

International Energy and Resources Law
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THE ENERGY CHARTER TREATY

An East-West Gateway for Investment & Trade

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Introduction
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International Energy and Resources Law and Policy Series

The Energy Charter Treaty

An East-West Gateway for Investment and Trade

Chapter 5

Negotiating the Energy Charter Treaty

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I. INTRODUCTION

The 50 signing parties to the European Energy Charter needed just under three years to negotiate the wording of the Energy Charter Treaty, the legally binding document that gives substance to the political declaration signed in December 1991. This is a considerable achievement, given the scope of the Treaty and the number of negotiating delegations. Timetables, however, were more ambitious and aimed to flesh out the legal requirements within six months of signing the Charter. This target was overshoot by more than two years. Why did it take so much longer than planned to conclude the negotiation process?

Several reasons can account for this.

- The timetables reflected strong political ambitions. First, the tight schedule sought to motivate negotiating partners to reach a speedy agreement. Secondly, the initial high level of enthusiasm for the political objectives of the Charter distorted the perception of how long it might take to settle debates over legal obligations. Rapid agreement on the content of the political statement led participants to believe that a legally binding document could be completed with similar ease.
- Since the Charter was initially promoted as a means for solving many short-term problems of the ailing Eastern energy economies, agreeing upon a legal framework was seen as an urgent task, and the complexity of the undertaking was only realised as precise difficulties began to surface.
- Debating advanced free trade concepts with the delegations of the former Soviet bloc, to whom these were entirely new, and trying to introduce legal principles in countries without an appropriate framework for detailed Western-style legislation are just two aspects of a range of difficulties that accompanied the Treaty negotiations due to the fact that this was one of the first agreements to be negotiated on a multilateral basis with the former Soviet bloc.

¹ This chapter is based on research for the Science Policy Research Unit at the University of Sussex. The author would like to thank her colleagues at SPRU and a wide range of interviewees for their input into this project. The contents are, of course, the sole responsibility of the author.

However, conceptual difficulties of the Eastern delegations were not the only reason negotiation deadlines were not met. The Treaty negotiations were riddled with disputes between the Western delegations as well. Differing legal concepts and traditions within the range of Western signatories led to clashes over the contents and wording of the binding document. Some negotiators felt that the overall willingness to compromise was lowered by including non-European countries within the group of contracting parties. The multilateral character of the Charter, making Charter provisions applicable not only to West-Eastern trade but also to West-Western trade, gave rise to further disputes during attempts to tally the Charter Treaty with existing Western agreements.

This chapter examines the different stages of the Energy Charter Treaty negotiations in order to assess the key factors responsible for delaying the negotiation process, and analyses the evolution of political objectives throughout the Charter negotiations.

II. THE FIRST STAGE: INTEREST IN THE "LUBBERS PLAN"

In the general euphoria following the opening of Eastern Europe, the Dutch Prime Minister, Ruud Lubbers, proposed to create a "European Energy Community" with Eastern Europe at the summit of the European Council in Dublin in June 1990.² Lubbers hoped that intensified trade relations and co-operation in the energy sector could secure democratic restructuring in the former Com-econ countries and act as an engine for their economic revival. Furthermore, he expected the Charter to enable all parties to "capitalise on the complementary relationship between the European Economic Community, the USSR and the countries of Central and Eastern Europe".³

This proposal was in the interest of all sides to be included in the agreement. To the East, an energy trade and investment regime with the West could facilitate access to Western capital, expertise and technology, so as to improve the performance and environmental standards and safety of their energy economies. To the East European states dependent on Russian oil and gas resources and nuclear expertise, opening stable trade links with the West could help to reduce the risk involved in a one-sided dependency on the Russian Federation. Russia hoped the Charter could help to draw Western capital into its ailing oil industry, thus securing stable exports and a steady flow of hard-currency earnings vital to the Russian economy. The energy-rich Central Asian Republics additionally hoped to become energy exporters in their own right by attracting Western capital to develop their energy resources. This source of hard currency earnings could offer them the prospect of genuine independence from Russia. An internationally supervised transit regime could further secure the flow of Central Asian resources to Western hard currency markets. Moreover, political motivation was high to support the Charter. To the East European states and the former Soviet Republics, the Energy Charter was the first multilateral trade document they had the opportunity to negotiate in the post-communist era.

² COM (91) 36, p. 2

³ *Ibid.*

Through the proposed energy co-operation, West European countries saw the chance to secure access to Eastern markets for their energy industries. The opportunities for investment, in particular in the former Soviet Union, are vast but market access is limited. In addition, the unfavourable legal and fiscal climate in Russia, disputes over the delineation of power between the central and regional administration in the autonomous regions of the Russian Federation, unclear legal status of energy resources and the danger of transit disruption in Central Asia, plus political and economic instability throughout the area present strong barriers to Western investment. The governments supporting nuclear industry also hoped that the Energy Charter could facilitate efforts to refurbish and retrofit nuclear power plants based on Soviet technology to meet Western safety standards and thus help to improve the image of nuclear power.

To many countries in Western Europe, the Energy Charter also offered the prospect of securing long-term energy flows from the former Soviet Union. In particular within the EU, gas import dependency is increasing, and most countries remain highly dependent on non-European oil imports, with oil accounting for approximately 44 per cent of the EU primary energy balance.⁴ In view of rising instability in the Middle East after the Iraqi invasion of Kuwait and, then, in Algeria - with intensifying conflicts between the government and Islamic fundamentalists - securing future oil and gas supplies from other regions had again become an important task for the EU and many of its member states. Despite the low price of oil, security of supply policies provided an important rationale of the EU and its member states for encouraging an Energy Charter.⁵ Since the Charter both supported a stable transit regime for energy supplies from the East and helped to maintain the export capacity of the former Soviet oil and gas sectors, most EU countries were convinced it could improve energy supply security in Europe.

