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CREATING A LEGAL FRAMEWORK FOR INVESTMENT IN THE COMMONWEALTH OF INDEPENDENT STATES ENERGY SECTOR: LESSONS FROM THE ENERGY CHARTER EXPERIMENT

*Dr. Peter Cameron**

I. INTRODUCTION

On December 17, 1991, forty-four States signed the European Energy Charter Declaration at the Hague in the Netherlands.¹ The aim of the Charter is to trigger economic recovery in the Former Soviet Union (FSU) and Eastern Europe by a joint effort to develop the region's energy resources, to modernize its energy industries, and to expand energy trade. It is a preeminent example of East-West cooperation and of the many problems which lie in the path of such cooperation. Highly ambitious in scope, the Charter broadly includes states which have an interest in Europe, such as the United States, Japan, and Canada. The Charter was expressly intended to have a legally binding character and two years later remains merely a declaration of political intent. Its legal counterpart, the Energy Charter Treaty, is as yet unsigned.²

This article briefly examines the context in which the Charter process has taken place, as well as the content of the Charter and the provisions in the draft Treaty concerning transport, trade, investment, and the transition to a market economy. It analyzes these issues in the context of the volatile and sometimes

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1. Concluding Document of the Hague Conference on the European Energy Charter, December 1991 [hereinafter Charter].

2. European Energy Charter Conference, Draft Energy Charter Treaty, Dec. 20, 1993 [hereinafter Energy Treaty]. This is the sixth version of the Treaty and all references to the Treaty in this article are to this version.

politically unstable climate of the Republics of the FSU.³ Central to the fortunes of the negotiators has been the political development of the Russian Federation (Russia), and many of the Charter's changes result from that indissoluble connection. However inefficient the centrally-planned system was in allocating resources, the unravelling of that system required the creation of a new set of trade relationships between the various component parts of the FSU. This is hardly surprising as the most important task facing negotiators of the Energy Treaty has been the development of provisions on transportation. Uneven distribution of energy resources in the FSU has necessitated the development of rules governing the transportation of gas, electricity, oil, and coal among the new Republics. The concentration of drafting and legal expertise in the FSU at the center has resulted in a dearth of the very kind of expertise which republics, such as Kazakhstan and Ukraine, need to create the conditions for large-scale investment. The Charter process has highlighted this and gone some distance in identifying the areas in which competence will have to be developed. In this and in other ways, the Charter has proven to be a useful educational instrument at a time when the Republics are sending a generation of experts to the classroom to learn the basics of the market economy and the rules of law.

Virtually all efforts to provide technical assistance to the FSU countries in the design of energy legislation have met with a large measure of frustration and disappointment in this initial stage. The Charter process has been slow. Other parties who have adopted bilateral or multilateral initiatives have met with similar problems. The process of developing a treaty on international East-West energy cooperation might yield lessons of a more general character. These lessons are the chosen subject of this article.

The initial declaration envisaged the development of a structure that includes a Treaty and several protocols covering specific sectors or issues such as energy efficiency. Throughout 1992 and 1993, representatives from all parties met in Brussels to discuss the content of the Treaty, which is aimed at the establishment of "a legal framework in order to promote long-term cooperation in the energy field based on mutual benefits . . . in accordance with the objectives and the principles of the Charter."⁴ Although in draft form, many of its key provisions have been agreed upon in the Plenary Sessions. More importantly, key officials in several FSU states have recently declared their willingness to sign the Treaty on the basis of the text now emerging. The prospects for an early signature and the commencement of the ratification process have never looked better. At the same time, the difficulties in

3. The term FSU is preferred to the CIS (Commonwealth of Independent States), which was formed on Dec. 26, 1991, by eleven republics of the former Soviet Union and formally took the place of the old Soviet Union. The Commonwealth includes Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine, and Uzbekistan. Since its inception, the CIS's efforts to develop a common policy have been conspicuously unsuccessful. The Baltic States chose to remain outside the CIS and one of its initial members, Azerbaijan, left the CIS at an early stage only to rejoin later. In the energy sector, the efforts at unified action by the CIS have not been successful. For example, the CIS Electricity Council, established by the Agreement on the Coordination of Interstate Relations in the Field of Electricity of Feb. 14, 1992, has proved ineffective despite the obvious need for co-operation in this sector.

4. Energy Treaty, *supra* note 2, art. 2.

developing a stable legal framework for large scale Western investment in the FSU have never looked greater. In this context, the treaty has a role to play in setting the ground rules.

This article examines the origins, structure, and key themes in the European Energy Charter, including the draft Treaty. It argues that, despite its "soft" legal character, the Charter can play an important and useful role as an educational instrument for countries with economies in transition by virtue of its summary of basic principles governing international investment, trade, and transportation in energy.

Its key provisions are those concerning transport within the CIS. This issue, like many of those facing Western investors, arose from the breakdown of inter-Republican trade following the dissolution of the CIS. While there are many shortcomings in the Charter, the context of rapidly developing East-West European relations is one which is a unique challenge to the countries concerned. To western investors who are being called upon to risk huge sums of money with the certainty that repayment will require an additional investment of patience, these countries have embarked on an extremely daunting transition. In the following section this context is examined.

II. THE DEVELOPMENT OF ENERGY LAWS IN THE FSU

A. Oil and Gas Law

In most cases, the breakup of the FSU into various new republics has made it necessary to develop energy laws from scratch. The laws that were in existence were unable to meet the requirements of the independent states which are urgently in need of large-scale investment. While there is a tradition of energy and mining legislation from before the communist period in Central Europe, the FSU countries have had to develop energy laws from central planning systems. These systems have experienced difficulties because of energy imbalances and poor transportation of energy.

The most spectacular example of the problems is found in Russia, the very country which is central to the success of any new phase of East-West energy cooperation. At present, Russia's share of the total oil and gas production of the FSU exceeds eighty percent;⁵ yet, there is probably no other country in the world where there is such a contrast between reality and potential. According to a recent World Bank study,⁶ "the Russian Federation is the second largest

5. Y.K. Shafranik, *The Fuel and Energy Complex of Russia: Modern Condition and Perspectives*, unpublished lecture delivered at the University of Leiden (The Netherlands, May 1993)(on file with the *Tulsa Journal of Comparative and International Law*).

6. WORLD BANK, *RUSSIAN ECONOMIC REFORM: CROSSING THE THRESHOLD OF STRUCTURAL CHANGE* (1992).

energy producer in the world, accounting for about fourteen percent of world commercial energy production" and "despite having one of the most energy intensive economies, it is able to export over forty percent of its total energy production, making it the world's largest exporter of energy."⁷ The irony however, is that since 1990, oil production in the Russian Federation has declined by one million barrels per day (bd) each year and may fall even more rapidly in the near future. In 1993, the decline has continued and appears to be extending to the production of gas, which formerly had not experienced instability.⁸ Despite some considerable efforts at restructuring the oil industry,⁹ oil production had been in decline for several years.¹⁰ The production decline accelerated with the breakup of the FSU.

The World Bank report should have noted that during the same period, efforts at producing oil and gas laws have increased inversely to the production of these natural resources. As one commentator has remarked, the Russian Federation has turned to law "like a dying monarch turns to his withered God."¹¹ A proliferation of draft laws has been followed by a period of synthesis of drafts and comments on drafts, but after at least two years of work, no law expressly concerned with oil and gas resources has yet been enacted. Given the central role which a legal framework plays in the stimulation of large scale oil and gas development, it is unlikely that the international oil industry would still be talking to the government and the Russian oil industry, had the scale of Russian oil and gas resources been less spectacular. The difficulties in producing an oil and gas law are attributable to more than political instability and a drift of authority from the center to the periphery. Some features of the process are at least notable due to their appearance in one form or another in many other ex-communist countries.¹² Therefore, it is worth pausing for a moment to consider the Russian experience in this area.

It is important to have a distinct law for the oil and gas sector. It provides a clear framework for the conclusion of specific agreements, for detailed legal

7. *Id.* at 175.

8. The decline is caused by a number of factors, but the principal ones appear to be the lack of investment funds from the central government, heavy taxes, and payments to the state. In 1992, investment fell by more than 40%. OIL AND GAS J., May 10, 1993, at 32. Payments to the state treasury associated with oil and gas production costs rose from 33% in 1992 to 60% in the first quarter of 1993. OIL AND GAS J., Sept. 13, 1993, at 29. Other factors include the shortage of freely convertible currency available to petroleum industry enterprises and the destruction of economic ties with other republics in the FSU. These factors have also led to a reduction in deliveries of oil field equipment and materials.

9. For an overview of the current structure and many of the problems which it faces, see Jonathan P. Stern, *Oil and Gas in the Former Soviet Union: the Changing Foreign Investment Agenda*, ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (London 1993).

10. For a comprehensive account of the energy policies which led to the current situation, see THANE GUSTAFSON, *CRISIS AMID PLENTY: THE POLITICS OF SOVIET ENERGY UNDER BREZHNEV AND GORBACHEV* (1989).

11. Bernard Rudden, *Civil Society and Civil Law*, unpublished paper delivered at the Symposium on East European Law, University of Leiden (The Netherlands, Aug. 1993)(on file with the *Tulsa Journal of Comparative and International Law*.

