A good number of publications have appeared recently on international investment law.\textsuperscript{1} The need to develop the legal doctrine in this field results from the rapid increase in the number of arbitral awards and the considerable challenges that the interpretation and application of investment protection standards generate. These challenges include the fragmentation of the sources of international investment law through different treaties.\textsuperscript{2} An arbitral tribunal interprets and applies the specific investment treaty applicable to the dispute. At the same time, however, the tribunal pays attention to the interpretation of similarly drafted clauses in previous awards. International investment law is therefore increasingly developing into a ‘treaty-overarching regime for international investments’.\textsuperscript{3}

In parallel with these developments, an increasing number of arbitral awards have in recent years been pronounced on the basis of the Energy Charter Treaty. In contrast to the traditional bilateral investment treaties, the Energy Charter Treaty establishes a multilateral framework for the protection


\textsuperscript{3} Ibid, at 499–500.
of investments in the energy sector. It complements the constellation of bilateral investment treaties existing between its contracting parties. Its investment protection standards and dispute resolution mechanisms are, to a large extent, comparable to the disciplines developed in bilateral investment treaties. The Energy Charter Treaty is therefore viewed as ‘an extension and further elaboration of efforts over the past 50 years to forge rules of international law to govern international investment’.4

Coop and Ribeiro’s book contributes to the legal doctrinal development of international investment law by analysing the ‘sector-specific’ investment protection regime of the Energy Charter Treaty. It focuses on the interpretation and application of the investment and dispute settlement provisions of this Treaty in recent awards and offers an analysis of these provisions in the light of the general arbitral ‘case law’.

Given the recent developments in this field, this book, together with Ribeiro’s first manuscript on this topic,5 offers a very useful complement to Wälde’s early analysis of the Energy Charter Treaty.6 Its timing can be considered as particularly apt. As mentioned in A Mernier’s introductory remarks (p xxxi), the last years have been particularly turbulent for the international energy markets. The drastic price spikes on the primary energy markets preceding the financial and economic crisis have brought host states to unilaterally review the conditions of large investments in the upstream sector.7 Moreover, huge investments are urgently needed to guarantee the long-term security of energy supply and, simultaneously, reorient the energy sector towards more climate-friendly patterns. The realisation of this potential ‘double dividend’ (to use A Palacio’s words, p. xxvii) will, given the capital intensity and long term nature of energy investments, depend on the ability of states to guarantee the stability and predictability of ‘the rules of the game’. It is therefore of particular interest to gain better knowledge of the substance of the investment and dispute resolution provisions of the Energy Charter Treaty in order to assess their potential contribution to these challenges. Furthermore, the publication of this book precedes the notification by the Russian Federation of its intention not to ratify the Energy


