The Energy Charter Treaty in 2000: In a New Phase  
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I Introduction  

The Energy Charter Treaty (ECT) is unique as a multilateral treaty, limited in scope to the energy sector, which establishes within that sector legal rights and obligations with respect to a broad range of investment, trade and other subjects such as the transit of energy goods, competition, the environment, access to capital markets and transfer of technology, and which in most cases provides for the enforcement of those rights and obligations. The purpose of the Treaty, as described in its Article 2, is to ‘establish a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter.’  

With respect to investment, the Treaty follows up on ideas originally conceived by John Maynard Keynes in the 1940s (the Havana Charter) and reflected in heretofore largely non-binding declarations and guidelines on foreign investment, and it set the stage for the unsuccessful efforts within the Organisation for Economic Co-operation and Development (OECD) to agree a non-sectoral ‘Multilateral Agreement on Investment,' the so-called ‘MAI’. A distinctive feature of the ECT is that its main investment obligations can be enforced by private parties against non-complying states through binding international arbitration. This enforcement is available not only against non-complying Eastern countries, but also against the OECD states and the European Communities.  

The opening for signature of the ECT in Lisbon on 17 December 1994 marked the end of the first, four and a half year, phase of the Treaty's development; this was a period of arduous negotiations among more than fifty states and the European Communities that had been set in motion by the June 1990 suggestion of Prime Minister Ruud Lubbers of the Netherlands that energy co-operation could help stimulate economic recovery in Eastern Europe and the former Soviet Union (FSU). In April 1998 a second phase of the ECT's history drew to a close, as the Treaty entered into force following the achievement of the thirty ratifications that were required for its entry into force; this second phase witnessed the development of functioning ECT institutions on a provisional basis, and the intensive pursuit of further trade and investment negotiations that were mandated for this period by the Treaty. While the negotiations for a new investment instrument remain unfinished, in the foreseeable future there inevitably will be - with one major exception - less focus on negotiations for new instruments.
The exception concerns efforts to facilitate the unimpeded transit of energy goods across national borders, a subject that has become perhaps the central focus of the Energy Charter Secretariat and Conference in the Treaty's third phase. This third phase could in other respects prove a complex and challenging one in which some Treaty signatories - including important participants such as the Russian Federation - continue to apply the Treaty only provisionally even though it has entered into force for the great majority of signatories.

The ECT and its origins have been discussed comprehensively elsewhere. This chapter briefly explains the Treaty's origins; describes the Treaty's main features and its effects; provides an update on recent developments; and casts an inquisitive eye on the Treaty's future. In the process, it offers fresh commentary on several issues that may be of special interest to European readers.

II. Origins of the Energy Charter Treaty

II.1 The 1991 European Energy Charter

The ECT was preceded by the European Energy Charter, a declaration not constituting a binding international Treaty (Title IV, first paragraph: ‘not eligible for registration under Art. 102 of the UN Charter’), adopted and signed on 17 December 1991 at The Hague, which represents the first formal step in the ECT process. The Charter and Treaty were initiated in reaction to the collapse of the FSU: in 1990, Prime Minister Lubbers called for a ‘European Energy Charter' to serve as a political and legal foundation for East-West co-operation, the idea being to support a transition to market economy status and to enhance political stability throughout Europe by promoting Eastern economic development. Western energy dependence and security of supply would be safeguarded by the creation of a privileged relationship of investment and trade between East and West. The East would provide investment security, and this would trigger investment inflows, which in turn would build up the Eastern economies and supply energy to the West. Liberated from regulatory hindrances, Western finance and technology would flow eastward and Eastern products westward.

This idea was welcomed by the European Council, which invited the Commission of the European Communities to study how best to implement such co-operation. In February 1991 the Commission proposed the concept of a European Energy Charter. Following discussion of the Commission's proposal in the Council of the European Communities, the European Union invited the other countries of Western and Eastern Europe, the FSU and the non-European members of the OECD to attend a conference in Brussels in July 1991 to launch negotiations on the European Energy Charter. The United States soon joined the negotiations, and Canada, Australia and Japan followed suit.

The Charter that was negotiated in this first conference is a statement of major principles that the signatories declare they wish to pursue, and a set of guidelines or signposts for the subsequent negotiation of a 'Basic Agreement' -- later to become the ‘Energy Charter Treaty' -- and a set of ‘Protocols.' The Charter was able to be more unqualified than the
ultimate Treaty on a number of issues, since it was seen primarily as a non-binding declaration of policy and good will. However, the Charter is not without significance in interpreting the ECT, since the ECT’s preamble makes clear that the Treaty is intended to provide the basis for implementing the principles contained in the Charter.

II.2 Negotiation of the Energy Charter Treaty

By the time the legally non-binding Charter had been agreed, negotiations already were under way on a treaty -- the ECT -- to implement the objectives and principles of the Charter. Although initiated with a sense of urgency, the negotiations encountered numerous obstacles that included not only East-West issues but intra-OECD disagreements as well, which effectively prolonged the negotiating process to more than three years. In retrospect, this was a relatively modest period within which to complete a Treaty of such scope, complexity, novelty and political sensitivity among so many parties having divergent interests. Ultimately, the leadership of the European Energy Charter Conference in which the negotiations were held, faced with the growing impatience not only of the European Commission, which had been providing financial and other support to the Conference, but also of many other negotiating parties, and struggling to hold together a temporary Secretariat, took a daring decision to set a deadline for the end of the negotiations. This succeeded in producing meaningful Treaty commitments, which were accepted by most of the participants in the Conference.

A major turn in the negotiations, opening the way for this successful gamble, came when the negotiating Conference was unable to agree to apply to the 'pre-investment' stage, on a legally binding basis, the 'national treatment' standard that had been accepted in the negotiations as a treaty standard for investments already made. The Russian Federation and other transitional countries lacked experience in applying this standard and thus, unlike many OECD countries, had no legislation denying national treatment, in sensitive areas, with respect to the making of new investments; they were not prepared to let those OECD countries 'grandfather' their own restrictive practices until they had a chance to catch up. That led, upon the initiative of the European Union, to deferral of this subject to a 'second-phase' negotiation of a 'Supplementary Treaty', mandated by the ECT, and encompassing issues of privatization and demonopolization.

The ECT remained open for signature for six months from 17 December 1994; by the time it closed for signature, it had been signed by 49 states and the European Communities. The signatories include almost all of the countries of Europe and all of the republics of the FSU, as well as Australia and Japan. Of the signatories to the non-binding 1991 European Energy Charter, only Canada and the United States did not sign the ECT.

III. Main features of the Treaty

Although the ECT covers a broad range of energy-related subjects, its principal provisions are those regulating energy investment, trade and - in a novel and unique manner - the transit of energy goods through states that are party to the Treaty.
III.1 Investment protection and dispute resolution

The ECT's investment provisions are the logical culmination of efforts made over the last fifty years to create multilateral investment rules, including: the Havana Charter of 1948; the ultimately abortive 1976-91 efforts to create a UN Code of Conduct on Transnational Corporations; several wholly or largely non-binding instruments (International Labour Organisation, International Chamber of Commerce, Draft Convention, the OECD Codes and Instruments, the World Bank Guidelines); the 1966 International Centre for Settlement of Investment Disputes (ICSID) Convention, which recognised the creation by state-investor agreements of individual rights against states -- a precursor of Article 26 of the ECT -- under international law; the 1986 Multilateral Guarantee Agency Convention providing arbitral/procedural and investment insurance facilities; the Lomé Conventions - - in particular Lomé III; the investment provisions of the US-Canada Free-Trade Agreement and the North American Free-Trade Agreement (NAFTA); the Colonia Protocol of the Mercosur Agreement; and especially the increasingly numerous bilateral investment treaties (BITs).

