

# ARTICLE 1

## DEFINITIONS

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As used in this Treaty:

- (1) ‘Charter’ means 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; signature of the Concluding Document is considered to be signature of the Charter.
- (2) ‘Contracting Party’ means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.
- (3) ‘Regional Economic Integration Organization’ means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.
- (4) ‘Energy Materials and Products’, based on the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM.
- (5) ‘Economic Activity in the Energy Sector’ means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.
- (6) ‘Investment’ means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
  - (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

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\* All websites referred to in the chapter were active as at 15 January 2018.

- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat.

- (7) 'Investor' means:
  - (a) with respect to a Contracting Party:
    - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
    - (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;
  - (b) with respect to a 'third state', a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.
- (8) 'Make Investments' or 'Making of Investments' means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.
- (9) 'Returns' means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.

- (10) 'Area' means with respect to a state that is a Contracting Party:
- (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
  - (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction. With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.
- (11)
- (a) 'GATT' means 'GATT 1947' or 'GATT 1994', or both of them where both are applicable.
  - (b) 'GATT 1947' means the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.
  - (c) 'GATT 1994' means the General Agreement on Tariffs and Trade as specified in Annex 1A of the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified. A party to the Agreement Establishing the World Trade Organization is considered to be a party to GATT 1994.
  - (d) 'Related Instruments' means, as appropriate:
    - (i) agreements, arrangements or other legal instruments, including decisions, declarations and understandings, concluded under the auspices of GATT 1947 as subsequently rectified, amended or modified; or
    - (ii) the Agreement Establishing the World Trade Organization including its Annex 1 (except GATT 1994), its Annexes 2, 3 and 4, and the decisions, declarations and understandings related thereto, as subsequently rectified, amended or modified.
- (12) 'Intellectual Property' includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.
- (13)
- (a) 'Energy Charter Protocol' or 'Protocol' means a treaty, the negotiation of which is authorized and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or

- amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of co-operation pursuant to Title III of the Charter.
- (b) ‘Energy Charter Declaration’ or ‘Declaration’ means a non-binding instrument, the negotiation of which is authorized and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.
- (14) ‘Freely Convertible Currency’ means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.’

## COMMENTARY

### Introduction

Article 1 of the Energy Charter Treaty (ECT), entitled ‘Definitions’, contains a list of definitions of terms that are used throughout the ECT. This is the first article of Part I, entitled ‘Definitions and Purpose’. The ECT was adopted in the Final Act of the European Energy Charter Conference and is contained in Annex 1 to the Final Act of the European Energy Charter Conference. The Final Act also adopted certain understandings in respect to the ECT, including Understanding 2 and 3. At the outset of this commentary it should be noted that Understandings are not part of the ECT and cannot be used to extend or modify the definitions provided for in Article 1. However, the Charter Conference made clear that they ‘are part of the overall political package when setting the conditions for accession to the ECT’.<sup>1</sup> **1.01**

This commentary is based on all English language decisions of arbitral tribunals that were available in January 2018. Considering the length of Article 1, including its various Understandings, the text of the provision is split into subparagraphs that are discussed one after the other. **1.02**

### A. Part I: Definitions and Purpose **1.03**

#### 1. Article 1: Definitions

#### ‘As used in this Treaty:

<sup>1</sup> Energy Charter Secretariat (2002), *The Energy Charter Treaty – A Reader’s Guide*, 85 pp., at 61 (Available at [https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT\\_Guide\\_ENG.pdf](https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT_Guide_ENG.pdf)) (hereinafter: ‘ECT Reader’s Guide’).

**(1) ‘Charter’ means 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; signature of the Concluding Document is considered to be signature of the Charter.’**

**1.04** Article 1(1) defines ‘Charter’ as the European Energy Charter (EEC) signed in The Hague in December 1991. The proposal for a European Energy Community had been launched by Dutch Prime Minister Ruud Lubbers at a European Council meeting in Dublin in June 1990.<sup>2</sup>

**1.05** Initially, the Charter was signed by 49 States and the EU. Currently, 54 States adhere to the EEC.<sup>3</sup> The signing of the Charter represented a milestone in the process towards the conclusion of the ECT in 1994, as the signing of the EEC included a commitment to negotiate, in good faith, a legally binding ECT.<sup>4</sup> All signatories of the Charter are observers to the Energy Charter Conference (ECC). Signatories of the Charter which are also signatories of or Contracting Parties to the Energy Charter Treaty are Members of the Energy Charter Conference.<sup>5</sup> Signing the Charter is a prerequisite for accession to the 1994 Energy Charter Treaty.

**1.06** The Charter is a political declaration for cooperation in the energy sector, based on the following principles:<sup>6</sup>

- State sovereignty and sovereign rights over energy resources
- non-discrimination and market-oriented price formation
- spirit of political and economic cooperation
- development of an efficient energy market throughout Europe, and a better functioning global market
- due account of environmental concerns.

**1.07** The EEC was the starting point for the negotiations on the ECT which started in 1992. The ECT was signed in Lisbon on 17 December 1994, and entered into force on 16 April 1998, after the 30th ratification by signatories.<sup>7</sup> The tribunal in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* found that, based on the text of the Preamble to the ECT, it can be

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2 Ibid., 7.

3 See <https://energycharter.org/who-we-are/members-observers/>.

4 Energy Charter Secretariat (2016), *The International Energy Charter – Consolidated Energy Charter Treaty with Related Documents*, Last Updated: 15 January 2016, Foreword, 2. Available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf> (hereinafter: ‘Consolidated ECT’).

5 See *supra* note 4 for an overview.

6 Art 1, European Energy Charter.

7 ECT Reader’s Guide , 67.

concluded that ‘the scope of the (non-binding) European Energy Charter of 17 December 1991 was replicated in binding form in the ECT’.<sup>8</sup>

Although being officially called the ‘European Energy Charter’, the scope and focus is global. Australia, Japan and Russia, as well as five Central Asian States (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan) are all founding members of the Energy Charter and Treaty.<sup>9</sup> The tribunal in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* also briefly considered the issue of whether disputes arising between EU Member States would be excluded from the scope of the ECT. The tribunal found that: **1.08**

[t]here is no indication of any *inter se* exclusion in the Charter, which refers to a ‘new desire for a European-wide and global co-operation based on mutual respect and confidence’, and further refers to the ‘support from the European Community, particularly through completion of its internal energy market’ (Preamble, paras 6, 14). The EC and Euratom were signatories to the Charter. This was of course before the Treaty of Maastricht, let alone the Lisbon Treaty.<sup>10</sup>

Hence, the tribunal, based on several additional arguments, concluded that ‘the European Member States remain ‘Contracting Parties’ and that the ECT does create *inter se* obligations for European Member States’.<sup>11</sup>

In 2009 a modernization process of the Energy Charter Process was launched which resulted in the adoption of the political declaration of an International Energy Charter on 20 May 2015. The declaration reflects the ‘global modern energy challenges and maps out common principles and areas of international cooperation in the field of energy for the 21st Century’.<sup>12</sup> **1.09**

**(2) ‘Contracting Party’ means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.**

Article 1(2) defines the term ‘Contracting Party’. A Contracting Party can be either a State or a Regional Economic Integration Organisation (REIO), such as the EU. To become a Contracting Party: (a) the State or REIO has to give its ‘consent to be bound’ by the ECT; and (b) the ECT has to have entered into force in the territory of the State or REIO. **1.10**

<sup>8</sup> *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, 280.

<sup>9</sup> ECT Reader’s Guide, 11.

<sup>10</sup> *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, *supra* note 8, 280.

<sup>11</sup> *Ibid.*, 284.

<sup>12</sup> Consolidated ECT, 2.