At first sight, Coop and Ribeiro’s book impresses by the quality of the contributors. The chapters are written by leading academicians and practitioners in investment law. However, the quality of the editorial work is disappointing. Although there are hints in the introductory remarks, the reader must wait until page 17 (footnote 2 of chapter 1, part II) to understand that the book is based on presentations given at the conference on Investment Protection and the Energy Charter Treaty organised by the Energy Charter Secretariat, the Arbitration Institute of the Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes in Washington on 18 May 2007. Moreover, a lack of rigour in the footnotes strikes the eye of the reader throughout the book. Furthermore, the logic underlying the structure of the book is not entirely clear to the present reviewer. Following introductory remarks (A Palacio, A Mernier, U Franke and A Houtman) and an overview of the negotiation history of the Energy Charter Treaty (C Bamberger), Chapter 1 deals with the dispute resolution mechanisms of the Treaty. It includes a general analysis of the access to dispute resolution (J Blanch, A Moody and N Lawn), as well as of the more specific issue of denial of benefits (S Jagusch and A Sinclair) and the provisional application of the Treaty (M Reisman). Chapter 2 analyses some ‘selected standards of treatment available under the Energy Charter Treaty’. It focuses in particular on the fair and equitable treatment (C Schreuer), the most favored nation treatment (P Friedland) and the arbitration of tax disputes (W Park). Friedland’s analysis of the most favored nation treatment examines whether investors may apply this clause to import more favorable dispute resolution clauses from another treaty. This part touches upon jurisdictional issues. It can therefore be questioned whether it is appropriate to include it in Chapter 2 on (substantive) investor protection standards rather than in Chapter 1 that deals with (the jurisdictional aspects of) dispute resolution. Chapter 3 is, rather strangely, entitled ‘questions and observations: interactive session’. It covers an analysis of the protection of
corporate acquisitions (T Wälde and W Ben Hamida), besides an overview of the ‘fork-in-the-road’ provision of the Energy Charter Treaty (E Gaillard) and a reviews of the reasons underlying the United States’ refusal to sign the Energy Charter Treaty (E Gaillard). Given the fact that the ‘fork-in-the-road’ provision affects the access to dispute resolution, it is difficult to understand why this topic has not been included in Chapter 1. In any event, it is unclear how this topic relates to the protection of corporate acquisitions and the United States’ refusal to sign the Energy Charter Treaty. Chapter 4 discusses ‘the interplay of the Energy Charter Treaty with other treaties’. In particular, it examines the role of the Energy Charter Treaty in the context of the energy dialogue between the European Union and Russia (K Hobér), as well as an overview of key contrasts between the Energy Charter Treaty and the investment treaties of the United States (A Menaker and H Van Slooten Walsh). Reflections on the future of the Energy Charter Treaty conclude the book (G Coop).

The first part of Chapter 1 provides an overview of the main issues related to the access to the investor-state dispute resolution mechanism of the Energy Charter Treaty. It does not discuss all the relevant literature on this topic but nevertheless provides a useful background for the discussion in the following chapters. The second part digs into the jurisdictional obstacle of ‘denial of benefits’ which might confront investors from third states (that is, non-contracting parties) that do not have substantial business activities in a contracting party. It describes the application of this clause in the Plama\(^9\) and Petrobart\(^10\) cases and offers a comparative approach by discussing denial of benefits clauses in the investment treaties concluded by the United States. The authors focus on the prior notification by the host state of the application of these clauses and the impact of this on the legal certainty and predictability of host states’ investment climates. The third part of Chapter 1 proposes an interpretation of the ‘provisional application’ clause of the Energy Charter Treaty. This issue is of central importance for those foreign investors that entered Russia after its signature of the Energy Charter Treaty but before it notified of its intention not to ratify the Treaty. The interpretation of the provisional application clause of the Energy Charter Treaty lies at the centre of the claims initiated by foreign investors in Yukos.\(^11\)

\(^9\) Plama Consortium Ltd v Republic of Bulgaria, Decision on Jurisdiction of 8 February 2005.
\(^10\) Petrobart Ltd v The Kyrgyz Republic, Award of 29 March 2005.
constitution, laws or regulations’. In addition, ‘any signatory party may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application’ (Article 45, para 2 of the Energy Charter Treaty). To Reisman, these provisions mean that the only time at which a signatory party can exercise the right to be exempted from the provisional application of the Treaty is at the moment of signature (p 54). Moreover, this right can only be exercised if the party is not able to apply the Treaty provisionally because of its domestic legislation. It does not give a signatory ‘an absolute and legally unqualified discretion to decide that it does not want to assume the obligations of provision application of the ECT’ (p 56). Reisman concludes that this provision does not allow ‘a signatory party, which has not exercised the option of making a declaration at (…) the moment of signing, subsequently to invoke “its constitution, laws or regulations”, on the ground that it is not able to comply, as a justification for and defense of dishonoring all or some part of its commitment to apply the Treaty provisionally’ (p 54). The implications of this interpretation are far-reaching. It would mean that any signatory state (for example the Russian Federation), not having notified of its inability to comply with provisional application at the moment of signature of signing the Energy Charter Treaty, would be bound by the obligations of the Treaty even if this provisional application conflicts with its domestic legislation. Reisman justifies this interpretation by referring to the interpretative rules of Article 31 of the Vienna Convention on the Law of the Treaties and by referring to the necessity to guarantee legal certainty for investors. For Reisman, ‘investors (…) must be able to determine whether they can rely on the ECT’s protections and benefits with respect to each signatory’ (p 58). Reisman’s interpretation appears, at least to some extent, to conflict with the approach adopted by the Ioannis Kardassopoulos arbitral tribunal. This tribunal considered that a ‘declaration (…) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State’s domestic law; there may be other reasons which prompt a State to make such a declaration. Equally, a State whose situation is characterized by such inconsistency is entitled to rely on the proviso to [para 1 of Article 45 of the ECT] without the need to make, in addition, a declaration’.