12. In the author's experience, the phenomenon of the proliferation of drafts has been found in countries as far apart geographically as Albania, Poland, the Russian Federation, Kazakhstan, and even Kyrgyzstan.

regulations, and for the achievement of government policy in the oil and gas sector. The current legislation in Russia includes the Subsoil Act, similar to what is known in Kazakhstan as the Subsoil Code, and encompasses minerals in general, despite all their different characteristics. Such mineral legislation is too general to provide a framework for the large-scale investments, which the international oil and gas industry has been considering in Russia. It is rather like a skeleton with too few bones to hold the flesh. A principal reason for making a petroleum law is to determine unequivocally who owns the resource and who has the authority to transfer rights to the resource for various purposes associated with petroleum operations. More specifically, a petroleum law needs to be enacted to convince potential investors that the government has the necessary authority to make the kind of contracts it wants to make and to identify who in the government is the central contact point. The petroleum law also needs to indicate who has jurisdiction over what and who has the right to interfere in a project by imposing taxes or other fiscal levies. It is necessary to legally address these matters to convince serious investors they will have security and to convince prospective lenders that their investment will be safe. Moreover, the law will provide a common practice for a very wide range of countries which have relations with the international oil and gas industry. In some form or another, such a law has been considered necessary in every major oil and gas producing province in the world. The areas of divergence have tended to be over the degree of detail and not over whether a law is necessary.

Oil and gas law is only one part of a structure in which the driving force to produce detail should be, and normally, is left to the parties to a contract. Therefore, it is oriented to a specific project. Whether this is a production-sharing contract, as is found in many countries outside the United States, a license, as is common in the North Sea, or a variant, is not the important point. Such contractual arrangements will inevitably be diverse, reflecting the specificities of the project, the technical situation, and the parties requirements and capacities. This is particularly true in the case of Russia and Kazakhstan, where the scale of the projects to be discussed is such that the contracts will contain a multitude of specific features. Such diversity is to be encouraged, but it should ideally take place within a defined framework rather than resemble a patchwork quilt. Moreover, the framework established should maximize the government's capacity to involve a wide range of companies and to avoid dependence upon the largest players on the international energy scene.

B. Subsoil Law

An interesting feature of the Russian scene is that in developing a law on oil and gas the Government decided that first, another type of law was required covering uses of the subsoil. An umbrella mineral resources law, the Subsoil

Law, was adopted in February 1991.¹³ Its scope extends to the entire territory of the Russian Federation. It deals with a wide range of topics including the competence of the Federal and Republican authorities in matters concerning the subsoil, types of use, granting of licenses, duration, terms and conditions, rights and obligations of the user, revocation, payment of fees, and dispute settlement. It contains fifty-two articles. The procedures for granting the rights to use the subsoil are set out in a separate statute,¹⁴ supplemented by instructions¹⁵ issued from time to time by the Committee on Geology and Use of the Subsoil.¹⁶

Because the Subsoil Law is concerned with minerals in general, its potential overlap with an oil and gas law is considerable. Efforts have been made to ensure that any licensing regime developed under an oil and gas law will co-exist and not conflict with such existing legislation. It will probably be necessary to amend provisions of the Subsoil Law to prevent the various authorities, with responsibility in the sector, from duplicating each others' efforts and creating confusion.

For the international oil and gas industry, the Subsoil Law fails on several counts. By encompassing minerals in general, with all their different characteristics, it fails, not so much because there is no framework provided, but because the framework which is set out is too general. For example, on the important question of identifying the competent authorities to negotiate and to conclude agreements with an international partner for oil and gas operations, the assurances provided by the Subsoil Law are insufficient to permit large-scale investment. Clarity about the substantive and procedural matters which would affect oil companies' operations is also insufficient. This latter point stands, even if one takes into account the details about procedure contained in the Statute on Licensing made under the Subsoil Law. Happily, there appears to be general agreement on the Russian side that a separate oil and gas law is necessary. However, it is correct to say that the existence of this subsoil law has complicated the drafting of a law on the exploration, development, and production of oil and gas.

After a promising start in 1991, the attempts to draft a law specifically concerned with oil and gas went awry in 1992. In addition to the sudden promulgation of the Subsoil Law, several draft oil and gas laws began to circulate, as did a draft law exclusively concerned with natural gas. Another draft concerned oil and gas concessions. Their aim was to fill an increasingly obvious gap. These four drafts deserve some comment, partly because of their content and partly because they illustrate some of the players involved in the

13. The Law of the Russian Federation on the Subsoil was adopted by the Russian Federation Supreme Soviet on Feb. 21, 1992. *Vedomosti SND RSFSR*, Issue No. 16, Item No. 34 (1992). Implemented by the Decree on the Procedure for the Introduction of the Law of the Russian Federation on the Subsoil into Operation on Feb. 21, 1992. *Vedomosti SND RSFSR*, Issue No. 16, Item No. 835 (1992).

14. Statute on the Procedure for Licensing the Use of the Subsoil, *Vedomosti SND RSFSR*, Issue No. 33, Item No. 1917 (1992).

15. *See, e.g.*, 43 *Rossiiskie vesti* (1993) Instruction No. BO-61/2296 (1992).

16. Statute on the Committee of the Russian Federation for Geology and Use of the Subsoil, *Vedomosti SND RF*, Issue No. 4, Item No. 306, No. 1917 (1993).

drafting process. These are the drafts produced under the supervision of M. Gazeev (Gazeev draft), A. Tishchenko (Tishchenko draft), Gasprom (Gasprom draft),¹⁷ and A. Perchik (Perchik draft). Two of the drafts claimed to have their origins in a project initiated by the University of Houston Law Center in 1991.¹⁸ However, the Russian drafters have played the leading roles in shaping the final drafts.

C. *The Gazeev Draft*

The Gazeev draft was intended to supplement the Subsoil Law, providing the kind of specialized provisions on oil and gas which the latter omits. It went a long way towards eliminating doubts about the ownership of petroleum and makes detailed provisions for licensing. It expressly forbids the licensing authority from engaging in entrepreneurial activities. As the regulator, the key body known as the Competent Authority would grant petroleum rights under the terms of a petroleum agreement and would supervise or monitor operations. In general, the draft law¹⁹ embraced board market mechanisms. It benefitted considerably from World Bank input, which attempted to bring to the drafters' attention the wide range of choices open to them by summarizing the experiences of other petroleum-producing countries.²⁰

D. *The Tishchenko Draft*

A very different draft was produced under the supervision of Dr. A. S. Tishchenko.²¹ The text was heavily influenced by contributions from oil-producing associations and was very ambitious in scope, including provisions on oil and gas pipelines. It represented an ambitious attempt to draw on the Russian oil industry's strengths and yet push it in a clear market direction. If the drafters took the suggestions of their international advisors, it was not apparent. Such advice was probably sought only to insulate the authors from the charge

17. "Gasprom" is the Russian state gas concern.

18. For a comprehensive account of the work carried out by the members of the Russian Petroleum Legislation Project, see Symposium, *The Russian Petroleum Legislation Project at the University of Houston Law Center*, 15 HOUS. J. INT'L L. 263 (1993).

19. The above comments apply to the Law of the Russian Federation on Oil and Gas (Tentative Draft 1992).

20. A wide variety of organizations were involved in providing assistance to the various groups of drafters at different times. In the case of this particular drafting group, assistance was also provided by the Commission of the European Communities and by the European Bank for Reconstruction and Development.

21. Dr. A. S. Tishchenko is the Director of the VNIIOENG Institute for research into oil and gas matters. The full title of the Institute in English is the All-Russia Scientific Research Institute of Organization, Management and Economy of the Oil and Gas Industry, with the Russian abbreviated to VNIIOENG.

The textual remarks apply to the second draft of the Law of the Russian Federation on Oil and Gas. See generally James W. Skelton Jr., *Drafting the Russian Law on Oil and Gas: An Oil Industry Lawyer's Perspective*, 15 HOUS. J. INT'L L. 463, 478 (1993).

that they had looked only to Russian experience for inspiration. In many cases, the scope for intervention by state bodies was far more extensive than would be usual or acceptable for an international oil company. The draft left open doubts about the property rights which a licensee company would acquire. It envisaged a state oil company with quite extensive control over petroleum operations. There was no clear separation between the awarding authority and the state company's activities when the company is acting in a commercial capacity.

Nevertheless, the emphasis in the Tishchenko draft is on state participation. There is also a willingness to regulate and a tendency to tackle many issues in detail rather than leave them to a contract. The Tishchenko draft was more revealing of the attitudes and values prevalent in the industry than the Gazeev draft. Geologists and technicians played a leading role in the drafting. Lawyers, accountants, and economists, those persons generally closer to the needs of investors, apparently played a very modest role. This distribution of skills would be bizarre in a market economy; however, it remains an important feature of the former centrally-planned economies and is a major reason for the frequent appearance of draft laws, which provoke the question of whether the drafting body is serious about securing investment at all. The predominance of technical experts in the development of a petroleum law was certainly surprising, but taking a broader view will also be very instructive regarding the educational priorities of the drafter's centrally-planned system.

E. The Gasprom Draft

The Gasprom draft was drawn up under the supervision of experts from Gasprom, who had consulted a wide range of international experts to develop a proposal for a distinct law on the gas industry. Such a law would cover gas operations from the well-head to the burner-tip.²² The need for a separate law was justified by reference to the fact that in Russia there was a "unified gas supply system" which had to be preserved. That gas supply system was being so well managed in contrast to the oil sector that the output of gas was not in decline. Ownership of the gas supply system was to be in the hands of the state and management of the network was to be done under a charter approved by the Russian government. The system was to consist of companies involved in exploration, production, processing, transportation, storage, and distribution of gas. All of the companies' activities were to be coordinated by the management of the unified system. There was no provision for gas producers outside this system to be connected to this huge transportation network unless there was excess capacity. Such a monopolistic structure would eliminate competition and nondiscriminatory access, hardly in line with the commitments following the European Energy Charter. Although the idea of a separate law for the gas industry appears to have been dropped, Gasprom remains the sole player in the gas business in Russia and has taken steps to acquire new interests in exploration

22. VNIIE/Gasprom Institute, Draft of the Natural Gas Act of the Russian Federation (Oct. 1992).

and development of natural gas, illustrating that the ambition for vertically-integrated status remains strong.

