy sector between the countries of the then European Community and those of the former Soviet Union.


11. The Charter of 1991 also emphasised the need for the establishment of an appropriate international legal framework for energy cooperation between the participants. Thus the Energy Charter Treaty (ECT) was signed in 1994. The Treaty is a legally binding agreement on energy trade, transit and the promotion and protection of investment.


12. After more than 20 years of existence, there was a need to update the 1991 European Energy Charter. In 2012, the Energy Charter Conference, the decision making body of the Energy Charter, decided to start negotiations to forge a new political declaration. The objective was to strengthen the profile of the Energy Charter and the Energy Charter Treaty as a framework for international cooperation at the international level.

13. In 2014, four rounds of negotiations were held in Brussels. Delegations from over eighty countries were involved. In late October, agreement was reached on the text of the 2015 International Energy Charter, a political declaration.

14. The new text has been stripped of its outdated elements. The text identifies current and future energy challenges. New key points of emphasis include
the importance of access to energy and the importance of renewable energy sources.

_Ukraine in the Energy Charter Process_


16. On May 21, 2015, on behalf of the Ukrainian Ministry of Energy and Coal Industry, Mr. Demchyshyn signed the International Energy Charter. As stated in the official press-release of the Government of Ukraine, “It is a strategic goal for Ukraine to join the International Energy Charter. This allows us to ensure the support of the countries that share the same principles of action in the energy field and ready to face together all current and future challenges in energy sector.”

II. Ukraine`s energy sector: key issues

17. The issue of access to energy has become internationally politicised. For its harmonious development, Ukraine needs to implement a forward-looking energy strategy to meet the needs of domestic consumers, to reduce energy dependence, to improve international cooperation, while at the same time fulfilling its international commitments. The best option would be if all these objectives were achieved within a legally binding framework, such as the one provided by the Energy Charter Treaty.

18. There are several common interests that could be a basis for energy cooperation between Ukraine and other ECT Contracting Parties. Ukraine is the principal transit partner for Europe: most gas and oil imported from Russia arrives to Europe through Ukrainian territory. Ukraine's gas transportation system is a powerful means of protecting national interests. Recent Russian initiatives in constructing alternative pipelines, if implemented, will lead to a decrease in the amount of resources transited through Ukraine. However, the numbers will remain significant. On the other hand, Ukraine needs European technologies and investments to modernise its gas transportation system (GTS) and, by providing new

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industrial technologies, to decrease the levels of energy consumption. These interests are interconnected: the more effective Ukrainian transportation system is, the more reliable it will be as a transit state. In other words, Ukrainian GTS can generate benefits for all parties involved in producing, transiting and importing natural resources.

19. Security of supply can be achieved on the pan-European level without differentiation between EU and non-EU countries, which represents the lesson learned from the Ukraine crises. There is skepticism towards Gazprom’s decision to build a pipeline via Turkey bypassing Ukraine. This is a political decision not based on a business case (and political decisions on large projects often fail, like Nabucco or South Stream). It is better to upgrade the existing networks adding some corridors and reverse flows options. Moreover, the EU should be consistent in their intention to support Ukraine and endorsement of a pipeline which could bypass Ukraine would not be compatible with this intention.  

20. Reforms in the gas sector, envisaging the separation of gas transportation system operators and the introduction of more transparent non-discrimination rules in the gas market make Ukraine’s gas transportation system more attractive to European companies. Ukraine is transforming from a historical transit country of Russian gas to the EU in a liquid market, which could be the basis for energy security strengthening.

21. The liberalisation of the domestic gas market in accordance with the rules of the Third Energy Package creates additional opportunities in Caspian natural gas supplies through the Black Sea region to Ukraine. The reforms of Ukraine’s oil and gas market will enable to look at its gas transportation system not only in the function of providing gas flows in the direction of East-West and South-East but also in the West-East and South-West.

22. In this regard, Ukraine has a developed network of oil and gas pipelines with underground storage facilities. This can be used to transport oil and gas from the Caspian region and Central Asia to EU countries. Central Asian countries as well as EU are parties to the ECT.

