

In the matter of:

NYKOMB SYNERGETICS TECHNOLOGY HOLDING AB, Claimant

v.

THE REPUBLIC OF LATVIA, Respondent

SCC Arbitration No. 118/2001

SECOND OPINION OF

ADNAN AMKHAN

HEAD OF LEGAL AFFAIRS
ENERGY CHARTER SECRETARIAT
BRUSSELS

Introductory note

1. I have been asked by Mr Wennerholm of Setterwalls Law Firm, acting for the Republic of Latvia, to give a second opinion regarding the issues raised in Professor Thomas Wälde's Opinion of 6 June 2003 concerning matters of the Energy Charter Treaty.
2. I have read Professor Wälde's extensive Opinion very carefully. I find Professor Wälde's resort to Eurlectric reports, the Florence process, international law and its history, international investment law and its development, WTO law, environmental law, various European state practices in the cogeneration field, the European Convention on Human Rights, NAFTA, the US Sherman Act and EU competition law most interesting and undoubtedly edifying.
3. However, my mandate in giving this opinion remains the same as stated in my earlier Opinion of 30 May 2003. Therefore, I will neither discuss all of the many issues raised in Professor Wälde's Opinion, nor comment on the relevance of his diverse sources or speculate whether they are applicable to the dispute at hand.
4. I should also like to note that, in view of my official capacity as the Head of Legal Affairs Department of the Energy Charter Secretariat, I am not in a position to express any opinion on the accuracy of any of the legal positions taken either by the Claimant or the Respondent.

The Energy Charter Treaty and Related Instruments Relevant to this Arbitration

5. In this section I will first summarise the nature, scope and relationship between the European Energy Charter, the Energy Charter Treaty, the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, and the Supplementary Treaty. I will then briefly examine Professor Wälde's comments on each of these instruments.

The European Energy Charter

6. The European Energy Charter is a political declaration. It was signed by fifty-two States and the European Communities at The Hague on 16-17 December 1991. Even though the European Energy Charter is not a legally binding instrument, it is not, as we shall see presently, without legal significance. The Charter was conceived as a means to further the complementary relationship in the energy sector between the CIS countries, Central and Eastern Europe and Western countries.

7. The European Energy Charter consists of four titles and a Preamble: Title I "Objectives", Title II "Implementation", Title III "Specific Agreements", and Title IV "Final Provisions".

8. The signatories of the European Energy Charter undertook to pursue their political objectives and principles by negotiating legally binding instruments. So far, two agreements have been concluded: the Energy Charter Treaty (the "ECT") and the Energy Charter Protocol on Energy Efficiency and Environmental Aspects ("PEEREA").

The Energy Charter Treaty

9. The ECT is an international agreement binding on all its Contracting Parties.¹ It was signed in Lisbon on 17 December 1994, and entered into force on 16 April 1998. The ECT is listed as Annex 1 to the *Final Act of the European Energy Charter Conference*,² and comprises eight parts and fifty substantive articles. Attached to the ECT are various Declarations, Understandings, and a number of Annexes. Annex 2 to the *Final Act of the European Energy Charter Conference* consists of Decisions with respect to the ECT.

10. The ECT deals with diverse issues in the energy sector including commerce, transit, investment promotion and protection, and various dispute resolution procedures. The investment promotion and protection provisions are set out in Part III of the ECT, which contains seven substantive articles (Articles 10-17). Part III of the ECT deals with matters relating to both the pre-investment phase (known in ECT parlance as “Make Investments” or “Making of Investments”) and post-investment phase.³ Article 10(2-5) is dedicated exclusively to the Making of Investment phase. The obligations therein are of a soft law nature, presented in the “best endeavour” language.

The Energy Charter Protocol on Energy Efficiency and Environmental Aspects (“PEEREA”)

11. PEEREA is an international agreement in its own right. It is listed in Annex 3 of the *Final Act of the European Energy Charter Conference*. All ECT Contracting Parties have ratified PEEREA,

¹ As of 4 September 2003, the ECT has been ratified by 47 countries including the European Community. 5 signatories have not yet ratified the ECT.

² There are 3 annexes to the Final Act of the European Energy Charter Conference.

³ Pursuant to Article 1(8) of the Treaty “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.”

with the exception of Georgia. It is to be noted that PEEREA does not contain a dispute settlement mechanism, as is the case with the ECT.

