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International Energy and Resources Law
&
Policy Series

THE ENERGY CHARTER TREATY

An East-West Gateway for Investment & Trade

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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 1

An Overview of the Energy Charter Treaty

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The Energy Charter Treaty (ECT) is unique as a multilateral treaty, limited in scope to the energy sector, which establishes within that sector legal rights and obligations with respect to a broad range of investment, trade and other matters, and in large part provides for their enforcement. The text of the ECT was negotiated during 1991-1994 by the Conference on the European Energy Charter, comprising over 50 states and the European Communities (EC), which came to a conclusion at Lisbon on 17 December 1994 with signature of the Final Act of the Conference and the opening of the ECT for signature.

The origins of the ECT are recounted as follows in the Final Act of the Conference:

> During the meeting of the European Council in Dublin in June 1990, the Prime Minister of the Netherlands suggested that economic recovery in Eastern Europe and the then Union of Soviet Socialist Republics could be catalysed and accelerated by cooperation in the energy sector. This suggestion was welcomed by the Council, which invited the Commission of the European Communities to study how best to implement such cooperation. In February 1991 the Commission proposed the concept of a European Energy Charter.
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> Following discussion of the Commission's proposal in the Council of the European Communities, the European Communities invited the other countries of Western and Eastern Europe, the Union of Soviet Socialist Republics and the non-European members of the Organisation for Economic Co-operation and Development to attend a conference in Brussels in July 1991 to launch negotiations on the European Energy Charter. A number of other countries and international organizations were invited to attend the European Energy Charter Conference as observers.
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> Negotiations on the European Energy Charter were completed in 1991 and the Charter was adopted by signature of a Concluding Document at a conference held at the Hague on 16-17 December 1991.

By the time the legally non-binding *Charter* had been agreed, negotiations

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were already under way on a *treaty* – the ECT – to implement the objectives and principles of the Charter.

The ECT remained open for signature for six months from 17 December 1994; by the time it closed for signature, it had been signed by 49 states and the EC. A complete list of signatories can be found at the end of this chapter; they include almost all of the countries of Europe and all of the republics of the former USSR, as well as Australia and Japan. Of the signatories to the non-binding 1991 European Energy *Charter*, only Canada and the United States did not sign the ECT; while the United States has stated that it does not intend at this time to become party to the ECT, the Canadian Government has continued to consult with Canada's provinces with a view to becoming a party to the Treaty, which as discussed later contains provisions allowing accession. The ECT will enter into force upon deposit with the depositary (the Portuguese Government) of the thirtieth instrument of ratification, acceptance or approval (by signatories) or of accession thereto (although an instrument deposited by the EC will not be counted as additional to the instruments of its member countries).[1]

The purpose of the ECT, as described in its Article 4, is to "establish a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter". Many of the Treaty's rights and obligations are of a "hard law" nature, enforceable in legally binding arbitration or through dispute resolution procedures of the nature practised within the General Agreement on Tariffs and Trade (GATT), although there also are a number of "best efforts" or other "soft law" commitments.

The Treaty is a complex document. Its text consists of eight Parts but also includes 14 Annexes and five Conference Decisions that are incorporated by reference and made integral parts thereof. In addition, while the ECT expressly prohibits reservations, it is necessary to take account of a number of Understandings (mostly interpretative) and Declarations that are contained in the Final Act of the European Energy Charter Conference (the negotiating Conference), and of several interpretative statements made by the Chairman of that Conference on the occasion of its formal adoption of the text of the ECT by the Conference in Lisbon on 16 December 1994.

If, as a consequence of this complex structure, the ECT is not as "user-friendly" as might be wished, it needs to be understood that the Treaty's negotiation was conducted and brought to a conclusion with the same sense of urgency that motivated its initiation in an effort to spur economic recovery in Eastern Europe and the former USSR. The slightly more than three years that it took to agree the Treaty is a relatively modest period within which to complete a treaty of such scope, complexity, novelty and political sensitivity among so many parties having divergent interests. The leadership of the negotiating Conference, faced with the growing impatience not only of the European Commission, which had been providing financial and other support to the Conference, but also of many other negotiating parties, and struggling to hold together a temporary Secretariat, took a daring decision to set a deadline

[1] As of 1 March 1996 Georgia, Latvia and Slovakia had deposited instruments of ratification, and the deposit of such an instrument by Kazakhstan was expected.

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for the end of the negotiations. This succeeded in producing meaningful treaty commitments, which were accepted by most of the participants in the Conference, at a cost in "user-friendliness".

These circumstances also help explain some imperfections in the Treaty's substantive protections. In order to bring the negotiations to a successful end, some concessions were made, a few ambiguities left in the text, and certain provisions adopted without meaningful consideration in the Conference. The alternative, however, might well have been failure of the negotiations, which would likely have sent negative signals to potential investors in the so-called "economies-in-transition". Furthermore, despite its shortcomings the ECT offers significant and in some cases groundbreaking legal protections for trade and investment.

This chapter describes the ECT, presenting its provisions in an organized framework into which are drawn important interpretations and other relevant information. The chapter is organized in the following manner: Part I explains the Treaty's *principal trade provisions* and Part II its *principal investment provisions*, excluding in each case those provisions that have significant elements of both trade and investment. Thereafter, Part III covers other substantive rights and obligations under the ECT that may affect *both trade and investment*; Part IV addresses provisions that *further implement* the Treaty's substantive obligations such as those on "*sub-national*" application, or those which regulate *state and privileged enterprises*; Part V details *exceptions*, and special temporary *("transitional") exceptions* for the "economies-in-transition"; Part VI describes the *related agreements* envisaged by the ECT, *viz.*, "Protocols", "Declarations" and "Association Agreements"; Part VII explains the ECT's *institutional arrangements*; and Part VIII lists several miscellaneous items. Finally, Part IX contains a short update on *1995 developments*.

