

CONCURRING AND DISSENTING OPINION

OF

JUDGE CHARLES N. BROWER

1. I concur fully with the Preliminary Award on Jurisdiction (“Award”), except for its finding¹ that “The Tribunal lacks jurisdiction over the dispute involving the Respondent and . . . AES Solar España Finance S.L., AES Solar España I B.V. y CIA S.C. and La Solana S.L. 1 to La Solana S.L. 60 (60 entities),” namely the 62 of the 88 Claimants that are incorporated in Spain but controlled by nationals of other Contracting Parties to the Energy Charter Treaty (“ECT”).

2. It must be remembered that Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”) requires primary attention, not just to “the ordinary meaning to be given to the terms of the treaty,” as the Award does in concentrating on the wording of Articles 1(7)(a)(ii), 26(1) and 26(7), but, more broadly, to such “terms . . . *in their context* and in light of its [the treaty’s] object and purpose.”² Unusually, the ECT states its purpose in Article 2, entitled “PURPOSE OF THE TREATY”:

This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.³

The ECT’s Preamble, which, as noted below, the VCLT expressly includes as “context,” is perhaps more illuminating. Thus this second recital in the Preamble to the ECT is to be noted: “Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991,”⁴ which was three years to the day before the actual signing of the ECT itself, which Concluding Document, under “TITLE II IMPLEMENTATION,” included among its bullet points “promotion and *protection* of investments.”⁵ Hence it is fair to conclude that one of the purposes and objects of the ECT was to provide legal protection for foreign investments.

¹ Award ¶ 375(b).

² Vienna Convention on the Law of Treaties, Art. 31(1), opened for signature May 23, 1969 (entered into force Jan. 27, 1980) 1155 U.N.T.S. 331 (emphasis added).

³ Energy Charter Treaty, Art. II, Lisbon, 17 December 1994, 2080 UNTS 95.

⁴ *Id.* (Preamble).

⁵ Concluding Document of the Hague Conference on the Energy Charter Treaty dated 17 Dec. 1991, Title II (emphasis added).

3. “Context” is defined in VCLT Article 31(2) as follows:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.⁶

4. It is to be regretted that the Tribunal was not presented by either of the Parties with, and doubtless for that reason the Award does not address, any of the context that exists outside the Treaty itself with respect to the ECT. I believe that it is particularly incumbent upon any tribunal to ensure that it neither exceeds its jurisdiction nor fails to assert a jurisdiction that it by rights should accept. Therefore I undertake to spell out here the publicly available context of the ECT. The definition of “context” in VCLT Article 31(2)(a) clearly includes the entire “Final Act of the European Energy Charter Conference,” which in its Part III “adopted the text of” the ECT (as Annex 1) and “Decisions with respect thereto” (as Annex 2), and in its Part IV “agreed to adopt [22] Understandings with respect to the Treaty.”⁷ Understanding 3, made “with respect to Article 1(6)” of the Treaty, concerns the meaning of “Investment” and is therefore especially relevant to Article 26(7) of the ECT.⁸ It reads:

For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor’s

- (a) financial interest, including equity interest, in the Investment;
- (b) ability to exercise substantial influence over the management and operation of the Investment; and
- (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

⁶ Vienna Convention, Art. 31(2).

⁷ Final Act of the European Energy Charter Conference dated 17 Dec. 1994, Parts III, IV. Commentators are in agreement that the Understandings “are relevant for the proper interpretation of the ECT’s provisions.” Crina Baltag, *The Energy Charter Treaty: The Notion of Investor*, International Arbitration Law Library, Vol. 25, at 20, fn. 94 (2012) (also citing Wälde who wrote “[a]n application of the ECT’s investment disciplines is not complete without consideration of the . . . ‘Understandings.’”).

⁸ Article 1(6) provides the definition of “Investment” under the Treaty.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

5. It is noteworthy that Understanding 3 nowhere mentions or even alludes to Article 26(7). Rather, it is of general application to the ECT. Surely it would have referenced Article 26(7) had this latter been understood as excluding foreign-controlled investors who are nationals of the host State from UNCITRAL and SCC arbitration. Its unrestricted, broad language is consistent only with such foreign-controlled investors having equal access to UNCITRAL, SCC and ICSID arbitration. Why else would there be an Understanding 3 of the widest possible scope if Article 26 did not contemplate jurisdiction over claims of companies incorporated in the host State but controlled by foreign nationals irrespective of whether arbitration was instituted under ICSID, UNCITRAL Rules or the SCC? Considering Understanding 3 as context for paragraph (7) of Article 26 confirms that the 62 foreign-controlled Claimants come within the Treaty's meaning of "Investor."

6. Indeed, this is consistent with how the late Professor Thomas Wälde, a specialist in the Energy Charter Treaty and author of several articles and books on the ECT,⁹ has explained Understanding 3:

a Treaty investor is either a natural person having nationality or permanent residence in a contracting party, or a company incorporated in a contracting party . . . [t]he investor needs to "control" the investment; [Understanding 3] recommends that all relevant factors should be considered, including equity, substantial influence and appointment powers.¹⁰

7. I cannot help but think that the interpretation of Article 26(7) by the Award produces a result which is indeed absurd.¹¹ My view has long been that proper application of Article 31 should endeavor to achieve a result that is not absurd, that the unreasonability of an interpretation potentially achieved in application of this Article alone should, if at all possible, be rejected in favor of one that is not absurd. That is a standard distinct from

⁹ A summary of Professor Wälde's CV and expertise in international investment and energy disputes is available at <http://www.transnational-dispute-management.com/about-author-a-z-profile.asp?key=6>.

