

Chapter 11. The Energy Charter Treaty: Some Observations on its International Context and Internal Structure

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I Introduction

This chapter gives a schematic view of the aims and text of the Energy Charter Treaty (the Treaty) and how that text fits into the immediate and more general contexts of international law. In other words, an overview of the Treaty as a whole and its function as an international legal document.

In brief, the Treaty is a binding agreement between various states which fall into two broad groups: members of the Organisation for Economic Cooperation and Development (OECD); and the former East Bloc - the newly independent states, the Russian Federation and Eastern Europe. The underlying purpose of the agreement is to consolidate the political reform and stability of the former East Bloc, whose economies are in transition from centrally planned to market economies, by bringing in Western capital and know-how to speed up the modernisation of the energy industries of those economies. The rationale is that the energy industry underpins all other industries so that there will be a knock-on effect, increasing the rate of modernisation for the economies as a whole. The other side of the coin is that the OECD and its investors get access to the oil and gas resources of the former Soviet Union, which incidentally meets the OECD's growing need for new sources of supply in the face of mounting competition for traditional energy resources from the newly industrialised and developing countries. ⁽¹⁾

The Treaty is thus, first and foremost, a treaty to govern the conditions under which investments can be made with minimum risk and the products of those investments traded on the global markets. If this had been all it attempted, it would have been simply one among many; but by virtue of the particular states party to it, the impact it is intended to have upon the national laws of some of those parties and the extremely detailed provisions it contains

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on more peripheral issues such as competition law and policy, it is a remarkable and unique document.

This chapter is necessarily introductory to the detailed discussions elsewhere of particular areas covered by the Treaty. It shows, however, how the parts of the Treaty fit together, how they will interact and how they will be interpreted in the legal context in which they will operate. That context is broken into two parts. The first covers aspects of public international law as a whole which bear on the interpretation and workings of multilateral treaties in general and, in particular, investment treaties. The second comprises international treaties and systems that relate so directly to the substance of the Treaty that the negotiators found it necessary to refer to them in the text of the Treaty itself. The chapter therefore begins by discussing the very broadest legal context of the Treaty - public international law and the status of treaties. It moves on to consider the immediate constraints imposed on the Treaty by elements of public international law relating to the subject matter of the Treaty, and finally to the structure of the Treaty and its accompanying texts and an indication, in broad terms, of their contents.

II Public International Law ⁽²⁾

Perhaps the most logical place to start when looking at the effect of public international law as a whole on the working of the Treaty is to consider in what sense the Treaty is "law" at all. We necessarily come from the viewpoint of national legal systems, where "law" is a system of rules laid down by recognised authorities - the legislature and the courts - and enforced through the civil and criminal courts. In many ways the Treaty is not like this at all - it has more the appearance of a private law contract, negotiated between equals, but without the sanction of a universally recognised system to enforce compliance.

In strict legal theory, the principle of observance of legal obligations applies - in international law always known by its Latin tag *pacta sunt servanda*; and this does have force. ⁽³⁾ But fundamentally it must be faced that in the absence of an overriding enforcement agency, how far

states will push each other to comply with specific agreements is always going to be a question as much of the politics of the moment as of law. Thus, the actual usage of established fora for the settlement of international investment disputes, such as ICSID, the International Centre for the Settlement of Investment Disputes, has been slight in comparison to the escalation in number of the international agreements which could be referred to them. Hence it is also true that, as well as being in a limited sense a system of rules, international law is a continuous process of authoritative decision-making, through which the members of

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a community of independent sovereign states chart and implement their common interests.⁽⁴⁾ According to this view, the observance and effectiveness of states' international obligations is determined at least as much by expectations and interests as by the legal requirement to do so. This interpretation highlights the fact that to a great extent the significance of a treaty such as the Energy Charter Treaty is not purely in its legal status. Rather, it is in the degree to which it operates as a constraint in the formation and execution of policy by the governments of the states party to it.

The fact that it has been given binding status enhances its significance as an index of the crystallised community expectations of the parties. Reference in the Treaty to various weak environmental agreements, for example, may not directly force any government to reduce its output of pollution, but it does make it politically very difficult for a government to ignore completely the environmental consequences of its decisions. To be seen not to ignore such consequences ultimately means acting to regulate them.

