INTERNATIONAL ENERGY AGENCY RL-108

The Energy Charter Treaty

a description of its provisions

By the Legal Counsel of the IEA

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2, RUE ANDRÉ-PASCAL, 75775 PARIS CEDEX 16, FRANCE

The International Energy Agency (IEA) is an autonomous body which was established in November 1974 within the framework of the Organisation for Economic Co-operation and Development (OECD) to implement an international energy programme.

It carries out a comprehensive programme of energy co-operation among twenty-three* of the OECD's twenty-five Member countries. The basic aims of the IEA include:

i) co-operation among IEA participating countries to reduce excessive dependence on oil through energy conservation, development of alternative energy sources and energy research and development;

ii) an information system on the international oil market as well as consultation with oil companies;

iii) co-operation with oil producing and other oil consuming countries with a view to developing a stable international energy trade as well as the rational management and use of world energy resources in the interest of all countries;

iv) a plan to prepare participating countries against the risk of a major disruption of oil supplies and to share available oil in the event of an emergency.

** IEA participating countries are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway (by special agreement), Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States. The Commission of the European Communities takes part in the work of the IEA.*

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

— to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

— to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

— to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973) and Mexico (18th May 1994). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

FOREWORD

On December 17, 1994, after several years of negotiation, the European Energy Charter Conference reached a successful conclusion with the opening of the Energy Charter Treaty for signature. The International Energy Agency had from the earliest stages supported the process leading to this result. Staff of the Agency's Secretariat provided assistance, first, in the negotiation of the non-binding European Energy Charter, and subsequently in the negotiation of the Treaty itself.

The IEA's Legal Counsel, Craig Bamberger, who authored this publication, chaired the panel of some twenty international lawyers who advised the negotiating Conference on legal issues and helped in the Treaty's drafting. The Treaty is a complex document with fourteen annexes and numerous interpretations recorded in connection with its adoption. In this guide to proper understanding of the Treaty, Mr. Bamberger describes its provisions, drawing together the related annexes and interpretations. We trust this publication will be useful to all who seek fuller understanding of this important Treaty.

Robert Priddle
Executive Director

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I. INTRODUCTION

The Conference on the European Energy Charter came to a conclusion on 17 December 1994 at Lisbon, with signature of the Final Act of the Conference; some fifty States and the European Communities (EC) participated in the Conference. On this occasion the Final Act was signed by forty-five States and the EC, and the resulting Energy Charter Treaty (ECT) and its Protocol on Energy Efficiency and Related Environmental Aspects were signed by forty-one and thirty-nine States, respectively, and by the EC. The Treaty and Protocol will remain open for signature for six months; any signatory to the legally non-binding European Energy *Charter* may sign the *Treaty*, whereas the complementary Protocol is open for signature only by signatories to the Treaty. This booklet describes the *Energy Charter Treaty*'s provisions.

This presentation is organized in the following manner: After briefly telling of the origins of the ECT and giving an introductory description of it, the booklet explains the Treaty's *principal trade provisions* (pages 10-15) and then its *principal investment provisions* (pages 15-23), excluding in each case those provisions that have significant elements of both trade and investment. Thereafter, the booklet covers other substantive rights and obligations under the ECT that may affect *both trade and investment* (pages 23-27); provisions that *further implement* the treaty's substantive obligations such as those on "*sub-national*" application, or those which regulate *State and privileged enterprises* (pages 27-29); *exceptions*, and special *temporary* ("transitional") exceptions for the so-called "economies-in-transition" (pages 29-33); the *related agreements* envisaged by the ECT, *viz.*, "Protocols," "Declarations" and "Association Agreements" (pages 33-34); and finally, the ECT's *institutional arrangements* (pages 35-36).

Origins of the Treaty

The origins of the ECT are recounted as follows in the Final Act of the European Energy Charter 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.

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.

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."

Some fifty-one States and the EC have signed the *Charter* document. Included are all OECD Member countries except Mexico and New Zealand.

By the time the Charter had been agreed, negotiations already were under way on a "Basic Agreement" -- later called the "Energy Charter Treaty" -- to implement the objectives and principles of the Charter in a legally binding manner. As is stated in Article 4 of the ECT, "Purpose of the Treaty", it "establishes 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."