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23. Ukraine has also a quite powerful oil refining industry. Known reserves of natural gas and oil in the future will enable to increase the share of the country’s own fuel in the energy balance, which is in line with the principles of the Energy Charter as it reduces the country's dependence on energy imports.

24. In the electricity sector, Ukraine has developed a set of energy production and supply mechanisms, which is part of the integrated energy system of the country. The energy system has enough power to satisfy domestic needs and to export surplus electricity and is connected to the power systems of Central and Southern Europe. The wholesale electricity market is operating with mechanisms of economic regulation.

25. Ukraine should reinforce its engagement in the Energy Charter process for improving its energy security and energy cooperation with other partners which are also Energy Charter Members.

*Investments in Ukrainian energy sector*

26. Ukraine needs investments as it is one of the ways to modernise its energy sector. Until today, Ukraine has attracted investment funds in hydropower (total projects amount to almost US$2bn), in the improvement of energy networks (total projects amount to US$700m), in the safety of nuclear power plants (total projects amount to EUR 600m), in the reconstruction of the gas transportation system (total projects amount nearly US$330m).

27. Investments are directly related to energy sector reforms. Attracting considerable investments in the energy sector of Ukraine and the overall improvement of the country’s investment climate depend on the legal framework linked to the implementation of EU laws and regulations. The Energy Charter Treaty is part of the *acquis communataire* of the European Union legal framework.

*Reforms in the energy sector of Ukraine*

28. A task of paramount importance for the Government of Ukraine is to introduce reforms, inter alia, in the energy sector. In this regard, in January 2015, the Ukrainian President approved the Strategy for Sustainable Development “Ukraine-2020.”³

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29. The Strategy for Sustainable Development of Ukraine until 2020 determines goals and indicators of their achievement, as well as directions and priorities of state development. The purpose of reforms is to achieve European standards of life and give Ukraine a good international position. The Strategy includes 62 reforms and 2 programmes. One of the top-priority programmes includes Ukraine’s energy independence.

30. The implementation of the Strategy provides for the achievement of 25 key indicators. Particularly, it is planned that in Standard and Poor's rating on liabilities in foreign currency, Ukraine's investment category will not be below the “BBB” rating and the net FDI inflow will have equalled US$40bn by 2020. Reforms are fully compatible with European rules in the energy market, providing the most transparent operational rules for energy companies and strong independent regulation.

Measures by Ukrainian Government to attract investments

31. On October 20, 2015, the Ministry of Energy and Coal Industry of Ukraine signed a Memorandum of cooperation with representatives of the European Business Association (EBA) and the American Chamber of Commerce (ACC) concerning a Mechanism on rapid response to problems related to the activities of investors in Ukraine's energy sector. A High Level Working Group was formed and two coordinators from the Ministry were appointed. Together with representatives of the EBA and the ACC, they will analyse complaints and inform the Minister and his Deputies about problematic issues in order to take adequate measures.

32. On November 10, 2015, the first meeting of the High Level Group created under the Memorandum was held. During the meeting, investors addressed more than 15 important problematic issues to the Ministry.

33. The Ministry has prepared amendments to three laws – the Law on Subsoil, the Law on Oil and Gas, the Law on gas-coal bed methane. The issues of investors concern are solved by these laws. Among the important issues the adoption of a new Code of subsoil remains open.

34. It should be mentioned that the Parliament of Ukraine adopted a law on the development of public-private partnerships and attraction of investments. The aim of the Law is the removal of regulatory barriers for the development of public-private partnerships and other mechanisms to stimulate investments in Ukraine.
Investment case against the Government of Ukraine and the “good offices” of the Energy Charter Secretariat

35. Despite Ukraine’s attempts to improve the investment climate, some cases were initiated against the Government of Ukraine based on the ECT investment protection provisions.