The next question must be, what does the Treaty mean? As with statutes, the language of treaties is normally interpreted according to its ordinary meaning in the light of its objectives and the context of the treaty as a whole. This includes using the meaning the words had at the time the treaty was made and in the light of the general international law at that time - convenient for those who happen to be looking at it contemporaneously, though tending later to increase the scope for legal arguments. An unusual meaning can be given to the words, but the proponent of such a meaning must justify it.

A question that could be important is the status of international law in the national laws of the newly independent states: whether their national courts will consider the Treaty binding without any specific act of incorporation by national legislatures. This depends ultimately upon the constitution of each state (but would appear to be the case in the majority of the newly independent states); however, the negotiations, while addressing the question of domestic justiciability with respect to the competition and environmental provisions, did not consider this issue in the context of the investment provisions, suggesting that the Charter Conference as a whole accepted the possibility. The significance is that if the Treaty is seen as binding, an aggrieved investor will be able to invoke it in front of the host state's national courts. If not, recourse to international arbitration or a commercial compromise may be necessary.

The question of national justiciability is most likely to be important in terms of the standard of treatment to be accorded to foreign investors, an element of state responsibility.⁽⁵⁾ There has been a lot of discussion as to whether or not there is an "international minimum standard" of treatment for foreign investment, a proposition greatly favoured by the capital-exporting countries. The existence of such a standard has been proposed since the beginning of the twentieth century and may be considered to have been affirmed in UN Resolutions, the vast majority of bilateral and some multilateral investment agreements. Unfortunately, this area is always fraught with difficulties for the

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negotiators of treaties dealing with foreign investment, since the interests of capital-exporting and -importing states are here most clearly opposite. The result is that no consensus has emerged over the years from which any clear principle of international law as to the contents of any such standard can be deduced; it is therefore difficult to pin down precisely what that standard is. One possibility is a reasonable care or due diligence interpretation of the standard, but this may be referred to the standard of treatment ordinarily observed by the state in question in its own affairs. The effect would then be to make allowances for the variations in wealth and circumstances between states. This may not necessarily support the philosophy of economic life which the capital-exporting countries are looking for.

The former socialist countries, however, consistently rejected the concept of there being any international minimum standard. They maintained that the regulation of alien property fell exclusively within national law and argued that the traditional concept of state responsibility was not supportable since it addressed the concerns of one side, the investor's home state, to the exclusion of those of the host. So it is difficult to know how the economies in transition would operate any such standard, and the wording of the Treaty itself on this point stands to be interpreted, at least by the courts of those countries, virtually in isolation.

But in any event, it may be wondered whether such a standard is as important now as it once appeared to be - certainly the major oil companies have virtually all been through the experience of having their assets in one country or another nationalised and have survived, in some cases apparently better than before. The issues for these companies now may focus more on mechanisms for maintaining control of their investments, in whatever hands titular ownership may lie; and such mechanisms are more likely to be a matter of individual contracts than of international treaties.⁽⁶⁾ For the smaller players, however, without the negotiating strength of the majors, the principle remains significant.

The general principle of state responsibility is also relevant in connection with the environmental aspects of the Treaty. This principle may not create strict liability for failure to control operations which create a serious risk of harm to others, but it does clearly apportion liability for the actual causing of harm.⁽⁷⁾ Notably, however, no claims were brought against the USSR after the Chernobyl accident despite widespread contamination across Europe - again, politics is at least as important as law.