- 1.11** At the time of writing there are 54 Contracting Parties to the ECT, including the EU. Some countries have signed the Treaty but not yet ratified it (Australia, Norway and the Russian Federation); others, such as Belarus, apply the ECT on a provisional basis.<sup>13</sup> According to the definition, the Treaty must be in force in order to be a Contracting Party. In the absence of domestic ratification a Treaty will not yet have entered into force. In other words, States such as Australia which have signed but not yet ratified the ECT are not yet a Contracting Party to the ECT.<sup>14</sup> However, such States are signatories to the ECT and hence a Member of the ECC. The status of ratification of the ECT can be consulted on the ECT's website.<sup>15</sup> There have also been States that have withdrawn from the ECT. Italy is a prominent example. On 31 December 2014 Italy notified the Depository of its withdrawal from the ECT. Under Article 47, paragraph 2 of the ECT, any such withdrawal takes effect upon the expiry of one year after the date of the receipt of the notification by the Depository. Therefore, the withdrawal from the ECT by the Italian Republic took effect on 1 January 2016.
- 1.12** There are essentially two distinct categories within the institutional framework of the ECC: members and observers. All signatories and Contracting Parties to the ECT are, by definition, members of the ECC. All signatories of the EEC (1991) are observers to the ECC. Signatories of the EEC which are *also* signatories of or Contracting Parties to the ECT are members of the ECC.
- 1.13** The distinction between 'consent to be bound' and the Treaty being 'in force' for a State was considered by the Permanent Court of Arbitration (PCA) in *Yukos Universal Ltd (Isle of Man) v. Russian Federation*. The PCA held:

That there is a distinction between consenting to be bound provisionally by the treaty and, on the other hand, the treaty being 'in force' for a State is also clear from the definition of 'Contracting Party' in Article 1(2) of the ECT. As used in the ECT, 'Contracting Party' means 'a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.' The use of the conjunction 'and' between the clauses 'which has consented to be bound by this Treaty' and 'for which the Treaty is in force' means that there must be circumstances, in the eyes of the parties to the ECT, including the Russian Federation, where a State for which the ECT is not 'in force,' has nevertheless consented to be bound by its terms.<sup>16</sup>

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13 <https://energycharter.org/who-we-are/members-observers/countries/belarus/>.

14 <https://energycharter.org/who-we-are/members-observers/countries/australia/>.

15 <https://energycharter.org/who-we-are/members-observers/>.

16 *Yukos Universal Ltd (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 385.

The tribunal in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* observed that: **1.14**

Article 1(2) of the ECT defines ‘Contracting Party’ as ‘a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force. EU Member States and the EU are all Contracting Parties. Prima facie at least, a treaty applies equally between its parties. It would take an express provision or very clear understanding between the negotiating parties to achieve any other result. Thus when Great Britain was asserting ‘the diplomatic unity of the British Empire’, it was argued from time to time that multilateral treaties to which the Dominions were separately parties had no inter se application. The inter se doctrine was not however accepted, being unsupported by express provision or clear understanding to the contrary.

**(3) ‘Regional Economic Integration Organisation’ means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.**

The definition of a REIO has mostly been developed through decisions and awards by tribunals dealing with disputes. In this regard the decision on jurisdiction, applicable law and liability of the tribunal in *Electrabel S.A. v. Republic of Hungary* is particularly instructive. The tribunal observed that ‘[i]t is commonly understood that the European Union was and remains such a Regional Economic Integration Organisation (‘REIO’).<sup>17</sup> As such, ‘[t]he framework of the ECT recognizes that the EU Member States will be legally bound by decisions of the European Union under EU law’.<sup>18</sup> Moreover; **1.15**

[a]s regards protection under the ECT, investors can have had no legitimate expectations in regard to the consequences of the implementation by an EU Member State of any such decision by the European Commission’. Thus, according to the tribunal, ‘the possible interference with a foreign investment through the implementation by an EU Member State of a legally binding decision of the European Commission was and remains inherent in the framework of the ECT itself.’<sup>19</sup>

However the mere fact that the EU is party to the ECT does not mean that the EU Member States do not have competence to enter into *inter se* **1.16**

<sup>17</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.142.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*



obligations in the Treaty.<sup>20</sup> Instead, the ECT seems to contemplate that there would be overlapping competences. But nothing in Article 1, nor any other provision in the ECT, suggests that the EU Member States had then transferred exclusive competence for all matters of investment and dispute resolution to the EU.<sup>21</sup> In this regard the tribunal in *Eiser Infrastructure Ltd and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* observed that ‘the Treaty of Lisbon, transferring to the EU exclusive competence in the field of investment protection, was not signed until December 2007’.<sup>22</sup>

**(4) ‘Energy Materials and Products’, based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities, means the items included in Annexes EM I or EM II.<sup>15</sup>**

**1.17** The definition of ‘Energy Materials and Products’ refers to the items listed in Annexes EM I or EM II.<sup>15.23</sup> Only the items listed in the Annexes are covered by the Treaty. Annex EM I refers back to Article 1(4) of the ECT and lists as Energy Materials and Products:

- nuclear energy (uranium, radioactive chemical elements and heavy water) (Chapter 26 and 28 of the HS);
- coal, natural gas, petroleum, petroleum products, and electrical energy (Chapter 27 of the HS); and
- other energy materials and Products, such as fuel wood and wood charcoal (Chapter 44 of the HS).

**1.18** Annex EM II does not contain any items. The original negotiations were based on the 1992 version of the Harmonized System Nomenclature (HS), whereas the negotiations for the amendment to the Trade-Related Provisions (Trade Amendment) were based on the 1996 version of the HS. This is the reason that Annex EM I uses four- to six-digit HS codes to identify products. As the HS has been updated several times since the original negotiations, the Energy Charter Secretariat has issued a correspondence table adapting the Annexes to the HS changes.<sup>24</sup>

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<sup>20</sup> *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, *supra* note 8, 280.

<sup>21</sup> *Ibid.* as well as *Eiser Infrastructure Ltd and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, 190.

<sup>22</sup> *Eiser Infrastructure Ltd*, *ibid.*

<sup>23</sup> Annex EM I replaces Annex EM in the original Treaty text.

<sup>24</sup> Available at [https://energycharter.org/fileadmin/DocumentsMedia/Legal/Correspondence\\_table\\_-\\_HS\\_nomenclature.pdf](https://energycharter.org/fileadmin/DocumentsMedia/Legal/Correspondence_table_-_HS_nomenclature.pdf).

**(4bis) ‘Energy-Related Equipment’, based on the Harmonised System of the World Customs Organization, means the items included in Annexes EQ I or EQ II.16**

The definition of ‘**Energy-Related Equipment**’ refers to the items listed in Annexes EQ I or EQ II.16. Only the items listed in the Annexes are covered by the Treaty. Annex EQ I contains as Energy-Related Equipment, for example: **1.19**

- self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls;
- tubes, pipes and hollow profiles, seamless, of iron;
- reservoirs, tanks, vats and similar containers for any material.

Annex EQ I covers products from HS Chapters 39, 73, 76, 78, 81–85, 87, 89–90. Annex EQ II does not list any items. **1.20**

The original negotiations were based on the 1992 version of the HS, whereas the negotiations for the amendment to the Trade Amendment were based on the 1996 version of the HS. As the HS has been updated several times since the original negotiations, the Energy Charter Secretariat has issued a correspondence table adapting the Annexes to the HS changes.<sup>25</sup> **1.21**

**(5) ‘Economic Activity in the Energy Sector’ means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.**

The definition of ‘**Energy Activity in the Energy Sector**’ encompasses an economic activity relating to the ‘exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products’ and is hence broad in its scope. Explicitly excluded are those products and materials that are listed in Annex NI on ‘Non-Applicable Energy Materials and Products for Definitions of ‘Economic Activity in the Energy Sector’. These are for example oils and other products of the distillation of high temperature; certain types of Fuel wood and Wood charcoal. **1.22**

<sup>25</sup> Available at *ibid*.