36. On February 16, 2015, it was announced that JKX Oil & Gas had commenced arbitration proceedings in the Stockholm Chamber of Commerce (SCC) against Ukraine under the Energy Charter Treaty. The claim exceeds US$180m. In addition the claimants claim compensation for measures adopted by Ukraine in response to the current difficult economic and political situation. These include the increase of royalties on gas production to 55%; exclusive authority of the state-owned company Naftogaz to sell gas to private parties; and other restrictions on foreign cash transactions.

37. On 14 January 2015, the emergency arbitrator provided for an interim award prohibiting Ukraine from imposing royalties exceeding 28% on gas production by the JKX. On June 8, 2015, the Pecherskyi District Court of Kyiv upheld an application lodged by JKX to enforce an emergency arbitrator award.

38. An investment arbitration can take a long time, it’s very expensive and draws negative attention, which could damage the country’s investment climate. Therefore, alternative dispute resolution procedures would be more appropriate. The Energy Charter Secretariat could assist in that matter.

39. The Energy Charter Secretariat, as a neutral and independent third party, provides its ‘good offices’ to facilitate an amicable discussion between the government and the foreign investor and/or could help in administering a potential mediation. Mediation is cheaper and faster than arbitration, and usually provides for a win-win scenario keeping the good relations between the investor and the host state, which is crucial for Ukraine.

III. Introduction to the Energy Charter Treaty

40. The aim of the Treaty is to establish a legal framework to promote long-term cooperation in the energy sector based on the principles enshrined in the European Energy Charter of 1991. The key provisions of the Treaty concern the protection of investment, trade in energy materials and products, transit, energy efficiency and dispute settlement.
III. a) Investment provisions

41. The text includes an investment protection chapter with standard ‘fair and equitable treatment’ rules, protection against illegal expropriation, and investor-state dispute resolution consistent with international conventions (1965 ICSID Convention and UNCITRAL rules).

42. With reference to investments, Contracting Parties must promote and create stable, favourable and transparent conditions for foreign investors and apply the most-favoured nation (MFN) principle or offer the same treatment that is given to national investors, whichever arrangement is the most favourable.

43. For Ukraine it is important to know that under the ECT a distinction is made between the pre-investment phase when setting up a new investment and the post-investment phase relating to investments already concluded. Under the ECT, for pre-investments the principle of national treatment will be applied in two stages. In accordance with the Treaty, the first stage is to apply the “best efforts” clause. Then, and subject to the conditions to be defined in a Supplementary treaty (under negotiation), it will become legally binding to offer national treatment regarding investments.

44. Foreign investors are protected against the most important political risks, such as discrimination, expropriation and nationalisation, breach of individual investment contracts, damages due to war and similar events, and unjustified restrictions on the transfer of funds. The dispute settlement provisions of the Treaty, covering both state-to-state arbitration and investor-state dispute settlement, reinforce these investor rights. By reducing the political risks that foreign investors face in the host country, the Treaty seeks to boost investor confidence and to contribute to an increase in international investment flows.

45. Investment dispute settlement procedures are set in Articles 26–28 of the ECT. Article 26 governs settlement of disputes between an investor and a Contracting Party and provides investors with the right to start arbitration proceedings. Article 27 regulates the resolution of state-to-state disputes between contracting parties concerning the application or interpretation of the ECT.

46. In accordance with Article 26(1), investment disputes must, if possible, be settled amicably. The investor may not submit a dispute for resolution in accordance with Article 26 until three months have elapsed from the date on
which either party to the dispute requested amicable settlement. However, if a dispute cannot be settled amicably within three months, the investor has the choice of submitting a dispute to:

- the national court or administrative tribunals of the Contracting Party where the investment was made;
- a previously agreed dispute settlement procedure;
- international arbitration.

47. According to Article 26, investors may choose any of the following forms of international arbitration:

- ICSID-arbitration;
- UNCITRAL Arbitration Rules;
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

48. In case of a withdrawal from the ECT, a Contracting Party remains bound to respect its investment protection obligations for a period of 20 years following the effective date of its withdrawal from the ECT (Article 47).

