

Altruism or Eurocentrism? The Energy Charter Treaty,
direct foreign investment in energy resources and
infrastructure and the Treaty's implications for Australia

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CERTIFICATE OF AUTHORSHIP/ORIGINALITY

I certify that the work in this thesis has not previously been submitted for a degree nor has it been submitted as part of the requirements for a degree except as fully acknowledged within the text.

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ABSTRACT

The Energy Charter Treaty (ECT) was initially promulgated as a European Union (EU) initiative designed to encourage economic development in Former Soviet Union (FSU) states through Foreign Direct Investment (FDI) in the energy sector by providing the legal framework within which contracts for energy projects may be formed. This framework provides stringent protection for FDI in all aspects of economic activity in the energy sector, inter alia: competition policy; national/most favoured nation treatment for investors by host states; freedom of movement for capital and investments, including the repatriation of profits; transit of energy supplies and products; environmental issues and dispute resolution.

It is argued that, in reality, the ECT is not the result of altruism but the means by which the EU states are attempting to secure their energy supplies for the twenty first century. In the EU the demand for energy products, particularly electricity, oil and natural gas, is constantly increasing. Consequently, the genesis of the ECT is to be found in the EU's increasing need for secure sources of all energy products and materials as well as the oil crises of the 1970's, 80's and 90's. The Treaty is therefore very much the creature of the EU energy policies formulated during the last decades of the twentieth century.

Further, it is argued that in order to achieve EU energy objectives, the provisions of the ECT have a number of practical legal effects which, whilst providing full protection for investments in the energy sector, have significant adverse legal implications for a host state Contracting Party.

Firstly, the ECT attempts to short-cut the negotiation process for contracts in the energy sector by rendering implicit terms and conditions which are usually subject to negotiation and agreement between the parties. Secondly, the Treaty not only abrogates the doctrine of privity of contract by conferring a right of action against the host state upon project investors who were not parties to the subject agreement,

but also renders the host state Contracting Party vicariously liable for the actions of state and privileged enterprises and sub-national and regional autonomous governments and authorities.

In addition, the obligations imposed by the ECT make substantial inroads into the sovereignty of Contracting Parties by imposing the strict obligation upon all Contracting Parties to allow the transit of energy products and supplies across their territories: by requiring that Contracting Parties effect substantial changes to domestic legislation in commercial, corporate, taxation and property matters in order to conform to the investment protection regime provided for in the Treaty: by requiring substantial changes to Contracting Party domestic economic, environmental and competition policies and by mandating what might be called “lock-in” provisions which effectively prevent a host state from amending or instituting any legislation which might affect the FDI project or agreement.

Full compliance by a Contracting Party with the provisions of the ECT could impinge upon the rights and independence of regional and sub-national autonomous governments. It is also argued that the ratification of or accession to the ECT by a Contracting Party government is unnecessary to activate the provisions of the Treaty

The language used in the Treaty is imprecise and obscure with few definitions of key terms to assist in the interpretation of its provisions and this occasional unintelligibility is exacerbated by inconsistencies between the legal effects of certain Articles. Consequently, deficiencies in drafting render the ECT a difficult document to interpret, thereby increasing the possibility and complexity of disputes arising from the application of its provisions.

Australia, as a signatory to the Treaty, is subject to its provisions and is used to illustrate the effects of the Treaty upon host state sovereignty, governance and administration.

The Dissertation discusses the origins of the ECT in the energy policies of the EU, the international context and negotiation and formation of the Treaty itself, as well as describing the structure and functions of the ECT administrative institutions. Further, it analyses the provisions of the ECT and related documents. The analysis is made from a practical legal viewpoint, by examining the legal implications for Contracting Parties of each of the discrete provisions. It then proceeds to present a discussion of those legal aspects of FDI, particularly contract negotiation and risk mitigation which the ECT seeks to address, as well as examining the impact of the ECT upon the sovereignty of Contracting Parties, particularly sovereignty over natural resources and the rights of sub-national governments and indigenous peoples.

Finally, to demonstrate the legal effects of the ECT upon a Contracting Party, the Dissertation discusses the implications for Australia of being a signatory and it is suggested that Australia has much to lose and very little to gain from membership of the ECT regime.

The ECT as an international instrument offers spurious benefit to all signatories except those developed states seeking to secure their future energy supplies through the application of the ECT's provisions to energy sector agreements. Ostensibly, it offers both impoverished FSU states and resource wealthy, energy exporting nations, such as Australia, the inducement of economic advantage through FDI in energy resources. In reality, however, the potential disadvantages implicit in the stringency of the Treaty's investment protection provisions and the resultant negative legal implications for host state-Contracting Parties, far outweigh

any putative benefits which may flow from membership to the Energy Charter Conference.

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