The PTA Charter on Multinational Industrial Enterprises

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Since its establishment a decade ago, the Preferential Trade Area of Eastern and Southern African States has been formulating organizational structures designed to enhance regional integration and accelerate economic growth. As part of this process, the member States of the Preferential Trade Area recently adopted the Charter on Multinational Industrial Enterprises which seeks, among other things, to encourage indigenous enterprise and promote foreign investment. The particular provisions of the Charter regime address various technical questions on the formation and structure of regionally owned companies in Eastern and Southern Africa, and contemplate a number of benefits and guarantees for such companies. This article provides a legal analysis of the Charter, and considers the likelihood that the Charter regime will receive the requisite number of State ratifications for entry into force. In addition, bearing in mind that the regime is not yet in force, some attention is given to the main difficulties to be overcome and the prospects for full implementation by member States.

Introduction

As conceived by the Preferential Trade Area for Eastern and Southern African States (the PTA), a Multinational Industrial Enterprise (MIE) is a limited liability company which derives its legal personality not from the law of any one country, but rather from the members of PTA as a group. In effect, therefore, an MIE is a regional company and, as such, it has the right to establish branches and subsidiaries within all States which participate in the regime. Also, as the name implies, MIEs can operate in the industries of the individual PTA economies, though the understanding is that the term "indus-

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try" is to be interpreted broadly to embrace such areas as the creation of infrastructure and the provision of services. Irrespective of the particular form of activity undertaken by an individual MIE, it will, as a matter of law, be treated as a business enterprise without the right to plead sovereign immunity in judicial proceedings; it may, in other words, sue and be sued in a court of law.

The basic document setting out the main features of the regime is the Charter on Multinational Industrial Enterprises,[1] adopted by the PTA Authority on 23 November 1990 at its Ninth Summit in Mbabane, Swaziland. At that meeting, almost all delegations signed the Charter[2] and, quite significantly, none of the State representatives present voiced disapproval or reservations with respect to any aspects of the text. The Charter, which consists of 28 substantive articles, seeks to provide definitive guidance on a fairly broad range of issues. For the purposes of exposition, however, the text may be divided into three general areas:

- provisions relating to the form, establishment and scope of application of MIEs;
- provisions concerning the benefits guarantees and obligations which are attached to entities with MIE status; and
- rules concerning the institutional and technical framework in which the Charter is to operate.

Before examining the text of the Charter it may be useful to consider, in brief outline, the general context in which the MIE regime will operate when it enters into force.

The general context

Although there are now 18 member States of the PTA, the community is still in the process of establishing organizational forms and structures designed to enhance regional integration and ultimately accelerate the pace of economic growth among its members.[3] Thus, since the entry into force of the constitutive PTA Treaty on 30 September 1982, member States have

[1] The full title of the document is the Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States (see *International Legal Materials*).

[2] Angola, Burundi, Djibouti, Kenya, Lesotho, Malawi, Mozambique, Rwanda, Somalia, Sudan, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.

[3] See The Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States (the PTA Treaty), especially article 3. For a general overview, see Sinare (1989).

reached some agreement on such issues as the gradual liberalization of trade within the subregion[4] systematic cooperation in matters pertaining to customs control[5] and the development of transit trade facilities to and from land-locked countries in Eastern and Southern Africa.[6] Similarly, in the area of finance and financial services, member States have established the PTA Bank and a clearing-house for the settlement of subregional transactions[7] while, with regard to agriculture, emphasis has been placed on cooperation in such areas as research and the exchange of technical information. Not all aspects of the PTA scheme have developed at a rapid pace, but this hardly casts a negative reflection on the member States; on the contrary, if anything, it suggests that particular rules and regulations have been adopted only after careful consideration and debate. This judicious approach also characterized the discussions on the formulation of the Charter on MIEs and, indeed, helps to explain why an earlier text of the Charter, prepared in 1988, was deemed unacceptable by the PTA Council of Ministers at its thirteenth meeting in Arusha, the United Republic of Tanzania (PTA, 1988, paras. 217-220).