Last but not least, enthusiasm for the Energy Charter proposal was based on the genuine desire of the West to support democratic reform and restructuring efforts in the former communist states, and the East to forge stronger ties with the West. Accordingly, when official steps were taken towards drafting a European Energy Charter in November 1990, the project was welcomed by governments throughout Europe.

III. THE SECOND STAGE: AGREEING ON THE EUROPEAN ENERGY CHARTER

With European countries from the West and the East in support of the wide-ranging and potentially beneficial document, motivation ran high, and it was quickly agreed to convene a conference at which the precise contents and nature of the Charter could be debated. A draft text put forward by the European Commission in February 1991 was to serve as a basis for discussion.

The European Energy Charter was set out as a strictly European exercise,

⁴ International Energy Agency (1994) *Energy Balances of OECD Countries 1991-1992* Paris: OECD, p. 77

⁵ D'Amarzit, P. (1993) "European Energy Charter: The Road to the 'Lisbon Treaty'", *Energy in Europe* Vol. 21 (July 1993), pp. 22-23; the need for increased security of energy supplies was also stressed in COM (91) 36, p. 2.

and several non-European OECD countries were not willing to accept such a design. The USA in particular understood the Charter to be an attempt by Western Europe to monopolise access to Eastern resources and markets, and were keen to secure access to these markets for US companies. Underlining the global nature of energy markets and pointing towards the financial power and technological expertise of US and other non-European enterprises, the USA lobbied strongly for an expansion of the Charter framework to include the non-European OECD countries.

US participation was warmly welcomed by many countries due to the importance of both the US energy industry and the USA as a trade partner. However, other countries - in particular France and Belgium - insisted as a matter of principle that the Energy Charter should remain within its original European framework.⁶ Spain took a third position, arguing that the Charter Conference should also invite the states of North Africa, which are important energy suppliers to the EU. It was finally agreed to invite the US and the remaining non-European OECD countries - Canada, Japan, Australia, and New Zealand⁷ - as full-fledged participants to the initiatory Energy Charter Conference held from 15-17 July 1991. This was in part so that the Charter could not be interpreted as an act of European protectionism, but also acknowledged the importance and the financial strength of the OECD energy industries. Other states, such as representatives of OPEC and the Maghreb countries, were granted observer status to the Charter Conference. A complete list of negotiating parties to the Charter is given in Box 1 (see opposite).

Spurred by the Dutch government, which was determined to finalise a non-binding policy declaration under its EU presidency during the second half of 1991, the Energy Charter was concluded within five months and was signed in December 1991. It was decided to supplement the Charter with a Treaty to set out the general rules of trade and cooperation, and with several specific protocols covering individual energy carriers or specific fields of cooperation. All supplements were to be legally binding documents, and priority was given to negotiating the Charter Treaty plus protocols on nuclear, energy efficiency, and hydrocarbons. The rapid conclusion of talks on the political statement gave rise to hopes amongst delegates that negotiations to the legally binding documents could be completed with similar ease, and an informal deadline for completing the Charter Treaty was set for the summer of 1992. However, translating the political intentions into a legally binding document proved to be a lengthy and contentious procedure.

IV. THE CHARTER TREATY NEGOTIATIONS

1. Focus on the West

At first it was decided to draft the Energy Charter Treaty and the protocols covering nuclear issues, energy efficiency, and hydrocarbons in a parallel pro-

⁶ European Energy Report (EER), *East Europe Supplement* 9:2 (May 1991).

⁷ At the time, Mexico had not yet joined the OECD and since has not become involved in the Charter process.

Box 1: List of negotiating parties to the European Energy Charter and its Treaty

OECD Countries			
Australia	Finland	Italy	Spain
Austria	France	Japan	Sweden
Belgium	Germany	Luxembourg	Switzerland
Canada	Greece	Netherlands	Turkey
Denmark	Iceland	Norway	United Kingdom
European Union	Ireland	Portugal	United States
Former Centrally Planned Economies			
Albania	Czech Republic	Latvia	Slovak Republic
Armenia	Estonia	Lithuania	Slovenia
Azerbaijan	Georgia	Moldova	Tajikistan
Belarus	Hungary	Poland	Turkmenistan*
Bulgaria	Kazakhstan	Romania	Ukraine
Croatia	Kyrgyzstan	Russia	Uzbekistan
* Turkmenistan belatedly joined negotiations to the Charter Treaty.			
Others			
Cyprus	Liechtenstein	Malta	

cess. This soon turned out to be too complicated, either because delegates could not agree on the nature of the protocols, or because the legally binding issues raised during the protocol negotiations touched upon the fundamental principles of the Energy Charter Treaty and could not be resolved in the protocol drafting forum.

Due to the multilateral character of the Energy Charter, it was impossible for its *nuclear protocol* to bypass the legal obligations most signatory states would be subject to under the Nuclear Safety Convention of the International Atomic Energy Agency (IAEA). It also turned out that the Charter Treaty text itself would contain more precise details that were likely to govern the nuclear protocol. Therefore, negotiations to the nuclear protocol were in effect put on hold in late 1992 to await the finalisation of both the IAEA Convention and the Charter Treaty. If this protocol is completed and turns out to be legally binding, there is little doubt it will be primarily guided by the IAEA Convention.

