# Chapter 10. The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?

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On 17 December 1994, the Energy Charter Treaty (The Charter Treaty) was opened for signature in Lisbon. Forty-six countries put their names to it on that day, bringing to an end a negotiating process that had started in June 1990 when the Netherlands Prime Minister, Ruud Lubbers, launched his idea for a European Community for Energy. (1) The Charter Treaty has its origins in the earlier European Energy Charter. This had as its basic concept the encouragement of economic growth through measures of liberalisation in investment and trade in the energy field. As such it sought to create a liberal international order for trade and investment in a specific industrial sector. That had not been done before.

The initial concept involved a treaty to be negotiated between the Member States of the European Union (EU) and the post-socialist states of the Former Soviet Union (FSU) and of Central and Eastern Europe (CEE). In essence the bargain was to be that, in exchange for guarantees of investment protection and promotion given by all the signatories, the EU Member States would ensure closer cooperation with the FSU and the CEE states in the field of energy investment and as regards access to EU energy markets. In this way both sides would benefit. The post-socialist states would gain access to investment capital and technology from EU sources, enabling them to expand their energy resources industries both domestically and for export, while the EU Member States would secure access to energy resources from their Eastern neighbours, thereby reducing their dependence on Middle Eastern sources. (2) This deal would also correspond with the emerging industrial organisation of the EU energy market, especially in the field of natural gas, where existing and





projected pipelines are expected to transport increased volumes of such gas from Eastern to Western Europe. (3)

This initial development was seen by other states, particularly the United States of America, as carrying the risk of a monopolisation of access by Western Europe to East European energy resources. (4) In response, the European Energy Charter initiative was expanded and the US and other non-EU Organisation for Economic Cooperation and Development (OECD) members were invited to participate in negotiations. (5) Negotiations were by no means smooth, with numerous disagreements surfacing between the Western participants. (6) In particular, strong differences of opinion emerged as to the strength of investment protection standards to be included in the Charter Treaty. These will be considered in detail in section IV. below. For now it is enough to note that, as a result of the failure to resolve these differences, the United States did not sign the Charter Treaty in December 1994 but only attended as an observer. (7)

Consequently, the Charter Treaty has emerged as an experiment in multilateral standard setting for trade and investment in a specific industrial sector, with participants mainly from the EU and the FSU and CEE states. To enter force, 30 ratifications are needed. Furthermore, supplementary negotiations are to continue on the question of the not yet fully settled regime concerning pre-investment standards of protection for foreign investors. Thus much remains to be done.

However, even as it stands, the Charter Treaty offers a significant addition to the history of attempts at the creation of a truly multilateral regime for the protection and promotion of foreign direct investment. The question to be addressed in this chapter recognises that fact by considering whether and, if so, how far the Charter Treaty furthers the aims of a liberal “New International Order for Trade and Investment”. As will be seen below, the tentative answers put forward to that question raise some misgivings about whether such a new order is any more realisable now than it was when the Havana Charter was negotiated some 50 years ago.

The refusal of the US to sign the Charter Treaty echoes the fact that it was also the US which refused to ratify the Havana Charter, and for much the same reasons: the power to protect foreign direct investment against host state control was too weak; the US could do a better job

by itself. [8] As to the Charter Treaty, the US Government explained its refusal to sign in these terms:

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> Unfortunately, some negotiating parties were not able to agree on a text that would have met the international investment standards that the United States has obtained in its bilateral investment instruments and in multilateral investment agreements. Our investors look upon U.S. Government acceptance of such a treaty as an indication that it provides a high standard of protection for them. Unfortunately, the current text of the [Energy Charter Treaty] simply does not measure up to that standard. [9]

Thus, we are left with the question: does the Charter Treaty offer a significant advance over earlier efforts to create an effective international legal order for the protection and promotion of foreign direct investment? This question will be answered in the following stages: first the background to the question will have to be sketched in with a brief overview of some earlier, mostly unsuccessful, attempts at the creation of such a multilateral treaty-based regime of protection placed in their historical and ideological contexts; secondly, the contents of the Charter Treaty shall be placed in the wider context of other contemporary attempts to create a New International Order for Trade and Investment, centred on the OECD, EU and World Trade Organisation (WTO); thirdly, an analytical position concerning the issues of globalisation and the role of law therein will be developed, against which the contents of the Charter Treaty can be judged. Finally, certain detailed aspects of the Charter Treaty itself will be analysed in the light of the foregoing analysis, with a view to assessing the extent to which an effective international order for the liberalisation of investment is being created.

## I The Historical Background [10]

In the nineteenth century the major Western European powers and the US developed agreed international minimum standards for the treatment of aliens and their property. In particular, the property of foreigners could not be taken without due process of law and without prompt, full and effective compensation. Furthermore, contractual relations entered into between host states and private foreign investors were to be accorded the utmost respect, requiring the preservation of the bargain even where its terms proved to be disadvantageous to the host state.

As Lipson points out, these principles emerged out of the, “orderly climate of European diplomacy after the Congress of Vienna”, and were “elaborated and sustained by the expansive foreign policies of the Great Powers, particularly Great Britain”. [11] As such they represented the consensus of the great capitalist and imperialist powers of the nineteenth century.

These principles were challenged, first, by the ideology of socialism, which denied the validity of private property rights, whether held by nationals or foreigners, and which resulted in the first major nationalisations of foreign

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owned property following the Russian Revolution in 1917. [12] The second major challenge came after the Second World War from the newly independent former colonial states of Asia and Africa. [13] In unison with the much older but economically less developed states of Latin America, these states sought redress for past and, in their view, continuing economic exploitation from the former Northern colonial powers. This was to be achieved through the widespread use of expropriation as a weapon of sovereign power and by calls for the institution of a New International Economic Order. This legitimated the expropriation of foreign owned property for less than full compensation, the termination of unfavourable contracts with foreigners and increased state control over the activities of foreign investors. [14]

The result of these challenges to traditional norms of international law was to generate uncertainty as to the content of customary international law in the field of foreign investment. Indeed in the *Barcelona Traction* case, the International Court of Justice maintained that there was no single accepted body of international law that laid down universally accepted standards for the treatment of foreign investors by host states. [15] The Court saw the reason for this as lying in a period of, “an intense conflict of systems and interests” between states, from which no generally accepted rules of international law in the field could emerge on the basis of an *opinio juris* among states. Such standards as applied were the product of bilateral agreements between states and, therefore, could not bind other states.