**1.23** The tribunal in *Electrabel S.A. v. Republic of Hungary* has held in this regard that:

[i]t is clear from the ordinary meaning of the term that electricity generation constitutes an economic activity in the energy sector. Furthermore, in accordance with the definition contained in Article 1(5) ECT and the provisions of Annex EM paragraph 27.16 ECT and Annex NI ECT, the activities of ‘production’ and ‘sale’ of ‘electrical energy’ as ‘energy materials’ also constitute an ‘economic activity in the energy sector’.<sup>26</sup>

**1.24** In addition, Understanding Nr. 2 includes a non exhaustive list of economic activities in the energy sector. It clarifies that the Treaty is only applicable to economic activities in the energy sector.<sup>27</sup>

**1.25** The tribunal in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* clarified that regarding section (b)(ii) of the Understanding, the words ‘construction and operation’ do not impose a cumulative requirement.<sup>28</sup> Otherwise, the tribunal considered, ‘an investor purchasing an already constructed plant would not be covered’.<sup>29</sup> Further, the preparatory phase of a project is over ‘once an active process of construction of an energy project involving substantial resources is commenced’.<sup>30</sup> The project then also qualifies as an investment under Article 1(6),<sup>31</sup> as further discussed below.

The Understanding reads:

**[UNDERSTANDING With respect to Article 1(5)]**

- (a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.**
- (b) The following activities are illustrative of Economic Activity in the Energy Sector:**
  - (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;**
  - (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;**

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<sup>26</sup> *Electrabel S.A. v. Republic of Hungary*, *supra* note 17, para. 5.50.

<sup>27</sup> *Ibid.*, para. 5.47.

<sup>28</sup> *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, *supra* note 8, para. 263.

<sup>29</sup> *Ibid.*, para. 263.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

- (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
- (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;
- (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
- (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and
- (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.]

The tribunal in *Limited Liability Company Amto v. Ukraine* held that '[t]he drafters of the Energy Charter Treaty did not require an Investment to be an Economic Activity in the Energy Sector, but only to be "associated with" such an activity', thereby adopting a rather broad interpretation of the term 'economic activity'.<sup>32</sup> This is arguably in line with the wording of the provision. Moreover 1.26

The Arbitral Tribunal considers that the interpretation of the words 'associated with' involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase 'associated with' must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector.<sup>33</sup>

- (6) 'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:**

Key to any investment treaty is the definition of '**Investment**'. Importantly for the purpose of the ECT is the relationship to the energy sector. The ECT 1.27

<sup>32</sup> *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award, 26 March 2008, para. 42.

<sup>33</sup> *Ibid.*

Secretariat has put forward that the scope of the ECT encompasses ‘Investment Associated with Economic Activity in the Energy Sector covering certain Energy Materials and Products.’<sup>34</sup>

**1.28** Article 1(6) of the ECT provides that an ‘**Investment**’ means ‘**every kind of asset**’ that is ‘**owned or controlled**’ ‘**directly or indirectly**’ by an ‘**investor**’, and then provides a list of possible investments. The definition of an ‘**investor**’ is provided in Article 1(7). Therefore, the main component of Article 1(6) is the establishment of what constitutes an asset. The ECT provides a broad, non-exhaustive, definition of an investment.<sup>35</sup> The definition of asset is broad and non-exhaustive, and includes:

- tangible and intangible, moveable and immovable property;
- shares, stocks, or other forms of equity participation in a company;
- bonds and other debt of a company;
- claims to money and claims to performance pursuant to a contract having an economic value associated with an investment;
- intellectual property;
- returns;
- any right conferred by law, contract or licence.

**1.29** The element of ‘**control**’ is further defined in Understanding Nr. 3. It covers both equity interests of the investor and the ability to exercise substantial influence over the company. The ECT Reader’s Guide further provides that ‘the definition extends to any investment “associated with” an economic activity in the energy sector’ and that the ‘term “associated with” implies that it includes not only the establishment of an energy company as such (e.g., a refinery), but also investments indirectly linked to economic activity in the energy sector (e.g., office space associated with a refinery)’.<sup>36</sup>

**1.30** The tribunal in *Plama Consortium Ltd v. Republic of Bulgaria* clarified that the broad definition, as including ‘any right conferred by law or contract’ extends to ‘a contractual or property right even if it were defeasible’.<sup>37</sup>

**1.31** The tribunal in *AES Summit Generation Ltd and AES-Tisza Erömu Kft. v. Republic of Hungary* confirmed that ‘the investments protected by the ECT

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<sup>34</sup> ECT Reader’s Guide, at 20.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., 20–21.

<sup>37</sup> *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 128.

include those made before the entry into force of this Treaty, provided that it shall only apply to matters affecting such investments after the Effective Date'.<sup>38</sup>

In *Alapli Elektrik B.V. v. Republic of Turkey* the tribunal relied upon arbitrations under the ICSID Convention in order to obtain guidance on the interpretation of the 'admittedly spare definitions of 'investor' and 'investment' under [...] the ECT'.<sup>39</sup> The tribunal observed that;

[i]n the words of the *Salini* tribunal, '[t]he doctrine generally considers that the investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract'.<sup>40</sup>

Thereby distinguishing the following elements:

- contributions;
- a certain duration of performance of the contract; and
- a participation in the risks of the transaction.

By contrast, the tribunal in *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan* referred to Article 1(6) as providing an 'extremely broad' definition and contrasted it with the ICSID Convention. Since the latter does not contain a definition of 'investment' it 'needs further interpretation as regularly done by ICSID tribunals'. However, according to the tribunal the:

[g]uidelines and tests of criteria developed in this jurisprudence on the ICSID Convention and similar treaties, therefore, cannot be used as long as any right or activity is clearly covered by the wording of the above definition in ECT cases. Therefore, the so-called *Salini* test, controversial and much discussed both by the Parties in this case and otherwise in ICSID and similar arbitrations, even if applied as a flexible guideline rather than as a strict jurisdictional requirement, *cannot be used* for the definition of investment under the ECT or, likewise, in the present case.<sup>41</sup>

38 *AES Summit Generation Ltd and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 6.4.1.

39 *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, para. 382.

40 *Ibid.*, para. 383.

41 *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, para. 806. (emphasis added).

**1.34** The tribunal further observed that there was no need to refer to the supplementary means of interpretation as provided for under Article 32 of the Vienna Convention on the Law of Treaties (VCLT), as the interpretation under Article 31.1 VCLT clearly did not leave the meaning of the term ‘investment’ ambiguous or obscure nor lead to a result which is manifestly absurd or unreasonable. This was the result of the fact that the ECT provides for a ‘wide and highly detailed above definition of “investment”’.<sup>42</sup> Finally, the tribunal observed that, considering the ‘extremely detailed definition of investment’ in the ECT, there was no ground for finding that an investment could somehow be considered ‘illegal’.<sup>43</sup>

**1.35** The tribunal in *Veteran Petroleum Ltd (Cyprus) v. Russian Federation* considered whether nominal legal ownership of an asset by an ‘Investor’ is sufficient to establish ownership of an ‘Investment’ under Article 1(6). In a lengthy paragraph the tribunal observed that:

the ECT, by its terms, applies to an ‘Investment’ owned nominally by a qualifying ‘Investor,’ and that nothing more is required. Respondent’s submission that simple legal ownership of shares does not qualify as an Investment under Article 1(6)(b) of the ECT finds no support in the text of the Treaty. The breadth of the definition of Investment in the ECT is emphasized by many eminent legal scholars.