Reviews of Investment Climate and Market Structure in the energy sector

49. The ECT investment provisions aim at the creation of the congenial investment climate which is of particular interest for Ukraine. In this context, the Energy Charter's Investment Group regularly reviews progress made in Member Countries towards the improvement of the investment climate and restructuring of domestic energy markets. Particular attention is paid to the reduction of remaining country-specific exceptions to the principle of non-discriminatory treatment of foreign investors when making an investment. The reports are discussed in the Investment Group which may suggest recommendations to the examined country concerning the further improvement of investment conditions, including the issues of market restructuring and privatisation.

50. It should be noted that the last review of the investment climate and market structure in the energy sector of Ukraine was undertaken in 2006. Taking into account the changes in the energy sector of Ukraine as well as in the international environment, Ukraine could submit a request to the Energy Charter Secretariat for review of its investment climate.

III. b) The ECT Transit provisions
51. Energy transit plays a very important role in the context of the energy security of some states. This issue is of particular importance for Ukraine as the main energy transit country of Russian gas to Europe.

52. Article 7 of the ECT is devoted to transit issues. The Energy Charter Treaty is the only multilateral agreement that seeks to directly address the complex political, economic and legal problems associated with energy transit. The Treaty promotes the principles of freedom of transit and of non-discrimination, it includes an obligation to provide national treatment for energy in transit, and prohibits the interruption of flows and the placing of obstacles to the construction of new energy transport facilities. In this context the Treaty (Article 7(2)) states that Contracting Parties shall encourage relevant entities to cooperate in:

(a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products;

(b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party;

(c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products;

(d) facilitating the interconnection of Energy Transport Facilities.

53. The conciliation procedure related to transit disputes is set in Article 7(7). The procedure aims to ensure the continuity and stability of energy materials and products supply. The procedure shall apply only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties – parties to the dispute.

54. This is a critical issue for the collective energy security of Energy Charter Members since energy resources are being transported across multiple national boundaries on their way from producer to consumer. For this reason, Energy Charter Members were trying to enhance the Treaty’s transit provisions through the elaboration of a Transit protocol, of which formal negotiations commenced in 2000.

Draft “Transit Protocol” and Resumption of negotiations of the Multilateral Framework Agreement on Transit of Energy Resources
55. Just about one year after the ECT entered into force, the Contracting Parties found it necessary to start negotiations on an additional international treaty on transit known as the draft “Transit Protocol”. The main purpose of the Protocol was to provide more detailed rules to guarantee the implementation of the Charter’s principles on transit and the Treaty’s relevant provisions.

56. The objectives of the negotiations on this Protocol, which started in 2000, were:

- to ensure secure, efficient, uninterrupted and unimpeded transit;
- to promote more efficient use of transit infrastructure;
- to facilitate the construction or modification of transit infrastructure.

57. Agreement was reached for most of the Protocol’s text by the end of 2002. However, in 2003 negotiations have been suspended. Three main outstanding issues became the subject of consultations between the EU and the Russian Federation and, later on, among all Energy Charter Treaty Contracting Parties. They concerned:

- long-term capacity booking and creation of transit infrastructure;
- the cost-reflectiveness of tariffs arising from auctions;
- the clause introduced by the EU having the effect that the Protocol would not apply to energy flows within the EU (“REIO-clause”).

58. In 2015, the Trade and Transit Group undertook a comprehensive review of the implementation of the ECT transit provisions. The conclusions of the review demonstrated that “the overall demand for a multilateral legally-binding framework for energy transit has not diminished since the conclusion of the last formal version of the Transit Protocol in 2003; and that the ECT is ideally positioned as a basis for common transit principles that would facilitate development of international energy transmission networks.”

59. As a result, the Trade and Transit Group supported the recommendation to start negotiations of a Multilateral Framework Agreement on Transit of Energy Resources on a new basis. It is anticipated to restart these negotiations in 2016-2017.