Faced with divergent approaches to the design of a law for oil and/or gas development in Russia, the Government attempted to produce a synthesis. However, the process has been far from easy and may have suffered from the changing political climate, as characterized by tensions in the relations between the legislature and the executive.

F. The Perchik Draft

Perhaps even more important is the continuing trend toward the sharing of authority between the institutions at the center of government and the regional governments, particularly those regions which have the bulk of the oil and gas reserves. This is a trend which is not controlled, but proceeds in fits and starts, making it essential for potential investors to contact a wide range of authorities at different levels, in order to ensure their involvement, even though the source and extent of their authority remains unclear. There are at least two interesting aspects of the Perchik draft:²³ first, its comments on the relationship between the central and the local authorities, and second, the approach it adopts for the content of a license. On the first point, the draft revealed just how much uncertainty investors would have to work with by leaving open many questions about the relationship between the central and the local authorities. It is hard to blame the drafters for their inability to specify relationships more clearly when the uncertainties arise from matters beyond their control. For potential investors, it is a significant omission. With respect to the second point, the content of the license, it is notable that many issues which a license agreement should address are listed without giving a prospective licensee an idea of precisely what terms and conditions are expected.²⁴ While it is quite reasonable to expect a greater

23. Draft Law of the Russian Federation on Oil and Gas, prepared by the InterDepartmental Commission of the Office of the Government of the Russian Federation, 1992. Since that time there have been further drafts.

24. Article 20 simply states that the agreement, which is to be contractual in character, shall specify general and special requirements applicable to the user of underground resources. These requirements include the right to dispose of oil and gas produced; procedures and deadline for the design of exploration and appraisal operations, general and annual programs and financial plans (budgets); minimum commitments regarding scale of exploration and appraisal activities; commitments pertaining to scaling down the area of exploratory activities; procedures and deadline for drawing up technological plans and designs of oil and gas field development, general and annual programs and financial plans/budgets; coordinated oil and gas production levels, to be subsequently updated as provided in line with an approved technological plan or development schedule, or commitments regarding field development operations bottom-line, deadlines for starting production, commissioning of wells, etc.; commitments regarding associated gas utilization; terms of products transportation; specifics of gas field development; ownership of property; a system of management applicable in case of several licenses for one field; an agreement on property rights for geological information derived in the process of the use of oil and gas rich deposits; quantities and types of production waste, produced and discharged water dumped underground; environmental protection and safety commitments; rights and duties of the parties; procedures for the use of general utility infrastructure facilities; payments pertaining to the use of underground resources, land plots and water basins; control over compliance with license terms; conditions

element of detail in the agreement than in the framework of the law, what is surprising, given the many uncertainties in the Russian situation, is the number of crucially important items which are being relegated to another forum for negotiation. In effect, it appears to give the local and regional authorities a mandate to negotiate specific deals. While this is not per se negative, it suggests some doubt among the drafters about the potential success of any oil and gas law tackling these issues even in a preliminary way when applied to the Russian Federation as a whole. Given the length of time which has elapsed without the enactment of a law, such a view should not be surprising. It is one which has its counterpart among the many players in the international oil industry who have been attempting to negotiate agreements in the Russian Federation.

The Russian experience with respect to the development of an oil and gas law is relevant because, despite its unique features, it highlights some of the problems which will be faced in the design of energy legislation in other FSU countries. While Kazakhstan may lack the centrifugal tendencies and the political instability, few would argue that the initial experience of drafting a petroleum law has been a straightforward one. It remains without an oil and gas law, despite the obvious investor interest in its oil and gas sector. Other republics vividly show the problems which can arise from a break-down of political authority. This is apparent in Azerbaijan, where rapid progress on the development of a petroleum regime came to a halt when the government was overthrown, and indirectly, in the case of Armenia, where attempts to develop a legal regime for its energy supply have been continually undermined by the wars in neighboring Georgia and Azerbaijan. In this highly volatile context, it is hard to see what specific contribution declarations such as the European Energy Charter can possibly make. At a minimum it provides investors with the legal security and stability of contract which they so badly require.

G. Problems with the West

Before proceeding to consider the content of the Charter, it is worth looking at the problems from another angle - westwards rather than eastwards. Inevitably, the countries of the FSU and Central Europe have looked to the market economies for models of legal and institutional frameworks which might be appropriate for their energy sectors. This leads to the rather embarrassing observation that most energy sectors, in virtually all of the OECD countries, display a large measure of state control. This is not evenly spread by sector or by country. For example, the oil sector enjoys a fair amount of freedom in its operations, but this is not generally the case in the electricity and gas sectors, and even to a lesser degree in coal and nuclear energy. Considerable variations can also be found country to country, with state dominated systems in France,

for extending the term of the license, discontinuation and suspension thereof; procedures for the conduct of liquidation activities; insurance terms; legal and economic liability mechanism; force majeure circumstances and dispute settlement procedures. *Id.*

Italy, and Spain, and market-oriented systems with a large measure of private ownership in the United States and the United Kingdom. The closer one looks at each system, the easier it is to see that each national energy regime is unique, reflecting the extent of indigenous resources, energy balance, industrial needs, and traditions regarding government-industry relations.²⁵

In many of the market economies, the interventionist approach to the energy sector has been challenged, and the role of the state has either declined or has assumed the role of taking measures to promote competition. This is so in the gas and electricity markets, where a large measure of natural monopoly was thought to inhibit the scope for competition. The United States experiment in deregulation of its gas sector is well known. Canada has embarked on a similar program of liberalization for its gas sector. In both countries there are steps being taken to liberalize the electricity sectors. The European Union (EU), Germany and the United Kingdom have taken steps to liberalize their markets in gas and electricity, although in each case one large company is still dominant in transportation. Further south in France and Italy, the state-dominated models which have thrived since the 1940s are threatened with privatization and loss of monopoly privileges. In this climate of diversity, it is no easy task to define exactly what sort of regime is appropriate to an emerging market economy. It is also clear that the energy sector has proved highly resistant to a market orientation.

II. *THE ENERGY CHARTER: AN ANALYSIS OF THE DECLARATION*

It is probably not an exaggeration to say that the key to understanding the psychology of policy makers on the international energy scene lies in the experience of the oil crises of the 1970s. This is certainly the case with the original version of the Energy Charter, designed by the Netherlands' Prime Minister Ruud Lubbers and known as the Lubbers Plan. This was launched at a summit meeting of the European Union in Dublin, Ireland on June 25, 1990, and was intended to make Western technology, know-how, and capital available in order to explore, develop, and exploit the oil and gas resources of the FSU. In return, the West was to obtain secure supplies of oil and gas from sources other than those controlled by the Organization of Petroleum Exporting Countries (OPEC). The OPEC dimension of the Energy Charter process is an unexplored one, but it can hardly be doubted that the promise of access to large-scale

25. For overviews of the particular markets in the European Union and the general framework of European Union law, see TERENCE DAINITTH AND LEIGH HANCHER, *ENERGY STRATEGY IN EUROPE: THE LEGAL FRAMEWORK* (1986). For a comparison of the United States situation with that of the European Union highlighting the barriers to integration, see TERENCE DAINITTH AND STEPHEN WILLIAMS, *THE LEGAL INTEGRATION OF ENERGY MARKETS* (1987).

resources of oil and gas in the FSU held out another very attractive prospect - a reduction in dependence upon OPEC supplies.

An interesting idea became a serious proposal only after two events occurred. First, only thirty-eight days after the summit meeting on August 2, 1990, Iraq invaded Kuwait. The Gulf crisis which followed illustrated once again how dependent the West is on oil from the Middle East, even if the supply itself was never seriously threatened. It emphasized the need to diversify sources of energy supply. The second, and more important factor, was the break-up of the Soviet Union and the recognition that Western technology would be essential if the new republics were to proceed rapidly in building market economies and in becoming integrated into the international economy.

The Concluding Document of the Hague Conference on the European Energy Charter is the outcome of discussions on December 16 and 17, 1991. The Document was ultimately signed by delegates from forty-eight states,²⁶ the EU, and the Interstate Economic Committee (CIS).²⁷ The signatories promoted the development of an efficient energy market throughout Europe, as well as "a better functioning global market."²⁸ In both cases, the actions are to be based upon the principle of nondiscrimination and on market-oriented price formation, taking due account of environmental concerns. The signatories "are determined to create a climate favorable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy."²⁹ Included among the many fields in which the parties are prepared to take action are the development of trade in energy consistent with major relevant multilateral agreements, such as the General Agreements on Tariffs and Trade (GATT), related instruments, and nuclear non-proliferation obligations and undertakings. This entails *inter alia* access to local and international markets and the promotion of projects to expand energy transport infrastructure, as well as access to existing infrastructure for international transit purposes in implementing their actions. The signatories undertook "to foster private initiative" and "to avoid imposing discriminatory rules on operators, notably rules governing the ownership of resources, internal operation of companies and taxation."³⁰ Further, the signatories declared their willingness to "undertake progressively" the removal of barriers to energy trade in products, equipment, and services in

26. The parties which had signed the Charter by March 1993 are, in alphabetical order: Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Belarus, Bulgaria, Canada, Crete, Czech Republic, Cyprus, Denmark, the European Union, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Ukraine, The United Kingdom of Great Britain and Northern Ireland, The United States of America, and Uzbekistan. Although present at the Conference, Turkmenistan did not sign the Charter.