¹⁰ Thomas Wälde, *International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors Within Western and Commonwealth of Independent States/Eastern European Countries*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* 251, 274 (Thomas Wälde ed., 1996).

¹¹ The most readily available dictionary source, www.dictionary.com, defines "absurd" as "utterly or obviously senseless, illogical, or untrue; contrary to reason or common sense; laughably foolish or false." It lists the origin of the word as "1550-60 Latin *absurdus* out of tune, uncouth, ridiculous".

Article 32's standard of "manifestly absurd or unreasonable."¹² In my opinion there is nothing whatsoever reasonable about a dispute settlement provision such as in the ECT discriminating among claimants as regards their access to arbitration under different sets of rules. It is of course a commonplace to say that each of the four sets of rules offered in the ECT has differences from the others. Each aspiring claimant must take the rules it chooses as they are. There is nothing in either the UNCITRAL Arbitration Rules, however, in either version, or in those of the Arbitration Institute of the Stockholm Chamber of Commerce that determines jurisdiction *ratione personae*. That instead is determined by bilateral or multilateral investment promotion and protection treaties such as the ECT. It defies common sense to think that the ECT, by expressly ensuring that the Article 25(2)(b) requirement of the ICSID Convention was met, implicitly intended to exclude from the same benefits those claimants who choose UNCITRAL or SCC Rules, thereby requiring them potentially to bring separate, parallel arbitrations, or abandon these proceedings and restart the process elsewhere. If it makes no sense, can it really have been intended? I think not.¹³ Curiously, what the Award says about the "Svalbard exception" would seem to dictate a contrary result:

It would be extraordinary that an essential component of the Treaty, such as investor-state arbitration, would not apply among a significant number of Contracting Parties without the Treaty drafters addressing this exception. In the Tribunal's view, it is irreconcilable with the ordinary meaning of the Treaty to read into it an implicit intra-EU disconnection clause.¹⁴

By the same token, how can it possibly be reconcilable with the ordinary meaning of the Treaty to disenfranchise wholly-owned Spanish subsidiaries of other Contracting State nationals if they choose the UNCITRAL Rules or the SCC Rules rather than the ICSID Convention and Rules?^{15 16}

¹² Below, in paragraph 10 of this opinion, however, I ultimately do take the position that the Award's conclusion following application of VCLT Article 31 is indeed "manifestly absurd or unreasonable."

¹³ The Award underscores in connection with its treatment of the Respondent's "aggregate proceedings" objection that the provision in ECT Article 26(3) that "each Contracting Party hereby gives its *unconditional* consent to the submission of a dispute to international arbitration" (subject to two exceptions not applicable here) is "significant" in the application of VCLT Article 31. Award ¶ 98 (emphasis added). It would seem to have no less significance for the interpretation of Article 26(7).

¹⁴ Award ¶ 183.

¹⁵ The Award at paragraph 280 disagrees with this point on the ground that whereas the Respondent here had argued for an "implicit intra-EU disconnection clause," the Article 26(7) issue is "precisely the opposite, as the Tribunal is faced with an explicit provision" and must determine the interpretive effect of it, if any, on the ECT, looking at the ECT as a whole. Just as the Award, in which I concur in this respect, cannot conclude from the "Svalbard exception" that the treaty drafters intended thereby to imply such a significant term as an intra-EU disconnection clause, so too, I cannot conclude that by insertion of paragraph (7) in Article 26 the drafters intended to compel all foreign-controlled claimants legally established in respondent States to proceed solely at

8. The Parties – actually only one, the Respondent – has offered but a single excerpt from the ECT’s *travaux préparatoires*, which I believe the Award has misconstrued. For the avoidance of doubt, let me be clear: I believe that the proper interpretation of Article 26(7) of the ECT, applying only Article 31, gives us jurisdiction of the 62 Claimants excluded by the Award. The Award itself rests on Article 31 alone, and would not have entered into any analysis under Article 32 of the VCLT but for the fact that Respondent did so and the Claimant responded. Since the Award has ventured there, I, too, must address the point since here, too, I think the Award is mistaken. To facilitate consideration of this point I insert here the entirety of the text set forth in Paragraph 272 of the Award:

This report responds to questions from the Japanese Delegation concerning Article [26]. The questions are set out separately below, followed by our answers.

[...]

1. Why are only the ICSID Convention and Additional Facility Rules referred to in this paragraph?

2. Interpretation and application of ICSID Convention, which is independent from the Treaty, cannot be decided unilaterally by the Treaty. Therefore, even if this paragraph (7) provides for definition of “National of another Contracting State”, the content of which is slightly different from that of Article 25(2) of ICSID Convention, it does not make sense legally.