Another general issue which should be mentioned from the outset concerns the relationship between the proposed Charter on MIEs and foreign investment codes currently in force in individual PTA States. It is trite knowledge that the past decade has witnessed a marked liberalization of foreign investment regimes not only among members of the subregion, but, more generally, throughout Africa and other parts of the developing world (UNCTC, 1990, pp. 13-18; UNCTC, 1988a, chapter XVII). In the particular context of the PTA, liberalization has manifested itself, for instance, in the removal of restrictions on access to domestic economic sectors for foreigners, the relaxation of equity limitations on foreign direct investment and in the relaxation of regimes on repatriation of profits and capital for investors. Among other things, several PTA States have also introduced relatively liberal incentive

[4] See, for instance, the PTA Treaty, annex 1, Protocol on the Reduction and Elimination of Trade Barriers on Selected Commodities to be Traded within the Preferential Trade Area.

[5] See the Treaty, annex II, Protocol relating to Customs Cooperation within the Preferential Trade Area for Eastern and Southern African States.

[6] See the Treaty, annex V, Protocol on Transit Trade and Transit Facilities. For general discussions on the transit problems faced by land-locked States, see Sinjela (1983) and Vasciannie (1990, chapters 7 and 8).

[7] In 1984, the year when it became operational, the PTA clearing-house handled only approximately 8 per cent of total intra-PTA trade; today, it handles "well over 50 per cent" of the trade. See Nomvete (1990, p. 8).

regimes, embarked upon privatization and divestment programmes and introduced institutional reforms intended to simplify foreign investment procedures. Against this background, the question arises whether it is actually necessary to establish MIEs for the promotion of investment in the subregion.

As far as objectives are concerned, there is certainly a distinct area of convergence between the MIE regime and the investment codes of individual PTA States. Thus, for instance, on the assumption that foreign investment will, *inter alia*, generate foreign exchange revenues and enhance employment opportunities in the subregion, such investment will naturally be encouraged under the MIE and other regimes. [8] However, a careful reading of the Charter suggests that the *raison d'être* of the MIE scheme does not lie within the realm of foreign investment promotion; instead, as is implied in the preamble to the text,[9] the main hope is that the Charter will encourage the development of indigenous entrepreneurial resources and expertise in the PTA subregion. The emphasis on local enterprise is also evident in article 5 of the Charter, which stipulates in part that, for an enterprise to gain MIE status, nationals of PTA States parties to the Charter must contribute at least 51 per cent of the capital of the enterprise. Obviously, this rather stringent condition does not preclude non-PTA nationals from holding a substantial minority share in the capital of an MIE; however, it does underscore the point that foreign investment promotion is not the fundamental objective of the regime and, consequently, suggests that the regime will not be rendered superfluous by the prevalence of liberal investment codes among the PTA States.

The coexistence of the Charter and national investment codes also calls to mind the issue of whether an increased liberalization of investment regimes actually stimulates capital flows into developing countries. The debate on this point is as yet inconclusive, but there are respectable arguments to the effect that legislative changes in favour of foreign investment have no more than a weak impact on investment growth (UNCTC, 1991). And, if such is the case, then surely it cannot be assumed that the investment plans of local entrepreneurs will be influenced significantly by the Charter on MIEs; on the contrary, it can be expected that local investors will pay careful attention to such factors as the market size, infrastructure and rate of return in individual PTA economies before they give serious thought to

[8] See, for example, the Charter of MIEs, articles 2 (*e*), (*j*) and (*l*).

[9] Specifically, preambular para. 4.

entering into the MIE scheme. Yet this is hardly to suggest that the MIE Charter is an exercise in futility. The document lays down a fairly elaborate body of rules which seek to create favourable conditions for investment in the subregion. It may not be sufficient to stimulate capital growth on its own, but it reduces impediments to such growth and provides the opportunity for businessmen to establish firms on a regional rather than a national basis. In addition, the very existence of the Charter gives a clear indication of the hospitable attitude of PTA Governments, as a group, to private enterprise—a fact of no small importance to entrepreneurs in the subregion.