Against this background numerous attempts have been made over time to develop an agreed international code for the regulation of foreign investor/host state relations. Such attempts were made periodically between the 1920s and the early 1960s. [16] In 1929 the League of Nations held a diplomatic conference for the purpose of concluding an international convention on the treatment of foreigners and foreign enterprises. [17] This was followed in 1930 by the Hague Conference on the Codification of International Law, which included the subject of the responsibility of states for damage caused in their territory to the person or property of foreigners. [18] Neither initiative met with success,

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due to the refusal of Latin American, newly independent East European and other ex-colonial states to accept the traditional international minimum standards of treatment insisted upon by the capital-exporting states. [19]

After the Second World War attempts at a general multilateral treaty, that included a code on the protection of foreign investment, were revived. [20] The major attempt was the Charter of the International Trade Organisation signed at Havana, Cuba, on 24 March 1948. The

Charter contained a number of provisions relevant to the regulation of foreign investment by corporations, including proposals for the control of restrictive business practices, (21) provisions protecting the security of foreign investments (22) and an assertion of the right of capital-importing states to control the conditions of entry and establishment of inward investment. (23) The inclusion of a right of capital-importing states to interfere with the conditions of foreign investment, and the absence of any unequivocal provision for compensation in the case of expropriation, caused widespread opposition to the Havana Charter among business interests and led, as noted above, to its demise when the United States and other signatory states did not ratify it. (24)

A similar fate befell the Economic Agreement of Bogota, the second post-war multilateral attempt to deal *inter alia* with the regulation and protection of private foreign investment. This agreement, signed at the Ninth International Conference of American States on 2 May 1948, did not go into effect as a result of fundamental disagreements between the capital-exporting and capital-

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importing states over the proper measure of compensation in cases of expropriation. (25)

Thereafter, attempts at stimulating interest in a multilateral convention on foreign investment were made mainly by private sector bodies. (26) In 1949 the ICC issued a draft code for the “Fair Treatment of Foreign Investments” as a continuation of its campaign, launched in 1931, for the conclusion of an international convention guaranteeing the protection of the private property rights of foreign investors. The ICC repeated its call for such a treaty in 1957. (27) Also in 1957, the German Society to Advance the Protection of Foreign Investments published a draft code entitled, “International Convention for the Mutual Protection of Private Property Rights in Foreign Countries”. (28) In early 1958, another privately inspired draft convention on foreign investments came from a group of European international lawyers headed by Sir Hartley Shawcross. (29) These two initiatives were combined into a single draft convention in 1959 (30) This convention was taken up by the then Organisation for European Economic Cooperation (OEEC now OECD) for consideration. It led to the OECD Draft Convention on the Protection of Foreign Property. (31) However, this draft convention failed to achieve sufficient support to be opened for signature, owing to the reluctance of the less developed members of the Organisation (such as *inter alia* Greece, Portugal and Turkey) to bind themselves to some of the proposed provisions, in view of their heavy leaning towards the interests of capital exporters. (32) Instead, the Council of the OECD, by a resolution adopted on 12 October 1967, commended the draft convention to Member States as a model for investment protection treaties and as a basis for ensuring the observance of the principles of international law which it

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contained. (33) Thus the OECD draft, while failing to contribute towards a general codification of the international law relating to foreign investments, has provided, “important guidelines for some of the more fundamental provisions on the treatment and protection of investments included in bilateral investment treaties.” (34)

Finally, the European League for Economic Co-operation, a body representing the views of industrial and banking interests, (35) published a report in February 1958, on the initiative of the group's German national committee, (36) suggesting that the Common Market countries draw up a common plan for the protection of foreign investments. This involved the conclusion of a “solidarity convention” between the Member States binding them to common action on the protection of foreign investments. This convention would be open to non-EC capital-exporting states and would act as the first step towards the acceptance of a Charter of Fair Treatment for Foreign Investors.

The above-mentioned private initiatives all had as their objective the reaffirmation of traditional international standards for the protection of foreign investors. The pattern of action in the decades between the 1920s and 1960s was little changed: private bodies representing business interests sought to reinforce traditional rules of international law by attempting to persuade international organisations to adopt conventions containing those norms, while the Member States of those organisations could not agree whether those norms represented international *opinio juris* on the subject. The various attempts at codification in the interests of private foreign investors therefore failed. This left the route of bilateral investment treaties (BITs) as the only means of institutionalising the traditional norms of international law in the field of investor protection.

By contrast, in the 1970s, international organisations began to accept the legitimacy of claims by capital-importing states for greater control over the conditions of entry and establishment, and over the subsequent conduct of foreign investors within their territory. The balancing of the interests of private foreign investors and those of the host state, first attempted in the abortive Havana Charter, became the basis for the new codes of conduct for multinational enterprises first proposed in the early 1970s. In particular, the now defunct UN Draft Code of Conduct for Transnational Corporations sought to provide such a balance. However, it failed to secure general agreement as a result of the resurgence of irreconcilable differences between capital-exporting and capital-importing states over the role of international law in the draft Code and the related issues of the proper rule as to compensation for expropriation and as to the conduct of disputes, as well as the precise meaning of references to “national treatment”. (37)

The foregoing attempts to generate a multilateral investment protection and

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promotion instrument, and the variant of a code of conduct on multinational enterprises which both controlled multinationals and provided rights of protection, all ended in failure. That failure arises in each case from the absence of clear consensus between the states involved as

to the correct policy to be taken in this field, and as to the proper balance to be struck between the legitimate expectations of foreign investors and the right of host states to control their economic policy as they see fit.

It has been argued that the contemporary environment is more suited to the successful creation of such a multilateral regime, as a result of shifts away from the New International Economic Order paradigm towards a new paradigm based on liberalisation, privatisation and the recognition of the utility of inward direct investment by multinationals as a source of capital and technology. (38) In this context it is arguable that the Charter Treaty has a higher chance of survival and effectiveness than some of its forerunners. However, as Professor Waelde asserts,

> The Charter Treaty is likely to create a very new type of regional and industry-focused international investment law. It cannot, however, substitute for the solution of the political problems emerging in the Russian and other ex-USSR republics and it will only function as envisaged if a reasonably effective process of national implementation and international respect for its obligations emerges. (39)

Thus, the mere passage of the Charter Treaty cannot be seen as a success in itself. It may yet succumb to the "intense conflicts of interests" that characterise the reality of international energy investment in the FSU and CEE states. Indeed, despite the pro-free market and foreign investment sentiments often heard in these states, there remain intense splits between economic and political "nationalists" and "internationalists" which make uncertain any long-term commitment to the values of the Western free-enterprise system in these states. If that were not so the Charter Treaty itself would be a redundant document. It aims at the creation of a new legal order that will promote those Western commercial values in dealings with the FSU and CEE states. However, it also recognises the art of the possible by including long transitional periods for many of the commitments that it contains. Whether these will ever be implemented in practice remains to be seen. An agreement to agree in the future can always be undone.

On the other hand, when the Charter Treaty is seen in the context of wider moves towards the establishment of a New International Order for Trade and Investment, it may be possible to argue with more conviction that it is the

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result of forces strong enough to effect permanent change. To these we now turn.