27. The Interstate Economic Committee replaced the Inter-republican Economic Committee after the signing of the Economic Community Treaty on Oct. 19, 1991. The Economic Community was in many ways the institutional precursor of the Commonwealth of Independent States (CIS) founded on Dec. 8, 1991.

28. Energy Treaty, *supra* note 2, tit. 1, at 7.

29. *Id.*

30. *Id.* tit. 2, at 16; *Id.* at 13.

a manner consistent with the provisions of the GATT and its related instruments. The importance of developing commercial international, energy transmission networks and their interconnections is stressed as is the relevance of long-term commercial commitments. To this end, the signatories are to provide for a stable, transparent legal framework for foreign investments "in conformity with the relevant international laws and rules on investment and trade."³¹

To solidify these broad principles, it was agreed to develop a kind of energy treaty among the parties which would specify the commitments and bind the parties by law. The treaty document would be supplemented by a set of protocols on sectors, such as Hydrocarbons and Electricity, which would be optional for signatories to the basic treaty. A modest institutional framework was to be set up to administer this process, including a Secretariat based provisionally in Brussels. It is perhaps appropriate to note what the Charter is not. In the words of its Secretary-General:

The Charter is not a fund, nor an aid or subsidies programme, and not an attempt to plan energy developments. Its objective for the energy sector is simply to create, rapidly, in the East the type of economic, legal and market conditions which our companies have enjoyed in the west, and which have been the key to our economic success.³²

It also contains a Final Provision, which states that the Charter is not eligible for registration under Article 102 of the Charter of the United Nations.³³ This arises from the fact that it is not a binding treaty or international agreement, but rather a non-binding political declaration of intent. Therefore, the Charter may not be invoked before any organ of the United Nations. The objectives of the Charter reflect the principal concerns of the participating states and are very broad in character. These are: to improve security of supply; to maximize the efficiency of production, conversion, transport, distribution and use of energy; to enhance safety; and to minimize environmental problems. These objectives must fall within the framework of four principles:

- (1) the principle of State sovereignty and sovereign rights over natural resources;
- (2) the principle of nondiscrimination;
- (3) the principle of market-oriented pricing; and
- (4) the principle of minimizing environmental problems.

The fact that the Energy Charter is not a legally binding international instrument constitutes a serious limitation. The parties could afford to be ambitious in their choice of aims in the absence of any mechanisms for enforcement. Yet a number of tensions are unresolved in the text: between, for example, environmental protection and energy production and consumption,

31. *Id.* at 15.

32. Josef M. Van Brabant, *Unraveling the Ruble Regime*, paper delivered at the European Policy Forum (London, Sept. 1992).

33. U.N. CHARTER art. 102.

between the commitment to "state sovereignty and sovereign rights over energy resources," and nondiscrimination in access to energy resources and markets, as well as the promotion and protection of investments.³⁴ Where these principles conflict it is unclear which should prevail. Indeed, the lack of clarity on concrete matters and the often slippery language are defining features of the Energy Charter Declaration.

At the time when the Charter was being discussed, the need for some international initiative was becoming more apparent each month as the institutions of the centrally-planned economies showed all the signs of imminent collapse. Since then, it has become clear that the process of transition will be a slow one. To the regret of many, the institutions representing the ideas and values of the previous regimes are not, to paraphrase Dylan Thomas, prepared to go gently into that good night but like the old man on his death-bed they intend to rage, rage against the dying of the light. Particularly in Russia, this has meant that progress in developing the legal framework appropriate to large-scale investment in oil and gas projects has been slow. The range of measures which need to be tackled, if a market orientation is to be adopted, is also extensive and includes subsidies, price transparency and controls, and taxes on the export of capital and goods. Restructuring has proceeded in ways that leave much to be desired. Vertically-integrated structures have emerged which can easily become regional monopolies, since the infrastructure is in place, especially in the network-bound industries, was designed for a centrally-planned economy, with the minimum scope for extra capacity and alternative supply lines.

It is in this context that the discussions have taken place between signatories to the Energy Charter on the development of a legally-binding treaty. Throughout 1992 and early 1993, the fortunes of the negotiators seemed to be guided more by the political instability generated by the conflict between the Russian executive and the Parliament in Moscow than in the plenary sessions in Brussels.

III. THE ENERGY CHARTER TREATY³⁵

The draft European Energy Charter Treaty is divided into eight parts. In Part I, two Articles provide definitions and the purpose of the agreement. Part II is concerned with matters of Commerce (Access to Resources, Trade, Intellectual Property, Competition, Transit, Technology Transfer, Access to Capital), while Part III is concerned with Investment Promotion and Protection (including Compensation for Losses, Expropriation, Transfer of Payments Relating to Investments, and Subrogation). Part IV groups together a number of provisions under the rubric "Contextual." They include Sovereignty over Energy

34. Energy Treaty, *supra* note 2.

35. Energy Treaty, *supra* note 2.

Resources, Environmental Aspects, Transparency, Taxation, State Entities and Exclusive or Special Privileges, and Observance by Sub-Federal Authorities. Part V deals with matters concerning the settlement of disputes, including disputes between Investors and Contracting Parties, and between Contracting Parties. Part VI covers Transitional Arrangements. Part VII treats Structural and Institutional Matters such as Protocols, the Charter Conference, the Secretariat, Voting, and Funding Principles. Final Provisions such as Signature, Ratification, Acceptance or Approval, Accession, Amendment, Association Agreements, and Entry Into Force are dealt with in Part VIII.

The Treaty would involve the establishment of a Governing Council and a Secretariat. The latter is to be small and could conceivably subcontract a part of its work to existing institutions. It could also be linked to existing institutions, such as the International Energy Agency or the European Union Commission. Industry bodies have voiced the concern that the Secretariat might be called upon to perform regulatory functions. The more important of the various provisions are examined below.

A. General Principles and Definitions

1. National and Most Favored Nation Treatment

In certain circumstances, the Treaty obliges each Contracting Party to give investors from other signatory countries "National" or "Most Favored Nation" Treatment, whichever is the most favorable.

National Treatment (NT) means that the Contracting Party in its laws, regulations, judicial decisions, administrative rulings or general applications, must treat investors who are nationals of other Contracting Parties as favorably as investors who are nationals of that state.

Most Favored Nation (MFN) means that a Contracting Party may, in its laws, regulations, judicial decisions, administrative rulings or general applications treat investors who are nationals of the State more favorably than those from other Contracting Parties but must ensure that investors from other Contracting Parties are treated equally and no less favorably than investors from any third state.

In practice, NT is usually the most favorable, and therefore, is the one which must usually be applied.

2. Freeze and Roll Back Procedure

Immediate relaxation of laws which restrict trade is difficult or impossible in many Contracting Parties. Therefore, the Treaty provides a freeze or roll back procedure for implementation of its obligations to liberalize trade and investment. Under this procedure existing laws which are discriminatory cannot be added to or made more restrictive and must be gradually eliminated over time. There is an absolute ban on the introduction of new law which would discriminate against investors from other signatory countries.

The countries of the CIS have negotiated transitional arrangements in accordance with Article 36(2) and have listed them in Annex T.³⁶ These provide that discrimination between local investors and investors from other signatory states is acceptable, so long as the overall trend is towards greater liberalization.

3. Sovereignty Over Natural Resources³⁷

The sovereign rights of Contracting Parties over their energy resources are to be maintained. Decisions on whether or when to make areas available for oil and gas exploration, the optimal rate of recovery, what environmental and safety rules to apply and what taxes and royalties to impose will still be made by the appropriate sovereign body in each country. However, state entities in the energy sector must act in accordance with that state's obligations under the Treaty.

4. Transparency³⁸

Contracting Parties must apply the transparency provisions of the GATT to laws, regulations, judicial decisions, administrative rulings, and standards of general application affecting trade in Energy Materials and Products. All laws relating to the matters covered by the Treaty must be made available to signatory countries and investors, and "enquiry points" to which requests for information about laws, regulations, judicial decisions, and administrative rulings may be addressed.

5. Exceptions³⁹

Apart from the provisions concerning the references to the GATT,⁴⁰ Contracting Parties are free to take measures necessary for the maintenance of public order, the protection of human, animal or plant life or health, or in situations where there the acquisition or distribution of energy materials and products is in short supply. For example, other exceptions which are being included are an exemption to the Euratom Treaty. Also regional trade agreements such as the EU, North American Free Trade Agreement (NAFTA), and the European Economic Area (EEA) will take precedence over conflicting obligations arising from the Energy Charter Treaty.

36. Energy Treaty, *supra* note 2, Annex T: List of Countries' Specific Transitional Measures, in accordance with Article 36(2) on Articles of the Energy Charter Treaty specified in Article 36(1), Energy Charter Conference Secretariat, Version 6, Dec. 20, 1993.

37. Energy Treaty, *supra* note 2, art. 21.

38. *Id.* art. 23.

39. *Id.* art. 27.

