

## SERIES OF NOTES ON THE ENERGY CHARTER TREATY

### Note 3

10 March 2014

## THE PROCESS INVOLVED IN INTERPRETING A TREATY With special reference to the Energy Charter Treaty

Introduction .....	1
The General Rule and Means of Interpretation .....	3
Interpretation of Treaties Authenticated in Two or More Languages.....	4
Annex 1 .....	6

### INTRODUCTION

1. It is undisputed that the meaning of any of the Energy Charter Treaty (“ECT”) provisions should be ascertained in accordance with the generally accepted principles and rules of treaty interpretation. This third note in the *Series of Notes on the Energy Charter Treaty* aims to shed some light on the generally accepted principles and rules of treaty interpretation. These rules and principles are essential to the subsequent notes in this *Series*, in many of which provisions of the ECT will be subject to detailed examinations and interpretation.
2. In his seminal work on the subject of treaties, Lord McNair described the duty of the interpreter of a treaty “[...] as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances*.”<sup>1</sup> *Oppenheim* observes further that:

“The purpose of interpreting a treaty is to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen.”<sup>2</sup>

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<sup>1</sup> Lord McNair, *The Law of Treaties*, 1961, p. 365 (footnote omitted and emphasis in the original).

<sup>2</sup> *Oppenheim's International Law*, (edited by Sir Robert Jennings and Sir Arthur Watts), 9<sup>th</sup> edition, 1996, p. 1267.

3. The specific methodology, which an interpreter of a treaty is under duty to follow is codified in Articles 31-33 of the 1969 *Vienna Convention on the Law of Treaties* ("VCLT"). Due to the central importance of these articles to many of the issues examined in the forthcoming notes in the *Series*, and for ease of reference, it is appropriate to reproduce them below.

## **ARTICLE 31**

### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c. any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

## **ARTICLE 32**

### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

## **ARTICLE 33**

### *Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31

and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

## THE GENERAL RULE AND MEANS OF INTERPRETATION

### The General Rule

4. Article 31(1) VCLT provides the foundation of the applicable method of interpretation: good faith, the ordinary meaning of terms, the context, and the object and purpose of the treaty. Accordingly, ascertaining the common intention of the parties to the ECT in their choice of certain terms must be undertaken according to the general rule set out in Article 31(1) of the VCLT.<sup>3</sup>

The methodology of interpretation set out in the chapeau of Article 31 of the VCLT is embodied in one single rule, as is clear from the title of that Article. Describing this method of interpretation according to Article 31, Anthony Aust observes: Article 31 is entitled ‘*General rule of interpretation*’. The singular noun emphasises that the article contains only one rule, that set out in paragraph 1. One must consider each of its three main elements – *the text, its context and the object and purpose of the treaty*.<sup>4</sup>

5. Paragraph 2 of Article 31 of the VCLT enumerates the kind of evidence that may be resorted to in order to establish the context of the treaty.
6. Therefore, a *good faith* interpretation is to be made of the ordinary meaning of that part of the text in dispute, unless “it is established” that the parties intended to give a term a “special meaning” which would not ordinarily be associated with word or terms used (see Article 31(4) above).

### Supplementary Means

7. In contrast to the single rule methodology of Article 31, the language of Article 32 is of a contingent nature. In the process of interpretation it permits recourse to “supplementary means of interpretation, including the preparatory work of the treaty [the *travaux préparatoires*] and the circumstances of its conclusion.”

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<sup>3</sup> This was confirmed in a Statement read by the Chairman at the ECT’s Adoption Session on 17 December 1994. The Chairman noted “that the representative of Norway supported” by other representatives have declared that “[t]he Treaty [ECT] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” For the full Statement of the Chairman, please see Annex 1, Annex I to CONF 115, dated 6 January 1995.

<sup>4</sup> Anthony Aust, *Modern Treaty Law and Practice*, second ed., 2007, p. 234. Emphasis added.

8. This permissive recourse is exercised only where the application of the general rule set out in Article 31 “[l]eaves the meaning ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable” or “to confirm the meaning resulting from the application of Article 31.”