The foreign investment regime of the Treaty is characterized by the distinction between pre-investment (the stage of 'making investments' and the issue of access conditions), and post-investment (when the risk is assumed and the 'hostage' effect arises). While the ECT contains not only a 'hard' regime for post-investment but also some binding rules with regard to the pre-investment stage (and there is an area of overlap between the two stages), the Treaty for the greater part establishes a 'soft' pre-investment regime characterized by 'best efforts' formulations, pending the outcome of the mandated second-phase investment negotiations. Those negotiations are discussed below; here we will concentrate on the post-investment regime, which includes mainly 'hard law' obligations enforceable by international arbitration.

III.1.1 Scope and definitions

The ECT's principal investment provisions are contained in Part III of the Treaty. The scope of the investment protection is shaped by the definitions in paragraphs (5) and (6) of Article 1. Investments are defined as 'every kind of asset, owned or controlled directly or indirectly by an Investor.' There follows in the Article 1(6) definition a non-exclusive list mentioning, among other things, tangible and intangible and movable and immovable property, 'a company or business enterprise' or an equity (e.g. shareholding) or debt interest therein, claims under contracts associated with an investment, intellectual property, 'Returns' (including profits, dividends, interest, capital gains, royalty payments, various fees and payments in kind), and rights to undertake 'Economic Activity in the Energy Sector'. The definition states that changes in the form of investments do not affect their character as investments.

This definition further stipulates that the term 'Investment' refers to any investment 'associated with an Economic Activity in the Energy Sector,' the definition of which employs the term, 'Energy Materials and Products.' Those products are defined in Article 1(4) by means of item references to the Harmonized System of the Customs Co-operation
Council and the Combined Nomenclature of the European Communities. The Treaty's Annex EM, which contains these item references, generally encompasses coal, electrical energy, natural gas, nuclear energy materials, petroleum and petroleum products, fuel wood and charcoal. The designation of petroleum products excludes some petrochemicals that are within the item references for petroleum products. The term ‘Economic Activity in the Energy Sector' is defined to mean ‘an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale' of the items that are covered by the definition of ‘Energy Materials and Products', except that fuel wood, charcoal, and the distribution of heat to multiple premises are excluded from the definition for investment purposes. It will be observed that the extension of the definition of ‘Investment' to investments (i.e. assets) ‘associated with' an ‘Economic Activity in the Energy Sector' attenuates the sectoral restriction of the Treaty's protections and dispute resolution mechanisms; it can provide a basis for claiming coverage, for example, with respect to otherwise uncovered petrochemical facilities within an oil refinery complex, or maritime transportation that is ‘associated with' a covered on-land investment.

In Article 1(7), ‘Investors' are defined simply as natural persons having the citizenship or nationality of or permanently residing in a Contracting Party ‘in accordance with its applicable law,' and as companies or other entities organized ‘in accordance with the [applicable] law.' The term thus has a broad scope but acquires policy substance only by its specific use in reference to investments.

III.1.2Absolute minimum standard of treatment

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

The next two sentences provide that ‘such investments' shall: ‘also enjoy the most constant protection'; in no way be impaired in their management, maintenance, use, enjoyment or disposal by ‘unreasonable or discriminatory measures'; and ‘in no case be accorded treatment less favourable than that required by international law, including Treaty obligations.' An Understanding in the Final Act of the European Energy Charter Conference indicates that the reference to ‘Treaty obligations' does not include ‘decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.'
III.1.3 Internationalization of contracts

Then comes a provision in paragraph (1) of Article 10 that can make it a violation of a Contracting Party's obligations under the ECT to breach an investment agreement: 'Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.' The negotiating parties were given an opportunity to opt out of dispute resolution with regard to this obligation: Articles 26 and 27 allow the Contracting Parties listed in the Treaty's Annex IA to preclude ECT dispute settlement for breaches of the obligation, and Australia, Canada, Hungary and Norway have elected to be listed in Annex IA.

III.1.4 The national/MFN treatment standard

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

The key concept of 'national treatment,' with its implication of non-discrimination, raises considerable interpretative challenges. Discrimination can take many forms, and existing and evolving European Communities law (competition, energy, state aids in particular) provides numerous examples of discriminatory practices that can exist in law or be encouraged, facilitated or tolerated by governments. The concept has a trade law meaning that is fairly well understood in that context, but there are fewer precedents for its application in investment law.

Special problems can arise in applying the national treatment standard to a Contracting Party within which sub-units exercise autonomy. If a sub-unit discriminates against investors of another sub-unit of the same state, it is not always clear what 'national treatment' in this context means. Although the same problems in principle attend the obligations of multi-state international organisations such as the European Communities, they are mitigated by the fact that the member states are themselves ECT signatories and will be directly bound by the Treaty's obligations.

The "national treatment" principle becomes more complex when it is applied to public companies or private companies vested with "special or exclusive privileges." The ECT duties of states to ensure Treaty-compliant conduct by such enterprises, transposed from relevant GATT provisions such as Article XVII, approaches a duty of enterprises with monopoly control over essential facilities or otherwise dominant market power not to abuse such power by discriminating against foreign competitors. The interplay of the Treaty's investment conditions and its creation of state responsibilities of effective regulation of such enterprises moves in the direction of a concept of state responsibility to impose and implement competition law, similar to that under Article 86 of the Treaty of Rome.
Likewise, questions can arise as to application of the trade law-based MFN principle to specific negotiations between resource-owning governments or state enterprises and foreign investors. Can, for example, a company making a new investment - or an established company - request, by application of the MFN clause, the same financial treatment (consisting of the particular combination of royalties, income taxes, privileged state participation and other levies) that was negotiated before or after with another company, and possibly ratified by legislation? Resource exploration and development licenses may be negotiated, taking into account the particular geological, commercial and bargaining context, and application of the MFN principle could be seen to undermine the negotiating freedom of the parties concerned. Be that as it may, worthy of note in this context is an Understanding to the ECT as a whole, contained in the Final Act of the negotiating Conference, that derogations from MFN treatment ‘are not intended to cover measures which are specific to an Investor or group of Investors, rather than applying generally.’

A limitation on the national/MFN treatment principle, sought by the United States, is indicated by paragraph (8), which notes that the ‘modalities of application’ of paragraph (7) in relation to programs of grants, financial assistance or contracts for energy technology research and development, are ‘reserved for’ the ‘second-phase' Supplementary Treaty; up-to-date reporting on such programmes is required by paragraph (9).

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

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

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

III.1.5 Key persons
Article 11 first obliges a Contracting Party to ‘examine in good faith' requests by investors of another Contracting Party and ‘key personnel' employed by them, or by the entity which constitutes their investment, to enter and remain in connection with the making or the subsequent conduct of an investment. It then requires the host Contracting Party to allow the employment of key persons, provided that they have been permitted to enter, stay and work and that the employment conforms to the permission granted.

### III.1.6 Freedom to transfer funds

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

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

**a. Exception for Russian investors**

Article 14 also is subject to two Decisions annexed to the Final Act of the negotiating Conference, the more significant of which applies exclusively to those FSU republics that elected by 1 July 1995 to be subject to it. This Decision allows restrictions by such a state ‘on movement of capital by its own investors,' subject to several conditions aimed at protecting the rights of investors of other Contracting Parties and narrowing the scope of the exception; in fact, only the Russian Federation made such an election. The intent of this Decision is to exclude a right of the domestic investor of such a state to request certain transfers (even where that investor is a business entity that qualifies as the investment of an investor of another Contracting Party), without foreclosing the right of the foreign investor itself to make the same request.