Supplementary Treaty

12. Pursuant to Article 10(4), the Contracting Parties of the ECT agreed to negotiate a supplementary treaty, the purpose of which is to convert the soft law obligation set out in Article 10(2) of the ECT into a hard law obligation. The Supplementary Treaty was completed in 1998, but has not yet been adopted.

The relationship between the above-mentioned four instruments

13. As mentioned above, the European Energy Charter is a political declaration. The European Energy Charter is also explicitly referred to in Article 2 of the ECT entitled “**Purpose of the Treaty**”. It reads as follows:

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

The “*Charter*” is defined in Article 1(1) of the Treaty as the European Energy Charter of 1991.

14. Therefore, the legal relationship between the ECT and the European Energy Charter is clearly established in Article 2 of the Treaty. This leaves no doubt that the European Energy Charter provides the context in which the ECT provisions are to be interpreted.

15. The relationship between the ECT and PEEREA, which is a Charter Protocol, is of a different nature. This relationship is explained in both PEEREA and the ECT.

Article 13(1) of PEEREA stipulates that:

“In the event of inconsistency between the provisions of this Protocol and the provisions of the Energy Charter Treaty, the provisions of the Energy Charter Treaty shall, to the extent of the inconsistency, prevail.”

Article 1 (13)(a) of the Treaty provides that:

““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.”

16. Accordingly, PEEREA is a separate agreement from that of the Treaty and contains obligations (mainly of a policy nature) independent from the ECT obligations.

17. The relationship between the Treaty and the unadopted Supplementary Treaty is that the latter was meant to convert the soft law obligation set out in Article 10(2) into a hard law obligation. In other words, the only purpose envisaged for the Supplementary Treaty was to transfer the non-discrimination obligation regarding the pre-investment phase set out in Article 10(2) into a hard law obligation.

Comments on Prof. Wälde's views on the above

18. In his Opinion, Professor Wälde advances a number of observations regarding the ECT and its Related Instruments. I shall now comment on what he says in this regard.

19. At the outset I must confess that I find Professor Wälde's analysis of the legal relationship between the European Energy Charter, the ECT, PEEREA and the Supplementary Treaty rather difficult to understand for the purpose of interpreting the ECT.

20. In order to argue that the objectives of the ECT can be ascertained from PEEREA, Professor Wälde observes in paragraphs 33 and 34 of his Opinion that PEEREA is "annexed to the ECT and form[s] part of the ECT". In actual fact, however, PEEREA exists as a separate treaty agreement from the ECT. It is not annexed to the ECT, but rather to the *Final Act of the European Energy Charter Conference*.

21. Furthermore, Professor Wälde mistakenly relies upon the ECT Preamble to establish a connection between the European Energy Charter and the ECT. He then states, in paragraph 32 of his Opinion, that the European Energy Charter is "below the preamble" of the ECT. As explained above, pursuant to Article 2 of the ECT, the European Energy Charter is explicitly relevant to the application of the ECT. Therefore, it cannot be considered as an instrument falling "below the preamble" of the ECT.

22. After an extended *tour d'horizon* through the European Energy Charter, Article 19 of the ECT and the PEEREA, Professor Wälde correctly states, in paragraph 34 of his Opinion, that "[t]he tools –

the “investment disciplines” in part III of the Treaty – have to be seen as instruments to implement the overall emphasis on promotion of private investment ...” However, he concludes more than once that the investment provisions of the ECT should be conceived as placing a “special highlight” on investment in the co-generation field. This, at least in the ECT context, is questionable. For the purposes of promotion and protection, the ECT does not distinguish in any way between investment in the cogeneration field and any other investment in the energy sector. All forms of investment must all receive the same standard of treatment.

23. In paragraph 28 of his Opinion, Professor Wälde observes that because the ECT was “negotiated [sic] at considerable haste ... The controversial issues were therefore separated from the accepted formulation. The accepted formulations entered into the 1994 ECT, while the not yet solved issues were to be negotiated in a supplementary treaty (which has not been completed as of 2003).” As mentioned above, the only issue the Supplementary Treaty deals with is the issue of non-discrimination during the pre-investment phase; it does not touch upon any of the other controversial issues which were not dealt within the ECT.