The *energy efficiency* protocol is formally a legally binding document, although its nature is more that of a political declaration, requiring "best efforts" to encourage energy efficiency, and doing little more than paying "lip-service to environmental protection".⁸ The weak character of this protocol is presumably why negotiations presented no major difficulties. In June 1992, the energy efficiency protocol was the first legally binding element of the Charter to be completed, and was the only one to be completed in time.⁹

⁸ The statement of an EU observer as quoted in *EC Energy Monthly* (ECE) 53:9 (May 1993). See also US Council for International Business (1993), *The European Energy Charter: Status Report and Analysis*, p. 4

⁹ ECE 43:9 (July 1993).

Negotiations to the *hydrocarbon protocol* proved to be much more contentious. First of all, on the transportation of energy products, the draft hydrocarbon protocol wanted "contracting parties to ensure that any capacity in existing pipeline systems will be offered to interested investors under fair terms and conditions".¹⁰ This provision aimed at ensuring stable transit conditions for energy products. Many EU member states, however, protested, since this wording was seen as an attempt by Brussels to introduce third party access (TPA) into European energy markets through the back door.

At the time the Charter was proposed, the European Commission had just put forward a proposal to introduce TPA as an instrument of market liberalisation which was met by opposition from most major European electricity and gas utilities. In the relatively mature markets of Western Europe, up-front investments for pipeline construction have been largely amortised, and the predominantly monopolistic organisation of European gas transmission and distribution is highly profitable for transmission companies. Accordingly, representatives of the European gas industry raised complaints against a Treaty in favour of TPA, fearing that the Charter might force pipeline owners to grant their competitors access to distribution grids. This unresolved debate was imported into the Charter negotiations, although the Charter article in question dealt with international transit rules rather than issues of national access to distribution grids. At times, major European gas companies stated more or less open hostility to the Charter, and the atmosphere of the negotiations threatened to be tainted by ardent opposition to anything that hinted at TPA.¹¹

As EU debates on mandatory TPA evolved, the alternative and much less daunting concept of negotiated TPA emerged, and within the Charter forum, negotiations could refocus on transit issues. To avoid all confusion, a ministerial declaration was annexed to the Treaty to specify that the Treaty would not oblige any party to introduce mandatory TPA.¹²

The second contentious issue raised by the draft hydrocarbon protocol pertained to one of the key articles of the Energy Charter Treaty. Many parties were unhappy that the initial draft protocol presented by the chairing Norwegians did not do justice to the Charter principle of non-discrimination against foreign investors, but upheld the right of governments to exercise sovereignty over their hydrocarbon resources. In fact, it was noted that drafts "looked so close to official [Norwegian] government policy that it was impossible to tell the difference".¹³ Norway has generally granted the majority of production licences for oil and gas in the North Sea to the state-owned company Statoil. In most cases, Statoil receives at least 50 per cent of the production licences, and this share is often exceeded. In the Troll development, for example,

¹⁰ Excerpt from the *Hydrocarbon Protocol* as reported by East European Energy Report (EEE) 3:2 (December 1991).

¹¹ An example of such hostility can be found in a statement by Ruhrgas presented at the International Conference on the European Energy Charter: A challenge for European Economies, The Hague, 13 December 1991. Ruhrgas later turned out in favour of the Charter. Czernie (1993) "Zusammenarbeit zwischen Ost und West, Erwartungen an die Energiecharta aus der Sicht der Ruhrgas AG" presented at the SAEF Annual Meeting in Zürich, 20 October 1993.

¹² Final Act of the European Energy Charter, p. 6 (17 December 1994).

¹³ *Energy Economist* 135:1 (January 1993).

Statoil's share amounts to 74.6 per cent.¹⁴ Competitive procedures have only applied to a fraction of Norwegian exploration and production licences. Sanctioning such practices under a Charter that was intended to support non-discrimination of foreign investors was unacceptable to other Western negotiating parties.

After a brief round of talks aiming to improve the overall draft hydrocarbon protocol, it was agreed that the issues covered within the protocol touched closely upon the fundamental principles of the entire Treaty, so that they should be debated in the overall Charter Treaty forum. Talks on the hydrocarbon protocol were suspended, and since most issues pertaining to trade and investment in the oil and gas sectors are deemed to be sufficiently covered in the Charter Treaty, it is unlikely that such a protocol will ever be concluded.

2. Debating Investment Promotion and Protection

The debate on non-discrimination of foreign investors having thus been imported into the main Treaty talks, negotiations quickly focused on this issue. The overall objective of the Charter Treaty had been to introduce an article guaranteeing mutual non-discrimination between all contracting parties. This aim was reflected in the drafting of an investment promotion and protection regime based on the principle of *national treatment*, according to which signatories are to treat investors from other contracting parties on the same basis as domestic investors. This article would outlaw granting privileges to national companies. After initial debates, most parties agreed that national treatment should provide the basis for all stages of investment, that is, both for *granting investors access to markets*, for example in licensing rounds or calls for tender (pre-investment, this is defined in the Charter Treaty as "making investments"), and for *treating investments established* in a country (post-investment). Exceptions were to be allowed at the pre-investment stage, but only if they were based on existing national legislation.

National treatment as a guiding principle for making investments was adopted as a Treaty principle corresponding to the US priority of securing access to markets for US companies. The concept is based directly on the US prototype bilateral investment treaty, which also allows for a list of exceptions to be added to pre-investment national treatment.¹⁵ Other West European and OECD countries have tended to focus more on ensuring that once investments have been made in a country, investors are treated no worse than domestic companies. Most countries maintain that the concept of post-investment national treatment is more relevant than that of pre-investment national treatment, since investment is more likely to be encouraged if investors can be sure that their investment is not discriminated against once it has been made. The US approach, however, sees non-discriminatory access to market as the key to promoting investment activity. According to observers, the principle

¹⁴ *Petroleum Economist* (November 1993) p. 5.