Form, structure and establishment

As has already been noted, the MIE is a limited liability company[10] with the right to establish branches and subsidiaries[11] and with the potential to operate in all industries.[12] In keeping with elementary company law rules, therefore, the capital of an MIE is divided into shares and, in the event of bankruptcy or related proceedings, the liability of individual shareholders for the debts and obligations of the enterprise is limited to the value remaining unpaid on the shares subscribed by each shareholder.[13] Capital contributions to the enterprise may be in the form of national or convertible currencies, the UAPTA,[14] or in corporeal or incorporeal property,[15] and all shares in the company enjoy equal voting rights.[16] It is also envisaged that MIEs may be formed by the Governments of member States, individual nationals of member States or by companies, with provision being made for the possibility that pre-existing MIEs may wish to establish new enterprises either through the creation of joint subsidiaries or by merging.[17]

[10] Charter, article 3.

[11] Article 3.

[12] Article 4(1).

[13] Article 3(2).

[14] The UAPTA is the Unit of Account of the PTA.

[15] Charter, article 7(3).

[16] Article 8(1).

[17] Article 6. In determining the nationality of individuals wishing to form a multinational industrial enterprise, reference is to be made to the laws of the respective PTA States; but, in instances of dual nationality, each individual will be deemed to be a national of the State in which he or she "normally exercises civil and political rights". In view of the general approach taken by the International Court of Justice in the case of *The Barcelona Traction, Light and Power Company, Limited* (I.C.J. Reports 1970, p.3), it is implicitly assumed in the Charter that the nationality of companies wishing to form an MIE can always be objectively determined.

While the preceding rules are straightforward and uncontroversial, two matters pertaining to structure and establishment deserve particular attention. In the first place, questions will almost certainly arise about the relationship between the Charter regime and the national law (and especially the national company law) in individual member States. On this point, the Charter adopts what may broadly be described as a minimalist approach: thus, it stipulates that each MIE derives its legal personality from the Charter itself,[18] but it specifies only a limited number of ground rules concerning the administrative and procedural matters which will need to be observed in the establishment and operation of MIEs. The expectation here is that, where the Charter does not provide a rule concerning the establishment or operation of MIEs, then the individual member States will be at liberty to adopt their own provisions. Still in this regard, the Charter also anticipates that the Council of Ministers for the Charter (see section on Institutional and technical provisions) may, at some time in the future, adopt protocols governing such matters as the establishment, operation, winding-up, liquidation and insolvency of MIEs;[19] until this is done, however, the relevant rules of national company law in each PTA member State apply to MIEs created in the territory of that State. Of course, where the Charter does specify a rule, it is envisaged that this rule prevails *vis-à-vis* pertinent rules of national law.[20]

The other "establishment" issue requiring special attention concerns the conditions for the formation of an MIE, set out in article 5 of the Charter. It is evident that considerable effort has been made to lay down fairly demanding requirements with respect to the circumstances under which a company may qualify for MIE status. Thus, among other things, the company must have at least 51 per cent of its equity held by member States or their nationals, the capital contribution derived from any one source must not exceed 80 per cent of the equity and each contributor to the enterprise must hold at least 10 per cent of the equity. Those rules are designed to ensure not only that real control of the enterprise rests among member States and their nationals[21] but

[18] Article 3(4).

[19] Article 4(2).

[20] Whether this takes place through the automatic application of law will depend on the relationship between international and municipal law prevailing in the individual PTA States. Perhaps in all cases, however, where a member State ratifies the Charter, it will take steps to give effect to the MIE regime through domestic legislation.

[21] It is, of course, well established that control is not always directly correlated with majority ownership of equity; from the extensive literature on this point see, for example, Asante (1979) and Freidmann and Beguin (1971, pp. 364 *ff.*). In a modest attempt to link ownership and control, the Charter requires that all MIE shares enjoy equal voting rights and imposes reporting requirements on share ownership and directorships.

also that no single State or national exercises heavily disproportionate control over the operations of what is intended to be a regional entity. The rules assume special importance when it is noted that, once an enterprise achieves MIE status, it is entitled to a range of special benefits and incentives (see section on Rights and duties of MIEs): to ensure that PTA nationals and member States are the primary beneficiaries of the regime, it will be necessary for the conditions specified in article 5 to be strictly applied.