**b. Preservation of EU investor rights**

The Decision is subject to an exchange of letters between Russia and the European Union, aimed at avoiding any curtailment of the rights otherwise available to the EU and its member states under their 24 June 1994 Partnership and Co-operation Agreement.
(PCA) with Russia. The exchange of letters was considered necessary because Article 105 of the PCA, whose payments transfer protections the EU considered preferable to those of the ECT within their scope, expressly provides for the PCA's inapplicability in areas covered by the ECT; although Article 16 of the ECT contains rules designed to assure that an investor will enjoy the most favourable treatment available to him under any Treaty, the EU apparently was concerned that the rule contained in the PCA might negate those in Article 16. Interestingly, since the Conference Decision concerning Article 14 leaves intact the ECT's MFN obligation (indeed, the Decision itself reasserts such an obligation), there is a question whether the investors of other ECT Contracting Parties are entitled to treatment, by Russia, at least as favourable as that which Russia accords investors of the European Union through the PCA.

III.1.7 Subrogation

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

III.1.8 Nationalization/confiscation

Investment is protected against nationalization/confiscation (with a reference to confiscatory taxation) under the so-called 'Hull rule,' the Western position in the 1970s debate on compensation standards. It is Articles 12 and 13 that deal with compensation for expropriations and for other losses such as those caused by armed conflict, state of national emergency, civil disturbance or similar event. Under Article 13, no Contracting Party may nationalize or expropriate, or subject to one or more measures having equivalent effect, the investment of the investor of another Contracting Party, except: for a public purpose; on a non-discriminatory basis; in accordance with due process of law; and when accompanied by prompt, adequate and effective compensation -- amounting to fair market value immediately before the expropriation or impending expropriation became known in such a way as to affect the investment's value, and with interest to the date of payment. The investor is entitled to have the fair market value expressed in a freely convertible currency on the basis of the market exchange rate at the time the expropriation became known. Further, the expropriating Contracting Party must afford a right to prompt review of the issues raised. The expropriation article has significant current implications: first, it could be construed to cover expropriation by exorbitant regulation, e.g. in environmental matters; second, it also covers, in spite of the very restrictive treatment of tax matters in the Treaty discussed below, confiscatory taxation.

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

### III.1.9 Host state right to deny benefits

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

### III.1.10 Arbitration of disputes

The Treaty's dispute resolution provisions that correspond to the Part III investment provisions are in Part V, which is comprised of three articles, two of which (Articles 26 and 27) establish investment dispute settlement mechanisms, and the third of which (Article 28) puts limits on access to one of those mechanisms.

a. Compulsory arbitration of private investor disputes

Perhaps the most important aspect of the ECT's investment regime is the Treaty's provision for compulsory arbitration against governments at the option of foreign investors, for alleged breaches of the Treaty's investment protections, without the need for a specific arbitral 'compromis.' Article 26 provides for the resolution of disputes between a Contracting Party and an investor of a different Contracting Party 'relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III...'. It gives an investor the choice to submit an unresolved dispute, following a failure to resolve the dispute by negotiation: to the fora of the host state; in accordance with some other previously agreed procedure; or, for binding arbitration, to the investor's preference among ICSID, a forum established under the rules of the United Nations Commission on International Trade Law (UNCITRAL), or a proceeding of the Arbitration Institute of the Stockholm Chamber of Commerce.

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

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

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

b. State-state arbitration

Article 27 provides for binding state-state arbitration (at the Hague, unless the parties decide otherwise), by an ad hoc tribunal, of disputes ‘concerning the application or interpretation' of the ECT. Unlike Article 26 on investor dispute resolution, Article 27 is not limited to investment disputes arising under Part III of the Treaty, although the Article 27 arbitral procedures are excluded by Article 28 from application to trade-related disputes arising under Article 5 (‘Trade Related Investment Measures'); Articles 6 (‘Competition') and 19 (‘Environmental Aspects') likewise are not subject to Article 27 arbitration.

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

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

III.1.11 Exceptions

The ECT allows a number of exceptions from the rights and obligations provided for therein. While many of these exceptions apply not only to the Treaty's investment protections but also to other rights and obligations, they are mentioned here because of their importance in the investment context:

a. Tax article

One of the purposes of Article 21 on taxation was to avoid having the benefits of bilateral tax treaties shared by ECT parties under that Treaty's MFN provisions. But in their efforts to achieve that goal, the negotiators went so far as to specify that except as otherwise provided in this tax article (with some limited scope for application of the non-discrimination principle, and with full application of Article 13 on 'Expropriation' and thus some scope for notions of 'confiscatory taxation'), nothing in the Treaty creates rights or imposes obligations with regard to a Contracting Party's domestic tax laws (or its international tax agreements), and they further stipulated that the tax article will prevail over any other Treaty provision in case of inconsistency between them.

This may have some unfortunate effects on other parts of the Treaty. As one example, with respect to the very important Treaty requirement that Contracting Parties observe their obligations entered into with investors or their subsidiaries, Article 21 raises a question about the value of that protection in a situation where the host state imposes a tax in violation of an investment agreement.

b. General exceptions

Most of these exceptions, set out in Article 24, found their inspiration in the exceptions from trade rules that are contained in the GATT: (i) a situation of short supply of 'Energy Materials and Products' due to causes beyond the control of the Contracting Party; the exception is subject to a condition of consistency with the principle that ‘all other Contracting Parties are entitled to an equitable share of the international supply...’; (ii) measures to benefit aboriginal or socially or economically disadvantaged investors; (iii) measures considered necessary for the protection of ‘essential security interests'; (iv) measures considered necessary with regard to nuclear non-proliferation; and (v) measures considered necessary for the maintenance of public order. As often throughout the Energy Charter Treaty's investment regime, these provisions rely, for investment principles, on concepts and practices developed in the context of international trade law; while the significant difference between trade and investment needs to be taken into account when dealing with virtually identical language, this may be indicative of a growing convergence between international trade and investment law.
It should be noted that these general exceptions do not apply to the nationalization/confiscation protections in Articles 12-13 (or to the Treaty's trade rules under Article 29, discussed below).

c. 'Transitional' arrangements

Although Article 32 sets out arrangements under which Contracting Parties that are among twenty-four specified 'economies-in-transition' are eligible for temporary exceptions from obligations under certain provisions of the ECT, the exceptions actually claimed -- which were recorded in Annex T of the Treaty -- proved surprisingly modest. The principal investment exception claimed by certain 'transitional' countries was from the Treaty's requirement that, in the interest of transparency, Contracting Parties establish 'official enquiry points' through which investors can obtain information. As noted in section V.2 below, few of these exceptions remain applicable today.

d. Certain multilateral agreements

Finally, there are exceptions from the requirement for preferences that Contracting Parties accord within the context of free-trade areas, customs unions, co-operation agreements among the FSU republics, or so-called 'Economic Integration Agreements.'

e. 'Economic Integration Agreements'

The provisions concerning 'Economic Integration Agreements' warrant special discussion, in light of the importance attached to them by the European Union in the course of the ECT negotiations. Paragraph (2) of Article 25 defines 'Economic Integration Agreement' (EIA) to mean an agreement 'substantially liberalizing inter alia trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto...'; the definition comprehends liberalization of investment, and arguably further differs in principle from GATT Article XXIV(8)(b) in that does not require full sectoral trade liberalization. Paragraph (1) provides that a Contracting Party need not extend, under the ECT's MFN provisions, to another Contracting Party that is not a party to the EIA, any preferential treatment enjoyed under the EIA among the parties to it.