[...]

The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to ‘beneficial’ ownership.<sup>44</sup>

**1.36** In an obiter dicta, the tribunal nevertheless proceeded to set out its views on the questions of beneficial ownership and control. It rejected the argument that in order for an investment to meet the definition of Article 1(6) it needs ‘an injection of foreign capital’.<sup>45</sup>

**1.37** Finally, in *RREEF Infrastructure (G.P.) Ltd and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* the tribunal considered that there is nothing in the ECT that says that there can only be one investor for each investment. As the tribunal observed ‘[t]he very concept of indirect ownership or control presupposes that there is interposed between a claimant

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<sup>42</sup> Ibid., para. 807.

<sup>43</sup> Ibid., para. 812.

<sup>44</sup> *Veteran Petroleum Ltd (Cyprus) v. Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 477.

<sup>45</sup> Ibid., para. 488.

that is an indirect owner or controller and the investment one or more other owners and controllers through which the claimant owns or controls the investment'.<sup>46</sup>

**(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;**

The tribunal in *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan* considered that the claimants had **tangible and intangible** holdings, including ownership of oil and gas wells, drilling equipment, gathering pipelines, treatment and storage facilities, vehicles, offices, an LPG Plant, equity interests, and contractual rights. According to the tribunal, '[t]hese are encompassed by the subcategories (a), (b), (c), (e), and (f) of Art. 1(6) ECT and, further, by the language 'any investment associated with an economic activity in the energy sector' for the purpose of Art. 1(6)'.<sup>47</sup> The oil and gas wells, drilling equipment, gathering pipelines, treatment and storage facilities, vehicles, offices, an LPG Plant presumably qualify as either movable and/or immovable tangible property. 1.38

**(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;**

The tribunal in *Ioannis Kardassopoulos v. Georgia* considered that 'the indirect ownership of shares [...] constitutes an 'investment' under [...] the ECT'.<sup>48</sup> 1.39

In *Veteran Petroleum Ltd (Cyprus) v. Russian Federation* the respondent unsuccessfully submitted that simple legal ownership of shares does not qualify as an **Investment** under Article 1(6)(b) of the ECT.<sup>49</sup> According to the tribunal, Article 1(6)(b) ECT contains 'no indication whatsoever that the drafters of the Treaty intended to limit ownership to 'beneficial' ownership'.<sup>50</sup> 1.40

Finally, in *Mohammad Ammar Al-Babloul v. Republic of Tajikistan* the tribunal considered that 'the Energy Charter Treaty protects not only directly, but also 1.41

<sup>46</sup> *RREEF Infrastructure (G.P.) Ltd and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 142.

<sup>47</sup> *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan*, *supra* note 41, para. 808.

<sup>48</sup> *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 124.

<sup>49</sup> *Veteran Petroleum Ltd (Cyprus)*, *supra* note 44, para. 477.

<sup>50</sup> *Ibid.*



indirectly, owned or controlled investments’ and ‘applies to assets held through an intermediary company in a non-ECT State’.<sup>51</sup>

**(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;**

- 1.42** The tribunal in *Mohammad Ammar Al-Babloul v. Republic of Tajikistan* considered that certain agreements that, even though they still required the issuance of a license to give effect to exploration and exploitation rights, gave the claimant a contractual right to the issuance of these necessary licenses. Therefore, according to the tribunal ‘they may be considered as *claims to performance pursuant to contract having an economic value and associated with an Investment*’ pursuant to Article 1(6)(c) of the ECT’.<sup>52</sup>
- 1.43** The tribunal in *Electrabel S.A. v. Republic of Hungary* considered the meaning of the phrase ‘associated with an investment’ in Article 1(6) of the ECT. It found that this phrase constitutes a ‘limitation’ on the notion of investment. In the dispute, the parties then disagreed on whether and to what extent this limitation gives rise to circularity in the ECT’s definition of ‘investment’.<sup>53</sup> The tribunal, relying upon the rules of treaty interpretation as contained in the VCLT, held that ‘the correct interpretation must give effect to the terms in their context and avoid obscure results’. Accordingly, ‘as a matter of common sense, it is necessary to understand ‘investment’ in sub-paragraph (c) to mean an investment other than the one addressed in this same sub-paragraph’. Based on this reasoning the tribunal considered that ‘the rights arising out of the Power Purchasing Agreement (PPA) needed to be associated with the Claimant’s overall investment’.<sup>54</sup>
- 1.44** In *Petrobart Ltd v. Kyrgyz Republic* the tribunal observed that ‘the wording “claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment” presents certain ambiguities’.<sup>55</sup> The tribunal held that:

[i]n particular, it is not entirely clear whether the words ‘pursuant to contract having an economic value and associated with an Investment’ or parts of these words – ‘having

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51 *Mohammad Ammar Al-Babloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 142.

52 *Ibid.*, para. 139.

53 *Electrabel S.A. v. Republic of Hungary*, *supra* note 17, para. 5.52.

54 *Ibid.*, para. 5.53.

55 *Petrobart Ltd v. Kyrgyz Republic*, ARB No. 126/2003, Arbitral Award, 29 March 2005, para. VIII.6.28.

an economic value and associated with an Investment' or 'associated with an Investment' – relate only to 'claims to performance' or also to 'claims for money'. If we assume that at least the terms 'associated with an Investment' also relate to 'claims for money', we are faced with the logical problem that the term 'Investment' is not only the term to be defined but is also used as one of the terms by which 'Investment' is defined. This means that the definition is in reality a circular one which raises a logical problem and creates some doubt about the correct interpretation.<sup>56</sup>

Ultimately the tribunal deferred to Article 1(6)(f) to circumvent this problem of circularity and concluded that there was in fact an investment.<sup>57</sup>

In *State Enterprise 'Energorynok' (Ukraine) v. Republic of Moldova* the tribunal considered whether the Agreement on the Parallel Operation of the Energy Systems of Ukraine and Moldova (APO) constituted evidence of the existence of an investment. It relied on, inter alia, the aforementioned findings by the tribunals in *Electrabel* and in *Petrobart*. The APO related to the transportation, distribution and supply of energy materials and products by way of transmission and distribution grids. The tribunal considered that the APO conferred 'a right to undertake an economic activity concerning the transit of electricity in the host State'. According to the tribunal, this activity 'constitutes an Investment according to the ECT'.<sup>58</sup> 1.45

The tribunal then however went on to consider that the claimant did not have any role in the economic activity carried out under the APO. The tribunal agreed that 'ECT Article 1(6) requires the **Investor** to own or control the asset'. It then raised the question whether the claimant only needs to own or control the claim to money or whether he must rather have some ownership or control, directly or indirectly, of the **Investment** to which the claim of money, as per ECT Article 1(6)(c), must be related. The tribunal referred to the third Understanding (discussed below) and found that '[w]here there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof such control exists'.<sup>59</sup> The tribunal considered, inter alia, the following factual considerations to support its ultimate conclusion that although the claimant had acquired a debt (or was authorized to collect a debt), it did not acquire an **Investment** under the ECT: 1.46

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid., para. VIII.6.30.

<sup>58</sup> *State Enterprise 'Energorynok' (Ukraine) v. Republic of Moldova*, SCC Case No. V (2012/175), Final Award, 29 January 2015, para. 81.

<sup>59</sup> Ibid., para. 89.

- the claimant offered no proof that it had any financial or equity interest in the economic activity it claimed its Investment arose out of;
- the claimant had no ability to exercise substantial influence of the management and operation of the transmission of electricity under the APO; and
- the claimant had no right to exercise any influence over the selection of members of the board of directors or any other managing body involved in the transmission of electricity to Moldova under the APO.<sup>60</sup>

1.47 Based on this finding, the tribunal concluded that it had no jurisdiction over the dispute.<sup>61</sup>

**(d) Intellectual Property;**

1.48 Investments can take the form of intellectual property rights. **Intellectual property** is defined in Article 1(12) and further discussed below. It includes copyrights as well as industrial property.