Rights and duties of MIEs

The second category of rules specified in the Charter is that which covers the benefits and guarantees to be accorded to MIEs and, conversely, the obligations to be incurred by these companies. As regards benefits and guarantees, the importance of the relevant provisions of the Charter cannot be overemphasized, for surely there is little point in establishing a fairly elaborate regional structure if private investors and States are not induced to form companies under the regime.

The particular incentives to be created for individual MIEs, as specified in article 15, include the rights, after payment of taxes, to remit royalties and other payments for the use or adoption of foreign technology, to remit funds for the repayment of intra-company advances and third-party loans, and to remit all dividends due to foreign shareholders. Likewise, foreign employees of MIEs have the right to repatriate their salaries, while each MIE is assured of equality of treatment with local companies in matters pertaining to taxation, government procurement programmes and access to local credit. Perhaps more controversially, in certain circumstances, MIEs are eligible for exemptions from import duties on capital equipment and intermediate inputs acquired from foreign countries and, during the first five years of income-earning activity, each MIE is fully exempt from the payment of taxes on income. It should also be noted that, while member States may introduce administrative requirements to monitor the effects of those rights, they are required, as a matter of law, to grant the whole range of incentives in the Charter to MIEs operating in their territories; in that sense, the benefits to MIEs contemplated in the Charter are non-derogable rights.

Closely related to the scheme of benefits are the guarantees which are to be granted to individual MIEs by the participating States. Specifically, the two guarantees incorporated into the text are that the benefits conferred on

each MIE cannot be modified without the consent of the MIE,[22] and that, where an MIE is nationalized or expropriated, the State has to pay compensation to the company "in accordance with generally accepted rules of International Law".[23] In view of the extended debate which has taken place between Governments of Western States and the Group of 77 concerning appropriate standards of compensation in cases of nationalized or expropriated foreign property (Brownlie, 1990, pp. 531-545; Asante, 1988, p. 588; Jiménez de Aréchaga, 1978; and UNCTC, 1988b, pp. 78-84).[24] The adoption of the latter provision by the PTA States may be of considerable significance. For, contrary to the view that questions in this area should be regulated by municipal law, the position taken in the Charter implies that a number of influential developing countries are now prepared, as a group, to accept internationally determined standards of compensation. However, this is not necessarily to suggest that the PTA States accept the Western contention that customary international law accords with the Hull formula of "prompt, adequate and effective" compensation. Rather, the formulation in the Charter carefully leaves open the issue of what is required by the *lex generalis*, and, in so doing, it allows PTA States to argue that international law requires compensation in accordance with a standard other than that advocated by the major capital exporting countries (Robinson, 1986; Vagts, 1986). In addition, the value of this formulation as a precedent supporting the international minimum standard of treatment for foreign property may be circumscribed by the fact that majority ownership of companies in the MIE scheme will be in the hands of subregional entrepreneurs; in at least some instances, nationalization of expropriation of an MIE would not be a taking of foreign property *strictu sensu*.[25]

With regard to the obligations of each MIE, the Charter seeks to preserve basic State interests without fettering entrepreneurial initiative. Among other things, it requires individual MIEs gradually to increase local value added, to produce goods at competitive prices, to undertake a programme of exports and, as far as is feasible, to provide training for employees.[26] It also requires MIEs to provide financial and other information on

[22] Article 16 (2).

[23] Article 16 (1).

[24] See also General Assembly resolutions 1803 (XVII), 3171 (XXVIII) and 3281 (XXIX); *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic*, *International Legal Materials*, vol. 17 (1978), p. 1.

[25] Naturally, this argument would not apply with full force where the MIE is partly foreign-owned.