¹⁵ US Council for International Business, *The European Energy Charter: Status Report and Analysis* USCIB, New York, 1993, p. 3.

of pre-investment national treatment was more important to the USA than participation in the Charter negotiations. Since by then many countries, including Russia, considered US participation to be vital for a successful Treaty, national treatment at the pre-investment stage was embodied within the draft Treaty.

The Norwegian delegation was particularly unhappy about this move, and made several attempts at softening the obligations while emphasising explicit recognition of sovereignty over energy resources within the Energy Charter Treaty. This reflected the argument Norway was using at the time to oppose the EU Hydrocarbons Licensing Directive during negotiations to Norwegian accession to the EU. The Hydrocarbon Directive aims at liberalising access to oil and gas field development in the EU and, like the Energy Charter Treaty, could have endangered Statoil's privileged position in access to energy resources on the Norwegian Continental Shelf.¹⁶ Since Norwegian licensing practices are not based on explicit legal discrimination, Norway would have been unable to add these as an exception to pre-investment national treatment as proposed in the Charter Treaty. One suggestion was to exclude the Continental Shelf - where most of Norway's energy resources are located - from the geographical area covered by the Charter Treaty, a proposal that was silently shelved after receiving no support from other negotiating parties.¹⁷ Norway's position on pre-investment national treatment was often mentioned as a major stumbling block to progress during the Charter Treaty negotiations. However, Norway was not the only country opposed to pre-investment national treatment, it was merely the country to articulate its objections most openly.¹⁸ The investment promotion and protection clause soon also gave rise to covert but intense behind-the-scenes wrangling between Western delegations.

Many perceived the incorporation of pre-investment national treatment into the Treaty as a manifestation of US tendencies to use its bargaining power to force certain provisions on to the negotiating table. France and Belgium had already opposed US participation in the Energy Charter and were annoyed that the USA could influence the Charter Treaty contents to an extent that might make it impossible for other participating countries such as Norway either to compromise or to sign the Treaty. Several participants in the Treaty talks observed that there was an underlying conflict between the USA and France throughout the negotiations. France was unwilling to let the USA gain any ground, and if the USA was adamant on certain positions, this led to unavoidable clashes between the USA and the EU delegation through which France was channelling its complaints. As a result, one official noted that delegations often ended up behaving like "obstinate children" in their refusal to compromise.

It is worth remembering that during the first two years, the Charter Treaty negotiations were being held at the same time as the GATT trade talks. Hence, underlying conflicts between the USA and France were closely linked to these wider trade issues. The GATT talks were characterised by constant rifts between France and the USA, and debates reflected a deep-rooted antagonism

¹⁶ ECE 58:8 (October 1993).

¹⁷ ECE 59:4 (November 1993).

¹⁸ In the Draft Version of the Charter Treaty dated 5 October 1993, p. 29, seven delegations, including the key parties the US, the EU and the Russian Federation, expressed their reserve on the suggested article on investment treatment pertaining to national treatment.

over the belief in free markets in the Anglo-Saxon world versus French-style dirigisme. Arguments presented by both sides were not necessarily based on problems germane to actual trade proposals. France frequently opposed US negotiating tactics, and its code of conduct for GATT sometimes boiled down to the rule: "if there is retaliation, there must be counter-retaliation."¹⁹ Top French politicians more generally asserted that the end of the cold war had "unleashed a new arrogance of American diplomacy that must be resisted by a 'Europe First' Policy". Even though these tough anti-US statements are not necessarily sincere, there is no denying the distinct animosity between the USA and France over trade issues. This atmosphere of hostility was imported into the Charter Treaty negotiations.

Crucially, both France and the USA had significant leverage over the Charter talks to effectively obstruct talks. The USA was in a strong position because the EU considered it to be a vital participant in the Charter negotiations, and because Russia was interested in finalising the Charter Treaty with the US to give the document more political weight. France on the other hand gained its leverage by being a member state of the EU. Since an EU delegation negotiated the Treaty on behalf of the individual member states, a common position on Charter provisions had to be found in advance between all EU member states. If one state refused to adopt this common position, the EU was incapacitated. Hence, even if there was no formal right for individual countries to veto decisions, one EU country could considerably disrupt the negotiation process.²⁰ As the initiator of the Charter, the EU would have tried to avoid such a situation and would seek to integrate all positions within its common negotiating stance.

Also, the Energy Charter Treaty negotiations were directly linked to the GATT talks, since – based on a US proposal – trade in energy materials under the Treaty was to be governed by GATT rules. This was accepted by most participants, since it sufficiently reflected the free trade aspirations of the Charter, but also because negotiating an additional set of trade rules might have considerably prolonged negotiations. The countries of Eastern Europe were particularly supportive of introducing GATT provisions into the Charter Treaty, since they hoped that the Charter would represent a first step for their economies towards becoming integrated within this international trade regime.

As West-Western conflicts persisted in the background, the deadline for concluding the Charter Treaty was continuously postponed, and the original purpose to help the economies of the former Soviet Union and Eastern Europe seemed lost. The Treaty negotiations appeared to be making no significant advances, several observing groups lost interest in the negotiation process, and New Zealand dropped out of the negotiations altogether.

3. Focus on the East

Other factors were also presenting obstacles to progress. The complexity of the entire Energy Charter Treaty undertaking was becoming obvious, and

¹⁹ Jean-Pierre Soisson, French Agricultural Minister, as quoted in *The Independent* 7 November 1992, p. 10

²⁰ P. D'Amarzit, personal communication (16 December 1993).

negotiating parties were becoming increasingly disheartened over the difficulties encountered in drawing up a legal text acceptable to all sides. Furthermore, problems with the delegations of the former Soviet bloc were becoming ever more apparent. Although the Eastern delegations expressed their support of the main principles of the Treaty: non-discrimination, national treatment, the prevalence of market forces, and the national sovereign rights over energy resources,²¹ they appear to have had certain problems in understanding precisely what these terms and principles mean, and what legal implications they carry with them.