I. PRINCIPAL TRADE PROVISIONS

1. General Description

Article 3 of the ECT announces the Treaty's perspective toward trade: "The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products."[2]

GATT member countries placed considerable emphasis on avoiding interference with or duplication of activities within the framework of the GATT, which for ECT purposes is defined to include both the original 1947 GATT and the recent World Trade Organization (WTO) Agreement. Thus Article 4 of the ECT provides:

> Nothing in this Treaty shall derogate, as between particular Contracting Parties which are parties to the GATT, from the provisions of the GATT and Related Instruments as they are applied between those Contracting Parties.

[2] The ECT text identifies defined terms, such as "Energy Materials and Products", through the capitalization of initial letters.

The ECT's specific trade articles extend on a legally binding basis, to trade involving Contracting Parties that are not party to the GATT, provisions of the 1947 GATT that are incorporated by reference into the ECT; they impose "best-efforts" obligations concerning energy tariffs among the ECT's Contracting Parties and provide for the initiation of negotiations to create binding obligations with respect to such tariffs; and they adopt significant new rules for the transit of energy goods through the "Area" of a Contracting Party.

2. The "Interim" Trade Provisions

A major element of the ECT is that it subjects the trade of Contracting Parties that are not parties to the GATT – such as republics of the former USSR – to rules of the 1947 GATT, both in those countries' relations with GATT countries and in their relations with one another. The provisions to this effect, which are set out in Article 29 of the ECT, are said to be "interim" ones, but this is so only in the sense that they apply "while any Contracting Party is not a party to the GATT and Related Instruments". The exact meaning of the quoted language may be open to debate, but one interpretation is that these provisions are intended to cease to be operative only if all ECT Contracting Parties should become full participants in either the 1947 GATT *and all of its "related instruments"* (i.e., other agreements, decisions, etc., under GATT auspices), or in "GATT 1994" which is annexed to the WTO Agreement *and all of its related instruments* (defined in the ECT to include the WTO Agreement itself as well as the other annexes thereto).

In response to the Russian Federation's desire for parallelism with the ECT Article 4 rule that governs intra-GATT trade (discussed above), the Chairman of the negotiating Conference indicated on the occasion of the adoption of the ECT text that it was the intention of the negotiating parties 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" to trade with non-GATT countries.

Article 29(2) applies provisions of the 1947 GATT to trade involving non-GATT countries; these provisions will govern trade between any two ECT Contracting Parties where either of them is not a GATT party, or if a GATT party, is not party to a GATT-related instrument that is relevant to such trade. The applicable 1947 GATT provisions are indicated through a list of the *in*applicable ones; the negotiating Conference maximized application of the 1947 GATT insofar as was practicable. An exception is allowed for trade between republics of the former USSR, which may instead be governed by an agreement between them, subject to prescribed notification procedures, and to cut-off provisions in case of their GATT entry and in any event as of December 1999. However, the specified GATT provisions will not govern trade between ECT Contracting Parties that are either party to the 1947 GATT or "party" to "GATT 1994", and to the relevant GATT-related instruments.

It is Annex G to the ECT that sets out the provisions of the 1947 GATT and its related instruments that will *not* apply to trade covered by Article 29(2); any 1947 GATT provisions *not* listed there *will* apply to such trade. Article

29(2)(a) stipulates that these provisions govern, "as applied on 1 March 1994 and practised with regard to Energy Materials and Products by parties to GATT 1947 among themselves . . .".

An Understanding in the Final Act says that where a provision of the GATT or a GATT-related instrument provides for joint action by parties to the GATT, the Energy Charter Conference that is created by the Treaty will take that action. Another such Understanding, included in the Final Act at the initiative of the Russian Federation, indicates that the language quoted above concerning the application and practice of GATT provisions among GATT parties is not intended to refer to cases where a GATT party has disapplied the GATT toward another GATT country under GATT Article XXXV, and unilaterally applies some GATT provisions vis-à-vis the other party.

Article 29(2)(a), which imposes 1947 GATT rules on trade involving non-GATT parties, is subject to "exceptions and rules" provided for in Annex G. Annex G contains an explicit provision that trade in nuclear materials "may be governed" by agreements referred to in relevant Declarations in the Final Act. There are in the Final Act bilateral Declarations of the EC jointly with Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan, stating that their trade in nuclear materials "shall be governed" by specified provisions of their bilateral agreements.

The term "Energy Materials and Products" is defined in Article 1(4) by means of item references to the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities. The Treaty's Annex EM, which contains these item references, generally encompasses coal, electrical energy, natural gas, nuclear energy materials, petroleum and petroleum products, fuel wood and charcoal. The designation of petroleum products excludes some petrochemicals that are within the item references for petroleum products. Energy services and energy equipment also are excluded. The ECT provides for the provisional Energy Charter Conference to examine the future inclusion of energy-related equipment in the ECT; as required by the ECT, this examination was nominally initiated at the first meeting of the provisional Energy Charter Conference on 17 December 1994, but it only got under way in a substantive sense in the fall of 1995.

Disputes between Contracting Parties over compliance with the applicable 1947 GATT provisions are subject to resolution under procedures set out in the Treaty's Annex D that was drafted using as a point of departure the then "Dunkel text" Uruguay Round dispute settlement procedures, which subsequently were modified in the course of their adoption as part of the WTO Agreement. Where a dispute resolution panel concludes that a measure of a Contracting Party fails to comply with the governing ECT provisions, it may recommend that the offending Contracting Party alter or abandon the measure. The panel's report is subject to adoption by the Charter Conference, acting by a vote of three-fourths of those present and voting. Where the offending party fails to comply with the panel's ruling or recommendation, the Charter Conference may by the same vote authorize the injured party to suspend ECT trade obligations to the other party "which the injured party considers equivalent in the circumstances". There are further provisions for the review of the level of obligations proposed to be suspended.

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There are exceptions from these dispute settlement procedures both for disputes arising under the agreements between former USSR republics that are referred to above, and for those arising under agreements establishing free-trade agreements or customs unions as described in Article XXIV of the GATT.