3. However, we consider that the content of this provision is important for the protection and promotion of investment. Therefore, we would like to propose the following text:

“In case an Investor other than natural person which has made Investment in a Contracting Party is controlled by Investors of another Contracting Party on the date on which the former Investor makes a request to the former Contracting Party to submit the dispute to the conciliation or arbitration in

ICSID and bar them from any access to both the UNCITRAL Arbitration Rules and those of the Arbitration Institute of the Stockholm Chamber of Commerce.

¹⁶ Correct application of the VCLT has frequently been the object of my attention. See *HICEE B.V. v. Slovak Republic*, PCA Case 2009-11, Partial Award dated 23 May 2011; Dissenting Opinion of Judge Charles N. Brower dated 23 May 2011, *HICEE B.V. v. Slovak Republic*, PCA Case 2009-11; *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2012; Dissenting Opinion of Judge Charles N. Brower dated 15 Aug. 2012, *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1; *Austrian Airlines v. Slovak Republic*, Award dated 9 Oct. 2009; Separate Opinion of Charles N. Brower dated 9 Oct. 2009, *Austrian Airlines v. Slovak Republic*; *Renta 4 S.V.S.A. et al. v. Russian Federation*, Award on Preliminary Objections dated 20 Mar. 2009; Separate Opinion of Charles N. Brower dated 20 Mar. 2009, *Renta 4 S.V.S.A. et al. v. Russian Federation*; Charles N. Brower & Anke Meier, *The Unsound “Plama Principle” and Other Errors in Application of the Vienna Convention on the Law of Treaties*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2010* (Arthur W. Rovine ed. 2011); Charles N. Brower & Epaminontas E. Triantafyllou, *Three Cautionary Notes for Investor State Arbitrators on the Vienna Convention on the Law of Treaties*, in *ARBITRATORS’ INSIGHTS: ESSAYS IN HONOUR OF NEIL KAPLAN* (C. Bao & F. Lautenschlager eds. 2012).

accordance with the provisions of this Article, the former Investor shall be treated for the purpose of the provisions of this Article as an Investor of another Contracting Party.”

Comments:

As recognized, the issue pertains only to the ICSID and Additional Facility (AF) rules. Articles 25(2) of ICSID and 1(6) of the AF rules are special cases and paragraph (7) is specific to those Articles only. Paragraph (7) does not differ in any substantive way from the wording of either Article 25(2) of ICSID or Article 1(6) of the AF. We do not believe that the proposed language is needed.

Frankly, the thrust of the Japanese inquiry is not entirely clear. It is apparent from its Paragraph 2 that there was concern that “the content of [Article 26(7)] is slightly different from that of Article 25(2) of [the] ICSID Convention,” and that is what the “Comment” of the Legal Sub-Group of the treaty conference was dealing with when it recorded that “Paragraph (7) [of ECT Article 26] does not differ in any substantive way from the wording of either Article 25(2) of [the] ICSID [Convention] or Article 1(6) of the [Additional Facility of ICSID].” Beyond that, the cited exchange obscures more than it reveals. It is a very weak reed, if any, with which to support the conclusion to which the Award has come regarding the proper interpretation of ECT Article 26(7).

9. Actually, the Tribunal had before it the entirety of the Legal Sub-Group Report of 2 May 1994 addressing a total of six questions (A.-F.) posed by the Japanese Delegation regarding what became Article 27 of the ECT.¹⁷ It is evident that the Japanese effort was designed to plug perceived loopholes which the Delegation feared might result in unequal treatment of ECT Contracting States if not eliminated. Thus as a result of its Question A., directed to Article 27(5)(a), it succeeded in securing from the Legal Sub-Group what is now Article 27(5)(a)(iii), ensuring that the “written agreement” requirement of the UNCITRAL Rules is met, but was dissuaded from pursuing the same issue in respect of the SCC Rules, being advised that those Rules had no such requirement. With its Question B. the Japanese Delegation sought and received assurance that Article 26(5)(b)’s reference to the New York Convention, taken together with Article 26(8), should result in universal enforcement. Question C. posed by the Delegation clearly sought assurance that Article 26(6) of the ECT did not authorize arbitral tribunals to tinker unduly with the proper application of whichever of the four authorized sets of arbitral rules might be chosen by a claimant. The Delegation’s

¹⁷ Report of the Legal Sub-Group of the Energy Charter Conference dated 2 May 1994 (RL-30) (attached to this opinion as Annex A).

Question E. veered somewhat from the path of its earlier Questions (A.-D.), seeking confirmation that Article 26(8) would not require an ECT Contracting State with an already well-functioning, effective system for enforcing arbitral awards to “reinvent the wheel.” With its Question F. the Delegation sought, and received from the Legal Sub-Group, confirmation that the process of implementing the ECT was up to each Contracting State’s particular constitutional system, always respecting the rule of *pacta sunt servanda*. Seen in this context, one is justified in concluding that the Japanese Delegation’s inquiry regarding Article 26(7) was designed to ensure that correct language was being used to effect compliance with Article 25(2)(b) of the ICSID Convention (and the related provision of its Additional Facility). It was assured by the Legal Sub-Group that the language of Article 26(7) was adequate to that purpose, noting that ICSID and its Additional Facility are “special cases,” Paragraph (7) being “specific to those [ICSID Convention and Additional Facility] Articles only.” Therefore this lone fragment from the extensive *travaux préparatoires* falls far short, in my view, of establishing that the drafters of the ECT intended to legislate split access among the four arbitral alternatives.