The EIA provisions were a highly contentious subject in the ECT negotiations; in fact, in subsequently explaining its decision not to sign the Treaty, the US cited Article 25 as one of its objections. The EU initially had proposed an EIA clause applying to national as well as MFN treatment, but this was withdrawn under widespread opposition, and the paragraph (2) test for qualification as an EIA also was made more stringent.

Since the exception created by this article applies only to MFN and not to national treatment, it affects only preferences that a party to an EIA such as an EU state extends to a non-EU state, which it does not extend domestically; such preferences are likely to be quite limited as concerns investment. Moreover, the EIA article excuses the EIA state only from extending MFN treatment to other Contracting Parties; yet Article 24, dealing
with MFN treatment of preferences accorded within free-trade areas and customs unions, contains an exception only as concerns the investors of another Contracting Party, suggesting a possible distinction between an exception for benefits to investors and an exception for benefits to Contracting Parties.

Annexed to the Final Act of the negotiating Conference and incorporated by reference into the Treaty is a Decision, agreed between the EU and the US as part of the Article 25 negotiations. This Decision, drawn from Article 58 of the Treaty of Rome and jurisprudence of the European Court of Justice, provides that an investment of an investor of a Contracting Party which is not a party to an EIA or a member of a free-trade area or customs union shall nonetheless be entitled to treatment accorded under such EIA, free-trade agreement or customs union, where the investment:

(a) has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or

(b) in case it only has its registered office in that Area, has an effective and continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union.

In addition, in a Declaration with respect to this article that is included in the Conference's Final Act, the European Communities and their member states recall the provisions of Article 58 of the Treaty of Rome according national treatment as to the right of establishment to certain kinds of firms present in the Community. They say that 'the application of Article 25 [of the ECT]...will only allow those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration....' Also relevant is the Final Act Understanding, alluded to above, that derogations from MFN treatment are intended to be limited to measures of general applicability.

III.2 The trade provisions

A major element of the ECT is that it subjects the trade of Contracting Parties that are not parties to the GATT -- such as republics of the FSU -- to rules of the 1947 GATT, both in those countries' relations with GATT countries and in their relations with one another. The provisions to this effect, which are set out in Article 29 of the ECT, are said to be 'interim' ones, but this is so only in the sense that they apply 'while any Contracting Party is not a party to the GATT and Related Instruments.'

III.2.1 General

Under Article 29(2), applying provisions of the 1947 GATT to trade involving non-GATT countries, these provisions will govern trade in 'Energy Materials and Products' between any two ECT Contracting Parties where either of them is not a GATT party, or if a GATT party, is not party to a GATT-related instrument that is relevant to such trade. The applicable 1947 GATT provisions are indicated through a list of the inapplicable
ones; the negotiating Conference maximized application of the 1947 GATT insofar as was practicable. A potential exception that was allowed for trade between FSU republics, which could instead be governed by an agreement between them, ceased to be available as of December 1999. However, the specified GATT provisions will not govern trade between ECT Contracting Parties that are either party to the 1947 GATT or ‘party’ to ‘GATT 1994’, and to the relevant GATT-related instruments.

It is Annex G to the ECT that sets out the provisions of the 1947 GATT and its related instruments that will not apply to trade covered by Article 29(2). These are the exceptions; any 1947 GATT provisions not listed there will apply to such trade. Article 29(2)(a) stipulates that these provisions govern, ‘as applied on 1 March 1994 and practised with regard to Energy Materials and Products by parties to GATT 1947 among themselves....'

III.2.2 The ‘exceptions and rules'

Article 29(2)(a), while imposing 1947 GATT rules on trade involving non-GATT parties, is ‘subject to the exceptions and rules provided for in Annex G.’ Annex G, entitled ‘Exceptions and Rules Governing the Application of the GATT and Related Instruments,' after setting out the provisions of the 1947 GATT and its related instruments that will not apply to trade covered by Article 29(2), calls for adherence to GATT provisions in examining balance of payments measures of non-GATT countries, and stipulates notifications to the Energy Charter Secretariat by such countries in cases where applicable GATT provisions call for notifications to the GATT.

III.2.3 Dispute resolution

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

There are exceptions from these dispute settlement procedures both for disputes arising under the agreements between FSU republics that are referred to above, and for those arising under agreements establishing free-trade agreements or customs unions as described in Article XXIV of the GATT.
III.2.4 EU-FSU nuclear trade

Paragraph (4) of Annex G covers nuclear trade, an issue which during the ECT negotiations was an especially hard-fought subject between the EU and the Russian Federation; indeed, so difficult was this subject to resolve that on 16 December 1994 it became necessary to adjourn the ceremonial meeting in Lisbon at which the text of the ECT was to be adopted by the negotiating Conference, in order to allow time for overnight negotiations (on this and on several lesser issues of Treaty interpretation).

Paragraph (4) provides: ‘Trade in nuclear materials may be governed by agreements referred to in the Declarations related to this paragraph contained in the Final Act of the European Energy Charter Conference.’ Article VI.7 of the Final Act contains six joint declarations of the European Communities with Russia and five other republics of the FSU, in each case stating that trade in nuclear materials between them ‘shall be governed' (or ‘exclusively governed') by certain other agreements, or that those other agreements ‘shall exclusively continue to apply.' In the case of Russia, the governing provisions are those of Article 22 of the EU-Russia PCA. As a result of the last minute EU-Russia negotiations, a joint memorandum was agreed recalling the EU's stated policy on nuclear materials import quotas, confirming applicability of the PCA's national treatment provisions to imports of nuclear material from Russia, and looking toward future review of the subject. Upon reconvening the Lisbon meeting, the Conference Chairman took note of the joint memorandum, which at the request of Russia and the Communities was to be annexed to the report of the Conference session, and stated that it was clear that as far as the ECT is concerned, ‘nuclear trade will be governed by Article 29(2)(a), Annex G and the joint declarations, concerning the implementation of the GATT rules by reference.'

A question left unaddressed in the Treaty is whether the GATT-like trade dispute settlement provisions in the Treaty's Annex D, which apply to ‘disputes regarding compliance with provisions applicable to trade' under Article 29, are available for disputes arising under the EU-Russia PCA and other agreements identified in the six declarations contained in the Final Act. In other words, do the statements in the Final Act declarations, that the nuclear trade shall be governed by the PCA or other specified agreements, make compliance with those agreements a right protected by the ECT? The Final Act/Conference Decision adopting the Trade Amendment contains a Declaration by the EU and Russia which indicates that they regard such trade as exclusively covered by the PCA.

III.2.5 Trade-related investment measures

In addition, of interest to foreign investors is the ECT's GATT-like discouragement of trade-related measures (TRIMs), i.e. measures imposing ‘local content requirements' or ‘trade balancing requirements.' Article 5 forbids all Contracting Parties from imposing any TRIM that is inconsistent with Article III or XI of the GATT. This specifically includes investment measures that would: require the purchase of goods of domestic origin or from a domestic source; impose limits on the purchase or use of imported
III.3 The transit rules

Most of the oil and gas resources in the FSU are located in remote regions with difficult access to consuming areas (Siberia, Azerbaijan, Kazakhstan, Turkmenistan). Transit, therefore, is a subject on which a meaningful energy treaty can have substantial impact, and it is a subject closely linked to investment. Article 7 of the ECT, dealing with this subject, contains the Treaty's most unique provisions, imposing unprecedented rights and obligations as concerns the transit of energy goods through a state that is party to the Treaty. Its potential relevance was highlighted during the dispute in early 1996 between Russia and Ukraine over Druzhba oil pipeline charges, when a Russian Deputy Minister, appearing before the State Duma, reportedly threatened to invoke the article.