40. General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. 4, 35, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

B. Trade

As one author notes, "trade dependencies created by over six decades of central planning and communist rule in the Soviet Union must be considered in transitional policy-making".⁴¹ Therefore, to the extent that predictions are based upon the trade behavior of market economies, they will "overstate the reorientation [of trade] towards the West that will likely take place in the long run."⁴² Nevertheless, the attempts to bring the CIS countries into the framework of international trade have included the adoption of the so-called "GATT Reference" approach, a formal linkage between the Energy Charter Treaty and the GATT. Essentially, the idea is that Contracting Parties should make a legally binding commitment to treat all other Contracting Parties on the same basis, as if they were all GATT members. Signatories would take on the relevant GATT obligations, such as the commitment not to erect trade barriers or to increase tariffs on energy imports. There are two comments which can immediately be made on this. Firstly, most of the countries of East Europe are not yet members of the GATT nor are they likely to become members in the short-term given the time which negotiations take prior to entry.⁴³ Secondly, it is hard to identify just what agreements would be made by non-GATT states. A further comment which may be made is that the GATT is one of the most complicated documents, comprising not only the text of the Agreement, but also a collection of codes, side agreements, dispute settlement procedures, and waivers which impose considerable demands on the non-expert. This situation must be something of a challenge to East European participants in the Charter process.⁴⁴ On the other hand, the link between the GATT and the Energy Charter is seen as a useful preparation for GATT membership by many countries and, therefore, to be supported in spite of the additional difficulties for the Charter negotiations which this route presents.

The most relevant articles of the Treaty in this respect are Article 4 (Trade in Energy Materials and Products and Related Services) and Article 5 (Uruguay Round) which state respectively:

41. Van Brabant, *supra* note 32, at 24.

42. Dani Rodrik, *Foreign Trade in Eastern Europe's Transition: Early Results*, Centre for Economic Policy Research, Discussion Paper Series, No. 676, 16 (London, June 1992).

43. The following have acceded to the GATT: the Czech Republic, Hungary, Poland, and Romania. All other Central and East European countries have been granted observer status except Georgia, Tajikistan, and Uzbekistan, as of the end of 1993. Russia became an observer in succession to the Soviet Union and submitted its request for membership in 1993. In its decision on July 21, 1993, "Observer Status of Governments in the Council of Representatives," the Council defined the purpose of observership as "to allow a government to better acquaint itself with the GATT and its activities, and to prepare and initiate negotiations for accession to the General Agreement." Observer status is initially granted for a period of five years.

44. The Tokyo Round Agreements alone refer to *inter alia* the Agreement on Government Procurement and others known collectively as the Tokyo Round codes, three sectoral agreements (The Agreement Regarding Bovine Meat, The International Dairy Arrangement and The Agreement on Trade in Civil Aircraft), and four decisions of the GATT Contracting Parties (Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Declaration on Trade Measures Taken for Balance of Payments Purposes, Safeguard Action for Development Purposes and Understanding Regarding Notification, Consultation Dispute Settlement and Surveillance, collectively known as the framework agreements).

“Except as otherwise provided in this Agreement trade in Energy Materials and Products between Contracting Parties shall be governed by the provisions of the GATT and Related Instruments, as they are applied under GATT rules between particular Contracting Parties which are parties to the GATT;”⁴⁵ and “In the event of the adoption of agreements within the framework of the General Agreement on Tariffs and Trade or other significant and relevant developments in the international trading system, Contracting Parties undertake to consider appropriate amendments to this Agreement.”⁴⁶

In addition to special procedures for dispute settlement required by the GATT relationship,⁴⁷ the Charter includes provisions applicable to trade between Contracting Parties where one or more Contracting Party is not a Contracting Party to the GATT and Related Instruments:

(1) If such trade is governed by an existing bilateral agreement between those Contracting Parties, that agreement shall apply between them following notification to all other Contracting Parties by both Contracting Parties concerned provided that its application does not distort the trade of any third Contracting Party.

(2) In all other cases trade in Energy Materials and Products shall be governed by the provisions of the GATT and Related Instruments, as in effect on 1 July 1992, as if all such Contracting Parties were members of GATT and applied the Related Instruments except as provided in Annex G. The Charter Conference may amend Annex G by consensus.

(3) Each Signatory to this Agreement, and each State or Regional Economic Integration Organization acceding to this Agreement, shall on the date of its signature or of its deposit of its instrument of accession, deposit with the Depository a list of all tariff rates and other charges at the level applied on such date of signature or deposit, on Energy Materials and Products imported into its Domain.

(4) Subject to paragraph (5) below, each Contracting Party undertakes not to increase any tariff rates or other charges on Energy Materials or Products above the level applied on the date of its signature or deposit as referred to in paragraph (3).

45. Energy Treaty, *supra* note 2, art. 4.

46. Energy Treaty, *supra* note 2, art. 5.

47. Energy Treaty, *supra* note 2, arts. 31, 33. Further changes can certainly not be ruled out. A recent addition to the text is a new Article 6 on Trade Related Investment Measures (TRIM) and the text of Article 13, paragraphs (10) to (13). The new Article shall apply the provisions in the Dunkel text of the GATT Uruguay Round in such a way as to call up the other relevant safeguards, exceptions, and provisions of the GATT. The notification and transitional arrangements for TRIMs shall follow the same approach as proposed in the Dunkel text, adjusted to allow for the fact that some negotiating parties are not parties to the GATT. Disputes about TRIMs should be taken under the GATT if the parties agree. If not, alternative rules will be set out in an annex to the Charter. Note by SubGroup Chairman, Sept. 24, 1993, CONF-70, 62/93, European Energy Charter Conference Secretariat, Brussels.

(5) Notwithstanding paragraph (4), a Contracting Party may maintain limited exceptions to the obligations of paragraph (4), provided that it deposits with the Depository on the date of signature or deposit as referred to in paragraph (3), a list of such exceptions, specifically identified by reference to the HS or CN items to which such exceptions apply.

(6) Annex D to this Agreement shall apply to disputes regarding compliance with provisions applicable to trade under this Article, except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:

(a) has been notified in accordance with and meets the other requirements of paragraph (1) of this Article; or

(b) establishes a free-trade area or a customs union as described in paragraph 5 of Article XXIV of the GATT.⁴⁸

C. *Liberalization of Trade*

1. Taxation⁴⁹

The provisions of the GATT will apply to taxation measures affecting trade other than those affecting taxes on income or capital. The provisions imposing national treatment or most favored nation treatment are to apply to taxation measures relating to investment, other than those on income or on capital. Provisions are also included which refer to issues arising from taxation, which may constitute an expropriation or where such a measure is alleged to be discriminatory. The right of a Contracting Party to impose or collect a tax by withholding is not limited.

2. Access to Energy Resources⁵⁰

Companies from Contracting Parties must be allowed access under transparent and nondiscriminatory rules to market-determined prices.

3. Access to Markets and Competition⁵¹

Companies from Contracting Parties must be allowed access to local, export and international markets for Energy Materials and Products on commercial terms. Barriers to trade must be progressively removed. Contracting Parties must ensure fair competition between such companies and local companies and ensure

48. Energy Treaty, *supra* note 2, art. 35 (Interim Provisions on Trade Related Matters).

49. *Id.* art. 24.

50. *Id.* art. 3.

51. *Id.* arts. 3, 7.

as far as possible that prices are determined by market principles. The Treaty provides a notification procedure for the enforcement of competition laws by a Contracting Party where it is adversely affected by anti-competitive conduct in another Contracting Party.

4. Access to Capital⁵²

Subject to its existing laws and regulations, Contracting Parties must accord the more favorable of MFN or NT to traders and investors acting in connection with the energy sector.

5. Transfer of Technology⁵³

Subject to the protection of intellectual property rights, non-proliferation and other international obligations, Contracting Parties must "freeze" and "roll back" any obstacles to the transfer of technology in Energy Materials and Products and related equipment and services on a commercial and nondiscriminatory basis.

It may be worth pausing a moment to consider what the GATT is and why it should be considered relevant to the Charter Treaty. Given the broad scope and, at best, tangential impact on energy markets, the value of a GATT reference is not immediately apparent. In general, the main areas of the GATT which are relevant are the MFN treatment of tariffs, which apply to both exports and imports. Member countries agree with each other to bind their tariffs (in other words, not to raise them) and to adopt National Treatment to such an extent that the same charges are to be applied to imports and to domestically-produced goods. In other areas, however, the provisions of the GATT present problems in the area of energy: elimination of quotas in imports and exports, subsidies, state enterprises and various provisions on exemptions, and emergencies. In areas such as the settlement of disputes on anti-dumping and the application of countervailing duties, the provisions of the GATT are also unsatisfactory insofar as the energy sector is concerned. There is the potential for taking protective action if the imports of another country are being sold at below cost or below their price in their country of origin. This is difficult to interpret and has given rise to many disputes. For the Republics of the FSU, this provision is particularly hard to apply in the absence of proper accounting systems. Until they are introduced, it is possible for members of the GATT to use this provision as an excuse for protective action.

As a body of rules, the GATT is far from perfect. Most of the provisions are vague or are subject to exceptions. Essentially, the GATT creates legitimate expectations for the parties to it, and it is the denial of such expectations rather than a breach of the GATT rules which gives rise to the GATT disputes, for which there are special procedures. Thereafter, it functions as a forum for bargaining on matters such as tariff rates. The breadth of the GATT is an

52. *Id.* art. 10.

53. *Id.* art. 9.

advantage here, which will not be shared by the Energy Charter Treaty. Indeed, its inability to go outside the energy sector may constrain its scope in bargaining. The contrast to the GATT will be marked given the diversity of instruments at its disposal. The Council has given formal waivers for certain restrictive practices which appear to contradict the GATT (such arrangements apply to Spanish coal). Informal understandings may not be recorded in any form and as a result it is not worth taking action against any particular breach of the GATT, because the costs of taking action would be greater than the rewards. This is relevant to certain arrangements with respect to energy in the EU. Australian coal can be produced more cheaply than German coal, but action has been avoided since in almost every other respect Germany is the strongest proponent of free trade within the EU. The point is this: informal understandings are a key part of the GATT system, but it is hard to see how such a system could work with the parties to the Energy Charter Treaty until they become formal members of the GATT. An attempted solution has been to include provisions in the Charter which allow for exceptions to the GATT rules through bilateral agreements.