10. If one indeed turns to VCLT Article 32, it provides as follows:

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.¹⁸

Thus “supplementary means” is rather open-ended, providing a non-exclusive list “including the preparatory work of the treaty and the circumstances of its conclusion.” The one fragment of the ECT’s “preparatory work” to which our attention has been drawn has been dealt with above. The open-ended character of “supplementary means,” as well as the specific reference to “the circumstances of [the ECT’s] conclusion,” appear to open the debate to consideration of the writings of those most intimately involved with the birth and the administration of the ECT. This is so whether one seeks, as I do, either to “confirm the meaning resulting from the application of article 31” as I see it, or, as I see it alternatively,

¹⁸ Vienna Convention, Art. 32.

“to determine the meaning when the interpretation according to article 31 . . . leads to a result which is manifestly absurd or unreasonable.”¹⁹

11. There is unanimity among the experts closest to the ECT that the interpretation given to ECT Article 26(7) is untenable. A survey of over 20 articles and chapters²⁰ demonstrates a universal understanding that paragraph (7) was included to ensure all investors have access to all arbitration options under the ECT. This interpretation is advanced in the work of leading scholars and experts in the field, including: Professor Thomas Wälde, who was a specialist in international investment law, an adviser to institutions in the oil and gas field, and editor of

¹⁹ This follows as well should one deem that the “determination according to article 31 . . . leaves the meaning ambiguous or obscure,” a result I also would find a tenable alternative to the Award’s negative ruling.

²⁰ The following sources of commentary on Article 26 and arbitration under the ECT were consulted in preparation of this dissenting opinion: CRINA BALTAG, *THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR*, International Arbitration Law Library, Vol. 25 (2012); THOMAS ROE & MATTHEW HAPPOLD, *SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY* (James Dingemans QC, consultant ed., 2011); Stanimir A. Alexandrov, *Renewed questions in ECT investment arbitration*, in *ENERGY DISPUTE RESOLUTION: INVESTMENT PROTECTION, TRANSIT AND THE ENERGY CHARTER TREATY 357* (Graham Coop and Clarisse Ribeiro eds., 2011); Stephen Jagusch & Jeffrey Sullivan, *Arbitration under the Energy Charter Treaty: recent decisions and a look to the future*, in *ENERGY DISPUTE RESOLUTION: INVESTMENT PROTECTION, TRANSIT AND THE ENERGY CHARTER TREATY 67* (Graham Coop & Clarisse Ribeiro eds., 2011); Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1(1) J INT. DISP. SETTLEMENT 153 (2010); Graham Coop, *Energy Charter Treaty and the European Union: Is Conflict Inevitable?*, 27 J. ENERGY & NAT. RESOURCES L. 404 (2009); Craig S. Bamberger, *The negotiation of the Energy Charter Treaty*, in *INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY xxxix* (Graham Coop & Clarisse Ribeiro eds., 2008); Juliet Blanch, Andy Moody & Nicholas Lawn, *Access to dispute resolution mechanisms under Article 26 of the Energy Charter Treaty*, in *INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 1* (Graham Coop & Clarisse Ribeiro eds., 2008); Lucy Reed & Lucy Martinez, *The Energy Charter Treaty: An Overview*, 14 ILSA J. INT’L & COMP. L. 405 (2007-2008); Adnan Amkhan, *Consent to Submit Investment Disputes to Arbitration Under Article 26 of the Energy Charter Treaty*, *INVESTMENT DISPUTES TO ARBITRATION* Int. A.L.R. 65 (2007); Philippe Pinsolle, *The Dispute Resolution Provisions of the Energy Charter Treaty*, *INVESTMENT DISPUTES TO ARBITRATION* INT. A.L.R. 82 (2007); Emmanuel Gaillard, *Investments and Investors Covered by the Energy Charter Treaty*, in *INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 54* (Clarisse Ribeiro ed., 2006); Andrea Giardina, *International Investment Arbitration: Recent Developments as to the Applicable Law and Unilateral Recourse*, 5 LAW & PRAC. INT’L CTS. & TRIBUNALS 29 (2006); Thomas Wälde, *Energy Charter Treaty-Based Investment Arbitration*, TDM 3 (2004); Craig Bamberger, Jan Linehan & Thomas Wälde, *The Energy Charter Treaty*, in *ENERGY LAW IN EUROPE: NATIONAL, EU AND INTERNATIONAL LAW AND INSTITUTIONS 171* (Martha M. Roggenkamp ed., 2001); Craig Bamberger, Jan Linehan & Thomas Wälde, *Energy Charter Treaty in 2000: in a New Phase*, 18 J. ENERGY & NAT. RESOURCES L. 331 (2000); Thomas Wälde, *International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 251* (Thomas Wälde ed., 1996); Craig Bamberger, *An Overview of the Energy Charter Treaty*, *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 1* (Thomas Wälde ed., 1996); Jan Paulsson, *Arbitration Without Privity*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 422* (Thomas Wälde ed., 1996); Kenneth J. Vandeveld, *Arbitration Provisions in the BITs and the Energy Charter Treaty*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 409* (Thomas Wälde ed., 1996); Thomas Wälde, *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*, 12 *ARBITRATION INT’L*, Issue 4 (Kluwer Law International 1996); Legal Counsel of the Int’l Energy Agency, *The Energy Charter Treaty: A Description of its Provisions* (1995); Julia Dore and Robert De Bauw, *THE ENERGY CHARTER TREATY: ORIGINS, AIMS AND PROSPECTS* (Royal Institute of Int’l Affairs 1995); Thomas Wälde, *European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects*, 33 I.L.M. 360 (1995).