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4 Document CC 527 “Adoption by written procedure – Conclusions of the review of implementation of the ECT transit provisions”.
60. The negotiation of the Multilateral Transit Agreement is very important for Ukraine as a transit country. It is very symbolic that during the 26th Meeting of the Energy Charter Conference in Tbilisi (Georgia) Mr. Mykhailo Bno-Airiiian, Head of Department of Strategic Planning and International Cooperation of the Ministry of Energy and Coal Industry of Ukraine, was nominated as Deputy Chair of the Energy Charter Trade and Transit Working Group (TTG).

Energy Charter Early Warning Mechanism in the context of the Russia-Ukraine-EU transit issues

61. The series of bilateral conflicts over natural gas supply, transit and fees goes back to 1990s. Russian gas was supplied to Ukraine at a considerably lower price than to Europe. In response, Russia enjoyed favorable transit fees. Both states suffered from a long economic setback in the 1990s and followed the scheme which allowed Ukraine to exchange transit for supplies of natural gas with only a small part of those supplies paid for in cash. That conserved Ukrainian dependence on cheap Russian gas and thus slowed down the modernisation of Ukrainian GTS.

62. Some of the current fundamental problems in recent energy crises were created at that time. On the one hand, Ukraine was unable to find alternative sources of gas supplies, relying on its transit capacity and enjoying low prices. On the other hand, Ukrainian economy, dominated by heavy industry and energy-consuming production, missed the chances for rapid modernisation in the 1990s. At that time, Russia had also put forward an idea of interconnecting natural gas supplies with the Russian Black Sea Fleet status in the Crimea. That idea, revisited in 2010, also had long-lasting effects on Ukrainian foreign policy, expanding natural gas issues into the area of geopolitical choices.

63. Since 2005, Naftogaz and Gazprom, major state-owned gas companies in Ukraine and Russia, have been involved in political and economic conflicts on the terms and conditions of natural gas supplies to Ukraine and on the natural gas transit to the EU.

64. Three main lessons can be drawn from the crisis between Russia and Ukraine. First of all, energy disputes involving a supply country and a transit country may have adverse effects on third parties, not directly involved in a

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dispute. Secondly, transparency is necessary to avoid “information wars.” Transparency activities should be in place before the actual disruption takes place. Lastly, all parties involved should be members of international, independent dispute prevention or dispute resolution procedures, such as those established by the Energy Charter, as the very availability of clear legal framework will become a factor of stability and predictability of relations in the energy sector. Furthermore, the crises of 2006 and 2009 showed that no mechanism for energy conflict prevention existed during that time.\(^6\)

65. During the gas war in 2014, the Energy Charter made concrete steps towards its resolution by establishing the Energy Charter Security Contact Group, comprising all the parties involved in the dispute. In parallel, the Energy Charter Trade and Transit Group (TTG) was working on the Energy Charter Early Warning Mechanism (EWM). Participation of Russian, Ukrainian and EU representatives in the TTG discussions while the gas dispute was escalating on the ground created a workable conflict prevention tool based on experience in real time. In late November, the Model Early Warning Mechanism was approved at the 25\(^{th}\) Meeting of the Energy Charter Conference in Astana.\(^7\)

66. According to the Article 2.1 of the Model Energy Charter Early Warning Mechanism, its objective “is to provide for a non-binding framework aimed at preventing and overcoming emergency situations in the energy sector related to the transit and supply of electricity, natural gas, oil and oil products through cross-border grids and pipelines.” Emergency situations indicate a major event in the energy sector with trans-frontier consequences.

67. The mechanism presents three levels:

- Initiation of the Energy Charter Early Warning Mechanism (by the country concerned or by the Secretary General)
- Establishment of the Energy Security Contact Group (encourages the exchange of information among the parties involved. The Group has 2 objectives: 1) it proposes an agreed assessment of the situation and, 2) it

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\(^6\) The EU-Russian Early Warning Mechanism in the framework of the EU-Russia Energy Dialogue cannot be seen as a dispute prevention tool, since it focuses on measures to be taken after an emergency occurs.

develops recommendations to eliminate the threat of an emergency situation, or to overcome an emergency situation).

- Establishment of the Energy Charter Monitoring Group (optional; the monitors from the Group should be allowed access to the national dispatch centres in order to make necessary verifications and controls).