Paragraphs (3) through (5) of Article 29, which apply to all ECT Contracting Parties, establish import and export tariff notification requirements; impose a "best-efforts" obligation to limit increases in import and export tariffs on "Energy Materials and Products"; and impose *requirements for future notification and consultation with respect to such increases*. Furthermore, Article 29(6) calls for negotiations on an amendment to the ECT, binding each Contracting Party not to increase energy import and export tariffs above a level to be specified in the amendment; the initiation of these negotiations was announced at the initial 17 December 1994 meeting of the provisional Energy Charter Conference, and substantive discussions began in a 29–30 June Working Group of the Conference.

Separately, Article 30 provides more generally for negotiation, by the later of 1 July 1995 or the entry into force of the ECT, on amendments to the ECT "in the light of the results of the Uruguay Round . . .". This negotiation was initiated at the 29–30 June 1995 Conference Working Group meeting.

Upon the occasion of the adoption of the text of the ECT by the negotiating Conference, the Conference Chairman noted and endorsed the view of the Russian Federation that the negotiation contemplated by Article 30, as it might address provisions of the General Agreement on Trade in Services annexed to the WTO Agreement, and the "second-phase", "supplementary" investment treaty negotiation provided for in Article 10(4) (discussed below), "should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at".

3. The Transit Article

In most respects the ECT's trade provisions call up, replicate or resemble provisions of the 1947 GATT or "GATT 1994"; what is groundbreaking about them is their extension of the application of those provisions *to energy trade with non-GATT countries*. The unprecedented Article 7 on "Transit" is thought of as the most significant instance in the ECT of a "GATT-plus" trade provision creating *new forms of rights and obligations*.

Article 7 of the Treaty deals with the movement of "Energy Materials and Products," the definition of which is discussed above. "Transit" refers to "carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party". The term has a secondary meaning: it also covers carriage originating in and destined for the same Contracting Party, where the goods pass through another Contracting Party, unless the parties concerned have opted out of this provision by listing themselves in the ECT's Annex N; only Canada and the United States have done so. The terms "originating in" and "destined for" are undefined.

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Paragraph (1) obliges each Contracting Party to "take the necessary measures to facilitate" transit "consistent with the principle of freedom of transit" (a reference to Article V of the GATT) and on a non-discriminatory, reasonable basis.

Paragraph (2) is a "soft law" obligation to "encourage relevant entities to co-operate" in modernizing, developing, operating, and facilitating the interconnection of "Energy Transport Facilities", and in measures to mitigate the effects of interruptions in the supply of energy goods. "Energy Transport Facilities" are fixed facilities specifically for handling "Energy Materials and Products"; a non-exclusive list of such facilities mentions high-pressure gas transmission pipelines, high-voltage electric transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, and oil product pipelines.

In paragraph (3) each Contracting Party undertakes that, unless an existing international agreement provides otherwise, its "provisions" relating to the transport of covered energy goods and to the use of fixed energy transport facilities shall treat energy goods that are in transit through that Contracting Party's "Area" no less favourably than they treat any other such goods originating in or destined for that "Area".

Paragraph (4) says that if transit via fixed facilities cannot be achieved on commercial terms, Contracting Parties "shall not place obstacles in the way of new capacity being established, except as may be provided in applicable legislation which is consistent with paragraph (1)". An Understanding to this paragraph in the Final Act of the negotiating Conference observes that legislation on environmental protection, land use, safety or technical standards would qualify under this language.

Paragraph (4) of Article 7 is subject to the ECT's "transitional arrangements", providing for temporary exceptions that the "economies-in-transition" have been allowed to take from specific provisions of the ECT; such exceptions, which are listed in Annex T to the Treaty, are described below. Paragraph (4) of the "Transit" article is the object of such exceptions on the part of Azerbaijan, Belarus, Bulgaria, Georgia, Hungary and Poland.

Under paragraph (5) of the article, the transit state is not obliged to permit construction or modification of new transport facilities or to allow new or additional transit through existing ones, "which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply."[3] However, subject to paragraphs (6) and (7), the Contracting Parties "shall . . . secure established flows . . .".

Paragraphs (6) and (7) are the article's most *operationally relevant* provisions. Paragraph (6) provides that the transit state "shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow" of energy goods prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where specifically allowed to do so by a relevant

[3] Cf. Article 79 of the 1982 Convention on the Law of the Sea; note also paragraph (8) of ECT Article 8, described below.

agreement or where permitted to do so by a conciliator appointed under paragraph (7).

Paragraph (7), which only applies following the exhaustion of all other dispute resolution remedies previously agreed to between the concerned Contracting Parties or between the concerned entities, allows a Contracting Party to the dispute to require the Energy Charter Secretary-General, who heads the Secretariat which supports the Energy Charter Conference, to appoint a conciliator. If the conciliator fails to secure agreement within 60 days, "he shall recommend a resolution and shall decide the interim tariffs and other terms and conditions to be observed . . . until the dispute is resolved". Paragraph (7)(d) states that the Contracting Parties "undertake to observe and ensure that the entities under their control or jurisdiction observe" the conciliator's decision *for 12 months*, unless the dispute is resolved sooner.[4]

Paragraph (7)(f) calls upon the Charter Conference to "adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators".

Paragraph (8) stipulates that nothing in the article shall derogate from international law, including existing international agreements, and specifically from rules concerning submarine cables and pipelines.[5]

Paragraph (9) notes that the article is not to be interpreted to require any Contracting Party to take any measure with respect to a particular type of fixed energy transport facility that is not already in existence in that country; however, it clarifies that this is not intended to excuse the Contracting Party from its paragraph (4) obligation to refrain from placing obstacles in the way of new capacity being established.

II. PRINCIPAL INVESTMENT PROVISIONS

1. The Core Provisions

The ECT's principal investment provisions are contained in Part III of the Treaty; the corresponding dispute resolution provisions are in Part V. In many respects these resemble provisions in bilateral investment treaties, although their drafting has not been based on any single negotiating party's treaty practice, and some aspects of the ECT are entirely original.