24. Professor Wälde refers frequently to Article 10(3) of the ECT in order to support Claimant’s causes of action. However, Article 10(3) contains merely a definition of the term “Treatment” for the Making of Investment phase, which is not at issue in the present case. In other words, Article 1(3) does not relate to any post-investment obligation. Nor indeed does it provide for any obligation. Professor Wälde’s invocation of this Article in paragraphs 26, 100, 102 and 111 of his Opinion is unfortunately erroneous.

25. In paragraph 102 of his Opinion, Professor Wälde refers to the non-discrimination obligation in Article 10(1), (3) and (7) of the ECT. He then states “[w]hile it is not clear why this – single – standard (also called “national treatment”) is repeated three times in Art. 10, it is probably the most sensible approach to consider Art. 10 to include, even if repeated in a more expansive and emphatic form, one single standard of non-discrimination of national treatment.”

26. The fact is that the non-discrimination standard (which encompasses national treatment and most-favoured-nation obligations, and not merely national treatment) is repeated three separate times for a reason. First, non-discrimination is mentioned in Article 10(1) as providing for the general principle of non-discrimination itself. Second, it is mentioned in Article 10(2) and (3) as a standard applicable to the Making of Investment phase. Third, it is mentioned in paragraph 10(7) as a specific application of the general principle to the post investment phase. There is nothing strange about this threefold repetition of the non-discrimination obligation, as it merely denotes three separate functions.

The Scope of the Dispute Resolution Mechanism of the Energy Charter Treaty

27. In this section I will first give a brief overview of the various dispute resolution mechanisms contained in the ECT. I will then comment on Professor Wälde’s observations in this regard.

28. The ECT contains a number of dispute resolution mechanisms. Some are set out in Part IV entitled “**Dispute Settlement**”, and

others are set out within the text of a particular article. In addition to Article 26 and 27 (discussed below) there are also the following dispute settlement mechanisms available under the ECT.

- For disputes arising under Article 6 entitled “**Competition**”, which is set out in Part II of the ECT, two mechanisms are made available. The first entails one Contracting Party notifying the Contracting Party which has adopted a specific anti-competitive conduct. The second procedure is set out in Article 27(1) and entails “diplomatic channels”. Accordingly, the competition article is not justiciable by way of arbitration under either Article 26 or Article 27 of the Treaty.
- Pursuant to Article 7 entitled “**Transit**”, in the event of a dispute concerning interruption or reduction of energy in transit, a Contracting Party is entitled to invoke a conciliation mechanism. This however is conditional on “the exhaustion of all relevant contractual or other dispute resolution remedies.”
- With regard to disputes arising in connection with Article 19 (“Environmental Aspects”), paragraph (2) stipulates that:

“At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.”

Article 19 is thus explicitly excluded from other dispute settlement mechanisms, particularly those set out in Article 26 and 27 of the ECT.

- Pursuant to Article 29(7), trade disputes will only be settled by the panel mechanism set out in Annex D of the Treaty.

Article 27 ECT: Settlement of Disputes Between Contracting Parties

29. Article 27 provides for a general dispute resolution mechanism between Contracting Parties to the ECT, and contains two elements. The first provides that Contracting Parties should endeavour to settle their disputes regarding the application and interpretation of the Treaty through diplomatic channels. Second, failing to resolve the dispute through diplomatic channels, either party may then resort to arbitration.

30. As mentioned above, the following Articles have been excluded from the remit of Article 27: Article 5, Article 6, Article 19 and Article 29.⁴

Article 26 ECT: Settlement of Disputes between an Investor and a Contracting Party

31. Article 26 provides for the dispute resolution mechanism to settle disputes between an Investor and a Contracting Party to the ECT. The main features of the Article are as follows:

- Private Investors have the right to bring a claim against a Contracting Party to the ECT;
- The Investor's claim must relate to his Investment;
- The claim must concern an alleged breach by a Contracting Party of its obligations under Part III of the ECT (Articles 10-17).

32. Pursuant to Article 10(11) of ECT, Article 5, which is listed in Part III of the ECT, is justiciable under Article 26 of the ECT. The

⁴ That Articles 5 and 29 are excluded from the reach of Article 27 is provided for in Article 28 of the Treaty. It reads as follows: "A dispute between Contracting Parties with respect to the application or interpretation of Article 5 or 29 shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree."

same applies to Article 23 and certain provisions of Article 21, where there is an explicit reference to Article 26.