## II Contemporary Attempts Concerning the Creation of A New International Order for Trade and Investment and the Charter Treaty

By contrast to the failures noted in the preceding section, the present section will examine the Charter Treaty in the light of a number of international and multilateral initiatives aimed at the promotion and protection of foreign direct investment that are already in existence, or that are proposed. It is not necessary to go into detail as this has been done elsewhere. (40) What is necessary is, first, to relate the Charter Treaty initiative to certain institutional developments that have had an influence on its content, and, secondly, to locate the Charter Treaty into the context of other initiatives which are currently under discussion as a means of furthering the New International Order for Trade and Investment.

Turning to existing initiatives that have impacted on the content of the Charter Treaty, (41) the earliest in point of time is the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965. (42) This was the first multilateral system for the delocalised settlement of investment disputes, offering conciliation or arbitration for disputes between a host Contracting State and an investor from another Contracting State before the International Centre for the Settlement of Investment Disputes (ICSID). The Charter Treaty takes this model a step further in Article 26, by providing for compulsory arbitration at the instigation of the foreign investor upon failure of attempts at the amicable settlement of the dispute. The investor retains a choice as to the method of arbitration to be used. The Washington Convention procedure is one option open to the investor. Any resulting award will be final.

A second influence upon the Charter Treaty comes from various multilateral codes and guidelines on investment and multinational enterprises. Unlike the abortive draft UN Code, with its initial emphasis on investor control, (43) other codes that are more favourable to the promotion and protection of foreign direct investors have been concluded. The two most important are the OECD Declaration and Guidelines on Multinational Enterprises of 1976 and the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment. Both include provisions on the protection of foreign investors (of which multinational enterprises are the most significant example) with an emphasis on

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the "national treatment" principle as modified by reference to rules of international law. Thus, both sets of guidelines assert that a foreign investor is entitled to treatment no less favourable than that accorded to a domestic investor in the same line of business, subject to preferential treatment where this is required under the international minimum standards of treatment for aliens and their property. (44) The Charter Treaty reflects these standards in Article 10. Furthermore, Article 10 contains the Most-Favoured-Nation (MFN) standard, a standard of protection taken from bilateral treaties of friendship, commerce and navigation.

Also of importance are the OECD Codes of Liberalisation, which embody the OECD member countries' commitment to the progressive liberalisation of capital movements and provision of services, including a right of establishment. (45) This has not been incorporated without

change, in that the Charter Treaty has failed to secure a binding right of national treatment prior to the investment being made, settling instead for a “best endeavours” principle at the pre-investment stage and for a subsequent treaty to be negotiated on the issue. (46)

A third strand of influence comes from the Final Act of the Uruguay Round Negotiations of the GATT. For the first time direct investment issues have been placed on the GATT agenda through the conclusion of a General Agreement on Trade in Services (GATS), an Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and an agreement on Trade Related Investment Measures (TRIMs). The most important effect of this process has been the inclusion of restrictions on TRIMs in Article 5 of the Charter Treaty. On the other hand the TRIPs Agreement is inapplicable to the protection of intellectual property rights under the Charter Treaty due to the cut off date of 15 March 1994 for GATT Rules under Article 29 of the Charter Treaty. (47) Services are not mentioned in the Charter Treaty except in the Preamble. A separate decision on trade in energy-related services will be negotiated. (48) Apart from these investment specific areas of the GATT, the more general GATT disciplines are provided for in the Charter Treaty on a transitional basis. (49) The GATT transparency principles are also included in Article 20 of the Charter Treaty.

A fourth source of influence has been the substantive provisions of BITs. The standards of protection contained in such treaties are manifested most prominently in Article 10, which lists the fair and equitable treatment, national treatment, most favoured nation treatment and non-discrimination standards as well as the general duty to observe obligations entered into with the investor.

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Standards of treatment common to BITs are also found in Article 12, concerning compensation for losses due to war or other armed conflict, national emergency or civil disturbance; Article 13, which introduces the principles applicable to the treatment of expropriation commonly found in BITs; and Article 14, which preserves the principle of free transfer of funds. In addition, Article 15, which protects the subrogation of rights after a designated agency has made a payment under an investment guarantee agreement, connotes bilateral investment guarantee agreements and the principles found in the Multilateral Investment Guarantee Agency Convention 1985. (50)

Turning to contemporary developments aimed at the creation of a New International Order for Trade and Investment, the Charter Treaty should be seen as one among a number of initiatives seeking the creation of a more robust system of international legal standards for the protection of foreign direct investment. The investment related aspects of the Final Act of the Uruguay Round negotiations have already been mentioned. However, these do not appear to be the final word on investment related issues to be addressed under the auspices of a multilateral organisation. There have been numerous calls from various quarters for the conclusion of a multilateral direct investment code. Such calls have been particularly strong from the EU and OECD.

Turning to the EU first, the EU Trade Commissioner, Sir Leon Brittan, has repeated calls for global rules for the treatment of foreign direct investment under the auspices of the WTO. (51) Sir Leon favours a binding code which could be administered by the WTO, aimed at the removal of unfair discrimination against foreign investors and at the provision of guarantees *inter alia* against expropriation, for the free transfer of funds and for free currency conversion. The attraction of the WTO is seen by Sir Leon to be twofold. First, it covers a large number of states, including developing countries. Secondly, it possesses a binding dispute settlement mechanism which can give the proposed code real legal force. (52) Sir Leon's proposals are said to be backed by the executives of many large European companies who are concerned about the treatment of foreign direct investment, especially in developing countries.

The EC Commission has itself entered the debate with a proposal for an early start to discussions in the WTO for a multilateral investment code. (53) This is envisaged as occurring alongside a more co-ordinated position among the EC Member States on foreign direct investment issues. Such a development would be a novel departure for the EC, which has traditionally avoided a common policy on outward or inward direct investment. (54) This development, coupled with the conclusion of the Charter itself, suggests that the EU is taking

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a more active overall role in the promotion of the New International Order for Trade and Investment.

Apart from tentative calls for a WTO initiative on a multilateral investment code, discussions are continuing under the auspices of the OECD towards the conclusion of an OECD Multilateral Investment Agreement (MIA). (55) The aim is to produce a treaty open for signature to both OECD members and non-members alike which would contain, “high-standard, state-of-the art provisions for liberalization, investment protection and dispute settlement and providing for a satisfactory balance of commitments”, such as would ensure widespread political support. (56) The instrument might include: liberalisation obligations including pre- and post-investment national treatment subject to appropriate exceptions; a standstill on reservations or exceptions; a non-discrimination principle; measures for increasing liberalisation; investment protection obligations including specific standards for expropriation, compensation and free transfer of funds; and a dispute settlement mechanism. (57) It is envisaged that the proposed instrument would draw on existing precedents such as NAFTA or the Charter Treaty itself as models for investor protection and dispute settlement provisions. (58)