The scope of the investment protection is shaped by the definitions in paragraphs (5) and (6) of Article 1. *Investments* are defined as "every kind of asset, owned or controlled directly or indirectly by an Investor".[6] An Understanding in the Final Act explains that control means "control in fact", determined on

[4] Note that the state-state dispute resolution procedures of Article 27, which are described below, apply to any dispute "concerning the application or interpretation" of the Treaty, potentially including disputes over matters arising from transit or from the conduct of conciliation with respect thereto.

[5] There was an exchange of Notes between Norway and the United Kingdom in June 1995 establishing that Article 7 does not affect their respective positions concerning pipelines originating in one such state and lying on the continental shelf in the other state.

[6] Note that not only an "indirectly controlled", but also an "indirectly owned" asset may qualify as an investment.

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the basis of all relevant factors, and says that in case of doubt an investor claiming such control has the burden of proving that control exists. There follows in the Article 1(5) definition a non-exclusive list mentioning, *inter alia*, tangible and intangible and movable and immovable property, "a company or business enterprise" or an equity (e.g., shareholding) or debt interest therein, claims under contracts associated with an investment, intellectual property, "Returns" (including, *inter alia*, profits, dividends, interest, capital gains, royalty payments, various fees and payments in kind), and rights to undertake "Economic Activity in the Energy Sector". The definition states that *changes in the form* of investments do not affect their character as investments.

This definition further stipulates that the term "Investment" refers to any investment "*associated with* an Economic Activity in the Energy Sector", and also to any investments which a Contracting Party voluntarily designates as "Charter efficiency projects". (Emphasis supplied.) "Economic Activity in the Energy Sector" is defined to mean "an economic activity concerning the exploration, extraction, refining, production, storage, land transport [i.e., not including *marine* transport], transmission, distribution, trade, marketing, or sale" of the items that are covered by the definition of "Energy Materials and Products", except that fuel wood, charcoal, and the distribution of heat to multiple premises are excluded from the definition for investment purposes. An Understanding in the Final Act of the negotiating Conference provides illustrations of covered activity.[7] That Understanding also indicates that no rights are conferred "to engage in economic activities" other than those within the above definition; on the other hand, the extension of the definition of "Investment" to investments (i.e., assets) "associated with" an "Economic Activity in the Energy Sector" attenuates the sectoral restriction of the Treaty's protections and dispute resolution mechanisms.

In Article 1(6), *Investors* are defined simply as natural persons having the citizenship or nationality of or permanently residing in a Contracting Party "in accordance with its applicable law", and as companies or other entities organized "in accordance with the [applicable] law". The term thus has a broad scope but acquires policy substance only by its specific use in reference to investments.

The key Article 10 on "Promotion, Protection and Treatment of Investments" begins, in paragraph (1), with general statements concerning the favourable conditions which Contracting Parties must maintain for investments by investors of other Contracting Parties. These provisions are intended to assure an absolute *minimum standard of treatment* such as has been established in bilateral investment treaty practice, based to a considerable extent on developments in international law. Paragraph (1) of the article consists of five sentences, the first two of which explicitly refer to the *making* of investments. The first sentence obliges each Contracting Party, "in accordance with the provisions of this Treaty," to "encourage and create stable, equitable, favourable and transparent conditions" for the making of investments, while the second sentence adds that such conditions "shall include a commitment to accord at all times to Investments of Investors . . . fair and equitable treatment".

[7] Various energy services activities are within the scope of coverage.

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The next two sentences provide that "such investments" shall: "also enjoy the most constant protection"; in no way be impaired in their management, maintenance, use, enjoyment or disposal by "unreasonable or discriminatory measures"; and "in no case be accorded treatment less favourable than that required by international law, including treaty obligations". An Understanding in the Final Act indicates that the reference to "treaty obligations" does not include "decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970"; the reference to decisions of international organizations was intended to preclude ECT dispute settlement with regard to the *OECD Codes*. In addition, at the time of the ECT text's adoption, the negotiating Conference Chairman confirmed the Russian Federation's view that the reference to "international law" is not intended to impose most-favoured-nation (MFN) treatment obligations with regard to the *making* of investments, which is defined in Article 1(8) to mean "establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity".

Then comes a provision in paragraph (1) which can *make it a violation of a Contracting Party's obligations under the ECT to breach an investment agreement*: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment[8] of an Investor of any other Contracting Party." The negotiating parties were given an opportunity to opt out of dispute resolution with regard to this obligation: Articles 26 and 27 allow the Contracting Parties listed in the Treaty's Annex IA to preclude ECT dispute settlement for breaches of the obligation, and Australia, Canada, Hungary and Norway have elected to be listed in Annex IA.

Another provision establishing a minimum level of treatment is paragraph (12) of Article 10, obliging each Contracting Party to "ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements, and investment authorizations".

As announced in a preambular provision of the ECT, national treatment and MFN treatment is expected to be applied to the *making* of investments pursuant to a "supplementary treaty". Paragraphs (2) and (3) of Article 10 therefore provide only for a "best efforts" ECT commitment to accord the better of national treatment or MFN treatment to investors of other Contracting Parties with regard to the *making* of investments. This is not to suggest, however, that the binding provisions of the ECT are entirely inapplicable to the investment-making phase; that phase is on the contrary affected by, *inter alia*, at least some provisions of Article 10(1), Article 5 on trade related investment measures (discussed below), and the stipulation in the Article 1(5) definition of "Investment" that an alteration in the form of investments does not affect their character as investments.[9]

[8] Article 1(6) defines "Investment" to include every kind of asset, including a "company or business enterprise"; thus, this provision of Article 10(1) applies to host country agreements with domestic subsidiaries of foreign investors.

[9] With respect to the Article 1(5) stipulation, see UN Centre on Transnational Corporations, *Bilateral Investment Treaties* (Graham & Trotman, 1988), p. 22, where it is said that an unqualified "alteration" clause can undercut requirements and conditions for admission imposed by a host country.