In the case of non-discrimination of foreign investors, the Eastern countries also felt unable and reluctant to implement a national treatment clause immediately, since they had no significant experience in accommodating foreign investment, especially in the energy sector. In many cases, appropriate legislation did not exist or was being discussed, and some governments were also facing nationalistic opinions fearing economic domination of Western private investors. Western parties and the Energy Charter Secretariat spent a lot of time explaining basic Charter concepts to representatives of the former Comcon states. In addition, the ambition to introduce specific legal principles in countries with no appropriate framework for detailed Western-style legislation was proving increasingly unrealistic.

This was highlighted as negotiations refocused on the concerns of the former centrally planned economies in mid-1993, as it became apparent that many of these states would not be able to sign up to key Charter commitments. Eastern delegations had applied for transitional status on several articles central to the Charter, which would allow these countries to adopt certain provisions at a later date to be specified in the Charter Treaty.²² This difficulty emerged in the midst of a political crisis in the Russian Federation, with relations between President Yeltsin and his conservative Parliament deteriorating rapidly. In an endeavour to at least reach a conclusion between the major negotiating parties - the EU, the Russian Federation, and the US - in order to signal support of the reform process in Moscow to the Russian Parliament, a two-stage Charter was proposed, in which the central actors would sign a full treaty to which other "less relevant" countries could add their signature whenever they were ready to do so.

However, this approach did not come to fruition, as the Russian Federation itself requested open-ended transition periods on many of the main Charter articles. Crucially, the Russians wanted to postpone subscribing to the key article on the promotion, protection and treatment of investments, which enshrines the main Charter principle of non-discrimination.²³ Although the Russian delegation stressed its support of the national treatment principle, it did not see itself able to undersign this commitment without sufficient national legislation in place to guarantee compliance with the Charter and without full parliamentary endorsement of the major investment principles.²⁴ It would have been useless or even counterproductive for the Russian delegation to sign up

²¹ ECE 56:13 (August 1993).

²² ECE 53:8-9 (May 1993).

²³ *Ibid.*

²⁴ ECE 56:13 (August 1993).

to a Treaty that would not be welcomed, much less ratified by Parliament. The Russian position caused a deadlock of negotiations over the summer months of 1993.²⁵

In a major diplomatic effort to accommodate Russian difficulties, the EU then put forward a novel proposal during the plenary session in October 1993, which suggested a new two-stage approach to the signing of the Charter, in which national treatment in the pre-investment stage would be postponed for a three year period. During this period, aimed at giving Russia, the other former Soviet Republics and Eastern Europe time to devise new energy and investment laws, market access for all contracting parties would be based on a most favoured nation (MFN) status. MFN status obliges a host country to treat the investor of a contracting party no worse than the most favoured of any third investing country. A pledge not to increase discriminatory practices and legislation and an obligation to participate in negotiations to a second Treaty would also be part of a first Treaty. National Treatment would only apply to the post-investment stage, i.e. once foreign investors of Treaty signatories had become established in the host country.

This EU proposal was greeted enthusiastically by the Russian delegation, which was becoming increasingly eager to see a final Treaty. The Energy Charter was being used as a tool for domestic policy in Russia. Supporters of a reform course in Russia were more determined to bring the Charter to a conclusion, hoping that signing a document with such a wide range of Western actors was bound to have some impact on domestic struggles. If a reform-oriented government were able to come up with a document suiting the Federation on terms that both government and Parliament could accept, the government then could have proven that Western support and advantageous documents can be secured if reforms are upheld. However, this also meant that the Russian delegation had to elicit terms to which Parliament could agree. The Russian delegation therefore needed to include the Parliament in the decision-making process by insisting on the opportunity to pass laws before signing up to specific obligations through the Charter and thus indirectly precluding parliamentary action.

The new EU approach was also welcomed by other West and East European participants in the Charter negotiations. However, US, Japanese and Norwegian responses were reserved. According to US officials, the EU proposal did not provide the access to market guarantees necessary to promote investment in the area. Some observers predicted that the second Treaty would never be completed, since delegations would only be required to *negotiate* but not to sign a second Treaty. They also noted that the EU advance gave the newly independent states a virtually blank cheque to introduce discriminatory legislation, since these countries could later state discriminatory rules as exceptions to national treatment after the period of three years. Some also feared that the lack of immediate legal commitments would encourage local authorities in the Russian Federation to continue with capricious decision-making towards Western investors in the pre-investment stage.²⁶

²⁵ *Ibid.*, ECE 55:14 (July 1993); ECE 57:6 (September 1993).

²⁶ At the time there were numerous cases in which Western companies, which had felt sure of a certain deal on exploration rights or had even obtained these rights, were suddenly told by

Others, among them most EU officials, were optimistic that the EU proposal represented a breakthrough, and believed that they had "created the necessary dynamics to permit rapid progress in remaining problems".²⁷ They hoped their proposal would focus the minds of negotiators on bringing the Treaty talks to a conclusion. Europe was keen to show clear support for reforms in Russia in view of an intensifying political crisis, but EU hopes that the Treaty could be rapidly finalised were also grounded on explicit self-interest. The EU and its Commission were the initiators of the Charter process, and had used the Charter to demonstrate that Europe was capable of taking the lead in international politics. The Commission remained an important actor in pushing the negotiations, and continually expressed its aim to "hold on to the initiative".²⁸ It had thus taken on public responsibility for the progress of the Charter and was eager to see the Charter Treaty finalised as soon as possible. If talks had become bogged down for another few years, as many observers feared before the EU proposed a two-stage signing process, the European Commission would have been discredited especially in the eyes of other negotiating parties.