Chapter 2 begins with an excellent analysis of the fair and equitable treatment in light of the other protection standards of the Energy Charter Treaty. In this part, Schreuer argues that, although some arbitral tribunals have found it unnecessary to distinguish the fair and equitable treatment standard from other standards, ‘the better view is that these standards,

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12 Ioannis Kardassopoulos v Georgia, Decision on Jurisdiction of 6 July 2007, para 228.
though related, are separate and autonomous’ (p. 100). The Plama tribunal refers to Schreuer’s analysis in its interpretation of the investment protection standards of the Energy Charter Treaty. The second part of chapter 2 proposes an interpretation of the most favored nation clause of the Energy Charter Treaty on the basis of the general arbitral ‘case law’. The question whether investors may use the most favored nation clause to broaden the jurisdiction of arbitral awards is a much debated issue. It is especially relevant for investors in countries (for example the Russian Federation) that, in some of their bilateral investment treaties, have limited the scope of arbitration to specific investment standards. However, the relevance of such analysis in relation to the Energy Charter Treaty is limited because this Treaty confers on investors’ broad protection standards and dispute resolution clauses. Friedland focuses on the nature of the benefits sought when applying most favored nations clauses. He distinguishes benefits concerning the ‘admissibility’ of claims (that is, the pre-conditions to the access to international arbitration), on the one hand, and benefits concerning ‘jurisdiction’ (that is, the designation of a forum or the nature of the claims subject to jurisdiction), on the other hand (p 110). Friedland argues, on the basis of the arbitral awards that he reviews, that the coverage of most favored nation clauses would apply in the former case. This means that investors could use such clauses to reduce or avoid waiting periods or the requirement of submission to local courts for a certain period of time (p 109). Recent awards, however, have not followed this interpretation. Indeed, the Wintershall tribunal considered that ‘even “procedural obstacles” can be so worded as to render them “jurisdictional”’. According to the tribunal, in casu, the requirement of recourse to local courts is ‘fundamentally a jurisdictional clause, not a mere procedural provision’. It can therefore only be dispensed when the text of the most favored nation clause ‘permits the interpreter to conclude that this was the clear and unambiguous intention of the Contracting Parties.’

Wälde and Ben Hamida’s contribution in Chapter 3 also touches upon a very real issue: the ‘justiciability of pre-investment claims’ and the protection of corporate acquisitions under the Energy Charter Treaty. This analysis first