III.3.1 Definitions

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

‘Energy Transport Facilities' are fixed facilities specifically for handling ‘Energy Materials and Products'; a non-exclusive list of such facilities mentions high-pressure gas transmission pipelines, high-voltage electric transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, and oil product pipelines.

III.3.2 Rules

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

Paragraph (2) is a ‘soft law' obligation to ‘encourage relevant entities to co-operate' in modernizing, developing, operating, and facilitating the interconnection of ‘Energy Transport Facilities,' and in measures to mitigate the effects of interruptions in the supply of energy goods.
In paragraph (3) each Contracting Party undertakes that, unless an existing international agreement provides otherwise, its ‘provisions' relating to the transport of covered energy goods and to the use of fixed energy transport facilities shall treat energy goods that are in transit through that Contracting Party's ‘Area' no less favourably than they treat any other such goods originating in or destined for that ‘Area'.

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

Paragraph (4) of Article 7 is subject to the ECT's ‘transitional arrangements,' providing for temporary exceptions that the ‘economies-in-transition' were allowed to take from specific provisions of the ECT; such exceptions, which are listed in Annex T to the Treaty, are described below. Paragraph (4) of the ‘Transit' article was the object of exceptions on the part of several countries, but only Bulgaria continues to maintain such an exception.

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

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

Paragraph (7), which only applies following the exhaustion of all other dispute resolution remedies previously agreed to between the concerned Contracting Parties or between the concerned entities, allows a Contracting Party to the dispute to require the Energy Charter Secretary-General, who heads the Secretariat that supports the Energy Charter Conference, to appoint a conciliator. If the conciliator fails to secure agreement within sixty days, ‘he shall recommend a resolution and shall decide the interim tariffs and other terms and conditions to be observed...until the dispute is resolved.' Paragraph (7)(d) states that the Contracting Parties ‘undertake to observe and ensure that the entities under their control or jurisdiction observe' the conciliator's decision for twelve months, unless the dispute is resolved sooner.
Paragraph (7)(f) calls upon the Charter Conference to ‘adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

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

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

III.3.3 Obligations of the European Communities

The fact that the European Communities are Contracting Parties to the ECT, separately from their members, presents some interesting issues in the context of this article, especially as concerns the article's paragraph (6)-(7) operational provisions. The obligations under the article fall on the ‘Contracting Parties,' which means that they fall on the Communities as such as well as on their individual member states. However, the obligations under the article pertain to ‘Transit,' which refers in its primary definition to carriage originating in ‘another state' and destined for a ‘third state,' a phrasing that could be read to imply that the transit in question occurs through an individual state.

This raises questions as to what are the obligations of the Communities when a disruption of transit is threatened. For example, as concerns enforcement of a conciliator's decision against a transit state within the EU, when are the Communities required under paragraph (7)(d) of Article 7 to ‘observe and ensure that the entities under their...jurisdiction observe any interim decision’ of a conciliator concerning tariffs, terms or conditions? Does this obligation pertain only when the carriage of energy goods is from and destined for non-member states, and through the territories of the European Communities' states as if they were one state, implying that the internal law of the Community is a special regime prevailing over the Energy Charter Treaty when no non-Community signatories are involved? Or does it apply to the Communities whenever such a dispute affects carriage through one of their member states? Note that under the latter interpretation, the article's obligations could apply to the European Communities not only with respect to disputes involving carriage of energy goods through states external to the European Communities, but also to those involving carriage through the Communities' own individual member states. One can hypothesize other cases, where goods originate in or are destined for EU states, that pose similarly difficult questions of European Community responsibility.

III.4 Other features of the Treaty

The ECT contains comparatively ‘soft' provisions on several energy-related subjects such as competition (procedures for consultation between competition authorities), the
environment (hortatory commitments of good environmental practice), access to capital (a best-efforts obligation to promote it), and transfer of technology (no obstacles should be imposed). It does, however, contain ‘hard law’ commitments, noted above, concerning compliance by sub-federal political units and state obligations regarding Treaty compliance by their state enterprises and other delegates of state power.

Article 33(1) provides that the Energy Charter Conference may authorize ‘Protocols’ (treaties which ECT parties may elect, but are not required, to participate in) and ‘Declarations’ (non-binding instruments) ‘in order to pursue the objectives and principles of’ the European Energy Charter; Article 13(a) says that a Protocol complements, supplements, extends or amplifies the provisions of the Treaty sectorally, or by category of activity, or with reference to co-operation envisaged in the European Energy Charter. In fact, the Protocol on ‘Energy Efficiency and Related Environmental Aspects' opened for signature along with the ECT and was signed by all signers of the ECT; it entered into force on 16 April 1998. Moreover, a decision has been made to aim the Conference's energy transit efforts toward negotiation of a Protocol; and other possible Protocols or Declarations also have been considered.

IV Direct Effect of the Treaty

The Treaty provides a range of means by which it can be enforced. The option of investor-state arbitration under Article 26 in respect of disputes concerning the investment chapter without the need first to exhaust local remedies, is clearly an important feature of the Treaty. The Contracting Party home state of an investor may also invoke the arbitration clause in Article 27 in respect of such disputes. Action to deal with alleged breaches of other provisions of the Treaty can only be taken by a Contracting Party in accordance with the mechanism provided under the Treaty. In this respect the general provision for resolving state-state disputes in Article 27 will not apply to disputes concerning, for example, the articles on an interim trade regime, which has its own dispute resolution mechanism.

While the Treaty provides these mechanisms to deal with disputes, a national of a Contracting Party may prefer to invoke the Treaty before national courts, or an issue of interpretation of, or compliance with, the Treaty may otherwise come before such courts. In this context, it will be important to consider whether the Treaty has ‘direct effect’ within the relevant legal system. This will require an examination of the constitutional situation in each Contracting Party. As the European Communities are also parties to the Treaty, the situation under Community law in respect of the direct effect of ‘mixed agreements’, such as the Treaty, also needs to be examined. It will also be necessary to determine whether the Treaty itself or parts of it are regarded as meeting whatever the relevant test is for direct effect. The investment regime of the Treaty (Part III) together with related provisions that clarify, explain, restrict or extend Part III (e.g. Articles 22 and 23), is perhaps the likeliest candidate for direct effect. The coverage of Part III by the Article 26 investment arbitration mechanism indicates that with respect to Part III, no further implementing legislative action was considered necessary. The situation is very different for the mainly hortatory environmental and competition
articles, where the explicit exclusion of the Article 26 investment arbitration method indicates that the Treaty's intention is not to make these articles justiciable in any way.

It is likely that in many Contracting Parties some of the provisions in the Treaty would be regarded as having a direct effect and could be invoked in national courts. In the case of the European Communities and most of its member states, this seems to be the case at least in respect of the investment provisions.

V Activity during the ECT's second phase

Since the opening of the ECT for signature in December 1994, the Energy Charter Conference and Secretariat have been given organizational form and substance, initially on a provisional basis; the Secretariat has proceeded to implement the Treaty; and, meanwhile, several second-phase negotiations envisaged by the Treaty have approached or reach fruition.

V.1 The institutional arrangements

All Treaty signatories and any states acceding before its entry into force accepted the provisional application of the institutional provisions set out in Part VII, to the extent consistent with their laws and regulations, regardless whether they applied the legal disciplines of the Treaty on a provisional basis. The immediate consequence was that the Provisional Energy Charter Conference and a Secretariat to serve it were created. The Provisional Charter Conference met nine times before it was terminated by the entry into force of the Energy Charter Treaty on 16 April 1998. As of mid-2000, the Energy Charter Conference had met five times.