V. THE FINAL STAGE: THE COMPROMISE TREATY

EU hopes for a speedy conclusion did not fully materialise. During a plenary session in mid December 1993, most delegations agreed in principle to use the EU approach as a basis for finalising the Treaty text. However, detailed proposals tabled by the EU caused further disputes on the commitment to MFN status for investments from all contracting parties.²⁹

French delegates argued that, if MFN were to be an obligatory commitment for the first stage of the Treaty, the reciprocity of access to resources and markets would not be guaranteed.³⁰ In some Western countries, MFN status gives investors de facto national treatment, since most favoured foreign investors have been granted national treatment. If MFN status were to be a compulsory Charter provision, more liberal countries would be ensuring national treatment for all investors without receiving national treatment in return. On the other hand, if MFN were not obligatory under the Treaty, not much would have been gained in terms of encouraging investment activity, the original purpose of the Charter, since investment provisions would be virtually unchanged. The USA, on the other hand, continued to insist that it would only accept a Treaty including full national treatment, and one official figured that

footnote contd.

authorities that the deal would be going to Russian companies. For example the Russian company Rosshelf was awarded a deal in the Barents Sea that was previously to go to Conoco (EEE 16:10, January 1993), and there are continuing debates over exploration rights on the Far Eastern island of Sakhalin (International Gas Report 197:4, February 1992, Power in Asia 140:22, December 1993).

²⁷ Dutch Ambassador Rutten, chairman of the Energy Charter plenary session, as quoted in "Les négociations sur le traité...", *Agence Europe*, 13 October 1993.

²⁸ COM (93) 56 final.

²⁹ "European Energy Charter Conference - December Plenary" Press Notice released by the European Energy Charter Secretariat, Brussels, 20 December 1993, p. 2.

³⁰ ECE 60:9 (December 1993).

the USA would rather delay negotiations further and "get it right the first time" than sign up to the two-stage process.³¹

The US delegation stood virtually alone with its concerns, and since it put the conclusion of the entire Charter Treaty at risk, the US position was not heeded. Both the EU and the Russian Federation were unwilling to abandon the suggested compromise or further delay negotiations just to find a solution more acceptable to the USA. Hence, it did not come as a surprise that after the October 1993 plenary, when there was an acute danger of the USA withdrawing from the Charter Treaty altogether, the EU and Russia did not appear to be severely shaken. To them, this was preferable to not signing the Treaty at all. The European Energy Charter Secretariat indicated that "you need Russia and the EC [to have a Treaty], and you hope you have the US as well",³² a position that was reinforced by another official quoted as saying: "The message is clear. Russia is ready to sign as soon as possible, and whatever happens the Community is ready to sign."³³

In contrast to US worries, French concerns were considered in the ensuing debate, since they did not threaten to disrupt Russian and EU aims. They did, however, lead to a further watering down of Charter provisions on investment treatment by causing the shift from mandatory to voluntary MFN. But apparently, negotiating parties were willing to take this into account. The EU explicitly stated that "it would be inadvisable to risk the success of the Charter negotiation process over the single issue of access to investment".³⁴ Apparently, other delegations agreed, since they approved of using the EU proposal as a basis for finalising the Treaty text. The compromise Treaty now requires signing parties to "endeavour" to grant foreign investors MFN or national treatment, whichever is better, for the pre-investment stage. Hence, in order to bring the Charter to a rapid conclusion, Treaty contents were watered down, difficulties concerning investment promotion and protection were not solved, and problems between Western countries have merely been postponed.

The USA decided not to make real its threat of leaving the negotiating table altogether, and in mid-December 1993 accepted the EU two-stage approach. However, the US decision to conclude the Treaty "on European conditions" was made at the highest political level and followed shortly after the Russian parliamentary elections of December 1993. Apparently, the state department conducting the negotiations on behalf of the USA was not happy with this decision.³⁵ Presumably, the US government had also succumbed to the position that signals of support for the Russian Federation were more important than the strength of the Charter Treaty.

After agreeing on a two-stage process for completing the Charter Treaty, a host of additional difficulties still needed to be resolved between the USA and the other Charter participants. One such problem was how the Charter Treaty handles regional economic integration organisations (REIOs) such as the EU. The Charter ensures that preferential treatment granted to, for instance,

³¹ US official quoted in ECE 60:9 (December 1993).

³² ECE 58:4 (October 1993).

³³ Quoted in ECE 60:9 (December 1993).

³⁴ COM (93) 542 final, p. 3.

³⁵ ECE 61:15 (January 1994).

member states within the EU, is exempt from national treatment, so that the Charter cannot be used to extend this preferential treatment to other signing parties. The USA resolutely opposed this article protecting economic integration agreements on the grounds that it could be used to maintain or even to raise existing barriers to investment. After the EU delegation clarified that this article would not be used to raise overall barriers to trade, but was needed to prevent non-member states from being drawn into the European integration process, the USA accepted special treatment of REIOs in general, but remained unhappy with the wording of the clause, contending that it would still allow one EU member state to raise trade barriers if another member state opened its markets, since this could count as a net market liberalisation.³⁶ The USA was also concerned that this clause could set a precedent for an OECD-wide investment agreement due to be negotiated, although the Final Act of the Treaty maintains that "the provisions of the Treaty . . . cannot be construed to constitute a precedent in the context of other international negotiations".³⁷

The USA was also opposed to a Treaty article requiring sub-national authorities to observe Charter Treaty rules, meaning that the Treaty can in effect override legislation at a state level. US officials argued that Congress would never ratify an agreement that runs counter to the US federal structure. This article, however, was considered an absolute necessity for a successful Treaty, since Russia - along with several other Treaty signatories - has state legislation which may be opposed to national law as required by the Treaty. A compromise for US states might have created a precedent, giving regional authorities in the Russian Federation justification to ignore Treaty provisions. Such a step would have offset most gains made by the Charter Treaty in fostering investor confidence in Russia.