The Treaty's provisions on expropriation and compensation must be interpreted in the light of the case law arising from the Libyan and Iranian forced expropriations of oil concessions. But bear in mind that international law attempts to strike a balance between the investors' right - to be compensated for property taken - and the need to make the states' acknowledged right - to nationalise - workable, ⁽⁸⁾ discussed below, states that the right is not to be used to circumvent any other provision of the Treaty - in other words, you can have any system of property ownership you like as long as it does not affect investors' rights or the operation of the Treaty. This is hardly the kind of permanent sovereignty that was the subject of strong disagreement when the UN Resolution on the subject was debated. ⁽¹¹⁾ Notably, this Declaration is the only one that is made by the representatives of all parties - all other Declarations are by a few parties or a single one. The unanimity of this statement of intention as to how the Treaty should be interpreted leaves little room for later argument as to how any conflict between the Treaty's objectives and a particular Contracting Party's system of ownership should be resolved, even though the Declaration may technically have no legal force. The principle of permanent sovereignty, never completely accepted by the OECD states, has here been incorporated only to be emasculated.

It is worth noting that where the same parties are party to more than one treaty, the provisions of which are incompatible, the terms of the latter prevail over the former, unless the earlier one specified that this was not to happen. In the case of the Treaty, an earlier treaty which under this rule would normally be overridden is the Svalbard Treaty of 1920 on Spitzbergen. The parties have provided for this by a Decision of the Charter Conference, ⁽¹²⁾ saying that where there is conflict the Svalbard Treaty is to prevail. In respect of the plethora of prior international agreements relating to Parts III (investment) and V (dispute settlement) of the Treaty, the Contracting Parties made special provision in Art. 16 expressly preserving both set of agreements (the prior and the Treaty itself) and any dispute resolution procedure under either. Whether this is logically possible in the case of conflict between the provisions remains to be seen. Article 16 also preserves subsequent agreements, but it is to be hoped that the negotiators of any such agreement will ensure that conflict does not arise in any significant area.

Finally, it may also be worth mentioning here, as many of the signatories to the Treaty remain in less-than-stable political and economic conditions, that a change of government does not release a state from its international

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obligations, although a profound change such as the break-up of the USSR and the birth of the newly independent states does. Similarly, it is usually accepted that a party to a Treaty cannot by amending its own national laws prevail over the obligations of the Treaty. ⁽¹³⁾ It is no good protesting about national sovereignty, since that was exercised in agreeing to the terms of the Treaty. In the last resort sovereignty can be exercised again by withdrawing from the Treaty altogether, but it cannot meanwhile be used simply to flout the terms upon which the benefits are accepted. Laws passed by the Russian Federation, since the signature of the Treaty, governing the exploitation of natural resources and, potentially at least, conflicting with the Treaty provision, may ultimately be caught by this principle. Conversely, however, an international tribunal cannot declare a prior conflicting national law to be internally invalid.

The specific international agreements that appear in the text, explicitly or by implication, now fall to be considered.

The Preamble to the Treaty text begins with the European Energy Charter and the Charter of Paris - the politico-legal ancestry of the Treaty. The Charter remains open to new signatories but no longer has any significance independent of the Treaty: post-Treaty signature of the Charter may or may not signify willingness to adhere to the Treaty, but the only benefit conferred by signature of the Charter is the opportunity to participate in the negotiation of Protocols and Declarations to the Treaty, and possibly the Supplementary Treaty on the treatment of foreign investments. ⁽¹⁴⁾

The first international agreement of substantive interest to be mentioned, however, is the GATT and its Related Instruments. For the West, the most desirable and easily operated trading system for energy would be a system exactly parallel to the GATT rules; but that is currently impossible for much of the former East Bloc. None of the fragments of the former Soviet Union are likely to accede to the GATT until the turn of the century at the earliest; for some, no process of accession has yet begun. The picture is complicated by the conclusion of the Uruguay Round negotiations, producing a new and unfamiliar world trading system and the new World Trade Organisation, just as the Treaty negotiations were coming to a close. As a result, the pre- and post-Uruguay Round GATTs are both invoked, and the confusion temporarily hidden under the carpet. The parties simply agreed instead to reconsider the entire trade provisions of the Treaty in the light of the changes; this process began in July 1995. Meanwhile, however, a series of half-way houses has to do - the old GATT to be applied between some pairs of parties, the new GATT between others and the newly independent states able to make special agreements amongst themselves in any terms they see fit for a considerable time, although subject to a commitment to limit the extent to which it deviates from the GATT, an obligation to notify the Charter Secretariat of the terms of the agreement, and agreement to make every effort to take other Contracting Parties' recommendations into account. The present Treaty, then, has crystallised the parties' intention to use the GATT rules (or a subset of them), but has not yet actually brought them in across the board. Nevertheless, the

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importance of the agreement in principle to use GATT rules should not be underrated.