However, significant obstacles lie in the way of such an instrument. (59) First, many restrictions on foreign investment may be regarded as entirely legitimate, the most obvious example being restrictions based on strategic and defence grounds. Indeed, the existing OECD instruments on Liberalisation of Capital Movements and National Treatment envisage these and other exceptions. (60) Thus, absolute standards of protection in a multilateral instrument may be too onerous for most states to accept. Secondly, the OECD members must persuade developing countries to accept the new disciplines and to sign up to the MIA. This is why the EU favours the conclusion of a

multilateral instrument under the auspices of the WTO which has a wider membership than the OECD, the latter being restricted to the more economically advanced states. Thirdly, the envisaged MIA would require progressive liberalisation of rights of entry and establishment. States may react differently to such proposals. While advocating greater liberalisation for outward investment, many states may prefer to restrict the flow of inward investment for protectionist purposes. Furthermore, economic unions such as the EC, may want the right to liberalise faster for internal investors than for investors from outside the economic union. (61) Equally, federal states may encounter internal political objections from





federal subdivisions to the effect that an MIA will curtail their local competence and discretion in formulating inward investment policy. (62) Thus many obstacles must be overcome before an MIA is eventually concluded. Finally, an unresolved issue is whether labour and environmental issues should be placed upon the agenda. The Trade Union Advisory Committee to the OECD would like to see these issues included on the ground that globalisation cannot be dealt with by investment liberalisation alone. (63) These are issues that the US has sought to include on the WTO agenda. The OECD initiative may therefore have to take these into account as well.

In some ways this exercise feels like a rerun of the history of the movement for codes of conduct on multinational enterprises in the 1970s. At that time the OECD concluded its Guidelines on Multinational Enterprises as a means of setting the negotiating agenda over the draft UN Code of Conduct on Transnational Corporations. The proposed MIA would appear to be attempting the same thing in relation to possible future negotiations in the WTO. As an official of the OECD has put it, “The choice of the OECD as the forum for negotiation would not foreclose the agreement being transferred elsewhere at a later stage, for example the World Trade Organisation if and when it appears that the broader membership of that organisation are ready to accept the high standards of liberalisation and investment protection that are the objective of this agreement.” (64)

From the above it can be seen that the Charter Treaty fits into these developments, first, as the product of the same process towards progressive multilateral liberalisation and protection of foreign direct investment that is motivating the calls for a new MIA, especially as regards the role of the EU in this process and, secondly, as a possible model for parts of a future MIA. On the other hand, as noted in the introduction to this chapter, the Charter Treaty is in many ways a unique departure in that it is located within the energy resources industry and is not a general investment protection and promotion code, that it operates in relation to the evolution of that industry in the FSU and CEE states, and that it offers a special combination of issues that include not only investor protection, but also trade liberalisation, free transit of energy resources, competition, dispute settlement and environmental protection. It may, therefore, be equally plausible to regard it as *sut generis*, and, in that sense, of no more general significance as a source of law than a BIT.

## III Globalisation, the Role of Law and the Charter Treaty

Having described the Charter Treaty in its historical and contemporary legal contexts, this section attempts to place the Charter Treaty into a more systematic analytical model of law in the process of globalisation. At the heart of





debates surrounding the new paradigm of global economic law lies an ideologically rooted distinction between “open” policies towards foreign direct investment and “managed” regimes. (65) The former rely on neo-classical economic prescriptions and are aimed at the progressive liberalisation of national controls over the entry, establishment and post-entry operations of foreign direct investors. The latter are based on varying degrees of scepticism concerning the efficacy of free-market policies and advocate varying degrees of regulatory intervention in the process of foreign direct investment. At present most states approach the regulation of foreign direct investment from the latter perspective, given the greater degree to which investment, as opposed to trade, is seen as an intrusion into national economic sovereignty. (66) Even an “open door” economy such as the United Kingdom, which has no specialised foreign investment controls, may, exceptionally, use other areas of law, such as competition law, to control the entry of foreign investors where this is seen to be in the national interest. (67)

Alongside this distinction another set of variables should be placed. These concentrate on the level of jurisdiction at which policy prescriptions ought to be developed. Here there is a choice between national, regional and global levels. (68) There may be a resulting tension between local regulatory regimes at the national level, whose priorities reflect national policy goals, and regional or global regimes which may seek to impose new disciplines upon individual national systems. This results in a pattern of national restrictions and/or controls being attacked at the regional or multilateral level through supranational and international organisations or other treaty based regimes aimed at liberalisation. The GATT system is an excellent illustration of this process at the multilateral level, while the EC offers a regionally based example. An MIA, as described above, would also display such features.

However, to assume that the passage of a multilateral instrument is enough to effect policy changes at the national level, even if it were legally binding and subject to dispute settlement mechanisms, might be to substitute a legal pseudo-order for a real legal order. Such a system of regulation may lack rootedness in actual commercial experience and local regulatory practice to be an effective means of changing that practice. What is needed is evidence that the detailed content of any multilateral regulatory order that seeks to change national practices has some actual precedent in contractual regimes used by foreign investors and in regulatory regimes as developed by home and host states. It is from such practices that a true “global proto-law” can emerge. (69)

In this respect the recent history of multilateral instruments aimed at the progressive liberalisation of trade and investment regimes shows an acceptance of actual regulatory practice which diminishes the possibility of extensive

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and swift liberalisation by means of such instruments. For example, the Final Act of the Uruguay Round has numerous gaps in it that make it less than a fully liberalising measure. It is the product of compromise between the reality of national restrictions and the goal of global liberalisation. Thus in the investment related areas of the Final Act, no general right of establishment for services was included, the settlement reached in Article XVI of the GATT being the voluntary grant by the host state of market access in selected sectors. In the field of TRIMs only those TRIMs favoured by developing countries, namely, local content rules and import and export quotas were placed under GATT disciplines, but were subject to temporary exceptions aimed at the protection of infant industries or the balance of payments. Subsidies and grants, the methods most commonly used by developed countries, are omitted. On the other hand the TRIPs agreement is relatively strong in its imposition of intellectual rights protection, giving only transitional periods of grace for countries to conform. Similarly, as mentioned earlier, the OECD Codes of Liberalisation have extensive exemptions from the commitment to the progressive dismantling of national barriers to entry and establishment of foreign direct investors, based on public policy, public health and strategic and defence considerations.

As will be seen in the next section the Charter Treaty is itself the product of such pragmatic compromise. Consequently, its ability to do more than place pre-existing practices into a multilateral framework should not be overstated. The Charter Treaty may represent goals of liberalisation that are desired as part of the emerging paradigm of the New International Order for Trade and Investment, but which will not be borne out in actual regulatory and contractual practice, at least not in the immediate future. To these matters we now turn.