several publications on energy law; Graham Coop, one of the world's leading experts on the Energy Charter Treaty, having been for seven years the General Counsel to the Energy Charter Secretariat (the organization responsible for the Energy Charter Treaty);²¹ Craig Bamberger, former General Counsel of the International Energy Agency in Paris, who served as Chair of the Legal Advisory Committee to the Energy Charter Treaty negotiations;²² and Professor Adnan Amkhan, who served for four years as Head of the Legal Affairs Department of the Energy Charter Secretariat.²³

12. The most detailed consideration of paragraph (7) is Professor Amkhan's article *Consent to Submit Investment Disputes to Arbitration Under Article 26 of the Energy Charter Treaty*, which provides a paragraph-by-paragraph summary and analysis of Article 26.²⁴ He writes the following as regards paragraph (7):

The main aim of this paragraph is to fulfil the conditions required by Art.25(2)(b) of the ICSID Convention and Art.1(6) of the Additional Facility Rule. These two articles provide that a juridical person (investor), who is a national of the respondent contracting party controlled by a foreign entity national of another contracting party has locus standi to bring arbitration or a conciliation claim under ICSID. In the ICSID Convention, this entitlement is conditional in that both states must agree to it. Paragraph (7) explicitly provides for such an agreement by all ECT contracting parties. However, even though this paragraph has been drafted in connection with ICSID and its Additional Facility, there are indications in the negotiation history that the main objective of this paragraph was:

“... to allow an Investor to have recourse to dispute settlement on behalf of a company that it owns or controls but that is established under the laws and regulations of the Contracting Party with which dispute settlement is sought.”

It follows that the principle set out in para. (7) is applicable to all arbitration venues.

It is to be noted however that para. (7) applies only to investors who are juridical persons as defined in Art.1(7)(a)(ii) of the ECT. Natural persons, to whom the concept of control is not applicable, are excluded.

²¹ More information on Graham Coop is available at <http://www.volterrafiotta.com/vf.coop.asp>.

²² More information on Craig Bamberger is available at <http://www.transnational-dispute-management.com/about-author-a-z-profile.asp?key=295>.

²³ Professor Amkhan has given expert legal opinions before the International Court of Justice, the International Chamber of Commerce and the Arbitration Institute of the Stockholm Chamber of Commerce. More information about his background and qualifications is available at <http://www.menachambers.com/people/adnan-amkhan-bayno/>.

²⁴ Adnan Amkhan, *Consent to Submit Investment Disputes to Arbitration Under Article 26 of the Energy Charter Treaty*, INVESTMENT DISPUTES TO ARBITRATION Int. A.L.R. 65, 70 (2007). This appears to be the only paragraph-by-paragraph commentary on Article 26.

Whether the juridical person who is a national of the respondent contracting party is controlled by an investor of another contracting party is an objective condition is a matter for the arbitral tribunal to determine [sic].⁴⁸

⁴⁸ Understanding 3 with respect to ECT Art.1(6) lists some of the factors which should be taken into consideration in determining whether an investment is controlled, directly or indirectly, by an investor.²⁵

13. It is noteworthy that Professor Amkhan, after having consulted the ECT’s negotiating history, has concluded that, “the principle set out in para. (7) is applicable to all arbitration venues.” Importantly, citing to Understanding 3, he notes “[w]hether the juridical person who is a national of the respondent contracting party is controlled by an investor of another contracting party is an objective condition is a matter for the arbitral tribunal to determine [sic].”²⁶ Therefore, according to Professor Amkhan, paragraph (7) does not limit certain investors’ access to arbitration institutions, but, quite to the contrary, ensures that *all* investors, within the meaning of Understanding 3, have access to *all* four ECT-approved arbitral options.

14. Other articles and books on the Treaty support this conclusion. In describing the kinds of investments and investors covered by the ECT, Professor Emmanuel Gaillard writes:

It is worthy of note that the ECT has envisaged the situation where a legal entity that defines as an “investor” under Article 1(7) is in fact a national of the host State. *In the event that such entity decides to bring a claim under the Washington Convention [ICSID], it needs [to] meet the requirement of Article 25(2)(b) of the Washington Convention that it be considered as a national of another Contracting State.* This situation is resolved under the ECT by Article 26(7), which provides that a legal entity that is incorporated in the host State will be treated as a national of another Contracting State for the purposes of Article 25(2)(b) of the Washington Convention if it is controlled by investors of another Contracting State.²⁷

15. According to Gaillard, the “situation” paragraph (7) resolves is the potential problem of some investors not having access to ICSID arbitration; he rightly notes that paragraph (7) provides the necessary reference to Article 25(2)(b) of the ICSID Convention so those investors are not excluded from ICSID. In resolving the “situation” there is no mention of

²⁵ *Id.*

²⁶ *Id.* All of the signatories to the Final Act adopted the Understandings with respect to the treaty and they “should be given considerable weight” as they “reflect the contemporaneous views of all the signatories at the time of the adoption of the Treaty text.” THOMAS ROE & MATTHEW HAPPOLD, *SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY* 21 (James Dingemans QC, consultant ed., 2011).