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Paragraph (4) expressly contemplates the "second-phase" investment treaty, negotiations toward which were required to commence by 1 January 1995 with a view to concluding it by 1 January 1998; these negotiations were formally commenced in December 1994 and now are well under way in a Working Group of the Conference, but their conclusion is expected to take about three years in light of the need to address the exceptions that parties will claim from the treaty's general principles. As noted above, there is recognition of the need to assure consistency of the results of the "second-phase" investment negotiation with the post-Uruguay Round trade negotiations under Article 30; this refers especially to the General Agreement on Trade in Services annexed to the WTO Agreement, whose rules on commercial presence in the territory of other parties are less protective of investors than would be a straightforward application to that activity of the ECT's national/MFN treatment provisions.[10] The "second-phase" treaty is to be open for signature by those who have signed or acceded to the ECT, but there is no indication in the ECT whether *non-ECT signatories* may participate in *negotiation* of the "second-phase" treaty (this is in contrast to Article 33(2) which specifies that any Energy *Charter* signatory may participate in the negotiation of *Protocols* to the ECT); at its 21–22 September 1995 meeting the provisional Charter Conference decided to allow such participation, subject to the participant's agreement to contribute to the costs of the negotiation. The ECT also is silent on whether the "second-phase" treaty is intended to be amendatory of the ECT, a question which has been deferred in the negotiations.

An Understanding in the Final Act says that the "second-phase" treaty is to include provisions relating to *privatization* and *demonopolization*: the purpose of such provisions would not be to *require* privatization or demonopolization, but rather to prescribe how the treaty would apply in case they occurred, with a goal of minimizing disincentives to undertake such activities while applying the disciplines of the Treaty to their results. A Declaration by the Russian Federation in the Final Act indicates its desire to revisit, in the context of the "second-phase" treaty negotiation, the Final Act's Understanding on the meaning of "control" of investment.

In the meantime, paragraphs (5), (6) and (9) of Article 10 establish "best-efforts" obligations of standstill and liberalization as concerns the making of investments, and require up-to-date *reporting* of all measures which do not comply with the standard of the better of national or MFN treatment; in addition, a Contracting Party may voluntarily bind itself to accord the better of national or MFN treatment to the making of investments in specified areas of activity.

The important paragraph (7) of Article 10 establishes, as a *post-investment* standard for the treatment of investment, *the better of national or MFN treatment*. This standard applies not only to the investments of investors of other Contracting Parties, but also to "their *related activities* including management, maintenance, use, enjoyment or disposal". (Emphasis supplied.)

A limitation sought by the United States is indicated by paragraph (8), which notes that the "modalities of application" of paragraph (7) in relation to

[10] See, e.g., Sauvé, "A First Look at Investment in the Final Act of the Uruguay Round", 28 *Journal of World Trade* (October 1994), p. 5.

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programmes of grants, financial assistance or contracts for *energy technology research and development*, are "reserved for" the "second-phase" supplementary treaty; up-to-date reporting on such programmes is required by paragraph (9).

In addition, a European Energy Charter Conference Decision that is incorporated into the Treaty allows the Russian Federation to require legislative approval for the leasing of federal property by companies with foreign participation, subject to an obligation not to discriminate among investors of different parties; and Bulgaria has listed in the Treaty's Annex T a "transitional" exception with regard to Article 10(7).

Also, paragraph (10) specifies that the Treaty's standard of the better of national or MFN treatment shall not apply to the protection of *intellectual property* (which is within the Treaty's definition of "Investment"). Instead, the treatment to be accorded with regard to intellectual property "shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties". This allows the Contracting Parties to maintain their existing exceptions to national/MFN treatment under the relevant intellectual property rights agreements.

There is an Understanding to Article 10 and to certain other provisions of the Treaty, sought by the United States, which acknowledges the permissibility of restraints on "programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or investment abroad", on the ground that these are not "connected with Investment or related activities of Investors from other Contracting Parties" *in* the "Area" of the constraining party.

Article 11 first obliges a Contracting Party to "examine in good faith" requests by investors of another Contracting Party and "key personnel" employed by them, or by the entity which constitutes their investment, to enter and remain in connection with the making or the subsequent conduct of an investment. It then requires the host Contracting Party to allow the employment of key persons, provided that they have been permitted to enter, stay and work and that the employment conforms to the permission granted.

Each Contracting Party is obliged by Article 14 to guarantee the free transfer of funds with respect to investments, both into and out of its "Area", without delay and in a freely convertible currency (i.e., a currency that is widely traded and used internationally), at the market rate of exchange for spot transactions. A non-exclusive list of covered transfers mentions initial and additional capital, returns, payments under a contract, unspent earnings and other remuneration of personnel, proceeds from sale or liquidation, dispute settlement proceeds, and compensation of expropriation or other losses.

Article 14 contains three exceptions. First, a Contracting Party may protect creditors' rights, ensure compliance with securities laws, and ensure the satisfaction of judgments, all subject to requirements of equity, non-discrimination and good faith. Second, there is an opt-out for former USSR republics as concerns transfers among themselves, provided that investments of the investors of other Contracting Parties must be accorded the better of MFN or national treatment. Finally, returns-in-kind (e.g., exports of crude oil pursuant to a production sharing agreement) may be restricted by the host country in circumstances where the GATT allows export restrictions, except that such returns

must be allowed in accordance with the provisions of any written agreement that the foreign investor or its domestic subsidiary has with the host state.

The article is also subject to two decisions annexed to the Final Act, which as noted above are made integral parts of the Treaty. One of these decisions, adapted from a protocol to Romania's bilateral investment treaty with the United States, provides that Romania, which is to endeavour to improve its payments transfer procedures during its transition to full convertibility, shall guarantee transfers without restriction, or face a delay exceeding six months.