## IV The Limited Liberalisation Regime of the Charter Treaty

The evidence for seeing the Charter Treaty as a limited and tentative attempt at creating a liberal multilateral regulatory order is considerable. In particular, this section will consider in more detail the following matters from which that conclusion stems: problems surrounding the negotiation and adoption of the Charter Treaty; the practical effects of the wide transitional arrangements built into it; the relationship between the law of the Charter Treaty and national regulations and contractual practice; the scope of the dispute settlement procedure; the strength of the investment protection standards; and, finally, the extent to which the Charter Treaty can stimulate competition in the energy resources industry.

### 1 The Negotiations

As noted in the introduction to this chapter one of the most significant results of the negotiations was the decision by the US not to sign the Charter Treaty on the ground that it failed to protect investors up to the standards contained in US BITs. In particular, the US argued that the Charter Treaty should protect

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national treatment at both the pre- and post-investment phase. However, as a result of Russian misgivings about that country's ability to comply with all the requirements of national treatment, the application of national treatment principle at the pre-investment stage was postponed subject to a commitment to enter further negotiations on the issue. (70) Such a compromise was deemed necessary in order to ensure that the Charter Treaty would be adopted by the Russian Parliament. Its side-effect was to discourage US participation in the Charter Treaty. However, the other negotiating parties felt that the conclusion of the Charter Treaty was more important than US support and went ahead with the two-stage process for national treatment. (71)

As a result the Charter Treaty is less than a truly multilateral instrument. Furthermore, it leaves out the major home country of the world's multinational energy resources companies. On the other hand the US position appears to have expected too much from the FSU and CEE countries, given that their attitude to foreign direct investment is still rather tentative in practice.

### 2 Wide Transitional Arrangements

The Contracting Parties have been given a wide discretion to continue restrictive practices in a number of areas. Again, this is an indication of the pragmatic compromise needed, for the Charter Treaty to have been adopted, between the goal of full liberalisation and respect for the existing realities of the transitional economies. Thus, a temporary continuation of existing TRIMs is possible under Article 5(4) of the Charter Treaty, and other trade-related matters are subject to the transitional principles contained in Article 29(1) of the Charter Treaty. Furthermore, Article 32 lists in Annex T certain countries that may take advantage of a temporary suspension of full compliance with a number of listed provisions of the Charter Treaty. These include: the duty to have appropriate competition laws and information exchange facilities under Article 6(2) and (5); the duty not to oppose new capacity for transit of energy materials under Article 7(4); the duty to promote access to open capital markets in Article 9(1); the duty to extend the MFN principle to investors of other Contracting Parties under Article 10(7); the guarantee of free transfer of unspent earnings under Article 14(l)(d); the designation of enquiry points under Article 20(3) and the duty of state enterprises and administrative entities to conduct their activities in a manner consistent with the Charter Treaty under Article 22(1) and (3).

### 3 Relationship Between the Charter Treaty and National Regulations and Contractual Practice

The Charter Treaty, as a treaty between states, raises the question of how it can affect and control practice at the national level. The practice concerned is not only that of the host state and its regulatory environment, but also that

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of the commercial contracts which form the basis of discrete business transactions. The former is expressed through the foreign investment and natural resources laws, regulations and administrative practices of the host state, while the latter is expressed through host state-foreign investor agreements concluded by the host state directly or through the instrumentality of a state enterprise. (72) These two strands of regulatory and legal activity form the context in which the risk assessments that underlie an investment decision by a foreign energy resources multinational actually take place. Can the Charter Treaty affect these risks and can it do so in a way that reduces investment risk for the foreign investor?

The calculation of investment risk in an energy resource investment depends on an appraisal of the relative effects of factors including the geological potential of the state or area concerned, balanced against the technological problems involved and the political and legal risk created by the policy and regulatory environment of the host state. Thus, where the geological opportunities are considerable and the technological challenges surmountable a high level of political and legal uncertainty and risk may well be tolerated. On the other hand where the geological potential is more marginal an investment regime designed to encourage investors may encourage investors to assume the risk. (73) In host states where political and legal risks are high the resulting issues may be dealt with by agreement. However, such agreement involves negotiating costs and may not operate as successfully as a specialised regulatory code. (74) On the other hand, in the absence of such a code, contract may be the only method of controlling legal and political risk.

In such a context the conclusion, by the host state, of binding international commitments to investor protection may serve to issue signals that political and legal risks are not as great as might be feared. In this way the risk calculation faced by the foreign investor may be steered more towards the geological and technological risks. Should these be significant, the presence of the international regime may make some marginal difference in favour of the investment being made. That is the hope behind such an international instrument. It offers an international legal alternative to the absence of concrete and sophisticated guarantees at the level of national law and regulation.

There is no doubt that the Charter Treaty is intended to act in this manner in relation to the states of the FSU and CEE. These states have only begun to enact a comprehensive code of foreign investment, energy and natural resources, competition and commercial laws. (75) Thus the Charter Treaty can stand as a model of the principles and policies that these new regulatory regimes should carry if they are to act as effective risk reducing devices. Thus, the principal legal role of the Charter Treaty may be to provide a “demonstration

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effect” to the lawmakers of these states. By this process the need for the negotiation of individual investment agreements should be reduced, though not entirely eliminated, in that there may be cases in which the special features of the proposed project require individualised solutions. In such cases the Charter Treaty will have limited importance, as it says little about the technical issues surrounding the negotiation and content of this class of agreement. Thus the main effect of the Charter Treaty should be through its influence upon the content of national regulatory codes.

This approach carries with it the risk that the applicable national code will not meet the standards embodied in the Charter Treaty. In such a case could the provisions of the Charter Treaty have direct effect as sources of enforceable rights enjoyed by the investor under the law of the host state? This raises the question of the legal effect of international treaties before the courts of the host state. Much depends on whether the host state automatically incorporates treaty provisions into national law or whether it requires transformation by national legal enactment. (76) Secondly, this raises the question whether the individual provisions of the Charter Treaty give rise to enforceable individual rights that can be applied by a court. According to Article 26(2)(a) the investor party to a dispute, involving an alleged breach of investment guarantees under Part III of the Charter Treaty, may choose to submit it for resolution to the courts or administrative tribunals of the Contracting Party to the dispute. The Charter Treaty thus presupposes that Part III will be applied as part of the legally enforceable bargain between the host state and the foreign investor. It appears to imply terms into the agreement between them. However, the actual legal effect of this provision would still appear to rest on the host Contracting State's ability and willingness to give to the Charter Treaty the full force of domestic law in accordance with the applicable rules of national law. On the other hand, should the investor choose to take the dispute to ICSID, Article 42 of the Washington Convention ensures that national law as is consistent with international law applies to the resolution of the dispute. This would include the provisions of the Charter Treaty itself as a part of international law.

## 4 The Scope of the Dispute Settlement Procedure

The preceding subsection has considered whether it is possible to use the Charter Treaty as a source of rights before the courts of the host Contracting State. The present subsection considers the scope of using the Charter Treaty's own dispute settlement system in the commercial context of an energy resource investment. In addition to recourse to the courts of the host Contracting State, the investor has two further choices: to deal with the dispute by any other agreed means or to use the procedures in Article 26 itself. As noted earlier, this includes the choice of ICSID arbitration. Thus there is a choice of delocalised dispute settlement open to the investor.