Introductory Description of the Treaty

The ECT is unique as a multilateral sectoral treaty broadly covering trade, investment and a range of other matters in the energy field. Many of the Treaty's rights and obligations are of a "hard law" nature, enforceable in legally binding arbitration or through GATT-type dispute resolution procedures, although there also are a number of "best efforts" or other "soft law" commitments. The Treaty text proper consists of seven Parts but the ECT also includes fourteen Annexes and five Conference Decisions which are incorporated by reference. In addition, it is necessary to take account of a number of Understandings (mostly interpretative) and Declarations that are contained in the Final Act, and of several interpretative

statements made by the European Energy Charter Conference Chairman on the occasion of the formal adoption of the text of the ECT by the Conference.

As indicated above the ECT will remain open for six months from 17 December 1994 for signature by any State or "Regional Economic Integration Organization" (such as the EC) which has signed the Charter document. Thereafter, such States or Organisations can accede to the ECT on terms to be approved by the new "Energy Charter Conference" which is created by the Treaty. The ECT will enter into force upon deposit of the thirtieth instrument of ratification, acceptance or approval (by signatories) or of accession thereto (except that an instrument deposited by the EC will not be counted as additional to the instruments of its Member countries).

Article 45 of the ECT provides in paragraph (1) that each signatory will apply the Treaty provisionally pending its entry into force, "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." However, paragraph (2) of that article says that a signatory "may, when signing" declare that it "is not able to accept provisional application", in which case the signatory shall only be obliged to apply provisionally the Treaty's provisions concerning institutional arrangements (as distinct from its substantive obligations), and then only insofar as that "is not inconsistent with its laws and regulations"; a signatory so electing, and its investors, are not entitled to claim the benefits of provisional application under paragraph (1). Subject to confirmation from the Treaty Depositary (the Portuguese Government), it appears that the following eight States made such declarations when they signed the ECT on 17 December 1994: Australia, Bulgaria, Cyprus, Iceland, Liechtenstein, Malta, Poland and Switzerland; some other States, although not making such declarations, reportedly consider themselves excused from provisional application based on the limiting language of paragraph (1), "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Where a signatory which has been applying the Treaty's substantive obligations provisionally in accordance with paragraph (1) of Article 45 terminates such application, it remains obliged for twenty years thereafter to accord the Treaty's investment protections to investments that were made during provisional application; this obligation does not apply, however, to those States which elected to be listed in the Treaty's Annex PA, *viz.*, the Czech Republic, Germany, Hungary, Lithuania, Poland and Slovakia.

The Treaty expressly provides for "provisional" institutional arrangements: there are to be a "provisional Secretariat," and a "provisional Charter Conference" composed of ECT signatories, which was required to be convened by the provisional Secretariat not later than 180 days after the date the Treaty opened for signature. In fact, the first meeting of the provisional Energy Charter Conference was held on 17 December 1994, following the initial signing of the ECT. This new Conference

appointed a provisional Secretary-General for a term of one year, and agreed that Secretariat employment for one year should be offered to the staff of the just-concluded European Energy Charter Conference.

An Understanding contained in the Final Act calls upon the provisional Secretary-General to "make immediate contact with other international bodies in order to discover the terms on which they might be willing to undertake tasks arising from the Treaty and the Charter." In addition, the provisional Charter Conference on 17 December 1994 authorized the provisional Secretary-General to explore headquarters arrangements both with potential host governments and with international organizations.

II. PRINCIPAL TRADE PROVISIONS

General Description

Article 3 of the ECT announces the perspective of the ECT 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."

Considerable emphasis has been placed on avoiding interference with or duplication of activities within the framework of the General Agreement on Tariffs and Trade (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."

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 (a defined term, see page 28). These articles are described below.

The "Interim" Trade Provisions

A major element of the ECT is that it subjects the trade of Contracting Parties which are not parties to the GATT -- such as republics of the former Soviet Union -- 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, are said to be "interim" ones, 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 on the preceding page), the European Energy Charter Conference Chairman indicated on the occasion of the adoption of the ECT text that it was the intent 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 selected 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. There is one potential exception: trade between republics of the former Soviet Union may instead by 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 selected 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.