A further problem for the USA was the fact that the Charter Treaty would have forced the USA to abandon national discriminatory trade practices. The prime example for this is the Jackson-Vanik amendment to the US Trade Act of 1970, which submits the MFN status of a number of US trade partners to yearly renewal. Initially founded on the criterion of the emigration policy of the partner country, the amendment is currently also implemented on the basis of other economic and political criteria. Most Central European countries and former Soviet Republics are on the amendment's list and removing automatic MFN status from these countries would undermine the Treaty trade provisions. An exception for the USA on such a wide-ranging provision was unacceptable to other negotiating parties.

While delegates were attempting to clarify these points in intense bilateral talks, rising political pressure to finalise the Treaty negotiations led the EU to insist that the June 1994 plenary session would be the closing round of negotiations. Some scope was left for clarifying remaining bilateral problems in last-minute talks before sending out a final text to all negotiating parties in September 1994. Hence, at their Corfu summit in June 1994, the EU and Russia could clarify issues concerning the trade in nuclear materials. Russia wanted nuclear trade to fall under the national treatment provisions of the Treaty, thus opening the European market to cheap Russian uranium. The EU and Russia

³⁶ ECE 67:2 (July 1994).

³⁷ Final Act of the European Energy Charter Conference, p. 6.

finally agreed that a separate document governing the trade of uranium will be negotiated by 1997.³⁸ Apart for the US-Russian disagreement over the Jackson-Vanik amendment, all of the remaining problems were between OECD countries.³⁹ The Charter Treaty was finally sent to negotiating parties as a "package deal" which parties could either accept or reject. This strategy was a risky but successful way for finding compromise solutions to most of the sticky issues between countries unhappy about certain details but in principle willing to sign the Treaty.

However, the USA remained unwilling to support certain elements of the Treaty, and restated it would prefer to continue negotiating until the agreement was acceptable to the US delegation.⁴⁰ Reopening negotiations on behalf of the USA was not a politically viable option for the EU, and most contracting parties seemed willing to take a US refusal to sign the Charter Treaty into account, given that negotiations were not likely to become any less complex if continued, and were unlikely to result in a better deal.

The USA did not officially disclose whether it was planning to sign the Charter Treaty until the Lisbon signing ceremony in December 1994. In late November, a US spokesman was still quoted saying "We have not yet agreed to sign, but that does not mean that we have decided not to sign."⁴¹ Finally, the USA decided not to sign the Energy Charter Treaty, which was endorsed by 42 negotiating parties on 17 December 1994.

Given the overall standing of the USA and the dynamics of the Treaty negotiations, this does not come as a surprise. The USA was unhappy with many of the Treaty provisions throughout the negotiations, and when, at the time of signing, the *political* weight of the Treaty in support of reforms in Russia was negligible, in particular after the beginning of Russian military intervention in Chechnya, the key reason for the USA to subscribe to the compromise Treaty had virtually disintegrated.

The USA had all along been trying to include concepts and provisions in the Treaty that corresponded with provisions generally granted in US bilateral investment and trade agreements. In signing the Treaty, the USA would have had to concede to less discriminatory practices (such as giving up the Jackson-Vanik amendment) and would have had to do without national treatment in the pre-investment phase. The US decision to finally give up their adamant position on investment treatment - one of the key arguments used to oppose the EU compromise in 1993 - was made on the basis of political considerations. Once these reasons had disintegrated, there was no reason for the USA to go ahead with the compromise Treaty the US state department found unsatisfactory.

Removing national treatment for making investments from the Treaty was the key reason for the USA to decline signing the Charter Treaty. Although the issues formally put forward as the only remaining US difficulties - the treatment of REIOs, the observation of Treaty provisions by sub-national authorities, and the Jackson-Vanik amendment - no doubt contributed to the

³⁸ ECE 72:3 (December 1994).

³⁹ ECE 67:1-3 (July 1994), *Europolitique* 15 June 1994.

⁴⁰ *Europolitique* 14 October 1994; *Agence Europe* 14 October 1994; *Europolitique* 19 October 1994.

⁴¹ *Telexpress*, 22 November 1994.

decision, it is unlikely that they alone provided sufficient grounds for the US to reject the Treaty. As the US government statement made at the signing ceremony of the Treaty in Lisbon argued, "the issues to be discussed in the supplementary treaty [pre-investment national treatment] are vital to our commonly shared goal of promoting foreign direct investment in the energy sector. (. . .) One of the keys to increasing this investment remains the establishment of a sound legal basis, such as that contained in the bilateral investment treaties negotiated between the United States and many of the countries represented here."⁴² As noted earlier, pre-investment national treatment was brought into the Treaty negotiations on US insistence, based directly on standard US bilateral trade and investment treaties.