A further result of the late conclusion of the Uruguay Round is that, despite the conclusion of the General Agreement on Trade in Services (the GATS) and the aim of the Treaty to liberalise trade in services, the Treaty makes no reference to the GATS at all. Instead, amendments to the Treaty are proposed to be negotiated to cover this and other areas arising due to the Uruguay Round Final Act; and negotiations have already begun.

The Preamble next refers to the Nuclear Non-Proliferation Treaty⁽¹⁵⁾ and the Nuclear Suppliers' Guidelines.⁽¹⁶⁾ The first of these is a binding Treaty, to which, however, not all nuclear powers⁽¹⁷⁾ are parties. The second is a non-binding set of guidelines as to the terms on which nuclear materials and establishments are to be supplied to non-nuclear powers. Both are part of the basis of the law of nuclear peace, but have never been universally accepted.⁽¹⁸⁾ In any case both are based upon the premiss that the benefits of nuclear power ought to be available to all. It may be questioned whether they are capable of safeguarding a world order in which many minor powers have access to the remnants of the former Soviet civil and military nuclear programmes. Even the International Atomic Energy Authority (IAEA), recognised by most people as the high profile international watchdog for nuclear affairs, has as its main tasks to encourage and facilitate the development and dissemination of nuclear power and to ensure its use for peaceful purposes.⁽¹⁹⁾ The IAEA's standards are not legally binding on its members; it has the power to inspect only by virtue of the Non-Proliferation Treaty's requirement that signatories allow periodic inspections. In keeping with the latter Treaty's aims, therefore, the power is limited to verifying non-military use. The establishment of health and safety standards for nuclear establishments is an incidental goal, albeit one that has been accorded increased importance since the Chernobyl disaster.

In these circumstances, and given the need of the newly independent states for hard currency, the need for an additional protocol on Nuclear Safety is clear: simply to facilitate trade in nuclear energy products and materials by a large number of states in states of greater or lesser political instability would be to invite disaster. A protocol on this subject was proposed but has not yet emerged, although negotiations continue; it will be interesting to observe whether agreement is reached, in particular on international minimum safety standards for reactors, something that the IAEA as a whole has never achieved. The costs of enforcing such standards, however, make agreement by the newly independent states to any stringent standards unlikely. Nor is it likely that there will be any agreement on liability for damage caused by nuclear accidents. Nevertheless, given the magnitude of the potential risks involved, a degree of consensus as to the control of transboundary risks is likely to be reached. It

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is to be hoped that any such protocol, like the Treaty itself and the Protocol on Energy Efficiency, will have legally binding status.

The Preamble comes last to a mention of the UN Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution⁽²⁰⁾ and "other international environmental agreements with energy-related aspects". It is a measure of the shift in public opinion internationally that their being mentioned is hardly likely to come as a surprise; that it comes last indicates the conflict perceived to exist between one of the principal objectives of the Treaty - catalysing growth - and the interests of preserving the global environment. The parties are signalling their intention of complying with international obligations that many of them have accepted, but of doing so with the minimum disruption to their present interests - and, possibly therefore, of doing the minimum they have to to be seen to be sufficiently in compliance.

The Convention on Long-Range Transboundary Air Pollution is aimed at pollution felt over such a distance that the exact source cannot be pinpointed, but tackles it only through the weakest of measures such as the development of policies compatible with balanced development. Thus, rigour of approach was sacrificed to breadth of adherence - for the Convention has the support of most of Europe (East and West) and of North America. Membership of the convention has not required states to curtail their transboundary polluting activities beyond the level that national interests can accept easily. On their own, even the provisions on notification and consultation cover only "major" changes in policy or industrial development likely to have "significant" effects. At base, the Convention simply provides a forum for information exchange and possible future agreements as to actions aimed at specific reduction of air pollution. It has in fact already spun-off the SO₂ and NO_x Protocols negotiated during the 1980s, which do require actual stabilisation or reduction of emissions by specified dates. But it will not in itself have any direct effect upon commercial investment and trade in energy resources.