The Treaty gives the Energy Charter Conference (referred to as the Charter Conference), which comprises the Contracting Parties to the Treaty, clearly defined powers and functions. These are set out in Article 34 and the voting regime for decision-making is described in Article 36. Among the powers and functions given to the Conference are to: carry out the duties assigned to it by the Treaty and any Protocols; keep under review and facilitate the implementation of the principles of the Charter and the provisions of the Treaty and any Protocols; facilitate in accordance with the Treaty and any Protocols the coordination of appropriate general measures to carry out the principles of the 1991 European Energy Charter; and encourage co-operative efforts aimed at facilitating and promoting market-oriented reforms and modernization of energy sectors in those countries of Central and Eastern Europe and the FSU undergoing economic transition.

The Charter Conference is also given specific tasks, such as developing additional elements for the several dispute resolution mechanisms in the Treaty, for example the Rules for the Conciliation of Transit Disputes under Article 7, which were adopted in December 1998. In addition, the Charter Conference has certain tasks under the Energy Efficiency Protocol, such as developing implementing procedures. It also has the usual functions given to a Conference of Contracting Parties of adopting new instruments;
approving accessions; and tending to the ‘house-keeping’ side of an international Secretariat, e.g. approval of work programmes and budget.

The Provisional Charter Conference and the Charter Conference have so far combined the roles of a negotiation forum for the development of the new instruments mandated under the Treaty (on trade and admission of investment) and ‘oversight body’ for the Treaty. Much of the work of the Provisional Conference was devoted to the normal start-up tasks associated with establishing a Conference of Contracting Parties and an international Secretariat. As the Treaty does not come under the umbrella of a larger international organisation such as the United Nations or the Organisation for Economic Co-operation and Development, there were no pre-determined models for Rules of Procedure, Staff Regulations and Rules, etc. The Provisional Charter Conference and the Charter Conference have also been involved in considering matters relating to the implementation of the Treaty, including the exceptions granted to countries in transition, progress towards ratification and requests to accede to the Treaty.

From an operational or functional point of view, it is open to the Conference to decide how it approaches its working methods and what subsidiary bodies it wishes to establish. With the entry into force of the Treaty and the finalisation of the current round of negotiations, the Conference could be expected to consider new organisational or working arrangements. A step in this direction was the creation, discussed in section VI.a below, of a Working Group on Transit.

The Secretariat which serves the Charter Conference is small by international standards, particularly when regard is had to the broad scope of the Treaty. This reflects the original intention of the negotiators that the Charter Conference and Secretariat should not duplicate the work of other international organizations. The Treaty provides a specific direction to the Charter Conference to ‘through the Secretariat...co-operate with and make as full a use as possible, consistently with economy and efficiency, of the services and programmes of other institutions and organizations with established competence in matters related to the Treaty.’ The Treaty also provides for periodic reviews of the Secretariat. The practical realization of this direction to co-operate will be vital to the future of the Treaty.

V.2 Treaty implementation

In the period of provisional application, much attention predictably was focused on encouraging signatories to ratify the Treaty. Moreover, regular review of the ‘transitional' exceptions described in section III.3.2 above has succeeded in the early phase-out of most exceptions in advance of the 1 July 2001 expiration date set in the Treaty. Many countries that had transitional periods to bring their laws into conformity with certain provisions in the Treaty have in fact done so before the deadlines prescribed in Annex T.

The peer review mechanisms in the Treaty also afford an important vehicle for implementation of other parts of the Treaty. Over the last few years, the reviews of the exceptions to MFN and national treatment in respect of the admission of investment
under the dual track of the review mechanism in Article 10(9) and the negotiations for a Supplementary Treaty have developed into an important transparency exercise. One issue confronting the Secretariat and the Charter Conference is the implementation of the trade-related rules. This clearly is resource-intensive for a small Secretariat and attention will have to be given to making the implementation of this part of the Treaty viable.

Some major efforts to implement the Treaty have been undertaken and financed through the EC-Phare programme - following earlier Synergy, Phare and Tacis projects to explain the Treaty and support its ratification. These technical assistance projects concern mainly an examination of an (Eastern) member country's legal and institutional regime to identify issues of compliance with Treaty obligations and the provision of advisory services for enhancing Treaty compliance.

V.3 The second-phase negotiations

a. Investment

As noted above, the application, to the pre-investment stage, of legally binding national and MFN treatment standards was deferred to a second phase of ECT negotiations; this was to be accomplished in a 'Supplementary Treaty'. Paragraphs (2) and (3) of ECT Article 10 therefore provide only for a 'best efforts' ECT commitment to accord the better of national or MFN treatment to investors of other Contracting Parties with regard to the making of investments. Paragraph (4) of Article 10 expressly contemplates the 'second-phase' investment treaty, negotiations towards which were required to commence by 1 January 1995 with a view to concluding it by 1 January 1998. It was recognized that the full three years would be needed in order to address the exceptions that participants in the negotiations would claim from the Treaty's general principles.

An Understanding in the Final Act stated that the 'second-phase' treaty was to include provisions relating to privatization and demonopolization: the purpose of such provisions would not be to require privatization or demonopolization, but rather to prescribe how the treaty would apply in case they occurred, with a goal of minimizing disincentives to undertake such activities while applying the disciplines of the treaty to their results.

In the meantime, paragraphs (5), (6) and (9) of Article 10 establish 'best-efforts' obligations of standstill and liberalization as concerns the making of investments, and require up-to-date reporting of all measures which do not comply with the standard of the better of national or MFN treatment.

As envisaged in paragraph (4) of Article 10, the negotiations for the Supplementary Treaty were 'concluded' in December 1997. However, at that time the European Union indicated that it was not satisfied with one element of the package, namely the inclusion of some OECD countries in the Annex providing for exceptions to national treatment in case of privatizations. Two subsequent sessions of the formal adoption Conference revealed that there were other issues still to be resolved. Substantial progress was made in these sessions in resolving the issues. However, the EU indicated in June 1998 that it was not yet in a position to adopt the text given 'serious hesitations at a political level' in
some Member states. This reflects domestic pressure from, among others, labour and environmental interests, to be heard more fully before negotiations are concluded on agreements liberalizing investment.

The text under consideration contains the following elements: a legally-binding obligation to accord the better of national or MFN treatment, subject only to existing discriminatory measures listed in an Annex and to any reservations concerning privatization listed in a separate Annex. The basic treatment obligation is subject to a number of Understandings and Decisions. The text has been drafted on the assumption that it in effect ‘incorporates' the new standard of treatment into the Treaty.

Given the strong opposition of three countries (Australia, Iceland and Norway) to the application of investor-state dispute resolution provisions of the Treaty to the rights and obligations provided for in the Supplementary Treaty, the text provides that the Charter Conference may agree to reservations in this area by these countries. The negotiators have also accepted that there may need to be a further elaboration of the dispute resolution mechanisms in the Treaty in the future. An authoritative assessment of the utility and viability of the Supplementary Treaty will have to await the adoption of the final package. However, given that substantive negotiations have concluded on the basic provisions, it is possible to note that the acceptance of the concept of legal controls on the treatment of admission of investment is positive. On the negative side, the fact that broad reservations in respect of privatization have been taken by most of the FSU has the potential to undermine, in the context of future privatizations, the standstill on new exceptions to the treatment standard that is at the core of the Supplementary Treaty. In this context, investors must hope that the strong review mechanisms included in the package will discourage discriminatory behaviour.

b. Trade

The ECT also provides for several second-phase trade negotiations. Articles 29(6), 30 and 31 call for negotiations on, respectively: introduction of a legally-binding standstill on import and export tariffs; incorporation of the results of the Uruguay Round; and extending coverage of trade rules to energy-related equipment.