²⁷ Emmanuel Gaillard, *Investments and Investors Covered by the Energy Charter Treaty*, in *INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY* 54, 69 (Clarisse Ribeiro ed., 2006) (emphasis added).

limiting an investor's choice to ICSID Rules only, but instead acceptance that paragraph (7) was included to “establish[] ‘diversity’ jurisdiction for an arbitral tribunal constituted under the ICSID Rules or the ICSID Additional Facility Rules.”²⁸ Similarly, in Crina Baltag's *The Energy Charter Treaty: The Notion of Investor*, Chapter 3 includes a section entitled “Investors of a Contracting Party Controlled by Investors of another Contracting Party,” which examines paragraph (7). Baltag begins the section by noting that “Investors are frequently required to carry out their investments through locally incorporated companies” and explains the role Article 25(2)(b) of the ICSID Convention plays in ensuring access to ICSID arbitration for foreign-controlled juridical persons.²⁹ After providing examples of how various arbitral Tribunals have interpreted Article 25(2)(b) of the ICSID Convention, Baltag explains:

Article 26(7) of the ECT contains the agreement of the Contracting Parties to treat a legal entity, ‘which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing ... and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party’, as a national of another Contracting State, *for the purpose* of Article 25(2)(b) of the ICSID Convention. This provision allows the control test to be applied in determining the nationality of a legal entity *in the context of an arbitration submitted under the ICSID Convention*, in addition to the incorporation test in Article 1(7) of the ECT. Consequently, legal entities that would normally be treated as nationals of the host Contracting Party and, thus, barred from bringing a dispute against this Contracting Party under Article 26 of the ECT, are allowed to do so if they are controlled by Investors of another Contracting Party.³⁰

According to Baltag, the purpose of paragraph (7) is to ensure that, for those arbitrations that have been brought under ICSID, the control test may be applied. In no way does she suggest that paragraph (7) was included to limit certain kinds of investors to arbitration under ICSID Rules only.³¹

²⁸ Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1(1) J INT. DISP. SETTLEMENT 153, 154 (2010) (emphasis added).

²⁹ CRINA BALTAG, *THE ENERGY CHARTER TREATY: THE NOTION OF INVESTOR*, International Arbitration Law Library, Vol. 25, 112 (2012) (emphasis added).

³⁰ *Id.* at 109.

³¹ *Id.* at 115, fn. 209. Admittedly, Baltag evidences some confusion when she suggests that: “As to the relevance of Article 26(7) of the ECT when Investors opt for arbitration under the SCC or UNCITRAL Rules, this provision appears to be inapplicable” and that “[s]ome authors consider that there might be some room for SCC or UNCITRAL tribunals to apply the provision under Art. 26(7) of the ECT.” Baltag suggests that a more cautious route for foreign-controlled investors would be for “owners or shareholders of a locally incorporated company might consider submitting the dispute in their own name, relying instead on the provisions of Article 1(6) of the ECT on the definition of ‘Investment.’” However, as numerous individuals hold the 62 foreign-controlled investments, making it impractical to follow this approach, Claimants have not followed this option.

16. Additionally, commentary on Article 26 and arbitration under the ECT further confirms that paragraph (7) was included to accommodate the particular requirements of the ICSID Rules. Leading experts on the ECT are in agreement that Article 26 “gives an investor the *choice* to submit an unresolved dispute, following a failure to resolve the dispute by negotiation” to ICSID, UNCITRAL, the SCC, or other fora³² as it is “the policy of the ECT to favour investors.”³³ Never do these experts suggest that paragraph (7) might limit some investors’ choice to ICSID Rules.

17. Instead, all commentary on Article 26 of the ECT emphasizes *the investor’s choice*. Craig Bamberger, who chaired the Legal Advisory Committee to the Energy Charter negotiations, writes:

The important Article 26 provides for the resolution of disputes between a Contracting Party and an investor of a different Contracting Party “relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III” [footnote omitted] It gives an investor the *choice* to submit an unresolved dispute, following a failure to resolve the dispute by negotiation: to the fora of the host state; in accordance with some other previously agreed procedure; or, *for binding arbitration*, to the *investor’s preference among* the International Centre for Settlement of Investment Disputes (ICSID), a forum established under the rules of the United Nations Commission on International Trade (UNCITRAL), or a proceeding of the Arbitration Institute of the Stockholm Chamber of Commerce.³⁴

18. Bamberger also wrote *The Energy Charter Treaty: a description of its provisions*, published by the Legal Counsel of the International Energy Agency. Similar to the excerpt above, the publication includes no commentary on paragraph (7) specifically, but its