Annex G to the ECT 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. The aim of the Energy Charter Conference was to apply all of the GATT provisions that could be workable when incorporated into the ECT. 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 Charter Conference will take that action. Another such Understanding 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.

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 such bilateral Declarations of the EC jointly with Kazakhstan, Kyrgyzstan, the Russian Federation, Tadjikistan and Uzbekistan.

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. Annex EM, which contains these item references, generally encompasses nuclear energy, coal, natural gas, petroleum and petroleum products, electrical energy, and 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; however, the ECT provides for the provisional Energy Charter Conference to examine the future inclusion of energy-related equipment in the ECT, and as required by the ECT this examination was formally begun at the initial, 17 December 1994 meeting of the provisional Charter Conference.

The covered 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 were 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.

There are exceptions from these dispute settlement procedures both for disputes arising under the agreements between former Soviet Union republics that are referred to at page 11 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) called for negotiations to commence by 1 January 1995 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, and these negotiations were formally commenced at the 17 December 1994 meeting of the Energy Charter Conference.

Separately, Article 30 provides 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 remains to be initiated by the Energy Charter Conference. Upon the occasion of the adoption of the text of the ECT by the European Energy Charter Conference, the Conference Chairman noted 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 at pages 17-18 below), "should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at." The Chairman said he was "sure that all delegations would fully endorse the need to achieve such consistency."

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*.

The article deals with the movement of "Energy Materials and Products," the definition of which is discussed on the preceding page. 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 the United States and Canada have done so. The terms "originating in" and "destined for" are undefined.

Paragraph (1) obliges each Contracting Party to "take the necessary measures to facilitate" transit "consistent with the freedom of transit" (a reference to Article V of the GATT) and on a non-discriminatory, reasonable basis. Paragraph (2) says that Contracting Parties shall encourage "relevant entities" to co-operate in developing, modernizing, operating, and interconnecting transit facilities, and in mitigating the effects of supply interruptions.

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 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 at pages 32-33. 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." 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 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 Conference Secretary-General to appoint a conciliator. If the conciliator fails to secure agreement within sixty 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 twelve months, unless the dispute is resolved sooner.

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. 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.

III. PRINCIPAL INVESTMENT PROVISIONS

The Core Provisions

The ECT's principal investment provisions are 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.

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." An Understanding in the Final Act explains that control means "control in fact," determined on 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 definition a non-exclusive list mentioning, *inter alia*, tangible and intangible 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 a change in the form of investments does 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." The term "Economic Activity in the Energy Sector" is defined to mean "an economic activity concerning the exploration, extraction, refining, projection, 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. Understandings in the Final Act provide illustrations of covered activity and indicate that no rights are conferred "to engage in economic activities" other than those within the above definition.

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 acquires policy substance only by its 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."

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 European Energy Charter Conference Chairman confirmed the Russian Federation's view that the reference to "international law" is not intended to impose most-favoured-nation ("MFN") 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 *makes 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 of an Investment of any other Contracting Party." The negotiating parties were given an opportunity to opt out of 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 in 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 will 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" commitment to accord the better of national treatment or MFN treatment to investors of other Contracting Parties with regard to the *making* of investments.

Paragraph (4) expressly contemplates the second-phase 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 begun at the 17 December 1994 meeting of the Energy Charter Conference. As noted at page 13 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. The second-phase treaty is to be open to 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). The ECT also is silent on whether the second-phase treaty is intended to be amendatory of the ECT.

An Understanding in the Final Act says that the second-phase treaty is to include provisions relating to *privatization* and *demonopolization*. 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 and MFN treatment to the making of investments in specified areas of activity.

Paragraph (7) of Article 10 establishes as a *post-investment* standard for the treatment of investment: the better of national treatment 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".

A limitation is indicated by paragraph (8), which notes that the "modalities of application" of paragraph (7) in relation to 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 Conference Decision incorporated into the Treaty allows the Russian Federation under certain circumstances to require legislative approval for the leasing of federal property; and Bulgaria has listed in 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 shall instead be accorded the treatment specified in other applicable international agreements.