The most difficult areas in relation to the GATT and the FSU are those concerning state aids and state enterprises. In a state-managed economy, such as the former Soviet Union, and in the successor states, it is almost impossible to identify what is or was a state aid and what was a genuine production. Trade is often between state enterprises and subject to controlled pricing, a far cry from "free trade." To achieve free trade, it will take several years of training to produce the necessary accountants. Until that time, there is the risk that the trading partners of the FSU countries will allege that such countries are unfairly subsidizing their local production. This problem is likely to be found in other areas covered by the Charter Treaty provisions. In this sense, the draft Treaty highlights a need for retraining and assistance from the West.

Contracting Parties will have to remove all barriers to selling Energy Materials and Products in other countries and the world market, as well as their own home market. All Contracting Parties will have to remove all trade restrictions, which are not listed in Annexes A or T of the Treaty or are covered by the Exceptions.⁵⁴

Consider how the GATT reference might be relevant to the CIS from the Eastern point of view. In the sense that it encourages the integration of the CIS Republics in the international trade system and encourages an increase in the volume of such trade, the benefits to all parties are clear. Trade between the CIS and Eastern Europe has declined precipitously from 1990, as has trade between the CIS and the West. The end of central planning led to a disruption in the production and supply of exports. Trade has been affected by rapid inflation, the collapse of the monetary and payments system, and the establishment of differential domestic price controls. The emergence of market institutions in support of international trade has been slow. There remain widespread government controls on exports. Trade in energy and materials has been much

54. *Id.* Annex A.

less affected, however, by the shift of East European countries to convertible currency trade at world market prices. A measure of the problems is that until 1991, trade between the component parts of the FSU amounted to eighty percent of total trade.⁵⁵

D. Investment

For Western investors, the Charter provisions on promotion and protection of investment are of interest. Yet, they have also been the source of many difficulties which have not been resolved.

In the pre and post investment phases there has only been agreement of NT on the post-investment phase. To facilitate this agreement, the structure has been developed to permit exceptions to NT. This assists those who are unable to identify their needs. Norway has objected to NT in the pre-investment stage. The draft Treaty states that exceptions to NT should be based upon existing legislation. However, such legislation is barely in existence in most of the CIS countries (and indeed in Eastern Europe generally). Foreign investment guarantees should be applied to local companies, otherwise there will be unequal economic conditions in consortia.

In the autumn of 1993, there was a proposal from the Russian delegation for a total transition period of ten years in which the Russian Federation could add new legislation to the annex of NT exceptions.

E. Transit

Given the huge distances which oil and gas have to cover to reach the markets in either the FSU Republics or Western Europe, the matter of transportation has always been very important to the countries concerned. Since the breakdown of the centrally-planned system and the collapse of the rouble, transportation has become a source of major problems. The uneven distribution of oil and gas reserves and the interconnectedness of the electricity grid has meant that trade between the constituent parts of the FSU has had to continue. The framework for such trade and the basis for and means of payment have provoked a number of disputes between the Russian Federation and the Ukraine, affecting the transit of gas. In the absence of a proper market for energy in the countries in transition, it is hard to establish prices for transit. For both the energy-importing nations and the exporters a solution has to be found. Essentially, it is necessary to re-establish trade in energy between the Republics, but on a different basis. In the meantime there are problems of interruption of supply due to disputes over payment, use of energy supply as a weapon in

55. Constantine Michalopoulos, *Trade Issues in the New Independent States*, Studies in Economies in Transformation, Paper No.7, The World Bank 3 (Washington, D.C. 1993).

disputes about non-energy trade matters, and armed conflict. It is in this context that the provisions on transportation have been developed in the draft Treaty.

Article 8 states each Contracting Party "shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to the pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges."⁵⁶ In the event of a theft of gas supplies by the transit country or a breakdown in transit, the courses of action available to the FSU Republics are a matter of great interest. Since 1992, there have been a number of such cases involving Russia and the Ukraine, and the Republics in the Caucasus region. How would the Charter help them? How would responsibility be fixed for repairing the pipeline and who is to pay? How would the remaining oil or gas be shared? These are problems peculiar to the CIS arising from the breakdown of central planning and the need to develop commercial relations. Each flow of oil or gas will have to be covered by a bilateral agreement, so the question becomes how much can Article 8 add to such agreements, if at all. The general approach adopted by the Charter Treaty is set out in Article 8(6), which states that:

[C]ontracting Party through whose Area Energy Materials and Products Transit shall not in the event of a dispute over any matter arising from that Transit interrupt or reduce, nor permit any entity subject to its control to interrupt or reduce, nor require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products except where this is specifically provided for in a contract or other agreement governing such Transit or where the procedure in paragraph (7) has been completed.

The procedure for settling disputes is set out in paragraph (7). Generally, the parties to a dispute are required to exhaust any contractual or other dispute resolution remedies already agreed upon. If this fails, there are a number of steps which can be taken to bring further conciliation procedures into operation. However, none of the steps are sufficient to compel the parties to reach a settlement. The general problem is how to develop a fast-track for settlement of transit disputes without disrupting transit.

The lack of any enforcement mechanism is the most serious obstacle to the success of this provision. An appreciation for both the need for improvement of the conciliation mechanisms and a transfer of any relevant experience has led to the establishment of a Transit Breakdown Sub-Committee under the umbrella of the Charter. This Committee aimed at identifying ways of dealing with problems outside the Treaty framework through model agreements or consultation mechanisms, which is a tacit admission of the limitations of Article 8.⁵⁷ It is questionable, however, whether the experience of governments and energy companies in transporting energy in the EU and North America is likely to be

56. Energy Treaty, *supra* note 2, art. 8(1).

57. *Id.*; Energy Charter Secretariat, Doc. TB 6, 1/94, Jan. 4, 1994.

a profitable source of lessons for East European countries. For the Republics of the FSU in particular, comparative material is likely to be in short supply, as Western countries have experienced no problems of war and political upheaval during the period since large-scale energy networks have been established. Yet in some Republics of the FSU, emergency conditions are the norm rather than the exception.

As an example of the seriousness of the transit problems which can be faced, it is instructive to consider the case of Armenia, a landlocked country which has been subject to a blockade by Azerbaijan due to armed conflict over the region of Nagorno-Karabakh. Transportation links and gas supplies via pipelines through Azerbaijan have been suspended since mid-1991. The alternative route, via Georgia, has been subject to interruption due to civil strife. In the first three and a half months of 1993, there were no less than five successful attempts to blow up the gas pipeline which runs through Georgia:⁵⁸

January 23 : reconstruction period - 8 days
February 11: reconstruction period - 5 days
February 19: reconstruction period - 4 days
March 2: reconstruction period - 4 days
April 6: reconstruction period - 6 days

Responsibility for the cost of reconstruction is generally left to the party responsible for the site of the breakdown. In this case, they were borne by the Government of Georgia, with the operations conducted by the state company, Gruzgas.⁵⁹ Subsequently, the cost of surveillance also has to be borne. It may be noted that in the Balkan States and in Central Europe, there are arrangements for joint responsibility which resemble those found in the West.⁶⁰ However, besides man-made problems, there are also natural accidents. On May 11, 1993, two lines of the South Caucasus-Transcaucasus main gas pipeline with a diameter of 1000 mm and 700 mm were broken by a landslide in Georgia. The supply of gas was not restored until June 21.

Armenia also provides an illustration of another type of problem which can arise: the problem of transit states exceeding their off-take of gas. During the winter period 1992-93, Uzbekistan and Kazakhstan, in their role of transit states for gas to Armenia (and also Georgia, Azerbaijan, Russia, and the Ukraine), took substantial amounts of gas above the set daily quotas.⁶¹ Despite the existence of treaties between the states concerned, breaches are a regular occurrence and will almost certainly continue in the absence of any clear mechanism to influence the transit countries, which are responsible for the irregularities. Turkmenistan and Armenia have concluded an agreement on the sale and purchase of gas, in

58. Hakobian, paper delivered at Transit meeting organized by the Energy Charter Conference (Geneva, June 1993)(translated from Russian, on file with the *Tulsa Journal of Comparative and International Law*).

59. *Id.*

60. Hakobian, *supra* note 58.

61. John Jirik, *Armenia Shivers as Blockade and Civil War Choke Fuel Supplies*, RUETER LIB. REP., Nov. 19, 1993.

which the type and timing of sanctions have been agreed upon for transit organizations which violate the agreement on transit.⁶² It also applies to suppliers, who do not execute deliveries of gas in the agreed upon quantities. However, the compliance mechanism is not yet in force and the practical effects of this agreement are unclear.

Another illustration is the long-running dispute between Russia and the Ukraine over supplies of gas. Ukraine is a transit country for Russian gas *en route* to the markets of Europe. Supplies have been interrupted because of a dispute between the two countries, which concerns a wide range of issues, going far beyond energy and arousing strong passions between the neighboring countries.