The other decision, which applies exclusively to those former USSR republics which elected by 1 July 1995 to be subject to it, allows restrictions by such a state "on movement of capital by its own investors", subject to several conditions aimed at protecting the rights of investors of other Contracting Parties and narrowing the scope of the exception; in fact, only the Russian Federation made such an election. The intent of this decision is to exclude a right of the domestic investor of such a state to request certain transfers (even where that investor is a business entity that qualifies as the investment of an investor of another Contracting Party), without foreclosing the right of the *foreign* investor to *itself* make the *same* request. At the time the Treaty text was adopted the European Energy Charter Conference Chairman stated that he believed to be correct, the interpretation of this decision by "certain countries in transition" that the rights granted to investors of other Contracting Parties under the decision do not prevent the "transitional" states "from applying . . . restrictions on movement of capital made by their Investors", subject to the conditions laid down in the decision. This is an unusual provision, whose consequences may depend on the manner in which it is implemented.

It should be noted that while the decision does not apply to "Current Transactions", the definition of this term, which has been based on a Joint Declaration concerning Article 52 of the 1994 European Union-Russian Federation Agreement on Partnership and Co-operation (PCA), differs from that in Article XXX(d) of the Articles of Agreement of the International Monetary Fund and carries over a wording flaw from the PCA.

The host state Contracting Party is required by Article 15 to recognize the assignment of rights and claims and the ability to pursue them, where another Contracting Party or an agency thereof makes a payment under an indemnity or guarantee in respect of an investment, and the indemnifying party is entitled to the rights accorded the indemnified party under the ECT. In cases of investor-Contracting Party dispute settlement, the payments under an insurance or guarantee contract will not operate to excuse the host Contracting Party as concerns damages.

Articles 12 and 13 deal with compensation for expropriations and for other losses such as those caused by armed conflict, state of national emergency, civil disturbance or some similar event. Under Article 13, no Contracting Party may nationalize or expropriate, or subject to one or more measures having equivalent effect, the investment of the investor of another Contracting Party, except for: a public purpose; on a non-discriminatory basis; in accordance with due process of law; and when accompanied by prompt, adequate and effective compensation – amounting to fair market value immediately before the expropriation or impending expropriation became known in such a way as to affect the investment's value, and with interest to the date of payment.

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The investor is entitled to have the fair market value expressed in a freely convertible currency on the basis of the market exchange rate at the time the expropriation became known. Further, the expropriating Contracting Party must afford a right to prompt review of the issues raised.

The article also includes a provision, "for the avoidance of doubt", that expropriation includes "situations where a Contracting Party expropriates the assets of a company or enterprise . . . in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares".

It should be noted here that Article 21 on "Taxation" contains, in paragraph (4), provisions which apply when there is a question under Article 13 of whether a tax constitutes an expropriation or is discriminatory. In such a case the issue is to be referred to the competent tax authorities; the Treaty's arbitral bodies for investor-state and state-state investment disputes (under Article 26(2)(c) or 27(2)) ***must*** take into account any conclusions arrived at within six months by these authorities as to whether the tax is discriminatory, and ***may*** take into account any other conclusions on the two kinds of questions.

Where the Article 13 expropriation article is inapplicable, Article 12 requires the host Contracting Party to accord, to an investor of another Contracting Party whose investment suffers a loss due to war or other armed conflict, state of national emergency, civil disturbance, or other similar event, the better of national and MFN treatment as regards restitution, indemnification, compensation or other settlement. In addition, prompt, adequate and effective restitution or compensation is required where, in such a situation, the investor suffers a loss from requisitioning of its investment, or a destruction thereof "which was not required by the necessity of the situation".

Article 17 allows a Contracting Party to deny the advantages of Part III: to an entity owned or controlled by investors of a non-Contracting Party, and lacking substantial business activities in the "Area" of the Contracting Party where it is organized, or to an investment of an investor of a non-Contracting Party state with which the host state does not maintain diplomatic relations, or as to which the host state maintains prohibitory legal measures. In light of the former provision, an investor based outside the Contracting Parties to the ECT will need to employ an entity that not only is based in a Contracting Party, but also ***conducts substantial business activities there***, in order to enjoy the legal protections afforded by the ECT.

Article 16 regulates, in an original manner, the relationship between the ECT and previous or subsequent treaties among ECT Contracting Parties concerning the subject matter of Parts III or V and the ECT. The article is intended to perform the function of assuring that neither investor rights under the ECT, nor investor rights under any other treaty, will be derogated from by operation of the international law principles concerning the application of successive treaties – such as the principles of *lex posterior* and *lex specialis*.[11] It states that in the circumstances described in the article, the ECT shall not be construed to derogate from a prior or subsequent treaty, and a prior or subsequent treaty

[11] For background on some of the legal issues concerning the Vienna Convention on the Law of Treaties which led to the inclusion of Article 16, see Sinclair, ***The Vienna Convention on the Law of Treaties*** (Manchester U. Press, 2nd ed. 1984), pp. 93–98, and Reuter, ***Introduction to the Law of Treaties*** (Pinter Publishers 1989), p. 102.

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shall not be construed to derogate from the ECT, where a provision is more favourable to the investor or investment. It further stipulates that the dispute settlement provisions in the pertinent treaty that are relevant to such a provision shall also remain available.

Part V is comprised of three articles, two of which (Articles 26 and 27) establish investment dispute settlement mechanisms, and the third of which (Article 28) puts limits on access to one of those mechanisms.

The important Article 26 provides for the resolution of disputes between a Contracting Party and an investor of a different Contracting Party "relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III . . . ."[12] It gives an investor the *choice* to submit an unresolved dispute, following a failure to resolve the dispute by negotiation: to the fora of the host state; in accordance with some other previously agreed procedure; or, *for binding arbitration*, to the *investor's preference among* the International Centre for Settlement of Investment Disputes (ICSID), a forum established under the rules of the United Nations Commission on International Trade Law (UNCITRAL), or a proceeding of the Arbitration Institute of the Stockholm Chamber of Commerce.

The article states that "each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions" of the article. It also contains several technical provisions to assure the sufficiency of Contracting Parties' consent to arbitration. Paragraph (8) requires that each Contracting Party carry out without delay any arbitral award, and that it make provision for the effective enforcement of such awards; it also provides that an arbitration award concerning a measure of a sub-national government or authority shall allow for the payment of monetary damages in lieu of another remedy.