68. The Model Energy Charter EWM has many advantages. Among them, is the fact that it is based on dialogue and it’s of a multilateral nature; it is an instrument for preventive diplomacy and confidence building. The EWM is complementary to existing mechanisms and does not duplicate them.

69. The crises of 2006 and 2009 have raised the question of confidence between the parties involved. In this direction, the Model Energy Charter EWM is based on full transparency and neutrality and inspired by the Energy Transparency Regime scheme proposed by Ukraine’s NOMOS and Strategy XXI centres, the Ukrainian non-governmental public policy think tanks.

70. Although the Russian-Ukrainian gas disputes are perceived by the international community as political rather than commercial, the Energy Charter has made efforts to settle the situation from the energy perspective and within the Energy Charter legal framework. In the framework of the Energy Charter, four meetings of the Energy Security Contact group took place. They were chaired by the Secretary General and consisted of the Kazakh, Russian, Ukrainian representatives from their respective diplomatic missions to the EU and the EU’s DG Energy and European External Action Service representatives.

71. These discussions did not give sufficient impetus to the rapid initiation of the transparency regime. However, following the efforts of the Secretary General, some months later Ukraine introduced unprecedented transparency initiatives regarding gas flows on its territory.

72. As of May 6, 2014, NJSC Naftogaz of Ukraine joined the Aggregate Gas Storage Inventory (AGSI+) transparency platform of Gas Infrastructure Europe (GIE). Moreover, from May 15, 2014, PJSC “Ukrtransgaz started daily reporting on the volumes of natural gas transit through Ukraine’s gas transport system on their website and on the ENTSOG website.8

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73. Another step by Ukraine towards transparency was its invitation to international observers to monitor gas transit via the Ukrainian GTS. It is worth mentioning that back in 2009 monitors were prevented from entering the dispatch centres in Ukraine.

74. Providing data on gas flows via Ukraine was a key recommendation made by the Energy Charter Contact Group. Ukraine has fulfilled it after the Contact Group ceased to meet. It should be noted however, whereas not directly referred in the abovementioned initiatives, the Energy Charter EWM provided useful input and indirect influence in their making.

75. As a conclusion it can be noted that the history of the Russia-Ukraine gas conflicts indicate that political means of dispute resolutions are not sustainable and could further escalate the tensions in the future. A better solution would therefore be to entrust the resolution of such strategic energy supply disputes with an independent platform based on an upfront and accessible legal framework such as the ECT.

76. To conclude on the 2014 crises, no disruptions to Russian gas supplies to Europe occurred this time, hence Ukraine was able to fulfil its obligations under ECT Article 7(6) and its transit contracts with Russia.\(^9\) This was possible due to the fact that Ukraine continued transit flows of Russian gas to Europe and, in return, the EU provided Ukraine with reverse gas supplies from Slovakia, Poland and Hungary. Reverse flows were possible according to EU law and the Energy Community Treaty which Ukraine has ratified in December 2010. The Energy Community Treaty imposes a legal obligation on its Parties to seek an expeditious resolution in the event of disruption of energy supplies.\(^10\) At the same time, ECT Article 7(2)(c) imposes a soft law obligation on Contracting Parties to encourage Transmission System Operators (TSOs) to cooperate in measures to mitigate the effects of interruptions to energy supply.

77. The Energy Charter is the only existing legal framework with a geographical scope covering major energy trade and transit routes in Eurasia and beyond. Although the Energy Community Treaty provides with options to overcome threats to energy security, its usefulness is limited in geographical extent.

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For instance, Turkey, whose role as an important transit country is increasing, is not a party to the Energy Community Treaty but a Signatory of the 1991 Energy Charter and Contracting Party the ECT. Therefore, the Energy Charter EWM can be viewed as the only multilateral and sustainable option for prevention and amicable resolution of energy conflicts. The Energy Charter EWM can play an important role in case of emergency for any party acting in good faith and willing to use it.

**III. c) ECT Trade regime**

78. The ECT trade regime is based on the provisions of the GATT – when the ECT was negotiated – and now of the WTO. This helps avoid the creation of any alternative framework for regulation of trade in energy.