³² Craig Bamberger, Jan Linehan & Thomas Wälde, *The Energy Charter Treaty*, in ENERGY LAW IN EUROPE: NATIONAL, EU AND INTERNATIONAL LAW AND INSTITUTIONS, 171, 184 (Martha M. Roggenkamp ed., 2001). In another publication, the same authors have also written that “[p]erhaps the most important aspect of the ECT’s investment regime is the Treaty’s provision for compulsory arbitration against governments at the option of foreign investors, for alleged breaches of the Treaty’s investment protections, without the need for a specific arbitral ‘compromis’. Article 26 provides for the resolution of disputes . . . [and] gives an investor the choice” of the fora to which it will submit the dispute. Craig Bamberger, Jan Linehan & Thomas Wälde, *Energy Charter Treaty in 2000: in a New Phase*, 18 J. ENERGY & NAT. RESOURCES L. 331, 334-35 (2000); see also Lucy Reed & Lucy Martinez, *The Energy Charter Treaty: An Overview*, 14 ILSA J. INT’L & COMP. L. 405, 427-28 (2007-2008) (noting, in their overview of ECT arbitration, that “[t]he investor commences a claim under the ECT by filing a Request for Arbitration. *The investor has the choice of arbitral institutions*, and can choose among ICSID (or the Additional Facility if the respondent state has ratified the ECT but not the ICSID Convention, which is true, for example, for Poland), UNCITRAL ad hoc arbitration, or the Stockholm Chamber of Commerce.”) (emphasis added).

³³ Philippe Pinsolle, *The Dispute Resolution Provisions of the Energy Charter Treaty*, INVESTMENT DISPUTES TO ARBITRATION Int. A.L.R. 82, 83 (2007).

³⁴ Craig Bamberger, *An Overview of the Energy Charter Treaty*, in THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 1, 15 (Thomas Wälde ed., 1996) (emphasis in original).

summary of Article 26 emphasizes a choice of “the investor’s preference among” the various arbitral institutions and Rules. The only exceptions to “unconditional consent to ICSID, UNCITRAL or Stockholm arbitration” discussed by Bamberger is 26(3)(b), which concerns a lack of consent to arbitration where the dispute has previously been submitted to other courts or tribunals.³⁵

19. Other experts have reached the same conclusion, and like Bamberger none mentions paragraph (7) when discussing exceptions to the investor’s choice in Article 26 arbitration. For example, Thomas Wälde wrote that “[i]nvestors, and only investors, may choose national courts, a previously agreed dispute settlement procedure, or arbitration under ICSID, UNCITRAL or Stockholm Chamber of Commerce arbitration rules.”³⁶ Importantly, Wälde qualifies this statement with a footnote acknowledging that “[t]here are some limitations,” but then discusses only Articles 26(3)(c) and 26(4).³⁷ Absent from his discussion of “limitations” is any reference to Article 26(7). Surely, if Wälde perceived that paragraph (7) restricted an investor’s choice to certain arbitration rules or institutions then he would have included this when discussing the other limitations.³⁸

20. In conclusion, the Award’s finding as regards ECT Article 26(7) in my view is simply wrong, whether interpreted according only to VCLT Article 31, or instead by reaching to

³⁵ Legal Counsel of the Int’l Energy Agency, *The Energy Charter Treaty: A Description of its Provisions* (1995).

³⁶ Thomas Wälde, *International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* 251, 305 (Thomas Wälde ed., 1996). In his writings, Wälde consistently emphasized the point of the investor’s choice. For example, in another publication he wrote that whether or not to go to arbitration was “the choice of the investor (only)” and that “[e]ach contracting party (*i.e.* states and the EC) give ‘unconditional consent to the submission of a dispute to international arbitration’ and this consent, given by signature of the Treaty is considered to satisfy the requirements of these four arbitral options.” Thomas Wälde, *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*, 12 *ARBITRATION INT’L*, Issue 4, 429, 449 (Kluwer Law Int’l 1996).

³⁷ Thomas Wälde, *International Investment under the 1994 Energy Charter Treaty: Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, in *THE ENERGY CHARTER TREATY: AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE* 251, fn. 202 (Thomas Wälde ed., 1996). Wälde continues: “There are some limitations: under Article 26(3)(c), countries can opt out of the mandatory investment arbitration for ‘sanctity of contract’ disputes-presumably mainly mineral concessions. It is not surprising that Norway, Canada and Australia have exercised this opt-out as listed in Annex IA. Annex ID countries – seventeen are named in the Annex – will not allow an investor having embarked on contractually provided arbitration or litigation with national courts to switch to Article 26(4) investment arbitration.” *Id.*

³⁸ *Id.*

VCLT Article 32, and is in conflict with the interpretive process applied in relation to the “Svalbard exception.”³⁹

Dated: 10 October 2014

Charles N. Brower

Charles N. Brower

³⁹ For the avoidance of doubt, my concurrence extends to the Award’s rejection of the Claimants’ MFN argument.

Annex A

IEA
INTERNATIONAL ENERGY AGENCY

2.5. 1994

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No. of pages (including cover page): 4

*Answer with final answers to
Japan's questions on Oct. 30.*

EUROPEAN ENERGY CHARTER CONFERENCE SECRETARIAT	
DATE/N° :	25/04/2678
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2 May 1994

**Legal Sub-Group Report:
Article 30**

This report responds to questions from the Japanese Delegation concerning Article 31. The questions are set out separately below, followed by our answers.

