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Interview: A new Energy Charter Treaty as a complement to the Paris Agreement

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by **Karel Beckman**



In an interview with Borderlex, the Energy Charter Treaty's secretary-general Urban Rusnák said: "In one or two years I expect to have a new Energy Charter Treaty as complement to the Paris climate agreement."

The Energy Charter Treaty has not been a very popular legal instrument in Europe in recent years. NGOs have **accused** it of being a tool of fossil fuel interests, Spain, Italy and other countries have had to pay heavy fines in arbitration cases brought under the treaty, and countries like Germany and The Netherlands are currently being challenged under the treaty over their respective decisions to close nuclear power and coal power stations.

At the end of May, the European Commission **published** a number of **proposals** aimed at reforming the treaty, such as providing members with more 'rights to regulate' with regard to climate change and social and corporate responsibility, and limiting its scope by demanding stricter definitions of 'investors', 'investment' and 'substantive protection standards'.

These proposals are now being discussed as part of a process the Energy Charter Secretariat calls the 'modernisation' of the treaty, which began at the end of 2017. Official negotiations kicked off on 2 June 2020 with a general meeting of the 55 members, which are mainly located in Europe and Central Asia, and include Japan and Australia. The meeting was held by video conference, for the first time in the history of the Energy Charter.

Borderlex spoke at length with Urban Rusnák, secretary-general of the Energy Charter shortly after the negotiations kicked off. Rusnák, is a former Slovakian ambassador who started in this post in 2012. He has been the main driving force behind the modernisation, is eager to correct what he regards as misconceptions of the treaty and to explain its significance for the future of the world.



Urban Rusnák

"The stakes are high," Rusnák tells Borderlex. "If the modernisation process fails, I don't see a future for the Treaty." And that, he says, "would seriously hamper the ability of the world to meet the Paris climate targets. The Paris Agreement does not protect investment. The Energy Charter Treaty does. It's a complement to the Paris agreement."

"We have been working on this process since our meeting at the end of 2017 in Ashgabat. In 2018 we did a scoping exercise which led to **a list of 25 topics** that will be addressed. [In June 2020] we started on the more painful part of the process. The Contracting Parties will have to find compromises. They will have to agree unanimously. Some are only now preparing their positions. We will have a number of follow-up video meetings and in December we will have a conference in Baku. There is strong support from Azerbaijan's Chairmanship. It will take some time, one or two years, but I think we will get there."

Q: Why does the ECT need to be modernised?

“There are three main reasons. First, the legal text, which dates from the early 1990s, is considered by many Contracting Parties as outdated. Second, there is a changed understanding of how investment and energy cooperation agreements look today. The rights and obligations of actors should be re-evaluated in all areas: transit, investments, energy efficiency, trade but also transparency. Thirdly, the Treaty should be changed to reflect the ongoing global energy transition, to find a new balance between the rights of governments to regulate and the rights of investors to have their investments protected.”

Q: What has the Energy Charter Treaty achieved?

“At the time it was a unique international agreement which set a legal regime for international energy cooperation, as well as the production and transit of energy in the post-Soviet era. I believe it achieved its greatest successes in Central Asia. It helped turn Central Asian countries into middle income and upper middle-income countries. It also served as a training ground for a number of countries from the Soviet bloc which later joined the WTO. And it served as a forum for dialogue on energy policies, long before there were international organisations like the International Renewable Energy Agency.”

Q: Why is it still important today?

“The Paris Agreement and UN Sustainable Development Goals require huge investment in sustainable energy sources. But the Paris Agreement does not protect energy investment, trade or energy transit. This is where the Energy Charter Treaty can play a key role. The renewable energy revolution is quite new. It will require more connectivity, international energy trade and grid connections across different jurisdictions. This is all facilitated by the Energy Charter Treaty. The Treaty also protects trade in materials and equipment, for example for solar panels and wind turbines.”