**(e) Returns;**

1.49 **Returns** can take the form of intellectual property rights. The notion of **return** is defined in Article 1(9) and further discussed below. **Returns** include the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.

**(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.**

1.50 The tribunal in *Plama Consortium Ltd v. Republic of Bulgaria* clarified that the broad definition, as including ‘any right conferred by law or contract’ extends to ‘a contractual or property right even if it were defeasible’.<sup>62</sup>

1.51 In *Electrabel S.A. v. Republic of Hungary* the tribunal considered whether a PPA constituted a right conferred by law or contract as referred to in Article 1(6)(f) ECT. It held that the PPA constitutes a commercial agreement to

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60 Ibid., paras 90–92.

61 Ibid., para. 102.

62 *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 37, para. 128.

undertake the sale and distribution of electricity, which constitutes an economic activity in the energy sector.<sup>63</sup>

The tribunal in *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* considered that '[s]ince the exercise of the exploration and exploitation rights' still required the issuance of a license, they could not be considered to constitute 'rights conferred by law' for the purpose of Article 1(6)(f) of the ECT. However, this did not prevent the tribunal from ultimately finding that they may be 'considered as *claims to performance pursuant to contract having an economic value and associated with an Investment*' pursuant to Article 1(6)(c) of the ECT'.<sup>64</sup> 1.52

**'A change in the form in which assets are invested does not affect their character as investments and the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.'**

This second subparagraph of Article 1(6) was interpreted by the tribunal in *Ioannis Kardassopoulos v. Georgia*, which focused on the term '**Effective Date**'. 1.53

The tribunal had to answer the following question: 'whether, for the purposes of the definition of '**Effective Date**' in Article 1(6) of the ECT, the date from which the ECT became provisionally applicable is to be treated as its 'date of entry into force'.<sup>65</sup> The tribunal found 'that the language used in Article 1(6), particularly its use of the term '**entry into force**', is to be interpreted as meaning the date on which the ECT became provisionally applicable for Georgia and Greece'.<sup>66</sup> Thus, for the purpose of Article 1(6) the date of provisional application of the ECT can be seen as the date of its entry into force, according to the tribunal. 1.54

63 *Electrabel S.A. v. Republic of Hungary*, *supra* note 17, para. 5.57.

64 *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, *supra* note 51, para. 139.

65 *Ioannis Kardassopoulos v. Georgia*, *supra* note 48, para. 221.

66 *Ibid.*, para. 223.

**‘Investment’ refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as ‘Charter efficiency projects’ and so notified to the Secretariat.**

- 1.55 The tribunal in *Limited Liability Company Amto v. Ukraine* held that ‘the interpretation of the words “associated with” involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector’. Hence, the tribunal concluded that ‘[a] mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector’.<sup>67</sup>

**[UNDERSTANDING With respect to Article 1(6)**

**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. 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.]**

**[DECLARATION With respect to Article 1(6) The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).]**

- 1.56 Article 1(6) of the ECT contains an Understanding that provides further background on the term **‘controlled directly or indirectly’** as used in the first part of that provision. In *Eskosol S.p.A. in liquidazione v. Italian Republic* the

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<sup>67</sup> *Limited Liability Company Amto v. Ukraine*, *supra* note 32, para. 42.

tribunal used the Understanding to interpret the meaning of the term ‘foreign control’ as used in Article 25(2)(b) of the ECT.<sup>68</sup> The tribunal observed that ‘[i]t is significant that in the non-exhaustive list of three “relevant factors” identified in the Understanding, the first listed is “financial interest, including equity interest, in the Investment”’ at the same time, the Tribunal noted, ‘this is not the exclusive criterion for – and therefore not conclusive proof of – control for purposes of the ECT’. It noted that the Understanding in paragraphs (b) and (c) provides two other ‘**relevant factors**’ that should be taken into consideration when examining whether there is **control** over an **Investment** for the purpose of the ECT.<sup>69</sup>

(7) ‘Investor’ means:

Article 1(7) of the ECT defines the term ‘Investor’. According to sub-paragraphs 1(7)(a)(i) and 1(7)(a)(ii), an **investor** is either a natural person having the citizenship or nationality of, or permanently residing in, a contracting party in accordance with its applicable law; or a company or other organization organized in accordance with the law applicable in that contracting State. 1.57

In *Khan Resources Inc, Khan Resources B.V. and CAUC Holding Co Ltd v. Government of Mongolia* the tribunal considered the question whether Article 17(1) of the ECT constitutes an automatic denial of benefits. In answering this question in the negative, the tribunal observed that ‘Article 1(7) of the ECT contains a broad definition of what counts as an ‘Investor’ for purposes of the Treaty’.<sup>70</sup> Thus, according to the tribunal, ‘[i]f Article 17(1) were to provide for an automatic denial of benefits, it would effectively create an exception to this broad definition. Such exception would more logically be found within the definition at Article 1(7) itself’.<sup>71</sup> 1.58

In *Alapli Elektrik B.V. v. Republic of Turkey*, the tribunal made clear that in order to be considered an ‘Investor’ for the purpose of the ECT it is not sufficient to merely be ‘a national of the other contracting state’. What is required, according to the tribunal is that the person in question actually 1.59

68 *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent’s Application Under Rule 41(5), 20 March 2017, para. 101.

69 *Ibid.*, para. 102.

70 *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012, para. 420.

71 *Ibid.*, para. 420.

makes an investment, ‘in the sense of an active (meaningful) contribution’.<sup>72</sup> The tribunal further considered that ‘[a]s a Dutch corporation, Claimant might otherwise have fallen within the range of entities eligible for consideration as Investors under the Netherlands-Turkey BIT, the ECT and the ICSID Convention’.<sup>73</sup> The tribunal observed however that, ‘to establish status of an Investor, such as to create jurisdiction pursuant to these investment treaties, something more is required than simple incorporation under Dutch law’.<sup>74</sup> According to the tribunal, ‘[w]ithout an actual contribution to some Turkish investment, however, the Dutch incorporation creates no entitlement to protection as an Investor subject to the jurisdiction of this Tribunal’.<sup>75</sup> In this sense, it appears that the tribunal introduced an element of an ‘activity’ into the term ‘investor’. The term was interpreted as meaning a person that ‘actively contributes’ in a ‘meaningful’ manner.

- 1.60** The tribunal in *RREEF Infrastructure (G.P.) Ltd and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* dealt with the question whether there can be only one ‘investor’ per investment. The tribunal answered this negatively when it observed that ‘[t]he very concept of an *indirect* investor and an *indirect* investment contains within it the concept that here will be a chain of ownership and control that involve more than one entity’.<sup>76</sup> Based on the fact that the first claimant indirectly controlled and the second claimant indirectly owned and controlled the relevant assets, the tribunal concluded that they constituted ‘investors’ under the ECT.<sup>77</sup>
- 1.61** Finally, in *Limited Liability Company Amtó v. Ukraine* the tribunal used Article 1(7) to come to a definition of the term ‘third state’. It found that the term ‘is not defined in the ECT, but is used in Article 1(7) in contradistinction to ‘Contracting Party’, which suggests that a third state is any state that is not a Contracting Party to the ECT’.<sup>78</sup>

72 *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, paras 349–350.

73 *Ibid.*, para. 355.

74 *Ibid.*, para. 356.

75 *Ibid.*, paras 356–358.

76 *RREEF Infrastructure (G.P.) Ltd and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 142. (emphasis added).