In April 1998 an Amendment to the Trade-Related Provisions of the Energy Charter Treaty was adopted which ‘updates' the 1947 GATT regime to the World Trade Organization (WTO); it deals with each of the three issues on which negotiations were mandated. While the Amendment is unlikely to enter into force for some years, it is important because it provides for provisional application. Moreover, the Charter Conference has decided that the Secretariat should develop an implementation system for the trade-related rules based on the regime in the Trade Amendment. However, until the Amendment is applicable between all countries, that either on a definitive or provisional basis, apply the trade rules in Article 29 of the Treaty, the regime in the Treaty will continue to be relevant.
On the question of a tariff standstill, it became apparent in late 1997 that there was no consensus in favour of such a provision. Accordingly, the Amendment 'reiterates' the best endeavours tariff commitment contained in Article 29 of the Treaty for ‘Energy Materials and Products' and extends this to ‘Energy-Related Equipment.’ The Amendment also provides for a future Conference decision that would move items to the level of a legally-binding tariff commitment based on applied tariff rates. Such a decision, which would require a unanimous vote, would involve moving items from one set of Annexes to another and is intended to obviate the need for formal amendment. It is not clear whether this mechanism will be used. There seems to be a reluctance on the part of non-WTO members to accept binding commitments before their accession to the WTO. However, the Conference is required under Understanding No. 3 to conduct an annual review of the possibility of moving items to a legally binding level and this could provide the impetus for change in the position of non-WTO members.

The Amendment also reflects the position of several WTO countries (and, late in the negotiations, non-WTO countries) that their tariff commitments should be at their WTO bound rate. The Amendment provides for a Conference decision to list such countries in special Annexes. The question of listing was regarded in the negotiations as essentially a 'political one,' and it was assumed that only a few countries would require listing. However, late in the negotiations it became apparent that other countries wished to be listed. In the case of non-WTO members that may wish to be listed, Understanding No. 2 provides that any concession offered formally in the process of accession to the WTO is to be treated as a commitment under the ECT and would thus provide a transitional binding until WTO membership. To deal with the possibility that a signatory to the Treaty may not be applying the Amendment and may not be listed in the appropriate Annexes when the Conference takes a decision to move items to a legally binding tariff commitment, provision is made for 'opting out' of any such decision.

The Amendment's provisions incorporating the Uruguay Round results follow the same approach as Article 29 and Annex G of the Treaty, which are replaced and updated. Under the Amendment, most of the substantive provisions of the WTO's Multilateral Agreements on Trade in Goods (Annex 1A to the WTO Agreement) are applicable. The rules of the Agreements apply, except those rules that are listed in Annex W as not applicable. The application of this Agreement is subject to additional rules and modifications, which appear in Annex W. The Annex 'disapplies', among others, the tariff provisions; a number of unrelated Agreements; and almost all on developing country related provisions, except those permitting the granting of GSP treatment (i.e. preferential tariffs).

In addition, under the 1998 Amendment the dispute resolution procedure in Annex D will be 'closer' to the DSU in the WTO and panels will be guided by the interpretations given to the WTO Agreement within the framework of that Agreement. There is also scope for non-violation complaints. However, it was necessary to exclude the institutional provisions of the WTO and the WTO dispute resolution mechanism -- the Dispute Settlement Understanding (DSU).
The Amendment represents a significant advance in ensuring compatibility with the WTO regime. Also, under the Agreement, the updated trade regime will apply to more than 70 categories of ‘Energy-Related Equipment’, another important development of the regime.

VI The ECT's new phase

It is unfortunate that the Energy Charter Treaty, following its entry into force in April 1998, did not have an opportunity to sail smoothly into a new, third phase. Interested readers can look elsewhere for information on the tempest over management of the Energy Charter Secretariat, which disrupted the transition. Suffice it to say that with the replacement of a Secretary-General at the start of the year 2000, the ECT now has an opportunity to make a fresh start on this leg of its still-promising journey.

Two particular aspects of the trip ahead warrant comment here. First, note should be taken of the very ambitious effort that is being made to devise legal instruments that can reduce impediments to the transit of energy goods across borders; as mentioned above, this promises to become the key focus of ECT attention over at least the coming months. But second, a word also needs to be said about the tricky shoals that lie ahead, in the form of continued provisional application of the Treaty by some of its signatories, especially the Russian Federation.

a. Transit negotiations

Following the consideration of energy transit issues at the meeting of G8 Energy Ministers in Moscow on 1 April 1998 (in the lead-up to the 1 May 1998 Birmingham Summit), the Energy Charter Conference later that month decided to constitute a Working Group on Transit. The view presented to the G8 Ministers in a paper contributed by the Energy Charter Secretariat was that energy consuming areas faced increasing dependence on imported energy, while new producers were emerging in often landlocked areas, so that larger volumes of energy would have to cross borders. Although the ECT already addresses energy transit, and does so in an innovative and ground-breaking way, more needed to be done. Future investment would depend on investor confidence, and any transit system needs multilateral agreement on a stronger framework for unhindered transit investment and commercial operation. Governments therefore should play a proactive role by initiating consultations toward such a regime.

The Working Group's efforts during 1998-99 led, in December 1999, to a mandate to it from the Charter Conference formally to commence negotiation of a legally binding Transit Protocol to the ECT, in order to ensure unimpeded transit, promote more efficient use of transit infrastructure and facilitate transit investment, with a view to concluding negotiations, if possible, by the end of the year 2000. The basic issues to be addressed would include ‘sanctity' of transit for oil, gas, electricity and other forms of energy; transparent and non-discriminatory access -- but excluding mandatory third party access; and prompt and effective dispute settlement.
By the time of the Fifth Meeting of the Energy Charter Conference on 29 June 2000, substantial progress had been made in drafting both a potentially binding Transit Protocol, and non-binding model transit agreements. The draft Protocol would include not only general obligations and guidelines such as on the enforceability of transit agreements and prohibition of the taking of energy goods in transit, but also specific commitments on transit capacity utilization or construction, liability, tariffs, charges, standards, metering and measuring, and actions in case of transit disruptions. Among the institutional provisions would be those on implementation and compliance, and conciliation and arbitration.

A Transit Protocol of this scope would constitute a significant elaboration upon Article 7 and other provisions of the ECT. Its preparation will require imaginative conceptualization and considerable drafting skill to assure its functional compatibility with the existing ECT provisions. A complicating factor, at least in the near term, is the provisional application of the ECT by some countries.

b. Provisional application

Following entry into force, the ECT is applied provisionally by a number of signatories, including the Russian Federation. On the surface, the ECT's Article 45 on provisional application is a bold and ambitious undertaking. However, provisional application of the ECT involves a number of uncertainties.

'Provisional application' of course refers to a Treaty signatory's commitment to apply a Treaty, in whole or in part, before completion of the ratification process; Article 25 of the Vienna Convention on the Law of Treaties allows for provisional application, which can create obligations beyond those that Article 18 of the Convention already imposes to 'refrain from acts which would defeat the object and purpose' of a Treaty. In states where parliament has not been asked to consent to provisional application, such a commitment normally rests on the actual or implied authority of the executive branch, the scope of which often is not clear, and which may be especially problematic as concerns the acceptance of legally binding dispute resolution mechanisms.