Similarly, the UN Framework Convention on Climate Change negotiated at Rio in 1992 is in itself a weak document with no enforceable commitments to present action on the part of the signatories; but it may yet provide the basis for more concrete discussions.

It will be clear that the inclusion of "other international environmental agreements with energy-related aspects" amounts to nothing more than a throw-away indication of the parties' intention to keep an occasional eye on their other environmental obligations. Those environmental agreements that have been reached are remarkable as a group for the high level of failures to ratify or observe, making this attitude merely par for the course. Judicial enforcement systems for environmental treaties are themselves an endangered species. Nevertheless, two significant environmental agreements that will affect trade and investment under the Treaty are worth mentioning: MARPOL,⁽²¹⁾ on pollution at sea, and the Convention on Transboundary Movements of

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Hazardous Waste and Its Disposal.⁽²²⁾ The 1991 ECE Convention on Environmental Impact Assessment may also be important, when it comes into force.⁽²³⁾

All the agreements discussed so far are mentioned specifically in the Treaty. The Treaty's Most Favoured Nation provisions implicitly apply, in respect of each Contracting Party, any other international treaty to which that Party is a party and which incorporates a higher standard of treatment for investors of other parties to that treaty. Only two other groups of treaties are referred to by genus expressly.

The first of these are the network of bilateral double taxation treaties. These appear only as the instruments under which, in each case, "competent tax authorities" are nominated. One function of the competent tax authority, in the context of its own double tax treaty, is to determine whether or not a state's tax laws are being applied in a non-discriminatory fashion between nationals and non-nationals. Under the present Treaty an additional competence is given to these authorities: to determine whether or not the state's tax laws amount to the

expropriation of investors' goods. This may seem a fairly simple allocation of responsibility; however, there is a significant difference between simply observing whether or not given a set of rules has been applied even-handedly, and looking at the content of a set of rules and deciding what value judgment to place on their effects. The level of neutrality required in the former exercise is considerably less than that in the latter - the Treaty has in effect given the competent tax authorities virtually a judicial function, to sit in judgment on their own states' tax laws - and it must be remembered that the competent authorities consist of civil servants from the party states, whose degree of detachment from the interests of their political masters cannot easily be evaluated in advance. An aggrieved investor can still refer the matter to arbitration under the Treaty, and in such a case the competent tax authority acts more in the role of expert adviser to the arbitrators who, it is to be hoped, will also take into account the opinion of any other experts who may come before them to the same extent as they are obliged to take into account the competent tax authority's opinion.

The second group consists of the international agreements dealing with standards of protection for intellectual property: in this context, principally the Paris and Berne Conventions⁽²⁴⁾ and the bilateral agreements which the United States for example has entered with many of the former Soviet Republics. The new GATT-TRIPS Agreement, on Trade-Related Aspects of Intellectual Property Rights, does not apply to the Treaty, due to the specification in the Treaty of a cut-off date, for which GATT rules are to apply, of 1 March 1994. This may change when the negotiations consequential on the conclusion of the Uruguay Round, under Art. 30, are completed. Meanwhile, however, it should be noted that the Treaty does not set any standard for the protection of intellectual property; it simply refers to the standard under any applicable international agreement. In fact, the majority of the newly independent states either have signed up or are about to sign up to the Paris Convention, which deals with

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industrial property - the best to do so, Azerbaijan, acceded to the Convention on Christmas Day 1995⁽²⁵⁾; certainly most have either passed or are in the process of passing legislation giving Western-style protection to intellectual property. The Berne Convention, which deals with literary and artistic copyright, is adhered to less widely. Even where new laws have been passed, the efficacy of the enforcement systems of the newly independent states remains a matter of conjecture. Thus, while the possibility of loopholes remains anywhere in the region, advisers should be careful to check that adequate protection is in place, and if not, to ensure that the opportunities for copying are minimised.