The question of how broadly the notion of transit should be defined was somewhat easier for the Charter negotiators to resolve. However, the parties concerned considered it a sensitive issue. Should it include the idea of Third Party Access, or require utilities to carry gas or electricity belonging to a third party on request, subject to capacity being available and a fee being paid? Given the highly controversial character of the idea among the Member States of the EU, it is not surprising that the Secretariat has prepared a draft Ministerial Declaration to the Energy Charter Treaty which states:

[T]he Contracting Parties declare that it is their common understanding that the provisions of the Energy Charter Treaty do not oblige any Contracting Party to introduce mandatory Third Party Access or to prevent the charging of identical prices or tariffs to customers in different locations who are in similar circumstances apart from location.⁶³

F. Environment

According to Article 22, the Contracting Parties "shall strive to minimize in an economically efficient manner harmful environmental impacts occurring both within and outside its Area from all operations within the energy cycle in its Area, taking proper account of safety."⁶⁴ The language of this Article provides an important clue to its likely effects. Throughout, it is the language of "soft law" in which the element of legal obligation is extremely vague. For example, Parties are "to strive to minimize . . . harmful environmental impacts,"⁶⁵ "to strive to take precautionary measures to anticipate, prevent or minimize environmental degradation,"⁶⁶ to "take account of environmental considerations throughout the formulation and implementation of their energy policies,"⁶⁷ to "promote market-oriented price formation throughout the energy

62. *Economic & Political Viability of an Armenian Corridor for Gas to Europe*, APS REV., Apr. 26, 1993.

63. Energy Treaty, *supra* note 2; Draft Ministerial Declaration, Version 4, July 7, 1993, Item 1, at 1.

64. Energy Treaty, *supra* note 2, art. 22.

65. *Id.* art. 22(1).

66. *Id.*

67. *Id.* art. 22(1)(a).

cycle and a fuller reflection of environmental costs and benefits,"⁶⁸ and to "have particular regard to improving energy efficiency."⁶⁹ Few states are likely to be so oblivious to domestic environmental concerns, as to fail the broad tests implied by these requirements. Indeed, in the event of a dispute on matters falling within this Article and the dispute being taken to arbitration, the arbitrator would almost certainly declare that such language is too weak to be justiciable.

In another important area for the energy sector, the environmental aspects of large-scale investment projects and the freedom left to Contracting Parties seems likely to be increased by clarification of the provision in Article 22. As presently drafted, Article 22 (1)(i) requires States to "promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of environmental impacts of environmentally significant energy investment projects."⁷⁰ However, in a draft Ministerial Declaration, Item 9 contains the following text which would further weaken the impact of the text: "It is for each Contracting Party to decide the extent to which the assessment and monitoring of environmental impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements and the appropriate procedures to be followed."⁷¹

In its defense, many of the obligations in this Article are ones which governments do not yet know how they can fully meet. They point out the direction of thinking and research, but imply in their current form that it is not yet possible to write them in the form of hard legal obligations. Further, the Charter Treaty is not an environmental treaty, but an energy one. Most likely, it goes further than the requirements found in the text of the Rio Summit Declaration.⁷² That said, it is further evidence of the considerable difficulty in securing international commitments to act on environmental issues.⁷³ For the Republics of the FSU, the Article has the added advantage of presenting no onerous obligations, which would require special consideration in a transition period.

G. Transition

Few East European countries have any energy laws. Under command economies, such laws were not necessary. This is being remedied at great speed in many cases. However, their energy and energy related laws are still in

68. *Id.* art. 22(1)(b).

69. *Id.* art. 22(1)(d).

70. *Id.* art. 22(1)(i).

71. *Id.*; Draft Ministerial Declaration to the Energy Charter Treaty, Version 4, Item 9, July 7, 1993, at 5.

72. Rio Summit Declaration, June 14, 1992, 31 I.L.M. 874.

73. Ironically, the difficulty in making progress on this issue may lie in the opposition of Western countries rather than in the newly independent states for whom the need to make progress is vividly illustrated by the environmental challenges, such as the Aral Sea and Chernobyl, which they inherited from the Soviet Union.

motion. Thus, a transition period is required while the laws necessary for a market economy are implemented.

The drafters of the Charter Treaty have had to take this into account. Parties seeking transitional arrangements must notify the Secretariat in accordance with provisional Annex T, and must make a provisional notification of needs for assistance to facilitate the completion of the stages set out therein. However, after signature of the Treaty, the possibility is closed for countries to provide for specific exceptions from NT regarding foreign investments in newly elaborated laws.

There are also problems with the length of the transitional period as a whole and with the need to ensure that countries within the transition period have the possibility of completing the formation of their legislative base.

It is not possible to give a blank check to the East European countries. With respect to duration, the RF has recently proposed a duration of ten years after signing the agreement.⁷⁴ However, exceptions to NT may be required in the forthcoming legislation. Therefore, a period of three years is recommended in order to permit the legislation to be put in place and to identify the exceptions.

IV. SUPPLEMENTARY RULES-PROTOCOLS

While originally intended as important legally-binding instruments, the Protocols have developed as rather modest supplements to the Energy Charter Treaty. They cover nuclear energy, energy efficiency, and hydrocarbons. Progress on the Hydrocarbons Protocol has been slow from the outset. However, the texts of the other two Protocols have been agreed to by the relevant working groups. Article 4(2) of the Draft Protocol on Energy Efficiency and Related Environmental Aspects (Protocol) states the signatories "shall establish energy efficiency policies and appropriate legal and regulatory frameworks which facilitate the efficient functioning of market mechanisms needed to achieve efficient allocation of energy resources."⁷⁵ Signatories will commit themselves to "formulate strategies and on a voluntary basis, targets for improving energy efficiency and thereby reducing environmental impacts of the energy system as appropriate in relation to their own specific energy conditions."⁷⁶ These strategies and targets "may be periodically reviewed" by the Committee on Energy Efficiency.⁷⁷ This Committee on Energy Efficiency is composed of

74. Statement of Mr. Shatalov, Head of the Russian Delegation at the Plenary Session of the Conference on the European Energy Charter (Brussels, Oct. 6, 1993).

75. Draft Protocol on Energy Efficiency and Related Environmental Aspects, 50/93 Annex, EE 9, June 17, 1993.

76. *Id.* art. 7.

77. *Id.*

representatives from the Signatories to the Protocol.⁷⁸ By committing States to market-oriented energy pricing and by establishing an energy efficiency office, States will have an incentive to include energy efficiency considerations when reviewing new investment plans. There is nonetheless a commitment to "best efforts" and the only sanction is to expose states to international criticism at the annual meetings of the Energy Efficiency Committee.

The Nuclear Energy Protocol⁷⁹ also sets out broad principles of domestic and international conduct. It provides a checklist for authorities in new countries, which are establishing or assuming responsibility for nuclear facilities. For example, it encourages states to have a legislative or statutory framework for the regulation of civil nuclear energy, which includes an organization to regulate safety, and that such body be independent of bodies responsible for the promotion and use of nuclear energy.⁸⁰ Further, it implores states to "ensure that comprehensive arrangements be developed and approved by the competent authority for the decommissioning of all peaceful nuclear installations under its jurisdiction and for the management of radioactive waste."⁸¹

V. CONCLUSION

One can attack the Charter process in a number of ways. Regarding the Charter's relationship to other treaties, additional protection may not be provided to these agreements, such as the GATT, simply because there is a shortage of experts who can interpret and apply the provisions.

Transition is a source of the greatest controversy and poses considerable problems. The Russians believe the Transition Article lacks a clear structure. The Western countries, concerned with a long transition period, wish to attach time limits. The West insists on transition concluding by January 1, 1998. The Russians prefer a staged approach with a country-by-country determination. The Russian Federation, therefore, is unable to provide the West with the guarantees it seeks. The Federation lacks a long-term program for economic development which, if available, would provide guidance on market development and pricing. Because of this, the parties remain on different sides of the fence when points of detail are raised.

The Russian position on energy law and oil and gas law remains vague. Legislative certainty is minimal and significant problems with center region authority exist. As such, the Russian government cannot guarantee that

78. *Id.* art. 14.

79. Protocol on Principles Governing the Peaceful Uses of Nuclear Energy and the Safety of Nuclear Installations and on Co-operation in these Areas, Energy Charter Secretariat, NU 11, 26/93 Annex, Mar. 24, 1993.

80. Energy Treaty, *supra* note 2, art. 5.2.

81. *Id.* art. 5.13.

Parliament would not modify projects not already under an energy law or an oil and gas law.

According to the West, the list of twenty-four derogations, including banking, foreign exchange, water resources, land code, insurance law, and patent law, may act to cancel the effect of the Charter. Furthermore, there is no guarantee that there will not be more derogations.

On balance, the Energy Charter draft process is beneficial. Nonetheless, one must be aware of its construction problems. It is not an OECD product but one drafted with NIS influence. Given the multifarious nature of such a process, flexibility remains the most valued component of the Charter. Flexibility is required because the Charter must create law where none has existed before it. Moreover, no political body can reliably interpret such laws. Political instability will exacerbate this problem in the foreseeable future.

The Charter's short-term goals are nebulous. Because of its liberal construction, parliaments will have problems accepting the Charter. This is so because the Charter primarily benefits small companies and not the large influential firms like Esso and Royal Dutch Shell.

Should the treaty fail, Russia will most likely be blamed. This accountability may be rightly placed as the future of the Charter will depend on the initiatives of the Russian Energy Minister, Mr. Shafranik, and Mr. Shatalov, the Deputy Energy Minister who has primary responsibility for the Charter. These uncertainties may have the unfortunate consequence of reducing NIS energy investment.

ANNEX

List of Some Existing National Laws in the CIS and Georgia Containing Provisions Which Contradict the Energy Charter Treaty⁸²

ARMENIA

Various discriminations against foreign investors are envisaged, including the proviso that their activities may be limited or forbidden on some territories defined by legal acts on grounds of defence and national security considerations.