This option is likely to be attractive where the domestic court or arbitration

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system of the host state is not deemed to be sufficiently reliable to deal with the dispute. However, this may create additional difficulties in the relationship between the investor and the host state as it presupposes a lack of confidence in the dispute settlement system of the host

state on the part of the investor. This may cause damage to good long-term relations between the parties. In such circumstances, the option of international institutional arbitration is likely to be a choice of last resort, in circumstances where the commercial relationship between the parties has foundered.

In any case recourse to international institutional arbitration may not be permitted in a given case, if the host Contracting State has not allowed the investor to resubmit the same dispute to international arbitration at a later stage where it has first selected domestic dispute settlement methods or any other agreed method, in accordance with the states' rights under Article 26(3)(b)(i). Twenty-four Contracting States have opted for this restriction.

## 5 The Strength of the Investment Protection Standards

The investment protection standards contained in Part III of the Charter Treaty are by no means absolute. As discussed in the context of the refusal of the US to sign the Charter Treaty, they may offer weaker guarantees than the BITs of certain capital-exporting states. However, as noted earlier these restrictions and exceptions are not unusual in multilateral - as opposed to bilateral - instruments, where the scope for unbargained for commitment to investor guarantees is considerable and where states must be on their guard against undermining their domestic freedom of action in some unforeseeable way. Thus, it is hard to deny that the protection offered by Part III is rather basic. However, it does represent the most extensive protection that it may be possible to negotiate in a multilateral instrument.

## 6 Competition

According to Article 6(1) of the Charter Treaty, “each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector”. The provision goes on to say in paragraph 2 that each party, “shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector”. These commitments are backed up by commitments to cooperation and information exchange in competition matters between the parties. There is, therefore, a commitment to the development of competition law and institutional cooperation in the energy sector reminiscent of the competition provisions in EC Europe Agreements (also known as Association Agreements) between the Community and the transitional states of the FSU and CEE. As noted earlier Contracting States listed in Annex T can obtain exemption from the need to implement laws and cooperation procedures, but not from the principle contained in paragraph 1.

The utility of these references to competition in the context of the energy

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sector has been doubted on the grounds that the energy sector is particularly susceptible to national security and security of supply considerations, the oligopolistic nature of the market, the monopolistic ownership of national transmission networks, and the inappropriateness of competition to certain types of policy goals such as environmental protection or energy conservation. (77) On the other hand there are a number of issues that can be subjected to competition analysis as a method of liberalisation. These include: control over abuses of a dominant position by state enterprises or by a dominant foreign investor, the protection of access to transmission networks by reference to the “essential facilities” doctrine, and the protection of consumers from excessive pricing and controls over supplies. However, all these aims may be achieved through a suitable regulatory framework. (78) Thus references to competition law may not be particularly useful in practice. In any case, the effectiveness of these measures again depends on action at the local level of the host state, and on the willingness of the FSU and CEE states to pass and administer competition laws. In this respect considerable progress has already been made in the CEE states and the FSU states are following suit. However, much remains to be done in this area. (79)

## V Concluding Remarks

This chapter has sought to answer the question whether the Charter Treaty represents a new departure in the creation of a liberal international order for trade and investment, or whether it is merely another attempt at regime building that is likely to fail. Two points can be made by way of conclusion.

First, the Charter Treaty may yet not become legally effective. It needs 30 ratifications. It remains to be seen whether these will be forthcoming. Furthermore, the refusal of the US to sign at all must severely weaken the ability of the Charter Treaty to gain general acceptance as a major source of multilateral regime building. Given the importance of US multinationals in the energy sector, actual practice involving US firms in the FSU and CEE states will also be a major source of regime building that will occur outside the Charter Treaty. Furthermore, given that it may take a long time to obtain the 30 ratifications, the creation of a uniformly binding international investor protection regime may be made more difficult as a result of the right of Contracting Parties not to accept the provisional application of the Charter Treaty, prior to its entry into force, under Article 45 thereof. (80)

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Secondly, unlike earlier failures at multilateral regime building, the Charter Treaty may be based on a stronger consensus among the Contracting Parties as to the details of the regime to be built. The principal capital-importing states involved, the states of the FSU and CEE, are eager to increase foreign direct investment in the energy resources industry and are thus, in principle, not hostile to the standards and

practices favoured by capital-exporting states. On the other hand, much depends on developments within the political, legal and regulatory orders of the CEE and FSU states. Here, it cannot be said with absolute certainty that the same consensus that appears to exist at the multilateral level is likely to be carried into practice, given uncertainties in domestic foreign investment and energy policies. Furthermore, commercial relationships must be negotiated and regulated, and disputes settled, at the local level. It is doubtful whether the Charter Treaty can play a major role in these processes other than as a model for an investor-friendly regime that may be adopted by the host state's legal and administrative system. The dispute settlement process in Article 26 should not be overestimated in this respect. Once the choice of international arbitration is made the underlying investment is likely to have ended in failure. It is a remedy of last resort.

Thus, while the Charter Treaty appears to be based on more solid foundations than earlier experiments of a similar sort, and though it appears to be part of a seemingly unstoppable process towards the creation of a New International Order for Trade and Investment, the tension between regime building from above and the development of political, legal, administrative and commercial practice from below has not thereby disappeared. The Charter Treaty may yet prove to be another defunct legal document adding to the already extensive archaeology of a so far abortive "international law on foreign investment". Alternatively, it may be given real life through the express adoption of the practices underlying its provisions by the states that really matter in this process, namely, those of the FSU and CEE.



References

1) See COM (91) 36 final February 1991. For a discussion of the negotiations leading to the Energy Charter treaty see J. Doré "The Negotiating History of the European Energy Charter Treaty" in T.W. Waelde and K.M. Christie (Eds), *Energy Charter Treaty: Selected Topics* (University of Dundee, Centre for Petroleum and Mineral Law and Policy, 1995) Ch. 1. The text of the Energy Charter Treaty is to be found in The Final Act of the European Energy Charter Conference 12 December 1994 AF/EECH/en 1 reproduced in 34 ILM 373 (1995).

2) Dore *ibid.* at p. 1.2.

3) The EC White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* (Luxembourg, 1994) states that growing consumption of gas will have to be met from imports from *inter alia* Russia. It continues, "It is essential, in the interests of economic security, to speed up construction of trans-European gas pipelines capable of guaranteeing supplies and creating avenues for long term cooperation with the producer countries" [p. 31]. See too the map of the proposed network of gas pipelines linking Eastern and Western Europe at p. 48.

4) Dore *ibid.* at p. 1.3.

5) For a complete list of participants see Dore *ibid.* Box. l.

6) These are described by Dore *ibid.* at pp. 1.4-1.8.