Q: NGOs have charged that the treaty protects fossil fuel interests...

“These charges are demonstrably false. The Treaty is neutral. It protects all energy investments, fossil fuels, renewables, nuclear. [A simple look at the arbitration cases](#) proves this. Apart from the Yukos case, damages awarded under arbitration cases up to now are twice as high in the renewable energy sector as in fossil fuels. Yet somehow the NGOs fail to mention this.”

Q: So why do NGOs [call on African governments](#) not to sign on to the ECT?

“I don’t know. I don’t get it. It is the sovereign right of each country to decide what sort of investments they want to have. If they have a commitment to attract investment in renewable energy, the Treaty will protect those investments. That’s why there is a lot of interest in the Treaty from African countries and countries across the world.”

“It’s a little known fact that the energy protocol of ECOWAS – the Economic Community of West African States – are modelled on the Energy Charter Treaty. These countries know what they are doing and take its preparation seriously. They have plenty of legal know-how. Some years ago they started their discussions on a Pan-African investment code, so they know what they want and are capable of deciding by themselves.”

Q: It’s a bit presumptuous perhaps to tell them what they should do?

“Yes. This is just a very small group of NGOs that keep making the same claims, which are simply baseless and only help them to be on the news. If you look at the arbitration cases brought under the treaty, you will notice that most of them were brought against European countries. Not against low-income countries. The Treaty does not discriminate.”

Q: Media reports last year charged that the Enerchy Charter secretariat has been “misfunctioning” ...

“We had a reorganisation because two countries left the treaty – Russia and Italy. We had to adapt the secretariat and make some cutbacks. Some people had to leave, which they were not happy about. That was the cause of the disturbance. This is nothing new. Other international organisations also underwent restructuring and had to face complaints. We have an external audit every year, in addition to our five-yearly review that took place in 2019, both of which have been positive. Further evidence of the fact that the Secretariat is up and working is the ongoing negotiations on the modernisation of the ECT.”

Q: Italy and Spain expressed strong dissatisfaction with the ECT: they had to pay a lot in damages in arbitration cases brought by investors from Luxembourg or the Netherlands...

“There was a spike in cases, yes, because some countries reformed their support schemes for renewable energy. But most of those cases you mention are not final yet and an increase of arbitration claims does not automatically mean an increase of breaches of the ECT. The Treaty protected renewable energy investments and Governments have to take into account the legitimate interests of investors. But arbitral tribunals have also confirmed the right to regulate and to reasonably respond to changing circumstances in the public interest. This lesson has been learned by both parties. There is less conflict now.”

Q: What if there is no agreement on the modernisation?

“Then I can’t see the treaty survive. If we fail I can’t see how the treaty can continue to serve the interests of its constituencies. But if this happens, how do you protect energy investments? Access to energy is a basic need. The UN has said every person must have access to modern energy

sources. How can you achieve this when there is no proper protection? When there are no rules for transit? If you lose the Treaty, you will lose the functions of this little known instrument which is providing the stability for energy investment in important parts of the world. There is nothing to replace it.”

Q: If the process succeeds, do you think the treaty might attract more members?

“Yes. Countries are looking for this type of instrument. In the Americas, Africa, Asia. More and more countries will join. The Treaty boosts security of supply for importing countries and security of demand for exporters. It is particularly valuable for countries that are not in the highest stage of development. It provides a package deal with rules on production, transit, trade, energy efficiency. They all become part of one regulatory framework which can be used for getting energy to the people. In the end that’s all that matters.”

Q: Do you think China and the United States might join?

“I’m much more optimistic about China. They have concluded the accession reports and are technically ready to ask for an invitation to accede. Now it’s a political decision for them and for the Contracting Parties.”

Q: What is your ideal view of how the treaty may develop?