There is an Understanding to Article 10 and to certain other provisions of the Treaty 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 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.

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Each Contracting Party is obliged by Article 14 to "guarantee" the free transfer of funds "with respect to" investments, 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.

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

The article also is subject to two Decisions annexed to the Final Act, which as noted above are made integral parts of the Treaty. One of these Decisions 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 a delay exceeding six months.

The other Decision, which will apply to those former Soviet Union republics which elect 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. The intent of this latter Decision is to exclude a right of the domestic investor of such a State to request certain transfers (even where that investor is a corporate 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 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. RL-108

The host State Contracting Party is required by Article 15 to recognize the assignment of rights and claims and the right 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 case 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 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. 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 contains 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."

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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.

Article 16 regulates 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. It 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*. 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 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 also shall remain available.

Part V is comprised of three articles, two of which establish investment dispute settlement mechanisms, and the third of which puts limits on access to one of those mechanisms. Article 26 covers disputes between a Contracting Party and an investor of a different Contracting Party "which concern an alleged breach of an obligation of the former under Part III...." It allows an Investor a 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. It contains several technical provisions to assure the sufficiency of Contracting Parties' consent to arbitration. Paragraph (8) 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.

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; twenty-three States (including eleven OECD countries) and the EC are listed in Annex ID as denying such consent, although it should be noted that these countries' policies differ concerning the extent to which a dispute may proceed in the domestic fora. RL-108

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 (excluding specified trade provisions, among which is Article 5 on TRIMs). Unlike Article 26 on investor dispute resolution, Article 27 is *not limited* to investment disputes arising under Part III, although the Article 27 procedures are excluded by Article 28 from application to trade-related disputes arising under Articles 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 settled within a reasonable period of time, either party to the dispute may submit it to arbitration. Article 27 then prescribes procedures for the constituting of a panel; specifies applicability of the rules of the United Nations Commission on International Trade Law (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 WTO Agreement dispute settlement procedures), 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 countries are listed in Annex P: Australia and Canada.

The "Sovereignty" Article

Article 18, "Sovereignty Over Energy Resources," is located in Part IV 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."

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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."

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 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 under Article 18(2) of that Convention "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

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.

IV. OTHER SUBSTANTIVE RIGHTS AND OBLIGATIONS

Trade Related Investment Measures

Article 5 of the ECT 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 preexisting 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 at page 13 above for properly notified agreements among former Soviet Union republics and for free-trade areas and customs unions as described in GATT Article XXIV. RL-108

Investors are afforded limited adjudication rights with respect to Article 5 TRIMs disputes, and Article 27 expressly excludes State-State arbitration of such disputes thereunder unless both parties to the dispute agree otherwise. Investors' 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.

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 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. 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.

As discussed at page 32 below, this article has been by far the single largest basis for claims to "transitional" exceptions by the "economies-in-transition."

Transfer of Technology

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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."

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, 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.

Environmental Aspects

Article 19 establishes "best-efforts" commitments to environmental goals in the energy sector, and enumerates some eleven 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. As in the case of Article 6 on "Competition," the absence of ECT dispute resolution with regard to the article 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."

V. IMPLEMENTING PROVISIONS

"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 adapts the language of GATT Article XXIV(12) to oblige 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 at pages 21 and 22, 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.

State and Privileged Entities

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

— to assure that its State enterprises conduct their *sales* activities "in a manner consistent with" the Contracting Party's Part III *investment* obligations;

— *not* to encourage or require such an enterprise to act "in a manner inconsistent with" the Contracting Party's obligations under *other* ECT provisions;

— to ensure that any *delegated* "governmental authority" is exercised "in a manner consistent with" the Contracting Party's ECT obligations; and

— *not* to encourage or require any "entity" (defined to include individuals) to which it grants "exclusive or special privileges" to act "in a manner inconsistent with" the Contracting Party's ECT obligations.

The Czech Republic has claimed, in Annex T, "transitional" relief pertaining to its uranium trade from the obligation mentioned in the third *tiret* of the preceding paragraph.