[26] Article 17(1).

operations and share ownership on a regular basis and specifies that MIEs shall refrain from certain restrictive business practices.[27] Such obligations, together with the benefits enshrined in the Charter, are to be incorporated into Performance Agreements between each MIE and the Government of its host State ("the Country of Establishment"), with the understanding that the latter will monitor MIE operations both through those agreements and by virtue of national regulatory competence. Given their broadly unexceptional character, these provisions are not likely to create controversy in the future.

The same cannot safely be said, however, about article 19 of the text, which establishes a Special Development Tax for the benefit of less developed member States of the PTA. This provision stipulates that, where an MIE is located in a "more developed member State", it shall, after its fifth year of income-earning operations, pay a tax equivalent to 1 per cent of its gross revenues for the benefit of the less developed PTA countries. The rationale for this novel rule is twofold. First, in accordance with specific instructions from the PTA Council, the tax is a modest attempt to take into account the special economic needs of the less developed countries in the subregion (PTA, 1989, annex IX, point 1 (*j*), p. 1). Secondly, given that the more developed countries are likely to have more attractive infrastructure, capital markets and technology than their less developed counterparts, there is every likelihood that MIEs will be drawn more readily to the former than the latter group of countries. Article 19 seeks to redress that imbalance by requiring a small transfer of the proceeds from MIE operations to the less developed States. No doubt, the provision raises difficult questions about the criteria for identifying "more" and "less" developed countries in the general context of regional underdevelopment, but, as the PTA Council has undertaken to consider that issue in the near future, it is not likely to block the effective implementation of the Charter.

Institutional and technical provisions

Generally speaking, the main provisions which fall into this class embrace rules concerning matters such as amendments to the Charter, protocols, entry into force and ratification.[28] As most of these rules conform with fairly standard treaty practice and raise no immediately apparent problems of interpretation, they need not be given detailed consideration here.

[27] Ibid.

[28] Articles 25 and 26.

However, two particular matters, namely, dispute settlement and the Council of Ministers for the Charter (the MIE Council), are worthy of comment. As regards the former, the text adopts a two-pronged approach: a dispute between an MIE and its host State is to be settled ultimately by an arbitral tribunal with members appointed by the parties to the dispute, while disputes between member States concerning the interpretation and application of the Charter shall be resolved by appointees of the Chairman of the MIE Council.[29] This approach affirms the willingness of the PTA States to have Charter issues resolved at the international level and, especially in the case of inter-State disputes, it should help create an atmosphere of impartiality in the resolution of technical problems.

With respect to the MIE Council, the point to be emphasized is that this body is not intended to challenge or usurp the authority of the Council of Ministers of the PTA established in the constituent treaty of the subregional organization. Instead, the MIE Council acts primarily as a monitoring and implementing body on matters pertaining only to the Charter regime. The need for such a Council arises because, at least in the early stages of the regime, not all PTA States will have ratified the Charter; as it would be rather unorthodox for non-ratifying States to be in a position to make determinative policy decisions concerning the regime, it is necessary to create a policy organ which has its membership limited to parties to the Charter. In addition to its monitoring functions, the Council will be expected to make recommendations to member States on the interpretation of the Charter and, from time to time, propose amendments or protocols designed to strengthen the efficacy of the overall regime.[30]

Prospects

Although the MIE Charter has been formally adopted by the PTA Authority and signed by 14 Heads of State or their representatives, it would be premature to say with assurance that the regime will enter into force in the imminent future. To be sure, adoption of the text implies at least that, in the view of the individual States concerned, the drafting of the document is regarded as acceptable; and, by virtue of the Vienna Convention on the Law of Treaties, signature commits the respective States to refrain from actions that are inconsistent with the "object and purpose" of the Charter (United

[29] Articles 23 and 24, respectively.

[30] Article 22.

Nations, 1969, article 18). To be fully bound, however, each State will have to ratify the document; when nine ratifications have been deposited with the Secretary-General of the PTA, the Charter will enter into force.[31]

While there can be no certainty on this point, a number of factors augur well for early entry into force. These are reviewed below, together with certain considerations which could conceivably delay early implementation.