33. Article 26 contains two relevant annexes: Annex ID and Annex IA.⁵ Annex ID lists the Contracting Parties who did not give their unconditional consent to conciliation or arbitration where the Investor has previously submitted the dispute to domestic courts or tribunals or to previously agreed dispute settlement procedures.

34. Annex IA lists the Contracting Parties which did not give their unconditional consent for conciliation or arbitration “with respect to a dispute arising under the last sentence of Article 10(1).”

Analysis of Prof. Wälde’s views on the ECT’s Dispute Settlement resolution mechanisms

35. I will now comment on some of Professor Wälde’s observations concerning the scope of the dispute settlement mechanisms of the ECT.

36. In paragraph 87 of his Opinion, Professor Wälde refers to Article 5, entitled “**Trade-Related Investment Measures**” as not “justiciable under Art. 26”. This is incorrect. As mentioned above, Article 10(11) makes explicit that Article 5(1)(2) falls within the ambit of Article 26.

37. In the same paragraph, Professor Wälde refers to Article 7(7) as not enforceable by arbitration “but merely by consultation, discussion or other low-level, soft law dispute measures.” Article 7(7) is an incorrect example of this. Article 7(6) and (7) deals with

⁵ Article 26(3)(b) and (c).

a Contracting Party's obligation not to interrupt or reduce transit in the event of dispute, and falls within the reach of Article 27. This is clear from the Chapeau of Article 7(7).

38. Further, Article 7(7) provides for an additional conciliation mechanism rather than consultation, where the conciliator's decision regarding "interim tariffs and other conditions" is binding on the disputing Contracting Parties for a certain period of time. However, the best example of an article where disputes are not enforceable by arbitration but rather by consultation is Article 19 (see paragraph 28 above).

39. In paragraph 89, Professor Wälde argues that because both Articles 26(1) and Article 22(1) refer to Part III's obligations, this "makes clear that Art. 22(1) does not establish a new, primary, obligation but merely clarifies and confirms the attribution of responsibility of the state for the conduct breaching part III by all of its organs, entities and enterprises". With all due respect to Professor Wälde, this is an over-general and ultimately incorrect comparison. Article 26(1) defines only the limits of an arbitral tribunal's jurisdiction, whereas Article 22(1) is concerned with the scope of a Contracting Party's obligation with respect to the activities of its enterprises. Furthermore, as explained in my first Opinion, it is problematic to argue that Article 22(1) confirms the "attribution of responsibility." It cannot be accurately said that responsibility under international law is attributable. Indeed, the juridical act of attribution constitutes only one of two prerequisites for establishing State responsibility.

40. Professor Wälde's allusion in paragraph 90 of his Opinion to Article 6(7) and Article 7(7) as including a clear exclusion of Article 26 is incorrect. Article 26 does not apply to these articles at all.

This is because these articles fall outside Part III of the ECT, and are in fact listed under Part II. What has been excluded in these two Articles is Article 27 of the ECT, namely, the issue of state-to-state arbitration.

41. As a point of clarification, it is to be noted that pursuant to Article 26, an Investor may only bring a claim against a Contracting Party for an alleged breach of its obligations under Part III of the ECT. However, an Investor may also bring a claim for an alleged breach of other articles wherever it is explicitly mentioned that such articles fall within the ambit of Article 26.

42. However, the respondent (always a Contracting Party) may rely upon all available defences, including Article 24 of the ECT entitled “**General Exceptions**”. Anticipating such a possibility with regard to Article 18 entitled “**Sovereignty over Natural Resources**”, the ECT contains Declaration V, which reads as follows:

“The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty.”

Accordingly, Professor Wälde’s reasoning in paragraph 95 of his Opinion is questionable.

Conclusions

43. In conclusion, I must reiterate that the above examination of the ECT provisions and indeed my comments on Professor Wälde’s various observations regarding the ECT and its Related Instruments do not in any way advocate the position of any party to the present dispute. The sole purpose of this Opinion is to

provide an accurate picture of the nature, scope and application of the ECT and its Related Instruments.



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4 September 2003
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