77 *Ibid.*, para. 147.

78 *Limited Liability Company Amtó v. Ukraine*, *supra* note 32, para. 62.

- (a) **with respect to a Contracting Party:**
- (i) **a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;**

In *Cem Cengiz Uzan v. Republic of Turkey* the tribunal was faced with a claimant that sought to invoke the status of ‘**permanently residing in**’ in order to establish the jurisdiction of the tribunal.<sup>79</sup> The tribunal observed that the claimant must satisfy the tribunal that he is an **investor**. The tribunal made the following observation in respect of Article 1(7)(a)(i):

Turning to the wording of Article 1(7)(a)(i), there are three ways in which a natural person may qualify as an Investor: (1) having the nationality of, or (2) having the citizenship of, or (3) permanently residing in a Contracting Party to the ECT in accordance with its applicable law. The first two requirements have an identical meaning and can be considered as one. There is no dispute that the Claimant is a national of the Republic of Turkey, and that he does not hold nationality or citizenship of any other country, or any other Contracting Party to the ECT.<sup>80</sup>

Thus, the tribunal was faced with the task of determining whether ‘the element of “permanently residing in that Contracting Party” entitles an Investor, without more, to commence an arbitration against a Contracting Party of which he or she is a national or citizen’.<sup>81</sup> Importantly, the tribunal observed that:

While under general international law nationality may be a stronger link than ‘permanently residing in,’ the Tribunal is satisfied that the ECT does not on its face seek to create a hierarchical relationship between the criteria of nationality and permanently residing. The wording of Article 1(7)(a)(i) appears to be broad in scope. Without having to examine the preparatory works of the ECT, it is clear that its ‘object and purpose’ was to create a wide expanding energy framework for the ease and encouragement of international energy investments. As has been evidenced in these proceedings, the Contracting Parties to the ECT address the issues of nationality, citizenship and permanent residence in different ways. The inclusion of ‘permanently residing’ appears to have been intended to give protection to investors who may not meet the often strict requirements for nationality and citizenship, as defined by a particular Contracting Party.<sup>82</sup>

<sup>79</sup> *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent Bifurcated Preliminary Objection, 20 April 2016, paras 133–134.

<sup>80</sup> *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent Bifurcated Preliminary Objection, 20 April 2016, para. 139.

<sup>81</sup> *Ibid.*, para. 140.

<sup>82</sup> *Ibid.*



**1.64** Importantly for the purpose of the dispute, the claimant also had to establish that he was an ‘Investor of another Contracting Party’ or ‘an international Investor’ by virtue of Article 26(1).<sup>83</sup> The tribunal considered that there are a factual and a legal component to the ‘**permanently residing**’ criterion:

Starting with the latter, there is no dispute that this operates a *renvoi* to the domestic law of the Contracting Party. The Tribunal must look to the domestic law of the Contracting Party in question to determine whether the Claimant qualifies as permanently residing in that country in accordance with that law. However, determinations by domestic authorities, while highly persuasive, are not absolutely determinative, and the Tribunal is authorized to examine the underlying facts in order to determine whether the Claimant has permanently resided there in accordance with the applicable domestic law. Regarding the factual component, the Tribunal decides that the structure of the wording ‘permanently residing’ implies that there must also be a determination that an Investor was actually living permanently in the territory of the Contracting Party. This is obvious from the ordinary and natural meaning of the text.<sup>84</sup>

**1.65** Ultimately the tribunal considered that the claimant was unable to meet the **permanently residing** criterion.<sup>85</sup> Co-Arbitrator Philippe Sands QC issued a declaration expressing support for the finding of the tribunal that it did not have jurisdiction over the claim because the claimant was not ‘an **investor of another Contracting Party**’ within the meaning of Article 26 ECT.<sup>86</sup> He however considered that it was not necessary for the tribunal to have made a factual finding as to whether the claimant had in fact been ‘**permanently residing in**’ France.<sup>87</sup> In the declaration the Co-Arbitrator further indicated that the claimant ‘was not – at the time of making the investment or at the time when the alleged interference was said to have occurred or commenced – a ‘natural person having the citizenship or nationality of or who is permanently residing in’ another Contracting Party’. The Co-Arbitrator further observed that the ECT:

is not a treaty that is intended to protect the international flow of national investors of a Contracting Party who have already made an investment and thereafter, by reason of their circumstances, decide to (or are forced to) relocate to another Contracting Party. The ECT is not akin to a human rights treaty of the kind that does provide certain protections in such circumstances.<sup>88</sup>

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<sup>83</sup> Ibid., para. 146.

<sup>84</sup> Ibid., para. 156.

<sup>85</sup> Ibid., para. 189.

<sup>86</sup> *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Declaration of Philippe Sands, 20 April 2016, para. 1.

<sup>87</sup> Ibid., para. 3.

<sup>88</sup> Ibid., para. 2.

**(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;**

In *Veteran Petroleum Ltd (Cyprus) v. Russian Federation* the PCA stated that it agreed with Professor Crawford that ‘in order to qualify as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party’.<sup>89</sup> As Professor Crawford rightly points out: ‘The Treaty imposes no further requirements with respect to shareholding, management, *siège social* or location of its business activities (...). Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management.’<sup>90</sup> The tribunal further juxtaposed Article 1(7) with Article 21 of the ILC Draft Articles on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens and found that the former is more comprehensive and naturally cast than the latter.<sup>91</sup> 1.66

In *State Enterprise ‘Energorynok’ (Ukraine) v. Republic of Moldova* the tribunal agreed that ECT Article 1(7) does not preclude a government agency from being an **Investor**.<sup>92</sup> 1.67

Finally, in *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan* the tribunal accepted the nationality of investors based on identification cards and passports. Moreover, the tribunal accepted the status of another investor based on a Certificate of Incorporation of the investor in Moldova. Based on these documents the tribunal accepted that the claimants were investors and that it had jurisdiction.<sup>93</sup> 1.68

**(b) with respect to a ‘third state’, a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.**

<sup>89</sup> *Veteran Petroleum Ltd (Cyprus) v. Russian Federation*, *supra* note 44, para. 411. The tribunal quoted Professor Crawford in James Crawford, SC, *Energy Charter Treaty Arbitration: Jurisdiction Issues*, 22 June 2006, para. 126:

[t]he Treaty imposes no further requirements with respect to shareholding, management, *siège social* or location of its business activities (...). Companies incorporated in Contracting Parties are embraced by the definition, regardless of the nationality of shareholders, the origin of investment capital or the nationality of directors or management.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, para. 413.

<sup>92</sup> *State Enterprise ‘Energorynok’ (Ukraine) v. Republic of Moldova*, *supra* note 58, para. 79.

<sup>93</sup> *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, *supra* note 41, paras 741–745.

**1.69** In *Libananco Holdings Co Ltd v. Republic of Turkey* the tribunal confirmed that the term ‘**third state**’ should be interpreted as a ‘state that is not a Contracting Party’.<sup>94</sup>

**(8) ‘Make Investments’ or ‘Making of Investments’ means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.**

**1.70** The definition of ‘**make investment**’ in Article 1(8) provides that making investments should be interpreted in a broad way. It does not only include new investments but also acquiring parts or an entire existing investment and also changing the field of an investment activity. It aims at extending the non-discriminatory treatment principle once an investment has been made to the ‘post-establishment phase’.<sup>95</sup>

**1.71** This becomes apparent when reading the definition together with the first sentence of Article 10(1) ECT. Article 10 ECT includes the obligations regarding the promotion, protection and treatment of Investments. Contracting Parties have the obligation to ‘encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area’. Foreign investors hence ‘would have been on equal legal footing with their domestic competitors in the host country when applying for an investment authorisation or any other kind of permission necessary for their establishment’.<sup>96</sup> This interpretation of making investments is also based on the second sentence of Article 10(1) and is confirmed by the tribunal in *Plama Consortium Ltd v. Republic of Bulgaria*.<sup>97</sup>

**1.72** Moreover, in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* the tribunal stated that Article 10(1) second sentence stipulates ‘that the stable conditions to be created under the first sentence ‘shall include a commitment to accord *at all times* to Investments of Investors of other Contracting Parties fair and equitable treatment’.<sup>98</sup>

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<sup>94</sup> *Libananco Holdings Co Ltd v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, para. 552.