“For me it is something that I hope will one day become a golden standard for energy cooperation and transit worldwide. A quasi-universal set of rules for cooperation and investment in transit, production and efficiency. I view it as one unique set of rules that will benefit us all, like traffic rules. These are more or less the same all over the world. They don’t tell you where to go, but they do make it safer to travel.”

Q: How have you experienced your job personally?

“What has been challenging for me is that governments have much shorter time horizons than the Energy Charter Treaty. This is a long-term project, a huge intellectual and visionary effort that was started by former Dutch Prime Minister Ruud Lubbers thirty years ago. I am convinced it delivers benefits for all. I feel I am doing an important job with a noble goal.”

Q: What do you expect from the modernisation process?

“The Contracting Parties are in the driving seat. Five years ago they were not ready for this. Now I think they are. In one or two years I expect to have a new treaty that will better reflect the interests of all stakeholders and their constituencies and will positively affect the lives of millions of people. We are making history.”

The interview was conducted by Karel Beckman, a Netherlands-based energy journalist who recently joined Borderlex's pool of contributors.

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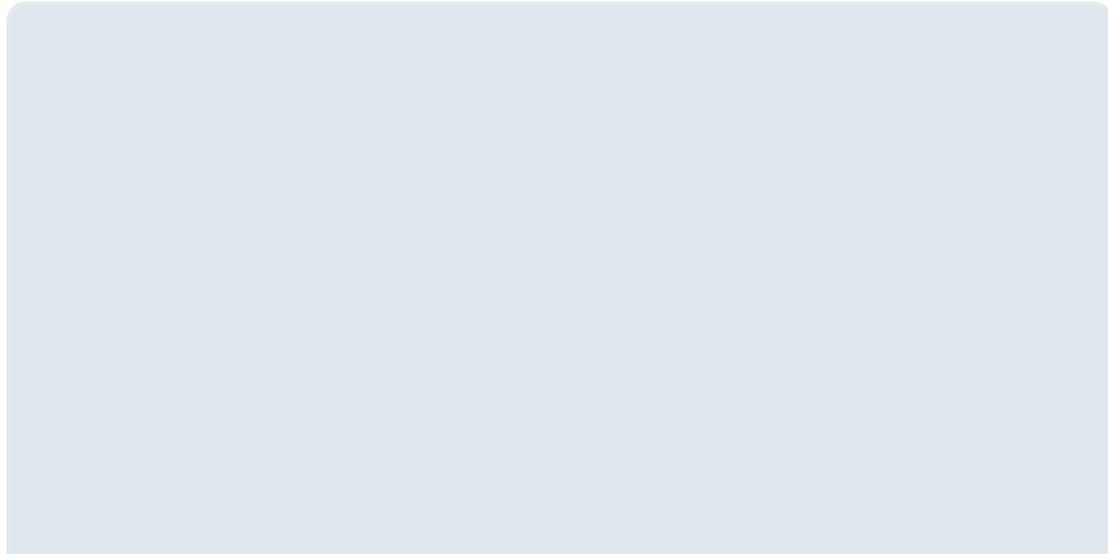
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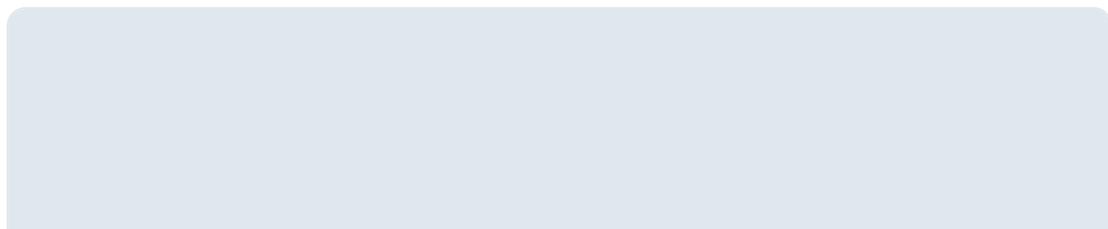
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