As in the case of Article 23 concerning "sub-national" application, a Final Act Understanding clarifies that for the purposes of the trade regulated under Article 29, the relevant GATT provisions called up by Article 29, rather than the provisions of Article 22, will apply with respect to State and privileged entities.

Transparency

Article 20, after having taken note of the transparency disciplines that exist under the provisions of the GATT and its related instruments which are brought to bear by ECT Article 29, goes on to apply, to other matters covered by the ECT, a rule parallel to that in Article X(1) of the GATT. Under it, Contracting Parties are to publish promptly, subject to protections for certain confidential information, all relevant international agreements and regulations, judicial decisions and administrative rulings of general application. Paragraph (3) of the article also requires each Contracting Party to designate "enquiry points" to which requests for information about such measures can be addressed. This requirement for "enquiry points" is the subject of Annex T "transitional" exceptions for ten "economies-in-transition."

Geographical Application

Many of the rights and obligations under the ECT refer to the "Area" of a Contracting Party. This term is defined in Article 1(10) to include for a Contracting Party "the territory under its sovereignty," which is further described in that article,

as well as certain additional maritime areas. Article 40 allows a Contracting Party to make the ECT binding upon itself with respect to the "other territories for the international relations of which it is responsible."

VI. EXCEPTIONS AND TRANSITIONAL ARRANGEMENTS

General Exceptions

Article 24 contains a number of general exceptions from the ECT for measures of Contracting Parties, except that none of these exceptions applies with respect to Articles 12 and 13 ("Compensation for Losses" and "Expropriation"), or to the Article 29 provisions regulating trade, which instead invoke the exceptions set out in the 1947 GATT. Article 24 found its inspiration in the exceptions contained in GATT Articles XX and XXI, but it addresses investment and other non-trade rights and obligations and its particulars are materially different from the GATT exceptions.

A set of three exceptions is contained in paragraph (2). These are all subject to the limitations that a measure in question must be nondiscriminatory and not a disguised restriction, and that it not unnecessarily impair benefits reasonably expected under the Treaty. The first of these three exceptions, for measures necessary to protect human, animal or plant life or health, is further limited in that it does not apply to Part III on investment. The second exception, for short supply of "Energy Materials and Products" due to causes beyond the control of the Contracting Party, is subject to a condition of consistency with the principle that "all other Contracting Parties are entitled to an equitable share of the international supply...." The third exception is for measures to benefit investors who are aboriginal people or who are socially or economically disadvantaged.

A set of three other, essentially "self-judging", exceptions is contained in paragraph (3). This set of exceptions begins with a prefatory requirement that the Contracting Party "considers" it necessary to take the measure. The first specific exception is for measures considered necessary for the protection of "essential security interests", including those relating to the supply of "Energy Materials and Products" to a military establishment or taken in time of war, armed conflict or other emergency in international relations. The second exception is for measures considered necessary with regard to nuclear non-proliferation. The third exception is for measures considered necessary for the maintenance of public order. This set of exceptions is subject to the limitation that a measure in question must not constitute a disguised restriction on transit.

Finally, paragraph (4) provides that the MFN requirements of the ECT shall not oblige any Contracting Party to extend to the *investors* of any other Contracting Party, any *preferential treatment* resulting from its membership in a free-trade area or customs union, or accorded by economic co-operation agreements among republics of the former Soviet Union pending the establishment of their mutual economic relations on a definitive basis. There is a Conference Decision bearing upon this exception, discussed in the following section.

"Economic Integration Agreements"

Paragraph (2) of Article 25 defines "Economic Integration Agreement" ("EIA") to mean an agreement "substantially liberalizing inter alia trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto...." Paragraph (1) provides that a Contracting Party need not extend under the ECT's MFN provisions, to another *Contracting Party* that is not a party to the EIA, any preferential treatment enjoyed under the EIA among the parties to it. As in the case of Article 24, Article 25 specifies that it shall not affect the application of the GATT according to Article 29.