7) As did Canada, Japan and several North African countries. See further the US Government Statement on the European Energy Charter Treaty, 15-16 December 1994: 34 ILM 556 (1995).

8) See further below at notes 23-24.

9) US Government Statement on the European Energy Charter Treaty *op. cit.* note 7 above at ILM p. 557.

10) This section draws heavily and expands upon P.T. Muchlinski, *Multinational Enterprises and the Law* (Oxford, Blackwell Publishers, 1995) at pp. 573-575.

11) C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, 1985) at p. 38.

12) See Lipson *ibid.* pp. 66-70.

13) *Ibid.* Ch. 4.

14) See further Muchlinski *op. cit.* note 10 above at p. 503 and see the UN Charter of Economic Rights and Duties of States 1974 Article 2.

15) *Case Concerning The Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (*Belgium v. Spain*) Second Phase, Judgment of 5 February 1970, ICJ Reports 1970 p. 3 at pp. 46-47 paras. 89-90.

16) See generally: Fatouros, "An International Code to Protect Private Investment - Proposals and Perspectives" 14 U of Toronto LJ 77 (1961); Miller, "Protection of Private Foreign Investment by Multilateral Convention" 53 AJIL 371 (1959); Snyder, "Protection of Private Foreign Investment: Examination and Appraisal" 10 ICLQ 469 (1961); Boyle, "Some Proposals for a World Investment Convention" [1961] JBL 18, 155.

17) See: Cutler, "The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929" 27 AJIL 225 (1933); Kuhn, "The International Conference on the Treatment of Foreigners" 24 AJIL 570 (1930); Potter, "International Legislation on the Treatment of Foreigners" 24 AJIL 748 (1930). For the proceedings of the conference see League of Nations Doc. C.97. M.23. 1930 II; for the text of the draft convention under discussion see League of Nations Doc. C.174. M.53. 1928 II.

18) See Hackworth, "Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners" 24 AJIL 500 (1930).

19) See Lipson *op. cit.* note 11 above at pp. 75-76. Lipson argues that the outcome of these initiatives, "is less surprising than the fact that they were held at all. That they were illustrates the decline of traditional norms and enforcement capacity during the inter-war period. Major European states could no longer legitimate the old standards, and they could no longer substitute effective force for agreement. To revive the rules they needed sustained agreement among themselves and significant approval from a wide number of peripheral states ... If traditional norms were to be re-established, truly international conferences were essential. Yet the outcome of those conferences paradoxically accelerated the decline of traditional norms." This was due to the equality of voting rights for all states, ignoring vast differences in wealth and power.

20) See Fatouros *op. cit.* note 16 above at pp. 79-81.

21) Havana Charter Art. V. See further Lockwood, "Proposed International Legislation with Respect to Business Practices" XLI AJIL 616 (1947).

22) Havana Charter Art. 11(1)(b): " ... no member shall take unreasonable or unjustified action within its territories injurious to the rights and interests of nationals of other Members in the enterprise, skills, capital, arts or technology which they have supplied."; *ibid.* Art. 12(2)(a)(i): provision of reasonable security for existing and future investments; Art. 12(2)(a)(ii): the giving of due regard to the desirability of avoiding discrimination as between foreign investments; Art. 12(2)(b): entry into consultation or negotiations with other governments to conclude bilateral or multilateral agreements relating to foreign investments.

23) Havana Charter Art. 12(l)(c): "... without prejudice to existing international agreements to which members are parties, a Member has the right (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies; (ii) to determine whether and to what extent and upon what terms it will allow future foreign investment; (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing or future investments; (iv) to prescribe and give effect to other reasonable requirements as to the ownership of existing or future investments;". For a critical comment on this provision see: Woolsey, "The Problem of Foreign Investment" XLII AJIL 121 at pp. 126-128 (1948).

24) Fatouros *op. cit.* note 16 above at p. 80; Lipson *op. cit.* note 11 above at pp. 86-87.

25) Fatouros *op. cit.* note 16 above at p. 81; Snyder *op. cit.* note 16 above at p. 474.

26) Apart from these initiatives certain states also made proposals to international organisations for the adoption of a multilateral convention for the protection of foreign investments. Thus at the 14th Session of the UN Economic Commission for Asia and the Far East (ECAFE) in March 1958, the Prime Minister of Malaya suggested the conclusion of an international investment charter; also in 1958 both the German and Swiss governments submitted draft investment conventions to the Organisation for European Economic Cooperation (OEEC now OECD). In 1957 discussions took place under the auspices of the Council of Europe for an investment convention between the Member States of the Council and certain African states.

27) See Miller *op. cit.* note 16 above at p. 372; Snyder *op. cit.* note 16 above at pp. 480-481.

28) For an analysis of this code see Miller *ibid.* This code was inspired by the President of the Society, Dr Hermann Abs, a director of the Deutsche Bank, who proposed the adoption of a "magna carta" of foreign investment at the International Industrial Development Conference in October 1957: Brandon, "An International Investment Code: Current Plans" [1959] JBL 7 at p. 12.

29) See Brandon *ibid.* at pp. 12-15.

30) The text of this draft can be found in 9 J.Pub.L. 116-118 (1960). The draft was concluded under the auspices of a new body of international lawyers and European business representatives, the International Association for the Promotion and Protection of Private Foreign Investment.

31) See OECD Publication No. 1563[6]7/Dec 1962 reproduced in 1-2 ILM 241 (1962-1963). The last revision of the draft Convention can be found in OECD Publication No. 232081/Nov 1967 reproduced in 7 ILM 117 (1968).

32) See Snyder, "Foreign Investment Protection: A Reasoned Approach" 61 Mich.LR 1087 at pp. 1112-1113 (1963); UNCTC, *Bilateral Investment Treaties* (1988, UN Sales N0.E.88.II.A.I) para. 20, p. 7.

33) UNCTC *ibid.* Denza and Brooks, "Investment Protection Treaties: United Kingdom Experience" 36 ICLQ 908 at p. 910 (1987).

34) UNCTC *ibid.*

35) Fatouros *op. cit.* note 16 above at p. 88, n. 88.

36) The original suggestions came from Dr Hermann Abs, the chairman of the committee, who was also the instigator of the 1957 draft convention put forward by the German Society to Advance the Protection of Foreign Investment (see above).

37) See, for a fuller discussion, Muchlinski *op. cit.* note 10 above at pp. 592-597.

38) See further T. Waelde, "A Requiem for the New International Economic Order: The Rise and Fall of Paradigms in International Economic Law" (Dundee, Centre for Petroleum and Mineral Law and Policy, 1994), also reproduced in N. Al-Nauimi and R. Meese (Eds), *International Legal Issues Arising Under the United Nations Decade of International Law* (Kluwer, 1995) at p. 1301. References are to the 1994 version.

