

## BOOK REVIEW – OCTOBER 1996

**A Review of "THE ENERGY CHARTER TREATY – AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE" by Thomas Wälde (Ed), Kluwer Law International, London 1996  
ISBN 90 411 0913-7 pp 700**

At the time of the oil embargoes in the early '70s, I was consulted by a major oil company about a contractual difficulty which today would be unthinkable: it had sold forward at a fixed price on the assumption that supply was secure and the producer price was predictable. My client was not alone; it was the way most oil business was done before the Arab countries acted in concert to drive home the point to the West that oil was not just another commodity – it was also a political weapon.

Western access to oil supplies, especially those of the Middle East, was one of the premier foreign policy interests during the Cold War years. Western and Eastern Europe were then worlds apart – Western oil economists could only talk in terms of the non-Communist World. The major ideological and political barriers between the two systems have since come down.

The big surprise is that this has now exposed a complex, stubborn web of institutional barriers which require painstaking dismantling and replacement. There are lessons here, as well as opportunities, for Australian lawyers involved in the energy industries.

As this book explains, the Energy Charter Treaty had its origins in the 1990 Lubbers Plan, named after the Dutch Prime Minister who took the early initiative. There were two main concerns: the first was to secure the long term energy needs of Western Europe, the second to assist the countries of Eastern Europe in their transition to market economies. Another important concern was environmental problems associated with energy supply which extended beyond national boundaries. The non-European members of the OECD were also invited to join the negotiations. By December 1991, the initiative had resulted in the signing of the (non-binding)

European Energy Charter and the commencement of negotiations on the Treaty itself – to implement the objectives of the Charter. The eventual signatories to the Treaty included almost all of the countries of Europe, all of the republics of the former Soviet Union, Japan and Australia. What was an European initiative thus evolved into a multilateral investment and trade treaty with implications well beyond Europe.

The book contains 27 contributed chapters on different aspects of the Treaty and its context. Together, they provide an authoritative analysis of the background to the Treaty, its geopolitical context, the negotiating process, the specific topics of the Treaty and describe the challenges involved in its interpretation and application. The appendices contain the major documents of relevance: the 1991 European Energy Charter, the 1994 Energy Charter Treaty and its protocols, annexes, understandings and final act declarations. The foreword is written by Mr Lubbers himself.

This book is of historical relevance in its exposition of the development of energy law and policy. It reveals how and why energy markets have become hostage to issues of energy security, energy politics and energy diplomacy. It is also a source of insight into many of the geopolitical and economic aspects of the broader process of globalisation of energy and other markets.

In his contribution to the Energy Charter Treaty, Mehmet Ogutcu predicts that, despite new discoveries in other regions, Western dependence on the Middle East will grow stronger over the coming decades. He also predicts that the Eurasian region around the Caspian Sea will become an energy

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exporting Super Power if (but only if) a secure network of pipelines can be developed to transport oil and gas to deep water ports for sale in world markets. He postulates that the Treaty the subject of this book may serve as an institutional and legal framework within which international cooperation can be fostered and problems can be arbitrated. One hopes he will be right but there is no doubting that painstaking efforts will need to be made before the aspirations underlying the Treaty can be realised.

The editor, Professor Thomas Wälde, recalls that the law of foreign investment has been subject to vigorous swings of the pendulum. With the advent of the Treaty, Wälde says the pendulum has swung back: liberalisation, privatisation, deregulation and national competitiveness are now the key paradigms of the currently dominant view in economic policy and legislation. I certainly agree but I see something more than a pendulum swing; in the increasingly globalised energy industry, most countries have become "makers" as well as "takers" of foreign investment and this poses new institutional challenges for law-and-policy-makers.

This Treaty signals a fundamental transformation in the law of foreign investment, not just for the energy industry.

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