Furthermore, paragraph 5(b) of Article 26 allows the investor to require that an arbitration be held in a state that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The effect is that the provisions of that Convention will apply to the enforcement of the award in the state where the arbitration is held, *and* the award will be recognized and enforced in *other* states that are party to the Convention.

However, paragraph (3)(b) provides an exception which allows Contracting Parties to deny unconditional consent to ICSID, UNCITRAL or Stockholm arbitration in the situation where an investor "has previously submitted the dispute" to the domestic fora of the host state or under another previously agreed procedure; 23 states and the EC are listed in Annex ID as denying such consent, although it should be noted that these countries' policies and practices differ widely concerning the extent to which a dispute may proceed in the domestic fora. Contracting Parties listed in Annex ID are required, by the time of their deposit of an instrument of ratification, acceptance, approval or accession, to provide a written statement of their policies and practices in this regard.

[12] This jurisdictional language employs the term "Investment" in its defined sense. As described above, the definition is asset-based, including "every kind of asset, owned or controlled directly or indirectly . . ."; a "change in the form in which assets are invested does not affect their character as investments . . .": see Article 1(6).

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Article 27 provides for ***binding*** state-state ***arbitration*** (at the Hague, unless the parties decide otherwise), by an ***ad hoc*** tribunal, of disputes "concerning the application or interpretation" of the ECT. Unlike Article 26 on investor dispute resolution, Article 27 is ***not limited*** to investment disputes arising under Part III of the Treaty, although the Article 27 procedures are excluded by Article 28 from application to trade-related disputes arising under Article 5 ("Trade Related Investment Measures") or 29 ("Interim Provisions on Trade Related Matters").

Initially, Contracting Parties are obliged to endeavour to settle state-state disputes through diplomatic channels, but if a dispute has not been resolved within a reasonable period of time, either party to the dispute may submit it to arbitration. Article 27 then prescribes procedures for the constitution of a panel; specifies applicability of the rules of UNCITRAL in the absence of a contrary decision by the parties or the arbitrators; and calls upon the panel to decide the dispute in accordance with the Treaty "and applicable rules and principles of international law".

Where, in state-state arbitration, a measure of a regional or local government is found not to be in conformity with the Treaty, those Contracting Parties listed in the ECT's Annex P may invoke the procedures of that annex (which have been based on language in the WTO Agreement Understanding on Rules and Procedures Governing the Settlement of Disputes), providing for Charter Conference authorization to the injured party to suspend such of its Treaty obligations to the offending party "as [the Contracting Party] considers equivalent to those denied . . .". Two federal states are listed in Annex P: Australia and Canada.

Under Article 47(3), all of the relevant provisions of the ECT remain applicable, for a period of 20 years, to investments that have been made at the time of a Contracting Party's withdrawal from the Treaty.

2. The "Sovereignty" Article

Article 18, "Sovereignty Over Energy Resources", is located in Part IV of the Treaty entitled "Contextual" rather than in Part III, but it pertains especially to investment issues, and in light of the international law background of the issues it may be seen as relevant to the Article 10(1) minimum standard of treatment of investment. In paragraph (1) the Contracting Parties "recognize state sovereignty and sovereign rights over energy resources" and "reaffirm that these must be exercised in accordance with and subject to the rules of international law".

Paragraph (2) states, in language drawn from Article 222 of the Treaty of Rome, that the ECT "shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources". The Final Act contains the following provision: "The representatives [of Conference participants] declared that Article 18(2) shall not be construed to allow circumvention of the application of the other provisions of this Treaty."[13]

[13] In addition, the statement of the Conference Chairman in connection with the adoption of the Treaty text noted that the representative of Norway supported by a number of other

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Paragraph (3) enumerates rights which each state "in particular" holds, such as the right to decide its geographical areas to be made available for exploration and development of energy resources.

Paragraph (4) is a "best-efforts" obligation to facilitate access to energy resources, "inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licenses, concessions and contracts to prospect and explore for or to exploit or extract energy resources". Other relevant Treaty provisions dealing with access to energy resources include the Article 10(3) "best efforts" national/MFN treatment clause with regard to the *making* of investments, and the legally binding Article 10(7) *post-investment* requirement to accord the better of national or MFN treatment to investments of investors of other Contracting Parties and their related activities.

III. OTHER SUBSTANTIVE RIGHTS AND OBLIGATIONS

1. Trade Related Investment Measures

Article 5 of the ECT for the most part follows closely the trade related investment measures (TRIMs) provisions of the WTO TRIMs Agreement, which forbid measures imposing "local content requirements" or "trade balancing requirements". Article 5 forbids all Contracting Parties from imposing any TRIM that is inconsistent with Article III or XI of the GATT. This specifically includes *investment measures* that would: require the purchase of goods of domestic origin or from a domestic source; impose limits on the purchase or use of imported goods; restrict or link with its exports, the imports of products which an enterprise uses in local production; limit imports by restricting access to foreign exchange; or impose limits on exports, through a link to the volume or value of local production or in another manner.

Nonetheless, there is an exception intended to allow TRIMs involving a "rule of origin" as a condition of product eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programmes; and pre-existing TRIMs may be temporarily maintained, subject to specified notification and phase-out requirements.

ECT Article 5 rights can be adjudicated in the ECT's Annex D state-state trade dispute resolution forum only when at least one disputant is not a party to the GATT. Article 29(7), making the Annex D trade arbitration procedures available to such disputes where at least one party to the dispute is not a party to the GATT, is subject to the exceptions referred to above for properly notified agreements among former USSR republics and for free-trade areas and customs unions as described in GATT Article XXIV.