79. The WTO does not have specific rules for the energy sector. However, the legal framework of the WTO includes a number of rules that are also applicable to the trade in energy-related products and equipment.

80. The purpose of the ECT trade regime is to extend the benefits, but also the obligations, of WTO Membership to the energy sector of those ECT Contracting Parties who are not yet in the WTO.

81. The ECT assumes that all its contracting parties and signatories will eventually become members of the WTO and any reference to trade issues in the Charter is aimed at filling the gap in the interim period pending accession of the remaining ECT member states that are not yet members of the WTO. On the other hand, the trade provisions of the ECT fill the gap of the WTO agreements being applied to energy trade.

82. The ECT has the effect of treating those contracting parties, which are not yet members of the WTO as if they were WTO members in the framework of energy-related trade. For ECT Contracting Parties who are not WTO members, the applicable ECT trade regime is a milestone towards WTO membership. It allows them to familiarise themselves with the practices and disciplines that WTO membership entails through the application of its rules to trade in energy materials and products and energy-related equipment.

83. Ukraine is a member to the WTO and applies the WTO rules vis-à-vis other Energy Charter Contracting Parties who are also WTO Members by virtue of the non-derogation principle of the ECT (Article 4).
84. There are areas of particular strategic significance to the energy sector where the Energy Charter Treaty goes further than the WTO. Firstly, there is no counterpart in the WTO system to the Energy Charter Treaty's provisions on the protection of investment. Secondly, the Treaty also covers in more detail the critical issue of energy transit, and includes a distinctive mechanism for the resolution of energy transit disputes.

85. As for transit, the ECT contains more elaborated rules in comparison to the WTO, as it explicitly incorporates energy transport facilities such as gas pipelines and electricity transmission grids as means of transport (ECT Article 7 versus WTO Article V). This allows to avoid uncertainties and also to apply the ECT dispute settlement mechanism to transit disputes.

Trade Amendment (1998)\(^\text{11}\)

86. Three years after the entry into force of the WTO agreement, the ECT was amended in order to take account of the relevant changes in the multilateral trade rules. Formally, the Trade Amendment mainly modifies Treaty Annexes. There are three new elements added by the Trade Amendment to the ECT:

- Technical adaptation of the references to incorporated rules in order to reflect the changes from a GATT to WTO-based regime (ECT Art. 30);
- Inclusion of Energy-related Equipment in the list of goods to which the ECT applies (ECT Art. 31),
- Possibility for the Energy Charter Conference to progressively replace the soft law customs tariffs pledges by a binding customs duty standstill regime (ECT Art. 29(6)).

87. Ukraine has ratified the Trade Amendment.

III. d) Energy Efficiency activities of the Energy Charter

88. Article 19 of the ECT requires all Member Countries to strive to minimise in an economically efficient manner harmful environmental impacts occurring from all operations along the entire energy chain.

89. Building on Article 19 of the Energy Charter Treaty, the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) defines in more

\(^{11}\) For Trade Amendment explanatory note see http://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Trade_Amendment_Explanations-EN.pdf.
detail the policy principles that can promote energy efficiency, and provides
guidance on the development of energy efficiency programmes. It also aims
to foster international cooperation between the member states by providing a
framework and an indicative list of areas for joint activities.

90. The Protocol requires member governments to formulate policy aims and
strategies for energy efficiency (Article 5), establish relevant policies
(Article 3.2), develop, implement, and update energy efficiency
programmes, and create the necessary legal (Article 3.2), regulatory (Article
3.2) and institutional (Article 8.3) environment for more efficiency energy
use.