14 Wintershall Aktiengesellschaft v Argentine Republic, Award of 8 December 2008, para 143.

See also the Separate Opinion of C Brewer in Renta 4 S.V.S.A and Others v The Russian Federation, Award on Preliminary Objections of 20 March 2009, considering that ‘[w]hile, on the one hand, there is no reason to differentiate between admissibility-related aspects of accessing investor-State arbitration and matters of jurisdiction, there equally is little merit in distinguishing between matters of substantive investment protection and the enforcement of these rights through investor-State dispute settlement.’
15 Wintershall Aktiengesellschaft v Argentine Republic, para 172.
looks at acquisitions within the European Union. It therefore contributes to
the acute debate concerning the application of bilateral investment treaties
among Member States of the European Union. Moreover, it examines
acquisition attempts of non-European companies targeting companies
within the European Union. This analysis is very useful in the context of the
European political and legal developments against the penetration of foreign
energy conglomerates in the internal market. These conclusions are also
particularly relevant in the context of Russia’s recent notification of its intent
not to ratify the Energy Charter Treaty. Indeed, Wälde and Ben Hamida’s
work helps to highlight the use that Russian companies could have made
of the investment regime of the Treaty to pursue their corporate strategy in
the European Union. In this respect, they stress the ambivalent position of
the European Commission by arguing that ‘[the] at present rather skeptical
view of the EU Commission towards investment treaty protection is likely
to sharpen once countries such as Russia and other petroleum producers
appreciate the benefit they could draw from the ECT in terms of access to EU
ergy investments and, subsequently, protection against regulatory action’
(p 205). In the second part of Chapter 4, Gaillard discusses the reasons why
the United States declined to sign the Energy Charter Treaty and so offers
an interesting complement to Fox’s chapter on ‘The United States and the
Energy Charter Treaty: Misgivings and Misperceptions’ in an earlier volume
edited by Wälde on the Treaty. Interestingly, Gaillard highlights that the
investment standards of the Energy Charter Treaty were viewed by the United
States as ‘unacceptably low’ (p 230). In his view, the United States ‘felt that
its investors would be sufficiently protected by the many bilateral investment
treaties that had been signed or were in the process of being negotiated
with many of the FSU States’ (p 230). Gaillard argues that ‘the passage of
time has proven the United States’ rejection of the Energy Charter Treaty to
have been extremely short-sighted’ (p 232). Indeed, as he notes, the United
States did not end up concluding bilateral investment treaties with many of
the former Soviet Union states that have ratified the Energy Charter Treaty.
Moreover, Russia never ratified its bilateral investment treaty with the United
States (p 233).

The second part of Chapter 4 supplements Gaillard’s analysis by comparing
the investment regime of the Energy Charter with the investment treaties of
the United States. Menaker and Van Slooten Walsh conclude their analysis

16 For a recent publication on this topic, see T Eilmansberger, ‘Bilateral Investment Trea-
17 W Fox, ‘The United States and the Energy Charter Treaty: Misgivings and Mispercep-
tions’, T Wälde (ed), The Energy Charter Treaty – An East-West Gateway for Investment and
by defending the view that ‘States considering acceding to the ECT should consider carefully whether and to what extent the ECT’s distinct provisions differ from those in a State’s existing investment treaties’ (p 318). This conclusion appears to be particularly relevant in the context of Russia’s refusal to ratify the Energy Charter Treaty. Indeed, this refusal could among other reasons be explained by Russia’s (mis)perceptions of the investment regime of the Treaty.18 In the first part of Chapter 4, Hobér provides a very interesting analysis of the role of the Energy Charter Treaty in the energy relation between the European Union and the Russian Federation. This chapter does not however discuss in detail the specifics of the investment treaties signed by the Russian Federation. As highlighted in the different arbitral awards involving the Russian Federation19, some of these bilateral investment treaties are characterized by very limited dispute resolution clauses.

In the concluding chapter of Coop and Ribeiro’s book, Coop argues that ‘[d]espite several invitations from other member states to do so, Russia has not yet tabled or made public the amendments which it would like to see adopted. In these circumstances, one can legitimately wonder whether the call for amendments is based upon a misunderstanding of – or even on misinformation about – the ECT’ (p 321). However, by failing to discuss the Russian approach to investment protection (and in particular the Russian position on the investment regime of the Energy Charter Treaty), Coop and Ribeiro’s book fails to bridge the existing gap between the Russian Federation and the members of the Energy Charter.

Anatole Boute
Groningen Centre of Energy Law

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