Annexed to the Final Act and incorporated by reference into the Treaty is a Decision, drawn from Article 58 of the Treaty of Rome and jurisprudence of the European Court of Justice, which provides that an investment of an *investor* of a Contracting Party which is not a party to an EIA *or* a member of a free-trade area or customs union shall nonetheless be entitled to treatment accorded under such EIA, free-trade agreement or customs union, where the *investment*:

> "(a) has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or
>
> (b) in case it only has its registered office in that Area, has an effective and continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union."

In addition, in a Final Act Declaration with respect to this article, the EC and its Member States recall the provisions of Article 58 of the Treaty of Rome according national treatment as to the right of establishment to certain kinds of firms present in the Community. They state that "the application of Article 25 [of the ECT]...will only allow those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration...."

There also is a Final Act Understanding that is relevant both to Article 25 and to Article 24, which states that derogations from MFN treatment "are not intended to cover measures which are specific to an investor or group of investors, rather than applying generally."

The Taxation Article

Article 21(1) provides that *except as otherwise provided in Article 21*, nothing in the ECT creates rights or imposes obligations with regard to a Contracting Party's domestic tax laws or international tax agreements (collectively, "Taxation Measures"). The article next deals separately, in a complex way, with the trade and investment provisions of the ECT. Finally, the article allows full applicability, to taxes, of Article 13 on expropriation.

As concerns trade, paragraphs (2) and (4) of Article 21 allow the Article 29 "interim" trade provisions, and the Article 7(3) MFN provision related to transit of "Energy Materials and Products," to apply only to "Taxation Measures" other than those on income or on capital. Within the remaining scope for applicability, however, the Article 7(3) MFN provision does not apply to an advantage accorded by an international tax agreement, and neither does it apply to "Taxation Measures" aimed at the effective enforcement of taxes, except where they arbitrarily discriminate between "Energy Materials and Products" or arbitrarily restrict benefits accorded under Article 7(3).

As concerns the ECT's Part III investment provisions imposing national treatment or MFN obligations (Article 10(2) and (7)), paragraph (3) of Article 21 similarly allows these to apply only to "Taxation Measures" other than those on income or capital. Within the remaining scope for applicability, the Article 10 provisions do not apply to advantages under an international tax agreement or resulting from membership in a Regional Economic Integration Organization, and neither MFN nor national treatment need be accorded to a "Taxation Measure" aimed at the effective collection of taxes unless it arbitrarily discriminates between investors or arbitrarily restricts benefits accorded under the investment provisions of the ECT.

Transitional Arrangements

Article 32 sets out arrangements under which Contracting Parties that are among the twenty-four "economies-in-transition" listed in Annex T of the Treaty are eligible for temporary exceptions from obligations under certain provisions of the ECT. The only ECT provisions as to which the "transitional arrangements" could be claimed are the following:

Article 6, "Competition," paragraphs (2) and (5)
Article 7, "Transit," paragraph (4)
Article 9, "Access to Capital," paragraph (1)
Article 10, "Promotion, Protection and Treatment of Investments," paragraph (7), "specific measures"
Article 14, "Transfers Related to Investments," paragraph (1)(d), "related only to transfer of unspent earnings"
Article 20, "Transparency," paragraph (3)
Article 22, "State and Privileged Enterprises," paragraphs (1) and (3)

The "transitional" exceptions from specific provisions that have been claimed by the "economies-in-transition" are described in Annex T; they are all identified in the previous parts of this booklet describing the obligations to which they pertain. A total of some 50 temporary exceptions have been claimed by nineteen of the eligible States. Half of the exceptions pertain to the "Competition" article's requirements to *have* competition laws and institutions to enforce them; the "Transparency" article's requirement for "official enquiry points" through which information can be obtained is the next most claimed exception. About a half dozen States took exceptions from the "Transit" article's prohibition against placing obstacles in the way of establishing new transit capacity, and from the "Access to Capital Markets" obligation to "endeavour" to promote access to such markets. Only one State claimed an exception (for its specific measures) from the Article 10(7) requirement of the better of national or MFN treatment of existing investment; two States took exceptions (for unspent earnings only) from Article 14's transfer of payments provisions; and one State took a narrowly focused exception from Article 22(3) concerning rules imposed on the exercise of delegated governmental authority.