In-depth Energy Efficiency Reviews

91. Within the energy efficiency activities, the Energy Charter Secretariat carries
out energy efficiency reviews. In-depth Energy Efficiency Reviews are
undertaken for countries that volunteer to host such an exercise. They are
based on a peer review by representatives of 3–4 other countries and the
Secretariat. The In-depth Energy Efficiency Reviews analyse the broad
economic and energy context of the country, patterns of energy use, energy
efficiency policies and institutional frameworks. They include specific
recommendations to national governments concerning possible
improvements to their national energy efficiency policies and programmes.
These recommendations are discussed and endorsed by the Working Group
on Energy Efficiency and Related Environmental Aspects and by the Energy
Charter Conference. After two to three years, countries report back to the
Working Group on the implementation of the recommendations.

92. The latest In-Depth Review of Energy Efficiency Policy of Ukraine was
undertaken in 2013, following an invitation from the State Agency on
Energy Efficiency and Energy Savings of Ukraine. The review team that
visited Kiev comprised officials from Austria, Kazakhstan and the Slovak
Republic and the energy efficiency team of the Energy Charter Secretariat.

93. Ukraine’s economy is one of the most energy inefficient economies in the
world. Therefore, the issue of energy efficiency is of high importance for the
country.

12 In-Depth Review of Energy Efficiency Policy of Ukraine (2013), available in English and in Russian at
http://www.energycharter.org/what-we-do/energy-efficiency/energy-efficiency-country-reviews/in-depth-review-of-
94. The report concluded that the government of Ukraine should recast and adopt a national energy strategy as soon as possible. Such a recast needs to be based on well-founded assumptions, realistic projections and the acknowledged potential for energy efficiency gains. Furthermore, the review team recommended that high standards of governance be obtained in the formulation of the country's energy and energy efficiency policy and in its implementation through energy market liberalisation, utility privatisation and the regulation of competition.

**III. e) Energy Charter Working Groups and the Energy Charter Conference**

*The Energy Charter Conference*

95. The Energy Charter Conference, an inter-governmental organisation, is the governing and decision-making body for the Energy Charter process, and was established by the 1994 Energy Charter Treaty.

96. All states or Regional Economic International Organisations who have signed or acceded to the Treaty are members of the Conference, which meets on an annual basis to discuss issues affecting energy cooperation among the Treaty's Signatories and to review the implementation of the provisions of the Energy Charter Treaty.

97. The Energy Charter uses a practice of Chairmanships. The Chairmanship of the Conference shall be held for a term of one calendar year. Every year, the Conference shall approve a list of future Chairmanships of the Conference covering at least the following three years. Contracting Parties may nominate themselves for the office of Chairmanship by letter to the Secretariat, indicating their preference for the year when they wish to assume this role.

98. Since 1 January 2015, the Chairman of the Energy Charter Conference is Mr. Kakha Kaladze, vice Prime Minister and Minister of Energy of Georgia. In 2016, Japan will chair the Energy Charter Conference, followed, in 2017, by Turkmenistan.

*Subsidiary Bodies of the Energy Charter Conference*

99. The Energy Charter Conference has created various subsidiary bodies, which report to the Conference and deal with particular issues in greater detail. They include the:
• Strategy Group (StG)
• Investment Group (IG)
• Trade and Transit Group (TTG) (with Ukrainian representative as a Vice-Chair.)
• Working Group on Energy Efficiency and Related Environmental Aspects
• Budget Committee (BC)
• Working Group on Procedural Issues (PRIS)
• Industry Advisory Panel (IAP).

100. So far, participation of Ukraine in the working groups was rather modest.

IV. Conclusions

101. The ECT is a significant international legal instrument that provides protection for investments and the facilitation of trade and transit across a widening community of energy producing, transiting and consuming countries. The role of the ECT remains very significant.

102. Participation in the Energy Charter process is not merely limited to the act of signing the ECT. The Energy Charter represents not only a legal framework, but also a multilateral policy forum where governments from across the world participate in a dialogue on issues affecting cooperation in the energy sector.

103. Participation in the Energy Charter process represents a strategic opportunity for Ukraine to signal its readiness for improved international cooperation, to stimulate investor interest in its energy sector and to build confidence and energy security with and among its neighboring states through the whole length of the energy supply value chains.

104. Having signed the International Energy Charter, Ukraine reconfirmed its commitment to the Energy Charter process and its continuing interest in its further development.