39) T. Waelde "The Current Status of International Petroleum Investment: Regulating, Licensing and Contracting" in T. Waelde and K. Christie (Eds), *op. cit.* note 1 above Ch. 4 at p. 4.47. See further T. Waelde "International Investment Under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors within Western and CIS/Eastern European Countries" (Dundee, May 1995).

40) See further Muchlinski *op. cit.* note 10 above at pp. 112-114; 238-60; 534-648; Waelde, *op. cit.* note 38 above at pp. 21-36; EC Commission, *A Level Playing Field for Direct Investment World-Wide* COM(95) 42 final 1 March 1995.

41) On which see further S. Fremantle, "Energy Charter Treaty: Investment Promotion and Protection" in Waelde and Christie (Eds) *op. cit.* note 1 above Ch. 2.

42) 4 ILM 524 (1965) 575 UNTS 159.

43) The UN Code included a section on the protection and promotion of investment from as early as 1980. It was gradually moved towards this position and away from a position emphasising investor control during the negotiating process.

44) See *OECD Guidelines for Multinational Enterprises* (Paris, 1994) at p. 58 "National Treatment" and see further OECD *National Treatment for Foreign-Controlled Enterprises* (Paris, 1993), OECD *National Treatment for Foreign-Controlled Enterprises* (Working Paper No. 34, Paris 1994); World Bank Guidelines Guideline III: 31 ILM 1363 (1992).

45) OECD Code on the Liberalisation of Current Invisible Operations OECD/C(6l)95; Code on the Liberalisation of Capital Movements OECD/C(6l)96, periodically reissued.

46) See Charter Article 10(2)-(4).

47) See L. Brazell, "Catalysing Growth: The Main Treaty Provisions, Their Intentions and Effect" in Waelde and Christie (Eds), *op. cit.* note 1 above Ch. 3 at p. 3.45. The TRIPs agreement was signed on 15 April 1994.

48) *Ibid.* at p. 3.9.

49) See Charter Articles 4, 29, and see for full analysis Brazell *ibid.*

50) 24 ILM 1598 (1985). See further Muchlinski *op. cit.* note 10 above at pp. 514-519 and references therein.

51) See "Brittan wants WTO rules for investment" *Financial Times*, 19 January 1995 at p. 4. on which this paragraph relies.

52) See further Kohona "Dispute Resolution under the World Trade Organization: An Overview" 28 JWT 23 (1994); DeAnne Julius, "International Direct Investment: Strengthening the Policy Regime" in P.B. Kennen (Ed), *Managing the World Economy: Fifty Years After Bretton Woods* (Washington DC, Institute for International Economics, 1994) at p. 269.

53) EC Commission *op. cit.* note 40 above at p. 13.

54) On which see further T. Brewer and S. Young "European Union Policies and Problems of Multinational Enterprises" 29 JWT 33 (1995).

55) See W.H. Witherell, "Towards an International Set of Rules for Investment: The OECD Initiative", *News from ICSID* Vol. 12. Winter 1995 p. 3; Guy de Jonquieres, "Rocky road to liberalisation" *Financial Times*, 10 April 1995 p. 17; A. Lehmann, *Liberalizing Investment Policies: Prospects After the Uruguay Round* (Royal Institute of International Affairs Discussion Paper No. 59, 1995) Ch. 6.

56) Witherell *ibid.* at p. 6.

57) *Ibid.*

58) *Ibid.*

59) See generally de Jonquieres, Lehmann *op. cit.* note 55 above.

60) *Op. cit.* notes 44 and 45 above.

61) This point has been conceded in the Charter Treaty in Article 25, which exempts Contracting Parties from extending, through the MFN principle, the privileges associated with membership of an economic integration agreement to another Contracting Party that is not also a member of that agreement.

62) This matter was another reason for the US refusal to sign the Charter.

63) Witherell *op. cit.* note 55 above at p. 5. The Charter Treaty does deal with environmental issues in Art. 19 but does not address labour matters.

64) Witherell *op. cit.* note 55 above at p. 5. The author is Director for Financial, Fiscal and Enterprise Affairs at the OECD. The opinion expressed is the author's alone and does not describe OECD commitments.

65) See further J. Atik, "Fairness and Managed Foreign Direct Investment" 32 Col.Jo.Transnat'l.L. 1 (1994); Muchlinski *op. cit.* note 10 above at pp. 93-102.

66) Atik *ibid.* at p. 3.

67) See Muchlinski *op. cit.* note 10 above at pp. 223, 400-403.

68) See further Muchlinski *op. cit.* note 10 above at pp. 102-114.

69) See further G. Teubner, "Global Bukowina: The Politics of Global Law Without the State" in G. Teubner (Ed), *Global Law Without the State* (Aldershot, Dartmouth Gower, forthcoming). P. Muchlinski, "'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community" in G. Teubner (Ed) *ibid.*

70) See Charter Treaty Art. 10(4); Doré *op. cit.* note 1 above at pp. 1.8-1.10.

71) *Ibid.* at p. 1.11.

72) See further Waelde, "Investment Policies and Investment Promotion in Mineral Industries" 6 ICSID Rev-FILJ 94 (1991), on which the following account draws heavily.

73) Waelde *ibid.* at p. 100.

74) *Ibid.* at pp. 105-107.

75) See further Waelde, "The Current Status of International Petroleum Investment: Regulating Licensing and Contracting" *op. cit.* note 39 above at pp. 4.12-4.13, 44; K. Baragona and S. Gleason, "Uzbekistan, on the Road to the Future" in Waelde and Christie (Eds), *op. cit.* note 1 above Ch. 9, A. McHardy "Oil and Gas Investment in Kazakhstan: Current Status" *ibid.* Ch. 10; A. Seck "Azerbaijan, the Resurrection of an Oil Legacy? A Legal Perspective" *ibid.* Ch. 11.

76) For the related issue of whether BITs can be directly effective see Muchlinski *op. cit.* note 10 above at pp. 634-637.

77) Brazell *op. cit.* note 47 above at p. 3.16.

78) *Ibid.*

79) See further on the CEE states S. Estrin and M. Cave (Eds), *Competition and Competition Policy: A Comparative Analysis of Central and Eastern Europe* (London, Pinter Publishers, 1993); Russia: Law on Competition and the Restriction of Monopolies in the Commodity Markets 1991: [1993] 2 ECLR Supplement, analysis: [1993] 2 ECLR 83, [1993] 6 ECLR 283; Lucas "Mergers, Market Share and Monopolies: The State of Antitrust Law in Russia" [1995] 3 ECLR 199; Kazakhstan: Law on Promotion of Competition and Restrictions on Monopolistic Activity 1991: [1994] 1 ECLR Supplement, analysis: [1994] 1 ECLR 46; Ukrainian Competition Law, analysis [1994] 5 ECLR 280.

80) On which see further T. Waelde "International Investment Under the 1994 Energy Charter Treaty" (Dundee, May 1995) at p. 70.