Article 27 expressly excludes state-state *arbitration* thereunder of Article 5 TRIMs disputes unless both parties to the dispute agree otherwise; however, *investors* are afforded limited adjudication rights with respect to such disputes.

footnote contd.

participants in the Conference had declared that the Treaty should be applied and interpreted in accordance with the accepted rules of treaty interpretation contained in the Vienna Convention on the Law on Treaties, and in particular that in the context of Article 18(2) of the Treaty "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

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In a departure from WTO practice, ***investor dispute resolution rights*** are provided for in Article 10(11), which says that the application of a TRIM to an investment of an investor of another Contracting Party "existing at the time of such application" shall be considered a breach of an obligation under Part III of the Treaty. Since the Article 26 investor arbitration provisions apply to violations of Part III, the effect is to make them applicable to TRIMs on *pre-existing* investments.

2. Competition

Article 6 obliges each Contracting Party to "work to alleviate market distortions and barriers to competition" (paragraph (1)); to "ensure that . . . it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct . . . " (paragraph (2)); and to give full consideration to providing other Contracting Parties with technical assistance in respect to competition rules (paragraph (3)). An Understanding in the Final Act of the European Energy Charter Conference indicates that it is for each Contracting Party to define "unilateral" and "concerted anti-competitive conduct", which may include "exploitative abuses".

Paragraph (5) contemplates consultations between Contracting Parties or their competition authorities where one Contracting Party "considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in" the article; in such a case the other Contracting Party "shall accord consideration" to any request that it "initiate appropriate enforcement action", and shall inform the requesting Contracting Party of its decision. However, paragraph (7) excludes binding ECT arbitration with respect to disputes that may arise over the implementation or interpretation of the article, although this would not prevent the article from being cited in disputes over other provisions. Furthermore, the negotiating Conference sought to assure that the provisions of this article would not support litigation in the domestic courts of the Contracting Parties.[14]

As discussed below, Article 6 has been by far the single largest basis for claims to "transitional" exceptions by the "economies-in-transition".

3. Transfer of Technology

Following the enunciation of a legally "soft" commitment to promote access to and transfer of energy technology on a commercial and non-discriminatory basis, paragraph (2) of Article 8 says that, to the extent necessary to give effect to the first paragraph, "the Contracting Parties shall eliminate existing and create no new obstacles for transfer of technology, in the field of Energy Materials and Products and related equipment and services . . . ." This obligation is subject to "non-proliferation and other international obligations".

[14] A recent article discussing the issues involved in treaty "direct application", "self-execution" or "invocability" is Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", 86 *American Journal of International Law* (1992), p. 310.

4. Access to Capital

Article 9 contains in paragraph (1) a "best-efforts" obligation of each Contracting Party to promote access to its capital market by nationals of other Contracting Parties, on the basis of the better of national or MFN treatment, in order to finance trade and investment in the energy sector. Further, the Contracting Parties are to "make . . . available" their "facilities" under programmes providing for access to public loans, grants, guarantees or insurance for such purposes, "consistent with the objectives, constraints and criteria of such programmes . . .". However, nothing in the article prevents a Contracting Party from taking measures for prudential reasons or to ensure the integrity and stability of its financial system and capital markets, or prevents financial institutions from applying their own lending or underwriting practices. The article also calls on the Contracting Parties to "seek as appropriate to encourage the operations and take advantage of the expertise of relevant international financial institutions".

Annex T contains claims to "transitional" arrangements by Azerbaijan, Belarus, Georgia, Kazakhstan and Kyrgyzstan with regard to the paragraph (1) "best-efforts" obligation.

5. Environmental Aspects

Article 19 establishes "best-efforts" commitments to environmental goals in the energy sector, and enumerates some 11 types of "softly" worded actions which Contracting Parties "shall accordingly" take. The general statement of commitments in paragraph (1) reads as follows:

> In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimize environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade.

The enumerated obligations include those to take account of environmental considerations in the policy process; promote market-oriented price formation and fuller reflection of environmental costs; encourage co-operation with other competent organizations; have particular regard to energy efficiency, renewables, cleaner fuels and pollution-reducing technologies; promote information-sharing; promote public awareness; promote and co-operate in research, development, and application; encourage technology transfer; promote transparency with regard to environmentally significant investments; promote international awareness and information exchange; and participate, "within their

available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties".

Article 27(2) precludes state-state dispute resolution under the Treaty with regard to Article 19, and the ECT's investor-state dispute resolution procedures under Article 26 for investment and its dispute resolution procedures under Annex D for trade likewise do not apply to such disputes; and as in the case of Article 6 on "Competition", the negotiating Conference endeavoured to assure that the provisions of Article 19 would not support litigation in their domestic courts.[15] Here too, the absence of ECT dispute resolution does not eliminate the possibility that it might be cited in dispute resolution concerning other articles; however, unlike the situation with Article 6, paragraph (2) of Article 19 states that upon the request of a Contracting Party a dispute concerning the application or interpretation of the article "shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference".

IV. IMPLEMENTING PROVISIONS

1. "Sub-National" Application

After recognizing the responsibility of each Contracting Party for the observance of the provisions of the Treaty, paragraph (1) of Article 23, employing a formulation originating in the language of GATT Article XXIV(12) and further adapted in the WTO Agreement context, obliges each Contracting Party to "take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area". Paragraph (2) then specifies that the Treaty's dispute settlement provisions – but excluding the GATT dispute settlement provisions called up by Article 29 – can be invoked in respect of regional or local measures affecting the Contracting Party's observance of the ECT. An Understanding in the Final Act clarifies the intention that the GATT's own provisions on sub-national application that are called up by Article 29 would apply to disputes over trade regulated by that article.

Mentioned above, in connection with the description of the dispute resolution procedures contained in Articles 26 and 27, are certain special provisions which apply to remedies for Treaty violations by sub-national authorities.

2. State and Privileged Entities

Article 22 imposes the following four obligations on each Contracting Party:

— to *ensure* that its state enterprises conduct their *sales* activities "in a

[15] It was only in connection with Articles 6 ("Competition") and 19 ("Environmental Aspects") that the Conference indicated a clear desire to avoid domestic justiciability of the ECT's provisions (i.e., the Treaty's "direct application", "self-execution" or "invocability"). From this one might infer an intention that other provisions *should* have such effect, subject of course to the requirements of particular domestic legal systems.