An Anti-Monopoly Law and an Energy Law are being drafted.

State monopoly exists in most energy sectors. Subsidies are used to limit the prices of electricity, gas and heat for small consumers.

AZERBAIJAN

Under the Law On the Protection of Foreign Investment, No. 57 of 15 January 1992, Article 7, activities of enterprises with foreign investors may be limited or forbidden on some territories defined by legal acts on grounds of *defence and national security considerations*. A list of activities forbidden to foreign investors has been prepared by the Cabinet of Ministers.

Under this law, foreign investors are guaranteed, after payment of appropriate taxes and levies, the transfer abroad of their income and other sums in a foreign currency legally received in connection with the investments. The Law does not contain a detailed list of the types of payments permitted.

Under a Leasing Law, entities which are wholly or partly owned by foreign investors must secure any lease of property from the owner of the property, whereas domestically owned entities may secure leases from whoever is currently using or supervising the property.

There are no official enquiry points so far to which requests for information about relevant laws and other regulatory acts could be addressed. At present such information is concentrated in various organizations.

A Law On Anti-Monopoly Activities was recently adopted but there is no implementation procedure yet established.

A state monopoly has been established in the extraction of oil and gas, in gas transportation, in the production of electric power and heat. There is also state regulation of prices for energy carriers. Energy laws are envisaged.

82. This Annex is based on information supplied to the Energy Charter Conference Secretariat as required by Article 13 of the Draft Charter Treaty (Existing Barriers to National Treatment, Annex A, version 4, 24 September 1993)(on file with the *Tulsa Journal of Comparative and International Law*).

BELARUS

There is a Law on Foreign Investment which seems to entail no discrimination against foreign investors, although only the lease and not the purchase of land is possible.

State monopoly exists in the extraction, transportation and processing of oil, transport of gas, electricity generation and transmission, and in the design, construction and assembly of fuel and energy infrastructure. There are no liberalization of prices for electricity, heat, or gas for the small consumer or the state sector. Prices are subsidized in the agricultural sector. A shortage of convertible currency exists, making compliance with Article 16(2) of the Treaty (Transfer of Payments Relating to Investments to be made in a Freely Convertible Currency) difficult. Compliance with Article 22 (Environmental Aspects) is difficult due to large costs incurred from clean-up after Chernobyl. Release of harmful emissions into the atmosphere is still common.

GEORGIA

Anti-monopoly laws are being drafted.

The possibility of drafting special laws on energy transit is being explored. Currently, the regulations differ widely between the various energy sources (electricity, gas, oil products and coal).

A Law on Foreign Investment is being drafted.

State monopoly exists in the extraction of energy resources and in their transportation and processing, as well as in the production of electricity and heat. Energy prices are regulated.

KAZAKHSTAN

Under the Law on Foreign Investments of December 7, 1990, Article 25, an obligation is imposed to compensate a foreign investor for expropriation of property but lacks the specific details concerning compensation which is included in Article 15. Article 26 provides investors with guarantees of "the right to freely transfer abroad the income from activities with foreign participation, as well as from the sale of their shares in such enterprises."

The Decree of the President of the Republic 'On the Organization of External Economic Activities of the Republic of Kazakhstan for the Period of Stabilization on the Economy and Implementation of Market Reforms' of January 25, 1992, para. 4, establishes that foreign currency will be sold to foreign investors "for transfer abroad of profit and dividends." This probably means that the existing legislation treats such matters in a more restrictive way than is envisaged in the text of Article 16.

Existing tax legislation under Article 24, para.(4)(b) does not provide that the competent tax authorities may deal with claims of foreign investors or

whether tax measures applied to them constitute an expropriation or nationalization as well as discrimination. Nor does the legislation currently in force provide for the application of principles under the OECD Model Tax Convention on Income and Capital. Under the Law on Taxes from Enterprises, Associations and Organizations of February 14, 1991, Article 32, para.1, the rules established by an international tax treaty with the participation of the Republic prevail over the domestic taxation legislation. However, the practices of the tax authorities have to be adjusted to the Treaty requirements, especially Article 24 (4)(b).

A Law on Concessions was passed in December 1991. Article 19 contains the requirement that, while hiring personnel for activities falling within the framework of a concession, the share of foreign specialists in the highest category of technical and administrative personnel must not exceed 30%.

Under the Law on Denationalization and Privatization of June 22, 1991, Article 10, privatization of some state property requires the grant of priority rights to Kazakh citizens and residence qualifications for buyers.

Draft legislation is underway on a number of topics, but in the meantime existing legislation is in conflict with a number of provisions in the Treaty, such as Article 10 on Access to Capital, Article 4 on Trade in Energy Materials and Products, Article 14 on Compensation for Losses, and perhaps Article 8 on Transit.

Energy prices have not been liberalized. They are currently being set by the Government.

KYRGYZSTAN

The Law on Foreign Investments in the Republic of Kyrgyzstan of June 28, 1991, Article 10, states that the export of goods and services purchased in the market is to be carried out according to the rules on export-import transactions, which lists specific products. Inter alia, it regulates the export of currency by foreign investors.

The Decree of the President of April 2, 1992 On the Regulation of the External Economic Activities in the Republic of Kazakhstan, para. 2, restricts the right to export certain energy products (oil and oil products, natural gas, coal, ores and concentrates) to specialized commercial state structures and producing enterprises.

A further restriction on trade in energy materials and products causing difficulty with Article 4 of the Treaty is found in the Law on the Customs Tariff of December 5, 1992. Article 30 states that preferential rates in the customs tariff may be established. Those rates are in the form of exemption from customs duty, reduced duty rates or setting quotas for preferential import regarding goods and other items which originate in those states forming a customs union with the Republic or a free trade zone or those states making preparations for the creation of such a union or zone. The rates also apply to those goods or items which are circulating in frontier trade.

The Law on Concessions and Foreign Concessionaire Enterprises in the Republic of Kazakhstan of March 6, 1992, contains a similar restriction on trade.

A list of objects is established for which the leasing on a concession basis is either not permitted or restricted.

An energy law is being developed.

There is a State monopoly for electricity and district heating. Price regulation has the effect of creating wide disparities between cost and price for electricity and between the prices paid by public utilities, household (subsidized), and industrial users. All energy prices are substantially lower than average world prices.

MOLDOVA

According to the Law of the Republic of Moldova on Foreign Investments, April 11, 1992, Chapter IV, paragraph 2, Article 31, foreign investors and enterprises with foreign investments may acquire state securities with the permission of the Ministry of Economy and Finance.

Limitations on the ownership of shares in joint stock companies are imposed through Article 12 of the Law on Joint Stock Companies of January 3, 1992, Chapter 1, para.4. Physical and juridical persons of foreign states and persons without citizenship may hold only nominal shares. Similar restrictions on foreign ownership are to be found in the Law on Property of January 23, 1991, with respect to land (chapter V, Article 38).

RUSSIAN FEDERATION

Under the Law On the Subsoil of February 21, 1992, the subsoil may only be used by subjects of entrepreneurial activity irrespective of forms of property, including legal persons and citizens of other States, except as otherwise provided for by laws of the Russian Federation. Foreign entrepreneurs may be prohibited from using the subsoil under Article 9 of this Law. Furthermore, under the Regulations Concerning Licensing of Subsoil Use, para. 10.5, it is possible to exclude foreigners from tenders and auctions.

Compensation for losses incurred through expropriation may prove unsatisfactory under the Law on Foreign Investments of July 4, 1991, Article 8, which provides that "compensation . . . shall correspond to the real value of the investments to be nationalized or requisitioned." The interpretation of "fair market value" requires a familiarity with market conditions which may be different in character from Russia than in the West. Criteria used in making such assessments of value are likely to be very different in Russia than in the West for some time.

A serious problem lies with Article 23 of the Charter Treaty (on Transparency). There is currently no provision for obligatory publication of judicial decisions and administrative rulings since they are not considered to be sources of law. Changes in legal thinking on this matter are not likely in the short term. On publication of legal data, there are no official inquiry points to which

requests for information about relevant laws and other regulations could be addressed.

Monopoly remains a strong feature of the energy sector despite the framework of anti-monopoly legislation which has been introduced. Laws on privatization, the promotion of competition, and market pricing are still either being developed or untested. This limits the relevance of the provisions of the Charter Treaty on investment promotion and protection which require more developed market conditions than the present ones.

TAJIKISTAN

With respect to Article 23 on Transparency, there are no inquiry points to which requests for information about relevant laws and other regulations could be addressed.

State monopolies play a major role, restricting the possibilities for competition as envisaged in Article 3 of the Charter Treaty. There are extensive subsidies for electricity, heat and gas for households, the public sector, and agriculture. Liberalization of prices in the industrial sector is a priority.

UKRAINE

Anti-monopoly legislation has been introduced as the Law on Control of Monopoly and Prevention of Unfair Competition in Entrepreneurial Activities. Transparent rules concerning facilitation of investment are still being developed. The national currency is not convertible. There are no transparency of laws, as required under Article 23.

Market principles are not applicable to price formation.

UZBEKISTAN

Anti-monopoly legislation has been introduced. From July 1992, the Law "On Restricting Monopoly Activities" has been in force. The Law does not extend, however, into the activities of the enterprises of the energy sector (Article 1, paragraph 3).

The Decree of the President of the Republic of Uzbekistan, July 24, 1992, on Measures for the Promotion of External Economic Activities and Attraction and Protection of Foreign Investments contains a number of restrictions on foreign investment.

Under the Law on Property in the Republic of Uzbekistan, state enterprises in the oil and gas sector are the Republic's exclusive property.