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Settlement of Investment Disputes under the Energy Charter Treaty

Thomas Roe and Matthew Happold

Consultant Editor **James Dingemans QC**

CAMBRIDGE

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FOREWORD

Of *The Pilgrim's Progress*, Huckleberry Finn said that he 'read considerable in it now and then', and that 'the statements was interesting, but tough'. To the quite small body of persons who have 'read in' them, the documents constituting the Energy Charter Treaty may or may not have been interesting, but they will surely have found them tough. In contrast with the ICSID Convention, which as a text is a masterpiece of multinational drafting even though as a practical source of rules it lacks spine, the Energy Charter Treaty is an uncouth thicket from which even an interested person could well recoil. Nevertheless, although the field of view is narrow and highly particular, it is important in theory as well as in practice, and calls for an informed, readable and scholarly monograph. This is what the present work supplies.

Since this is a foreword, not a review, I must with difficulty abstain from offering a personal appraisal of international energy law and practice; of dispute resolution in that field; and of the crippling inconsistencies in the jurisprudence of bilateral investment treaty disputes, now apparently incurable. The books get longer and longer, and so do the awards, whilst colloquia, study groups, task forces and the like continue to proliferate, often producing book-length records of their proceedings; yet in the absence of a doctrine of binding precedent there is currently no means of imposing order where it is needed. Although notable talents continue to be involved, the entire area of study seems to be heading for a thrombosis.

This bleak landscape offers an almost irresistible invitation to wade in with proposals for a remedy. But only 'almost', for the urge to add another pebble to the pile must be resisted, particularly in a foreword, whose writer is not given the broad licence to deploy his own ideas and personality conferred on a reviewer. A foreword must be about the book itself, not the contributor. The task is more limited, and more practical, namely to encourage a prospective reader to partake of what is on offer.

Quite often, a foreword is perfunctory, the fruits of no more than dipping into the book, or even its index, and the writer of it quite frequently

contributes only as a favour to the author or publisher. Not so here. With pleasure and profit, as advertisements used to say, I read the whole book straight through. This is a tribute, not only to the clarity of the language but also to careful structuring which enables the essence of the Energy Charter regime to be perceived amidst the tangled foliage. These features make the book an ideal primer for those lacking an extensive acquaintance with the subject.

There is, however, much more to it than that, for the authors offer balanced accounts of selected practical and conceptual issues. The balance and the selection are important. A schoolgirl's celebrated review of a book, on *The Elephant*, read: 'This book tells you more about the elephant than you want to know', and one or two of the otherwise excellent works on the kindred topic of bilateral investment treaty disputes are handicapped by a similar surplus of material. In the present writer's opinion the text of this trail-blazing work avoids surfeit whilst at the same time furnishing most readers with what they require. I am glad to commend *Settlement of Investment Disputes under the Energy Charter Treaty* as an enterprising, scholarly and useful volume with a very promising future ahead of it.

Lord Mustill PC LLD FBA 24 Lincoln's Inn Fields
London WC2

PREFACE

The difficulties which face the scholar or practitioner of international investment law in the second decade of the twenty-first century do not include a lack of reading material. The authors of a further contribution ought therefore to begin with a defence of their decision to make it.

Ours, put shortly, is that the Energy Charter Treaty's provisions on investor–state dispute settlement deserve an up-to-date study of their own. Although the Treaty is limited in its application to just one field of international investment – energy – that field is of great significance and sensitivity, and is one in which the interests of states in attracting foreign investment on the one hand and on the other in regulating the conduct of foreign investors are inevitably in a state of real or potential tension. And what it lacks in breadth of subject-matter the Energy Charter Treaty makes up for in the number of its signatories: some forty-six countries and the European Union are parties (another state applies the Treaty provisionally and Russia must apply the Treaty for twenty years to all investments made until 18 October 2009). The Energy Charter Treaty is, in short, a very important treaty whose provisions ought to be well understood by all parties and by all relevant investors. Yet in truth the Treaty is not always easy to understand and the meaning of many of its provisions remains obscure.

In writing this study we have had three main aims. First, to describe clearly the Treaty's principal investor–state dispute resolution provisions. Second, to think – in rather more detail than would be possible in a work on international investment protection law generally – about the meaning of those provisions, especially the ones which give rise to the most difficulty. When we conceived this project, we planned to fulfil this aim simply by *identifying* points of difficulty and the arguments on each side. We found this an impossible limitation to keep to and have instead felt free to state our views. Whether or not readers agree with them, we hope that we have thereby contributed to the fulfilment of our third aim: to stimulate debate and thereby contribute in a small way to the

development of an area of law which in many ways is still in its infancy. For, although the corpus of arbitral case law on bilateral investment treaties is vast (and sometimes highly relevant), very few cases have yet been determined under the Treaty itself and much remains open to debate.

We gratefully acknowledge the insights into the Energy Charter Treaty, and into the field of international investment protection generally, provided by papers and discussion at conferences organised by the Energy Charter Secretariat and attended by us in Washington DC in 2007 and in Brussels in 2009. We are grateful to Liz Heathfield for her help in conceiving this book. We thank James Dingemans QC for agreeing to act as our consultant editor and for his valuable assistance both in that capacity and in discussions about real cases. The views stated in this book are, however, ours alone; nor are they put forward to represent the views of any client. Errors, too, are ours.

Kim Hughes of Cambridge University Press has given us much guidance and shown great patience when the many other pressures of our professional and academic lives got in the way. Kate Ollerenshaw has been an astute and tactful copy-editor. We are extremely grateful. Above all we thank our respective families, of whose company the Energy Charter Treaty, interesting though it is, has deprived us for an unconscionably long time.

We have tried to state the law as at 1 August 2010.

Thomas Roe — *London*

Matthew Happold — *Luxembourg*

TABLE OF CASES

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* Most modern awards of arbitral tribunals constituted under bilateral and multilateral investment treaties are freely available on the internet. The authors have consulted in particular the Investment Treaty Arbitration website maintained by the Faculty of Law of the University of Victoria (http://ita.law.uvic.ca). The majority of references to arbitral awards are, accordingly, identified by name and date only.

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International treaty arbitration and the Energy Charter Treaty

1. Investment treaty arbitration: origins and characteristics

In the beginning was diplomatic protection. Modern international investment treaties seek to provide agreed rules concerning a state's conduct towards foreigners who invest in its territory and a neutral forum for the settlement of disputes between states and such investors. The aim is to promote foreign investment and thus economic development. But this is a relatively recent phenomenon. Traditionally, international law afforded private persons no rights. Only states had legal personality in international law. Only states had rights, duties and the capacity to bring claims to assert their rights. States were obliged to treat foreign investors in accordance with an 'international minimum standard' but this obligation could only be enforced by the aggrieved investor's state of nationality. Indeed, the obligation was seen as being owed not to the investor but to its state. As the Permanent Court of International Justice explained in 1924:

> by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.[1]

Diplomatic protection had three major disadvantages. First, from the perspective of the injured investor, it was unsatisfactory because it gave its state of nationality complete discretion whether to make a claim on its behalf or not, the rights in question belonging not to it but to its state. Claims could be pursued (or not), compromised or abandoned as the state thought politically expedient.[2] Even when compensation was paid, a

1 *Mavrommatis Palestine Concessions* case (*Greece* v. *United Kingdom*), PCIJ, Series A, No. 2 (1924), 12.

2 See *Mutasa* v. *Attorney-General* [1980] QB 114 and *R (Abassi)* v. *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76.