Article 45 of the ECT provides in paragraph (1) that each signatory will apply the entire Treaty provisionally pending its entry into force, but only ‘to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.’ However, paragraph (2) of that article says that a signatory ‘may, when signing' declare that it ‘is not able to accept provisional application', in which case the signatory shall only be obliged to apply provisionally the Treaty's provisions concerning institutional arrangements (as distinct from its substantive obligations), and then only insofar as that ‘is not inconsistent with its laws and regulations'; a signatory so electing, and its investors, are not entitled to claim the benefits of provisional application under paragraph (1). The following six states, for which the Treaty is not yet in force, were among those making such declarations when they signed the ECT: Australia, Iceland, Japan, Malta, Norway and Poland.
These provisions raise a number of questions of interpretation, among which are the following: What is the function of the opting-out declaration, given the conditionality of the provisional application obligation? Specifically, where the existing legislation of a Treaty signatory so conflicts with the Treaty's substantive provisions as to make that signatory's compliance with the Treaty virtually impossible, was the signatory under an obligation at the time of signing to declare itself ‘not able to accept provisional application,’ or is it instead entitled to simply rely on the conditionality language attached to the provisional application commitment? If a signatory follows the latter course, may its investors -- unlike the investors of signatories actually making a declaration -- claim the benefits of provisional application? If the opting-out declaration is viewed as mandatory under some circumstances, to what extent must a signatory have been unable to apply various provisions of the Treaty with respect to its relevant legislative or other measures, before the obligation to make such a declaration was triggered?

But even if it is assumed that a signatory acted properly in not making the opting-out declaration, it could prove extremely difficult to pass judgement on the extent to which the provisions of the Treaty are inconsistent with a particular signatory's constitution, laws or regulations. One of the questions that might arise is whether the fact that a state's constitution puts certain Treaty commitments beyond the authority of its Executive, means that those Treaty commitments are themselves inconsistent with the state's constitution; in other words, assuming that there is no inconsistent law or regulation, could the state be in violation of the Treaty because the state can constitutionally undertake certain Treaty commitments, even though the Executive lacked the domestic authority to undertake the commitments?

The complexity of these issues is illustrated by the possibility of having, in the context of the Treaty's important Article 7 on transit, a dispute involving a threatened disruption in the flow of energy along a chain of countries that include states for which the Treaty is in force and others that have either declined provisional application or else asserted some legal impediment to their obligation to do so.

While provisional application has been a common practice in intergovernmental agreements for several decades, a novel feature of the Energy Charter Treaty is the combination of the vesting, by Article 26 of the Treaty, of direct arbitration rights against governments in private parties, with Article 45 on provisional application. The question is whether the very signature of the Treaty, without ratification, makes submission to international arbitration effective on the basis of provisional application.

Thomas Waelde has argued that the signature of the Treaty should be viewed, in light of Articles 26 and 45, as the irrevocable promise of a government to arbitrate, which is accepted by a plaintiff’s formal request for arbitration; this assumption could only be rebutted if the signatory government did not have constitutional and legal authority to enter into arbitration agreements with foreign private parties. The signatory government would therefore have to prove, between signature and before ratification, that its internal law does not give it sufficient authority. Provisional application -- the argument goes -- would thereby make the arbitration provision effective for most governments, as there
seems to be little evidence for constraints in national law limiting the implied or explicit authority of governments to enter into arbitration agreements.

These issues will continue to be relevant, potentially affecting not only those signatories that apply the Treaty on a provisional basis, but also those for which the Treaty is in force. While such mixed regimes are not unheard of, the implications for investors and for the strong compliance mechanisms contained in the Treaty are unclear.

VII Conclusions

The Energy Charter Treaty is, together with NAFTA, the major multilateral treaty pioneering the extensive use of legal methods characteristic of the fledgling regulation of the global economy. Imbued by the philosophy of economic liberalism - to which the Treaty's Preamble makes explicit reference - it breaks away from the pattern of multilateral trade agreements by making governments accountable directly to aggrieved investors before non-national tribunals for important duties specified in the Treaty. It also pushes the concept of state responsibility further than in traditional international law by formulating a concept of state responsibility for regulating private enterprises. Similarly, it develops a right of energy transit far beyond the classical confines of the Barcelona Convention, following here the trail blazed by the European Communities' transit directive. As such, it is arguably the most innovative of the modern international economic treaties. The logic of the Treaty's underlying philosophy will call for greater implementation in national law, and direct effect through application by national regulators and courts could be a principal avenue to achieve this.

One should not forget that the initiative underlying the Treaty was to create an East-West European legal framework. This original intention - first diluted by the entry of the US into the negotiations - is now reemerging as the core membership of the Treaty encompasses Western and Eastern Europe; continued interest by non-European OECD countries, such as Australia and Japan, need not deflect this progression. To the contrary, countries and regions with close energy-related links to the EU (Mediterranean/Maghreb; Gulf; Africa; Asia; Latin America) might well be induced to either join the Energy Charter Treaty or to negotiate similar multilateral treaties with, primarily, the EU. The Treaty's content is as marked by the modern practice of bilateral investment agreements, NAFTA and WTO practice as it is by the internal European Communities' single market and energy law, notably the transit and licensing directives, Articles 85 and 86 of the Treaty of Rome on competition law and notions of special responsibility incumbent on state and private enterprises with a publicly privileged, but dominant market position. With Russia's ratification being far from certain, the Treaty currently fulfills a role in assisting the East European countries in moving towards their already envisaged accession to the EU and in preparing the other countries of the FSU for closer economic association with the EU. The EU, after all, was the international actor that largely initiated, pushed, supported and funded the ECT project.

This close proximity to the EU is not without problems. One wonders to what extent this Treaty, with an independent Secretariat and Conference, can become a self-sustaining
international arrangement able to survive independent of the European Union. There is a public perception that the ECT is a key instrument of EU policy towards the East, and it is perhaps not surprising that the Treaty still is widely, and incorrectly, called the ‘European’ Energy Charter Treaty. One may question whether this proximity will allow the Energy Charter process to evolve outside of the flows of EU energy and Eastern policy.

The Treaty also represents, in the area of energy law, a significant development. Since the time of the American Standard Oil Monopoly, lack of transparency, positions of legally privileged market power and discrimination -- in licensing, access and tariff-making -- have been core issues of energy law in a market economy. The Treaty now transposes efforts at national regulation into the Treaty, albeit in a diluted form.

The Treaty provokes another observation about the interrelationship between international investment law (characterised by traditional doctrine, bilateral and multilateral treaties and a series of well known arbitral awards) and international trade law (characterised by the GATT/WTO agreements and their increasingly significant dispute settlement by panel practice). In common understanding, trade and investment law differ significantly: trade law is about short-term commercial transactions, mainly the import and export of goods, and is governed mainly by inter-governmental trade diplomacy, while investment law is about the long-term commitment of capital, and governed mainly by capital exporting state-sponsored protection against host-state originated actions. But with so many textual imports from trade to investment law, one wonders if we are not witnessing some convergence between trade and investment law concerns, concepts and procedures. It is perhaps not surprising that there had been an idea of moving the MAI negotiations to the WTO, and that the WTO has placed investment matters on its agenda. Investment and trade are now closely interrelated. Long-term trade relations acquire investment aspects and trade restrictions can seriously undermine the viability of foreign investors. National protectionism can use the same instruments -- abuse of economic and environmental regulation, taxation, state aid, procurement policies -- directed against foreign trade as against a foreign investor. It is therefore entirely imaginable that in the future one may seek to interpret identical language in investment treaties by referring to the interpretation and application of such terms in the negotiation and dispute settlement practice of international trade law. With a paradigm shift away from mere protection by the home state of investors and traders to the legal architecture of a liberal global economy, goes a coordinated use of trade and investment law methods to achieve the same objective: a global level playing field for activities in competitive markets.