III The Energy Charter Treaty

1 External Structure

Even starting from the perspective of a distant observer, the Treaty as signed does not have a particularly unitary structure: one Protocol, five Decisions and a host of Annexes accompanied it, not to mention a plethora of Understandings and Declarations.

The Protocol agreed on Energy Efficiency and Related Environmental Aspects is a quasi free-standing binding agreement which is not necessarily going to be signed by all the parties to the main Treaty.⁽²⁶⁾ It is not completely independent of the Treaty since it is intended to particularise the environmental aspects of energy policy and regulation laid down by the Treaty's scope and it relies on the Treaty's Secretariat for its administration. As mentioned above, a Protocol on Nuclear Safety was also proposed, but at the time of writing the negotiations were incomplete. A protocol on hydrocarbons was also intended in the early stages of the negotiations, but nothing seems to have come of this.

The Decisions are binding on all the parties to the Treaty, being incorporated by reference into the Treaty text. They are Decisions of the Charter Conference, which negotiated and agreed the text of the Treaty, and relate to matters of detail not sufficiently general to form part of the text, but sufficiently important to require binding status. These initial Decisions cover

- the priority of the Svalbard Treaty on Spitzbergen over the Treaty, where the two clash;
- the leasing of federally owned property in the Russian Federation;
- the transition of the Romanian currency to full convertibility;
- the right of parties to restrict movements of capital by their own nationals; and
- the treatment in free-trade areas, customs unions and so on of companies owned by investors of other parties.

Similar issues which do *not* require binding status appear in the Understandings which form part of the Final Act, having been agreed by all parties. Of

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these, some relate to the interpretation of the Treaty as a whole. For example, one states that any derogations from Most Favoured Nation (MFN) treatment are to apply generally rather than to a specific investor or group. Others deal with individual Articles, paragraphs or subparagraphs - for example, clarifying that despite its having a possible adverse effect upon the establishment of new transit capacity (and

therefore being otherwise disallowed under the Treaty's transit provisions) parties can still pass legislation concerning environmental protection, land use, safety and technical standards.

Finally, various parties and groups of parties made Declarations which are noted in the Final Act. Thus, for example, the European Union points out bilateral treaties it has signed with the Russian Federation and others overriding reference to the GATT in respect of trade in nuclear materials; Denmark brings Greenland and the Faroe Islands into the Treaty; and Canada and the United States explain their policy as regards the standard of treatment applicable to foreign investors and investments.

Both Understandings and Declarations make very useful explanatory notes to the Treaty text.

2 Internal Structure: the Treaty Text

The main text of the Treaty consists of a Preamble and eight Parts, which can be broken into three rough groupings. The first of these, consisting of the Preamble and Part I, gives the context, aims and scope of the Treaty.

The two remaining groupings contain respectively the substantive and the administrative provisions.

3 Context and Scope

The Preamble, as one would expect, sets out the history, motivations and aims of the Treaty. As such, it can appear too general in its language to be a meaningful part of the text, but this is misleading. The Preamble throws valuable light on the parties' intentions, which are part of the context within which the Treaty will be interpreted, should it ever come to be arbitrated.⁽²⁷⁾ Although the Preamble does not in itself say much on any particular subject, it can be useful as a reference point where the text seems confused or the thrust of an Article is unclear.

Article 1 contains definitions crucial to the working of the Treaty, for example as to the types of investor and investment, products and materials to be covered by the Treaty. Some of these definitions are also expanded in the accompanying Understandings: in particular, note the Understandings discussing "economic activity in the energy sector" and "investment", each of which expands upon and considerably clarifies the definition to which it refers.

The legally binding nature of the Treaty and its aim of promoting long-term co-operation in the energy field are set out in Art. 2. Article 2 also refers to

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aims of the original European Energy Charter which might otherwise have been forgotten now that the Treaty it engendered is finished. Through this reference the text of the Charter acquires fresh significance, as a key to the interpretation of the Treaty.