VI. CONCLUSION

The negotiating history of the Energy Charter Treaty shows that the agendas of the main negotiating parties were not cast in stone. Positions and negotiating behaviour evolved during the negotiation process, and the outcome of the Treaty can be attributed as much to these later positions, interests and goals as to the initial negotiating stances and expectations of the participating countries. All countries supported the Treaty from the outset, but as the political climate changed, reasons for support changed, and finally most negotiating parties were content with a "softer" Treaty only the USA was unwilling to accept. Throughout the negotiation process, the USA had much less political motivation to finalise the Treaty than other participants, and was therefore more concerned about the contents of the Charter Treaty than about its political impact.

It was surprising to many to find that conflicts between Russia and other former Soviet Republics do not surface during the Charter negotiations. On the one hand, the Charter Treaty was of great political importance to the former Soviet Republics, since it represented the first international document they had the opportunity to negotiate and sign as independent states. On the other hand, in seeming contradiction to their aim to assert independence from the Russian Federation, the former Soviet Republics usually took on the same negotiating position as Russia. However, since all these countries have the same legal background and similar ensuing problems, this development was only rational. Hence, the break-up of the Soviet Union in December 1991 and the resulting growth in the number of negotiating delegations did not notably complicate the Treaty talks.

Negotiations to the Energy Charter Treaty faced problems at several levels. Technical details caused unavoidable difficulties, not least that of explaining precise legal obligations of the Charter to the former communist states, which were having to come to terms with advanced market concepts, often for the first time. The lack of energy legislation in many of the Eastern countries is another technical issue that needed to be resolved before the Treaty could be concluded.

The second category of problems emerged over the immediate contents and framework of the Treaty. Disagreements over whether investment rules should

⁴² "U.S. Government Statement on the Energy Charter Treaty" presented at the signing ceremony of the Lisbon Energy Charter Conference, 17 December 1994.

be based on national treatment, for example, fall into this category, as do the disputes over whether the USA and other non-European countries should join the Energy Charter and the many problems that final bilateral talks aimed to resolve before the Treaty could be signed. Since debates over the contents of the Treaty were usually based on the political and commercial interests of the involved parties, these issues tended to overlap strongly with the third level, which encompasses problems with the Treaty negotiations arising through political differences. Underlying conflicts between France and the USA over GATT, and the disputes over TPA, for example, are issues that largely fell into this category.

It is difficult to establish the precise extent to which each individual level contributed towards a delay or complication in the Treaty negotiations. It remains to be pointed out that most problems concerning the content and the framework of the Charter and its Treaty emerged between Western countries. East-Western conflicts played a minor role. It became apparent early on, that the driving force to concluding the Energy Charter Treaty was the political will of the majority of parties - most importantly the EU and the Russian Federation - to finalise an agreement. Without this political will, the Treaty talks might well have been abandoned. One EU official commented in late 1992: "I believe we have missed the boat. It is too late, and too complex, but we have to succeed for political reasons."⁴³

Arguably, the main flaw of the adopted Energy Charter Treaty is that it was initially oversold as a solution to all problems the East (and the West) could possibly face in the energy sector. It was not only outlined as an agreement that could provide answers, but one that could provide them quickly. This created the impression that the Charter would come up with short-term solutions to the economic difficulties in the former Comecon states, leading to an ambitious agenda which eventually had to be down-sized. Attention was diverted from long-term issues, and coming up with perfect solutions to investment treatment problems became a main aim, which in turn stalled progress on the Charter Treaty.

Negotiations to the second treaty are not in danger of falling victim to the same pitfalls. Still, there are likely to be significant problems in negotiating a second treaty, not least because major difficulties between Western countries - rather than having been adequately resolved - were postponed in the negotiations to the Energy Charter Treaty. These issues will no doubt resurface during negotiations to the supplementary treaty.

⁴³ ECE 49:3 (January 1993) 5.

*The Energy Charter Treaty***Timetable of Events up to Signature of Treaty***

<i>Date</i>	<i>Charter Events</i>	<i>World Events</i>
June 1990	Charter proposed by Dutch premier R. Lubbers	
2 August 1990		Iraqi invasion of Kuwait
Jan./Feb. 1991	Debates on membership of Energy Charter	Gulf War
July 1991	First international Charter Conference	
August 1991		Moscow: Coup against M. Gorbachev
December 1991	17 December: Signing of political statement on the Energy Charter	GATT-talks: Package agreement on talks proposed by US, denounced by French before publication 25 December: Dismemberment of the Soviet Union
May 1992		EU decides Common Agriculture Policy; reform opposed by France
November 1992		GATT-talks: Blair House accord on Agriculture paves way for coming to an agreement on agriculture under GATT, "bitterly contested" by France
March 1993		21 March: Elections in France: Conservative coalition takes over from socialist government
October 1993	5-9 October: EU puts forward two-stage approach to accommodate Russian problems	3 October: Storming of the Russian Parliament, opposition forces surrender to Yeltsin
December 1993	14-18 December: Endorsement of the two-stage approach despite US opposition	5 December: US Vice President A. Gore in Moscow 12 December: Elections in Russia 14 December: Conclusion of the Uruguay Round to the GATT talks

Timetable of Events up to Signature of Treaty* (Continued)

<i>Date</i>	<i>Charter Events</i>	<i>World Events</i>
January 1994	11 January: US indicate they are willing to accept EU proposal on two-stage Charter Treaty	17 January: Y. Gaidar, economic reformer and head of democratic party "Russia's Choice", resigns from Russian government 26 January: G. Fyodorov, Russian Finance Minister, confirms resignation from Russian government
June 1994	7-10 June: Final round of Charter Treaty negotiations in Brussels	
September 1994	Final Treaty text sent out to negotiating governments	
December 1994	17 December: Formal signing of the first Charter Treaty in Lisbon	Beginning of Russian military intervention in Chechnya

* This timetable was prepared by the author of this chapter, Julia Doré.