Initially, it is important to recall that the basic idea concerning the implementation of a Charter of MIEs has its origin in the constituent Treaty of the PTA itself. More specifically, article 4 of Annex VIII of that Treaty records the agreement of member States to promote and encourage the establishment of MIEs, and mandates those States to formulate specific rules and conditions for MIE operations. Therefore, unless and until member States amend the PTA Treaty on that point, they are legally bound to implement an MIE regime at some time in the future. Against this background, and bearing in mind that they have now adopted a full text, some States may reasonably take the view that there is little point in delaying the entry into force of the regime in the form set out in the Charter. Some support for this viewpoint may be derived from the rejection of the earlier version of the Charter in 1988. On that occasion, the PTA Council of Ministers indicated that parts of the text were vaguely worded and stressed the need for the Charter to provide substantial and non-derogable benefits to enterprises which participate in the scheme (PTA, 1988, paras. 217-220). In effect, the Council's position was that the Charter did not fulfil the mandate specified in the PTA Treaty and, for this reason, it was not adopted; adoption of the text in 1990, therefore, suggests that the present version satisfies the expectations outlined in the PTA Treaty and, if such is the case, the Charter may prove to be broadly acceptable.

Other aspects of the Charter's history bolster this position. In particular, the current version of the regime has been subjected to detailed scrutiny by government officials at various levels; a study team of PTA lawyers and economists prepared detailed terms of reference for the draftsman (PTA, 1988, para. 293) and the text was considered in turn by a special study team on the Charter (PTA, 1990), the Committee of Legal Experts of the PTA (PTA Secretariat, 1990a, paras. 93-96), the PTA Commission (PTA,1990b, paras. 265-267),[32] the Council of Ministers (PTA, 1990c, paras. 352-354),

[31] Charter, article 26.

[32] At this stage in the deliberations, one State reserved its position on adoption of the text, but that reservation was subsequently withdrawn.

and, finally, by the PTA Authority. At different stages, certain amendments to the text were introduced, but at each stage the document was eventually adopted by consensus. The result is that individual Governments may be hard-pressed to deny that they had ample opportunity to consider the Charter and to voice their opposition to particular provisions. Of course, acceptance of the text all throughout the decision-making procedure does not create binding obligations, but, politically, it appears to tip the balance in favour of early ratification of the text.

Nor does the case for early ratification rest solely upon history and background circumstances. In recent years, other regional organizations, most notably the European Community and CARICOM, have brought into force regimes on regional companies which are similar, in some respects, to that of the MIE. While this is not the place to embark upon a discussion of alternative regional approaches, a common theme is that these regimes are designed to encourage indigenous entrepreneurs (acting sometimes with transnational corporations and other foreign investors) to take advantage of economies of scale and market opportunities by pooling regional resources. Especially in the case of the European Community, there is a distinct possibility that large, integrated and highly efficient entities will emerge from the regional company scheme. In this context, the PTA States may see the need to accelerate the pace of implementation of the MIE regime in order to prompt the establishment of PTA-based firms that can retain at least a part of the eastern and southern African market in the face of growing competition.

On the other hand, in issues concerning regional co-operation, "the best laid schemes o'mice an' men gang aft agley"; and so, a note of caution concerning the prospects of the Charter may not be out of place. Even at this advanced stage, States may, for a variety of reasons, choose not to initiate steps towards ratification of the text in the near future. To begin with, individual States may not be prepared to undertake the financial obligation which could follow upon ratification; for example, they may be reluctant to provide infrastructural support to MIEs where that is necessary,[33] or some of their number may regard the regime's fiscal incentives as a questionable method of encouraging investment. And some countries may view the idea of the Special Development Tax as an undesirable precedent, while others may conclude that the machinery for monitoring the scheme or the requirement that disputes be settled on the international level are incompatible with

[33] Charter, article 11.

their notions of national sovereignty. Such responses to the Charter could hardly be described as idiosyncratic, for they related to well-known State concerns. In the view of the present writer, however, it would be unfortunate if they were to bar early entry into force of the Charter. Because the Charter represents a delicate balance of State interests and the interests of local and foreign capital, no single constituency will find it perfectly acceptable. States should keep this in mind as they ponder the fate of the text. ■

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