4 Substantive Provisions

Part II of the Treaty deals with commerce (trade, competition, transit, technology transfer, trade-related investment measures (generally known as TRIMs) and access to capital). These are covered both in principle and, in places, at a fairly nuts-and-bolts level. Trade, through the operation of Western-style free markets, is obviously one of the linchpins of the Treaty. Although relating to one sector of the economy only, the Treaty aims to provide interim trade arrangements that will assist the economies in transition down the road towards membership of the GATT system. It is worth reiterating in passing what the trade provisions do *not* yet cover: trade in services and in energy-related equipment. Also note that the dispute resolution procedure under Art. 27 does not apply to trade disputes other than with reference to transit issues - unless the parties to the dispute elect that it should.

Very few parts of the Treaty are completely self-contained. Where the commerce provisions are concerned, note particularly Art. 22 in the contextual Part IV, which contains provisions on the conduct of state-owned enterprises in connection with the provision of goods and services as well as in other areas. There is also Art. 24, which contains the only internal grounds on which parties can make exceptions to any of the Treaty's commercial provisions - the GATT, of course, contains its own exceptions and as such these are incorporated in the transitional Art. 29.

Part III covers all those aspects of investment upon which agreement was reached during the negotiations (including expropriation and compensation but NOT including the standard of national treatment for the making of investments). Note that none of the Art. 24 exceptions applies at all to the provisions on expropriation and compensation, and that the principal environmental ground for exceptions - necessity to protect human, animal or plant life or health - does not apply to any of the investment provisions.

Part IV concerns the legal context within which the provisions of Parts II and III are to be applied. This context includes amongst other things:

- the principle of national sovereignty over energy resources discussed above - here expressed to be subject to international law, although international law may in fact say that national sovereignty over natural resources is inalienable;
- the need for national laws and administrative requirements to be transparent - that is, readily available to be read by those affected by them, although not necessarily available before they come into effect;
- the environmental provisions (remembering that the Protocol on Energy Efficiency applies only to those parties which choose to become parties to it);
- the extent and effects of taxation;

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- application of the Treaty provisions to and by sub-national authorities and state-owned enterprises; and
- Article 24 on exceptions.

All of these provisions are capable of affecting the commerce and investment provisions.

Part VI contains the transitional provisions, which for the short and probably medium term may be the most significant part of the text, since the Treaty will be provisionally applied without formally coming into effect until ratified by 30 parties. Bear in mind that the GATT has been provisionally applied for 47 years - it was only ever ratified by Liberia and Haiti. The transitional provisions governing trade, and the time limits within which the various economies in transition are pledged to make certain reforms, are therefore crucial to the real effect of the Treaty for at least the first six years of its operation. The details of which parties have requested time to bring their laws in line with the Treaty in various ways before complying are set out in one of the Annexes.

The reforms which are permitted to be staggered include many of the most significant:

- the bringing in of national competition laws;
- the commitment not to raise obstacles to the establishment of new transit capacity;
- national treatment for investments once made;
- the guarantee of freedom of transfer of employees' unspent earnings; and
- the behaviour of state enterprises.

In fact, however, very few signatories have taken advantage of the opportunity to delay implementation of the last three of these requirements.

Note that the Art. 24 exceptions cannot be invoked at all in respect of trade while trade is governed by the transitional provisions in Art. 29. The GATT exceptions will continue to apply as between parties which are applying GATT rules, but no other provision is made for exceptions.

5 Administrative and Functional Provisions

Part V, on dispute settlement, contains separate procedures for the resolution of disputes between parties and between a party and an investor. The actual procedural rules for the conduct of proceedings in front of any ad hoc tribunal set up under the Treaty are either determined by the Convention applying to the forum chosen or, where the dispute involves a non-GATT Contracting Party and concerns trade, set out in an Annex to the Treaty. There are also rules to determine whether or not the dispute procedure of the Treaty applies, as trade disputes are referred by the Treaty to GATT panels.

Part VII contains details that are likely to be of little direct interest to anyone outside the governments and civil services involved. For example, the funding of the Secretariat and the responsibilities of and voting arrangements for the Charter Conference (the body of representatives of the parties to the Treaty which will oversee the Treaty's functioning, review parties' compliance and decide issues of policy affecting the Treaty) are dealt with.