<sup>95</sup> ECT Reader’s Guide, at 21. See also *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 37, para. 172.

<sup>96</sup> ECT Reader’s Guide, at 21.

<sup>97</sup> *Plama Consortium Ltd v. Republic of Bulgaria*, *supra* note 37, para. 172.

<sup>98</sup> *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, *supra* note 8, para. 315. (emphasis in original).

Although based on the Turkey-United States BIT and not on the ECT, the award of the tribunal in *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret LtdSirketi v. Republic of Turkey* provides valuable guidance in this regard. The tribunal found a ‘breach of the fair and equitable treatment (‘FET’) standard by reference to the ‘roller-coaster’ effect of the continuing legislative changes’.<sup>99</sup> According to the tribunal ‘[t]his is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of [a project], and the constant alternation between private law status and administrative concessions that went back and forth’.<sup>100</sup> The tribunal, ‘while emphasising the relevance of the changing attitudes and policies of the administration, concluded that ‘[s]tability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation.’<sup>101</sup>

**Understanding 4 with respect to Article 1(8) provides that**

**[UNDERSTANDING With respect to Article 1(8)**

**Consistent with Australia’s foreign investment policy, the establishment of a new mining or raw materials processing project in Australia with total investment of \$A 10 million or more by a foreign interest, even where that foreign interest is already operating a similar business in Australia, is considered as the making of a new investment.]**

The understanding thus establishes a minimum threshold for investments in Australia’s new mining and raw materials processing projects. Investments with total investment of \$A 10 million or more by a foreign interest qualify as making an investment. It clarifies that this is also the case even in cases where that foreign interest is already operating a similar business in Australia.

**(9) ‘Returns’ means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.**

<sup>99</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, para. 250.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*, para. 254.

1.75 Article 1(9) of the ECT has not yet been the subject of dispute settlement proceedings. The provision defines **‘Returns’** as covering **amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and also returns/payments in kind.** As per the definition of Article 1(6) of the ECT, a **‘return’** can in itself also constitute an investment for the purpose of the ECT.

1.76 Article 14(1)(b) on transfers related to investments specifies that each Contracting Party shall with respect to investments in its area of investors of any other Contracting Party guarantee the freedom of transfer into and out of its area, including the transfer of **returns.** Article 14(2) ECT specifies that these transfers shall be effected without delay and (except in case of a **Return** in kind) in a Freely Convertible Currency (see also Article 1(14) below). Even though the issue of returns were not of direct concern in dispute settlement proceedings as yet, the tribunal in *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan* clarified that reinvesting profits is also an investment, as Article 14(1) ECT allowed the Claimants to **‘take the ‘Returns’ [...] and to distribute them as dividends or to spend or invest them as they saw fit’.**<sup>102</sup>

(10) **‘Area’ means with respect to a state that is a Contracting Party:**

- (a) **the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and**
- (b) **subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction. With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.**

1.77 Article 1(10) provides an explicit definition of the term **‘Area’.** The definition of an area of a **State that is a Contracting Party** includes the **land, internal waters and the territorial sea.** The tribunal in *Libananco Holdings Co. Ltd v. Republic of Turkey* found that **‘Area’ [...] is a term of art, defined in Article 1(10), and includes the land and maritime territory of a Contracting Party’.**<sup>103</sup> In *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* the tribunal

102 *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, *supra* note 41, para. 809.

103 *Libananco Holdings Co Ltd v. Republic of Turkey*, *supra* note 93, para. 550.

observed that '[i]t is evident that all investments at sites located within the territory of a Contracting Party constitute Investments in the "Area" of the Contracting Party'.<sup>104</sup>

For a definition of the term '**territorial sea**' one has to refer to Article 2 of the United Nations Convention on the Law of the Sea ('UNCLOS').<sup>105</sup> According to that provision, '[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea'. Article 2.2 of the UNCLOS provides that '[t]his sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil'. There are limits to the territorial sea introduced by Articles 3–16 of the UNCLOS. **1.78**

Article 1(10) ECT defines the concept of territory by referring to both the territory of the Contracting Parties, as well as the territory of REIO, such as the EU.<sup>106</sup> The tribunal in *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain* found that 'Article 1(10) of the ECT, in order to define the concept of "area" refers to both the territory of the Contracting States (Article 1(10)(a)) and the EU territory (Article 1(10) second paragraph)'.<sup>107</sup> Accordingly, so the tribunal reasoned, 'it appears reasonable to deduce that, in referring to investments made "in the territory" of a contracting party, Article 26(1) refers to both, in the case of a EU member State, to the territory of a national State as well as the territory of the EU'.<sup>108</sup> **1.79**

In respect of the definition of the territory of the EU, Article 52 of the Treaty on European Union ('TEU') provides that: **1.80**

The Treaties shall apply to the Kingdom of Belgium, Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the

104 *Mohammad Ammar Al-Babloul v. Republic of Tajikistan*, *supra* note 51, para. 140.

105 Available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

106 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, *supra* note 8, para. 236.

107 *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, unofficial translation by Mena Chambers, para. 430.

108 *Ibid.*

Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.<sup>109</sup>

The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union ('TFEU').<sup>110</sup> The Faroe Islands, Greenland, French overseas territories, Netherlands Antilles are not part of the Territory of the EU. Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands however form part of the European territories in accordance with Article 349 of the TFEU.<sup>111</sup>

(11)

- (a) **'WTO' means the World Trade Organization established by the Agreement Establishing the World Trade Organization.**
- (b) **'WTO Agreement' means the Agreement Establishing the World Trade Organization, its Annexes and the decisions, declarations and understandings related thereto, as subsequently rectified, amended and modified from time to time. Annex W: Exceptions and Rules Governing the Application of the Provisions of the WTO Agreement (in accordance with article 29(2)(A))**
- (c) **'GATT 1994' means the General Agreement on Tariffs and Trade as specified in Annex 1A to the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified from time to time.**

**1.81** Article 1(11) of the ECT defines the terms 'WTO', 'WTO Agreement' and 'GATT 1994'. It confirms the close relationship between the ECT regime and the World Trade Organization ('WTO') (Article 1(11)(a)).

**1.82** The Energy Charter Secretariat confirms this close relationship as it states that

[o]ne of the necessary conditions for forging open and non-discriminatory energy markets through the Energy Charter process has been to create a stable, predictable and non-discriminatory regime for energy and energy-related trade between all 52 ECT Contracting Parties ('CPs')/signatories. Such a framework should naturally follow and be based on the rules of the multilateral trading system as embodied in the

109 European Union, Treaty on European Union, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>.

110 European Union, Consolidated version of the Treaty on the Functioning of the European Union, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

111 See also for an overview [https://ec.europa.eu/taxation\\_customs/business/vat/eu-vat-rules-topic/territorial-status-eu-countries-certain-territories\\_en](https://ec.europa.eu/taxation_customs/business/vat/eu-vat-rules-topic/territorial-status-eu-countries-certain-territories_en).