Paragraph (3) says that each Contracting Party claiming "transitional arrangements" must list in Annex T, for each such provision, "the stages toward full implementation of each, the measures to be taken and the date or, exceptionally, contingent event, by which each stage shall be completed and measure taken...." Paragraph (3) further requires that the Contracting Party "shall take the measure listed by the date indicated for the relevant provision and stage...."

According to paragraph (3), Contracting Parties that have temporarily suspended full compliance with any such provision "undertake to fully comply with the relevant obligations by 1 July 2001." Once-yearly progress reports and annual progress reviews by the Charter Conference are provided for. Any extensions of time for compliance or amendments to Annex T must be approved by the Charter Conference; a three-fourths majority of the Contracting Parties present and voting would be needed.

Paragraph (2) of the article calls on other Contracting Parties to assist the relevant "economies-in-transition," in whatever form the assisting parties consider most effective, in achieving conditions which eliminate the need for "transition arrangements." The Conference Secretariat is to "circulate and actively promote, relying where appropriate on arrangements existing within other international organizations, the matching of needs and offers for technical assistance...", and the Conference is to annually review such matching.

VII. RELATED AGREEMENTS

Protocols, Declarations and Association Agreements

Paragraph (1) of Article 33, "Energy Charter Protocols and Declarations," provides that the Energy Charter Conference may authorize Protocols or Declarations "in order to pursue the objectives and principles of" the European Energy *Charter*. "Protocol" is defined in Article 1(13)(a) as a treaty, the negotiation of which is authorized and the text of which is adopted by the Charter Conference, which is entered into by Contracting Parties to "complement, supplement, extend or amplify" the ECT. Adoption of a Protocol text requires a vote of three-fourths of the Contracting Parties present and voting. Any European Energy *Charter* signatory may join in the negotiation of a Protocol, but it may not become a party to the Protocol without becoming a Contracting Party to the Energy Charter *Treaty*. Participation in any particular Protocol is at the option of each ECT Contracting Party; paragraph (5) assures that a Protocol shall not derogate from the ECT rights of non-participating Contracting Parties.

Under paragraph (6) a Protocol may assign duties to the Charter Conference and functions to the Secretariat. A Protocol also may provide that decisions to be taken thereunder, which it assigns to the Charter Conference, shall be taken in the Conference under special voting rules, which may include a rule allowing only the

parties to the Protocol to vote on the matter in the Conference. Article 37(4) requires that a Protocol contain provisions to assure that any costs of the Secretariat (which by definition include the Charter Conference's costs) arising from the Protocol are borne by the parties to the Protocol.

"Energy Charter Declaration" is defined in subparagraph (b) of Article 1(13) as a "non-binding instrument" entered into by Contracting Parties "to complement or supplement the ECT", the negotiation of which is authorized and the text of which is approved by the Charter Conference. As in the case of Protocols, participation by Contracting Parties in Declarations is optional.

As indicated above a Protocol on "Energy Efficiency and Related Environmental Aspects" opened for signature along with the ECT. This Protocol contains a provision that in the event of inconsistency between its provisions and the provisions of the ECT, the provisions of the ECT shall, to the extent of the inconsistency, prevail.

Negotiations are advanced on another proposed agreement on "Principles Governing the Peaceful Uses of Nuclear Energy and the Safety of Nuclear Installations." However, the Working Group in which this document was being negotiated did not reach a conclusion, prior to the end of the European Energy Charter Conference, on whether the instrument should be in the form of a Protocol or that of a Declaration.

A third possible Protocol, on "Hydrocarbons," is further from completion, negotiations in the European Energy Charter Conference having been suspended some time ago, pending the outcome of negotiations on the ECT.

An Understanding in the Final Act calls on the provisional Energy Charter Conference to decide "at the earliest possible date how best to give effect" to the European Energy Charter's goal of negotiating Protocols in areas of co-operation identified in Part III of the Charter.