The final provisions in Part VIII may be more relevant to those interested in operating under the Treaty, since they include, for example:

- the details of how the Treaty can be amended;
- the requirement for it to be applied provisionally pending its presumed eventual entry into force; and
- the consequences, for investors, of a host state deciding to withdraw from the Treaty.

On this last point, once the Treaty is in force, all parties which withdraw from the Treaty will be required to continue to protect existing investors for 20 years on the same terms as though the host state were still a party. Most parties have agreed to do this even if they withdraw while the Treaty is still being applied provisionally. But note that five countries including Germany and Poland have elected NOT to extend the 20 year continuing protection to existing investors if they withdraw while provisionally applying the Treaty.

IV Conclusions

The negotiation of the Treaty was an ambitious undertaking, and it is remarkable that so much was achieved so fast. The text, like any text as long and complex as this one, is not easy to grasp as a whole at a first, or even third or fourth reading. It is important to treat it as a mechanism rather than a static, two-dimensional picture, in order not to lose sight of the influence of the parts and the external legal, political and economic environments on the whole. It will be interesting to see how it will stand up to the conflicting demands which are bound to be placed upon it.

References

- 1) So enthusiastic are the Member States of the European Union (EU) to consolidate their supply lines that within months of the signature of the Treaty the Energy Commissioner had proposed a Mediterranean Energy Charter, to be modelled on the Treaty, but this time aiming to establish a framework for European investment in the Mediterranean oil and gas suppliers (*EC Energy Monthly* (1995) 76/8).
- 2) I am indebted for much of the following discussion to Brownlie, *Principles of Public International Law* (OUP, 4th edition 1990).
- 3) Under Art. 26 of the Vienna Convention on the Law of Treaties (63 AJIL (1969) 875) a treaty in force is binding upon the parties and must be performed by them in good faith. Treaties often are observed; however, the Vienna Convention itself is only a treaty and the sanction for breach of Art. 26, like that for breach of any term of the Treaty, depends upon the political and economic expediencies pertaining at the time of the breach.
- 4) To paraphrase McDougal and Feliciano, *Law and Minimum World Public Order* 1961, p. vii.
- 5) I am indebted for parts of the following discussion to *Bilateral Investment Agreements*, UN, 1988.
- 6) Fawcett & Parry, *Law and International Resource Conflicts*, 1981 pp. 124-125.
- 7) Birnie & Boyle, *International Law and the Environment*, 1993 p. 42 et seq.
- 8) Fawcett & Parry, *supra* [Final Act of the European Energy Charter Conference](#).
- 11) Resolution 1803 (XVII) of UN General Assembly, 1962.
- 12) Decision 1, Annex 2 to the Final Act.
- 13) Advisory Opinion of the PCIJ in the *Greco-Bulgarian Communities* case (1930) PCIJ Series B no.17, p. 32.
- 14) Personal communication, Sidney Fremantle (former UK negotiator).
- 15) (1968) UNTS vol 729 No 10485; renewed in April 1995.
- 16) IAEA INFCIRC/254, 1978.
- 17) In particular France and China are not.
- 18) The Guidelines have been accepted by the principal signatories of the Non-Proliferation Treaty and by France. China, however, has not accepted the Guidelines. Lamm, *The Utilization of Nuclear Energy and International Law*, 1984.
- 19) Article III.A, IAEA Statute, IAEA Legal Series 1 (1959) 49.
- 20) UKTS 57 (1983).
- 21) International Convention for the Prevention of Pollution by Ships, (12 ILM (1973) 1319) and Protocol (17 ILM (1978) 546).
- 22) 28 ILM (1989) 657.
- 23) Convention on Environmental Impact Assessment in a Transboundary Context (30 ILM (1991) 802).
- 24) Both in *International Treaties on Intellectual Property*, Leaffer (ed.) 1990.

- 25) Industrial Property and Copyright (*WIPO Review*) No. 11, November 1995.
- 26) At the signing in Lisbon, 42 states and organisations signed the Treaty while 39 signed the Protocol.
- 27) Vienna Convention Art. 31(2).

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