General Agreement on Tariffs and Trade ('GATT') – when the ECT was negotiated between 1991 and 1994 – and now in the World Trade Organisation ('WTO').<sup>112</sup>

The ECT regime and the regime laid down by the GATT 1994 (as defined in Article 1(11)(c)) are closely connected. The ECT also found a way through which to deal with transactions between ECT Contracting Parties that were already a party to the GATT and those that were not. This was done by making the substantive GATT rules applicable to such transactions ('GATT by reference' – Art. 29).<sup>113</sup> The ECT therefore has the effect of treating those Contracting Parties which are not members of the WTO, as if they were WTO members – in the framework of energy-related trade. Indeed, 'the ECT trade regime will have fulfilled its purpose once all member countries have also become members of the WTO'.<sup>114</sup> **1.83**

Three years after the entry into force of the WTO Agreement, the ECT was amended in order to take account of the relevant changes in the multilateral trade rules resulting from the Uruguay Round that had led to the creation of the WTO. The amendment has taken the same approach as the original Treaty: it incorporated all those WTO rules on trade in goods that are relevant from a sectoral viewpoint ('WTO by reference').<sup>115</sup> **1.84**

'On 24 April 1998, the International Conference of the Parties to the Energy Charter adopted a new instrument, which amended the Treaty (the so-called 'Trade Amendment'). It replaced the GATT provisions of the ECT with those of the WTO.'<sup>116</sup> It is beyond the scope of this commentary to discuss the relationship between the ECT and the provisions of the WTO in detail.<sup>117</sup> It should be noted that '[t]he integration of GATT rules was done using the legal technique known as 'incorporation by reference', i.e., declaring the applicability of the GATT through an Annex'.<sup>118</sup> The Annex is a 'negative list' stating the provisions of GATT that are not applicable in ECT'.<sup>119</sup> **1.85**

112 ECT Reader's Guide, at 12.

113 Ibid.

114 Ibid., at 13.

115 Ibid., at 12.

116 Ibid., at 14.

117 Reference is made to the explanation relating to 'The Trade Amendment (TA) of the Energy Charter Treaty' ('Explanations relating to the Trade Amendment (TA) of the Energy Charter Treaty'). Available at [https://energycharter.org/fileadmin/Documents/Media/Thematic/Trade\\_Amendment\\_Explanations-EN.pdf](https://energycharter.org/fileadmin/Documents/Media/Thematic/Trade_Amendment_Explanations-EN.pdf).

118 Explanations relating to the Trade Amendment (TA) of the Energy Charter Treaty, p. 2.

119 Ibid.



(12) **'Intellectual Property' includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.**

[UNDERSTANDING With respect to Article 1(12) The representatives recognise the necessity for adequate and effective protection of Intellectual Property rights according to the highest internationally-accepted standards.]

- 1.86 Article 1(12) provides a definition of the term **'intellectual property'**. Title II of the EEC states that 'the signatories will ensure that the international rules on the protection of industrial, commercial and intellectual property are respected'.<sup>120</sup> This is again reflected in Article 8(1) ECT on transfer of technology. **Intellectual property** also qualifies as an 'investment' according to the definition of that term provided in Article 1(6)(d).
- 1.87 The definition includes two categories of **intellectual property**, namely industrial property such as **patents, trademarks, industrial designs** and **geographical indications**, as well as **copyrights** which covers amongst others literal and artistic work. The **understanding** with regard to Article 1(12) further specifies that the protection of **intellectual property rights** is to be carried out adequately and effectively, according to the **highest international standards**.
- 1.88 The Joint Declaration on Trade-Related Intellectual Property Rights on the amendment to the trade-related provisions of the ECT re-confirms this commitment of the signatories and specifies that for the purpose of this Declaration property rights are 'in particular copyright and related rights (including computer programmes and data bases), trademarks, geographical indications, patents, designs, topographies of semiconductor products and undisclosed information'.<sup>121</sup> The definition included in the amendment is therefore slightly different than the one of the ECT itself. It is more detailed in that it explicitly specifies that copyrights and related rights include 'computer programmes and databases' and further explicitly includes 'topographies of semiconductor products' into the definition.

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120 Title II: Implementation EEC.

121 Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, as adopted on 24 April 1998.

(13)

- (a) **‘Energy Charter Protocol’ or ‘Protocol’ means a treaty, the negotiation of which is authorised and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of cooperation pursuant to Title III of the Charter.**

Article 33 ECT deals with Energy Charter Protocols and Declarations. This is the first article of Part VII on Structure and Institutions. Article 33(1) includes the mandate for the Charter Conference to authorize the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter. Article 13(5) further states that a Protocol shall apply only to the Contracting Parties which consent to be bound by it, and shall not derogate from the rights and obligations of those Contracting Parties not party to the Protocol. 1.89

Currently only one Protocol has been adopted, as Annex 3 to the Final Act of the European Energy Charter Conference. This is the Protocol on Energy Efficiency and Related Environmental Aspects (‘PEEREA’). The Protocol builds on ECT Article 19 and ‘defines policy principles for the promotion of energy efficiency as a considerable source of energy and for consequently reducing adverse Environmental Impacts of energy systems’.<sup>122</sup> Moreover, it provides guidance on the development of energy efficiency programmes. It indicates areas of cooperation and ‘provides a framework for the development of cooperative and coordinated action’.<sup>123</sup> The protocol was negotiated and signed alongside the ECT in 1994 and open for signature as well as entered into force at the same time as the Treaty on 16 April 1998. 1.90

Negotiations on a second Protocol, the ‘Transit Protocol’ based on ECT Article 7 started in 2000, roughly one year after the ECT and PEEREA entered into force. The objectives of the Protocol as included in the last official draft of 2003 were (a) to ensure secure, efficient, uninterrupted and unimpeded Transit [...] (b) to promote transparent and non-discriminatory access to and use of Available Capacity [...] (d) to facilitate the construction, expansion, extension, reconstruction, and operation of Energy Transport Facilities [...].<sup>124</sup> The negotiations were suspended in 2003 and in 2009 a new 1.91

122 Article 1 PEEREA.

123 Ibid.

124 Article 2(1) draft Transit Protocol, version 31 October 2003.

negotiation mandate was issued. However, this mandate was repealed by the ECC in 2011.<sup>125</sup> At the point of writing, the Energy Charter Secretariat is conducting consultations with stakeholders on a reset of negotiations on the Transit Protocol or an additional Energy Charter instrument on energy transit.<sup>126</sup>

**(b) ‘Energy Charter Declaration’ or ‘Declaration’ means a nonbinding instrument, the negotiation of which is authorised and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.**

**1.92** Declarations include individual views and positions of the Charter Conference (made by States or groups of States) regarding certain aspects of the Treaty.<sup>127</sup> They are not formal parts of the Treaty but constitute non-binding instruments. However the Charter Conference emphasized that they belong to the ‘overall political package when setting the conditions for accession’.<sup>128</sup> Article 33(1) includes the mandate for the Charter Conference to authorise the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter. Most of the declarations are directly included in the Final Act.<sup>129</sup>

**(14) ‘Freely Convertible Currency’ means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.**

**1.93** Article 1(14) of the ECT has not yet been at issue in dispute settlement proceedings. The provision simply provides a definition for the term ‘**freely convertible currency**’ as used in Articles 13 and 14 of the ECT. The *Collins English Dictionary* defines a **convertible currency** as ‘a currency that can be bought and sold on the open market for other currencies’.<sup>130</sup>

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125 For a detailed overview of the negotiation history and process of the Transit Protocol see <https://energycharter.org/what-we-do/trade-and-transit/transit-protocol/>.

126 <https://energycharter.org/what-we-do/trade-and-transit/transit-protocol/>.

127 ECT Reader’s Guide, 62.

128 *Ibid.*, 61.

129 *Ibid.*, 62.

130 *Collins English Dictionary*. Copyright © HarperCollins Publishers, 2018.