Provision also is made in Article 43 of the ECT for the negotiation of "Association Agreements" with States, Regional Economic Integration Organizations, or international organizations, "to pursue the objectives and principles of the Charter and the provisions of this Treaty or of one or more Protocols." The term "Association Agreement" is undefined, and paragraph (2) merely says that "[t]he relationship with and the rights enjoyed and obligations incurred" thereunder will depend on the particular circumstances and will be spelled out in the agreement.

VIII. INSTITUTIONAL ARRANGEMENTS

The Charter Conference

Article 34 provides that the Contracting Parties will meet "periodically" in "the Energy Charter Conference." The functions of the Conference, enumerated in fourteen subparagraphs of paragraph (3), include not only specific duties such as approving the programme of work and budget and taking decisions concerning the Secretariat, but also some fairly broad general powers such as to "facilitate the implementation of the principles of the Charter and of the provisions of this Treaty and the Protocols," to "facilitate...the co-ordination of appropriate general measures to carry out the principles of the Charter," and to "encourage co-operative efforts aimed at facilitating and promoting market oriented reforms and modernization of energy sectors" in the "economies-in-transition."

Unanimity of the Contracting Parties present and voting is necessary for certain specified Charter Conference decisions, including most types of Treaty amendments, accessions to the ECT by States or Regional Economic Integration Organizations which have not signed the *Charter* by the ECT's closing date for signature, and changes to most Annexes. Article 36 expressly contemplates that other decisions will if possible be taken by consensus, but it sets out voting rules in case that is infeasible. The budget is to be approved by Contracting Parties whose assessed contributions represent a three-fourths majority of the total assessed contributions. And in the absence of a contrary specification in the ECT, decisions are to be taken under the Treaty by a three-fourths majority of Contracting Parties present and voting. This last requirement applies, *inter alia*, to amendments to the ECT's Article 34 and 35 provisions concerning the Charter Conference and Secretariat or to Annex T containing "transitional" exceptions, and to ECT accessions by those who were signatories to the Charter on the closing date for ECT signature.

Paragraph (4) contains the following guidance:

> "In the performance of its duties, the Charter Conference, through the Secretariat, shall co-operate with and make as full a use as possible, consistently with economy and efficiency, of the services and programmes of other institutions and organizations with established competence in matters related to the objectives of this Treaty."

Paragraph (7) directs that in 1999 and at intervals of not more than five years thereafter, the Charter Conference "thoroughly review the functions provided for in this Treaty", and authorizes the Conference thereupon to "amend or abolish" its own functions "and...discharge the Secretariat." Article 36(3) allows such decisions to be taken by an absolute three-fourths majority of the Contracting Parties.

The Secretariat

Article 35 provides for a Secretariat responsible to the Charter Conference, including a Secretary-General to be appointed by the Conference (initially for a maximum term of five years), and a staff which shall be "the minimum consistent with efficient operation." The Secretariat is empowered to enter into administrative and contractual arrangements.

The Treaty imposes substantial responsibilities upon the Secretariat, many of which will have to be discharged by the provisional Secretariat from the very outset. These include, in addition to starting-up activities, administrative duties such as receiving notifications, keeping records, distributing information, appointing transit conciliators and trade dispute panelists, helping match technical assistance offers and needs, and arranging for Charter Conference meetings. The Secretariat also will have to support new treaty negotiations, by itself a demanding task. These include negotiation of the "second-phase" investment treaty; negotiation of an ECT amendment to bind Contracting Parties' energy tariffs (an Understanding in the Final Act indicates that the Contracting Parties "may consider any connection between" the ECT's provisions on these two subjects); consideration of Treaty coverage of trade in energy-related electrical and other equipment; a more general trade negotiation that is supposed to start before the ECT enters into force; and possible Protocol or Declaration negotiations.

Funding

The costs of the Charter Conference and Secretariat are to be assessed annually on the basis of an adjusted version of the United Nations' "Regular Budget Scale of Assessment." Voluntary contributions also can be accepted, but they do not operate to reduce the annual assessments.

During provisional application the signatories to the ECT (and any State or Regional Economic Integration Organizations that accede to the Treaty) are required to contribute to the costs of the provisional Charter Conference and Secretariat as if the Treaty was in force.

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