A. *Paragraph (5)*

Sub-paragraph (i) refers only to the "written consent" in the dispute-settlements within the framework of the ICSID Convention and the Additional Facility Rules, although the Arbitration Rules of UNCITRAL and arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce also provide for "written consent". We, therefore, request clarification why only the ICSID Convention and the Additional Facility Rules are referred to in the said sub-paragraph and the objective of the said sub-paragraph.

Comments:

While there was not a consensus in the Sub-Group on the need for such a provision, it would do no harm to add under paragraph (5)(a) a new sub-paragraph (iii) as follows:

- (iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

The Charter Secretariat already has included such a provision in CONF-98, based on a draft of this opinion.

No equivalent provision is required for the Stockholm Arbitration Institute since its Rules do not specify either written consent or prior agreement of the parties to the dispute.

B. *Paragraph 5(a)(ii)*

We don't understand concretely what kind of requirements shall be satisfied in relation to this sub-paragraph. Therefore, we request clarification to this effect.

In this regard some people said in the negotiations that this sub-paragraph intended to ensure enforcement of awards of arbitration by referring to "the New York Convention". However, Contracting Parties to the Treaty will not always be Contracting Parties to the New York Convention. Therefore, we request clarification for the following: What effects will this sub-paragraph have to the countries which are not Contracting Parties to the New York Convention? If "the New York Convention" must be referred to in order to ensure execution of an award of arbitration, how will its execution be ensured in the territory of the non-contracting parties to the Convention?

Comments:

We believe the reference in Japan's question should have been to paragraph 5(b).

- 2 -

If a party to the dispute requests that the dispute be arbitrated in a New York Convention State, then even if neither the Contracting Party of the investor nor the Contracting Party party to the dispute is a party to the New York Convention, the provisions of the Convention will apply to the enforcement of the award against assets of the parties to the dispute in the State in which the arbitration is held. In addition, the award will be recognized and enforced in other States party to the New York Convention. This does not remove the requirement on the State party to the dispute to comply with the award even if it is arbitrated in a non-New York Convention State; see paragraph (8) of Article 30.

C. *Paragraph (6)*

We think that this paragraph is unnecessary because: (a) each arbitration procedure enumerated in paragraph (3) is legally independent of the Treaty, and cannot be influenced by the Treaty; and (b) each procedure should be able to decide the applicable laws to the dispute according to its own procedure.

Comments:

(a) The Treaty can vary the application of the dispute resolution agreements to disputes under the Treaty if the negotiating parties desire this.

(b) It is not unusual to provide guidance to future arbitrators in this manner. In the particular case of arbitrations under this Article, it is important to ensure that arbitrators understand that the law to be applied is the law established by the Charter Treaty as well as other relevant international law and not, for example, the national law of the Contracting Party against which the arbitration has been instituted.

D. *Paragraph (7)*

1. Why are only the ICSID Convention and Additional Facility Rules referred to in this paragraph?

2. Interpretation and application of ICSID Convention, which is independent from the Treaty, cannot be decided unilaterally by the Treaty. Therefore, even if this paragraph (7) provides for definition of "National of another Contracting State", the content of which is slightly different from that of Article 25(2) of ICSID Convention, it does not make sense legally.

3. However, we consider that the content of this provision is important for the protection and promotion of investment. Therefore, we would like to propose the following text:

"In case an Investor other than natural person which has made Investment in a Contracting Party is controlled by Investors of another Contracting Party on the date on which the former Investor makes a request to the former Contracting Party to submit the dispute to the conciliation or arbitration in accordance with the provisions of this Article, the former

- 3 -

Investor shall be treated for the purpose of the provisions of this Article as an Investor of another Contracting Party."

Comments:

As recognized, the issue pertains only to the ICSID and Additional Facility (AF) rules. Articles 25(2) of ICSID and 1(6) of the AF rules are special cases and paragraph (7) is specific to those Articles only. Paragraph (7) does not differ in any substantive way from the wording of either Article 25(2) of ICSID or Article 1(6) of the AF. We do not believe that the proposed language is needed.

E. *Paragraph (8)*

We would like secretariat or Legal Sub-Group to confirm in writing the meaning of "make provision for the effective enforcement in its Domain of such awards". We understand that countries which already have effective legal system for the enforcement of arbitration awards can discharge their obligation stipulated in the third sentence of this paragraph by making provisions in accordance with their national legislation, as provided for in the New York Convention. Otherwise we cannot accept this sub-paragraph.

Comments:

The understanding of the Japanese Delegation accords with that of the Legal Sub-Group, viz., a country which already has an effective legal procedure for enforcement of arbitral awards complies with the Treaty.

F. *Ministerial Declaration to Art. 30(2)(a)*

We request clarification of the meaning of this declaration. Does this declaration intend to ensure that it is up to each Contracting Party on how to implement the Treaty within its legal framework, and that it is not always necessary for a Contracting Party to take legislative measures in order to implement the Treaty? If so, we accept this declaration.

Comments:

It is a matter for each Contracting Party to implement the Treaty in the manner appropriate to its constitution bearing in mind the rule, pacta sunt servanda. The Ministerial Declaration does not qualify this in any manner.