## INTERPRETATION OF TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

9. According to its Article 50, the texts of the ECT have been signed in six languages, including English and Russian, with each text being “equally authentic”.
10. Paragraphs 1, 3 and 4 of Article 33 of the VCLT outline the applicable methodology when issues of interpretation arise with respect to provisions of a treaty “authenticated in two or more languages.” Accordingly, the starting point is that “the text is equally authoritative in each language”; secondly, there is a presumption that “the terms of the treaty ... have the same meaning in each text”; thirdly, “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.”
11. In a long passage, the International Law Commission commented on the mechanism set forth in Article 33, which, due to its direct relevance, is quoted in full:

[t]he existence of more than one authentic text clearly introduces a new element — comparison of the texts — into the interpretation of the treaty. But it does not involve a different system of interpretation. Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the rules set out in articles 27 and 28 [now Articles 31 and 32]. The unity of the treaty and of each of its terms is of fundamental importance in the interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text. This presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another. A term of the treaty may be ambiguous or obscure because it is so in all the authentic texts, or because it is so in one text only but it is not certain whether there is a difference between the texts, or because on their face the authentic texts seem not to have exactly the same meaning. But whether the ambiguity or obscurity is found in all the texts or arises from the plurilingual form of the treaty, the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties. The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, *travaux préparatoires*, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts means that every reasonable effort should

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first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.<sup>5</sup>

12. Anthony Aust elaborates further:

If there are two or more authentic texts the normal rules of interpretation in Articles 31 and 32 [of VCLT] still remain the starting point. Although discrepancies between different language texts can complicate interpretation, *when the meaning is ambiguous or obscure in one text it may be clearer in another, and so there may be no need to attempt to reconcile them.* Paragraph 3 reflects this approach: the terms of a treaty are presumed to have the same meaning in each authentic text.<sup>6</sup>

13. Finally, it is suggested here that an interpreter of the ECT provisions would be well advised to keep in mind the following dictum of the International Tribunal for the Law of the Sea:

[...] [T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*”.<sup>7</sup>

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<sup>5</sup> Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, 1966, vol. II, paragraph (7), p. 225.

<sup>6</sup> Anthony Aust, *Modern Treaty Law and Practice*, second ed., 2007, p. 254, footnote omitted and emphasis added.

<sup>7</sup> *The MOX Plant Case* (Ireland v. United Kingdom), Request for Provisional Measures, Order of 03 December 2001, paragraph 51, International Tribunal for the Law of the Sea, Year 2001.

## ANNEX 1

EUROPEAN ENERGY CHARTER  
CONFERENCE SECRETARIAT

42/94

CONF 115

RESTRICTED

Brussels, 6 January 1995

### NOTE FROM THE SECRETARIAT

Subject: Summary of the Sixteenth Plenary Session of the Energy Charter Conference - Adoption of the Energy Charter Treaty

The Session was held in Lisbon on 16 and 17 December 1994 under the Chairmanship of Ambassador Charles Rutten. Forty eight countries and the EC delegation participated. Two international organisations and one country were represented as observers.

#### 1. Meeting on 16 December

- 1.1 The Conference Chairman opened the Session and explained that its purpose was to confirm the adoption of the text of the Energy Charter Treaty. A very large majority of the participating countries, well in excess of the two-thirds referred to in Article 9(2) of the Vienna Convention on the Law of Treaties, had already given their written agreement to the adoption of the final text circulated on 14 September 1994 (CONF 104). Certain delegations had, however, raised doubts about this written procedure and it was important to ensure that there were no procedural uncertainties.
- 1.2 The Chairman informed the meeting that consultations between particular delegations were still in progress on a few issues of interpretation. Requests from the Russian Federation for additional statements to be included in the Final Act of the Conference had been circulated by the Secretariat (CONF 110, 111 and 113) and these might give rise to requests



## Chairman's Statement at Adoption Session

I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to Making of Investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage.

In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.

Further, the Russian Federation has stated its view that, except where the Treaty expressly indicates a contrary intention, no provision of this Treaty shall derogate from the provisions of GATT 1947 as made applicable by Article 29(2), Annex G and relevant Declarations. This again is clearly the intent of the negotiating parties and a basis for the approach to trade contained in Article 29 of the Treaty.

Having followed the long and difficult discussions on the Freedom of Transfers, I note that certain countries in transition have drawn attention to their interpretation of Decision No.3 which I think to be correct: the rights granted to Investors of other Contracting Parties under paragraph 1(a) of Decision No.3 do not preclude these countries from applying, without derogating from paragraphs 1(b) and (c), (2), (3), and (4) of that Decision, restrictions on movement of capital made by their Investors.

I have also noted the Russian delegation's concerns on nuclear trade with the European Communities. It is clear that as far as the Energy Charter Treaty is concerned, nuclear trade will be governed by Article 29(2)(a), Annex G and the joint declarations, concerning the implementation of the GATT rules by reference. I take note of the fact that the Russian Federation and EC have agreed that a joint memorandum be annexed to the report of our session.

Finally, I note that the representative of Norway supported by the representatives of Armenia, Belarus, Estonia, European Communities and their Member States, Finland, Iceland, Lithuania, Liechtenstein, Kazakhstan, Moldova, the Russian Federation, Sweden, Switzerland and Ukraine have declared that the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.