

ARTICLE 2

PURPOSE OF THE TREATY

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

COMMENTARY	59	C. ‘Long-term cooperation in the energy field’	64
A. ‘In accordance with the objectives and principles of the Charter’	60	D. ‘A legal framework’	66
B. ‘Complementarities and mutual benefits’	64	E. Modernisation of the ECT	68

COMMENTARY

Article 2 of the Energy Charter Treaty (ECT) lays down the purpose of the Treaty. **2.01** The provision highlights the ‘treaty’s role in providing a legal framework promoting long-term cooperation, suggesting that the treaty is conceived as enhancing the stability required for such cooperation’.¹ The ECT is a multilateral treaty² which is ‘broad and far reaching in scope’.³ The Treaty’s purpose essentially contains four elements:

1. the establishment of a ‘legal framework’ aimed at;
2. the promotion of long-term cooperation in the energy field based on;
3. complementarities and mutual benefits;
4. in accordance with the objectives and principles of the Charter.

¹ *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, 378–9; as further confirmed in *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, at 197ff.

² *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan*, SCC Case No. V116/2010, Dissenting Opinion of Judge Magnus Ulriksson, 9 December 2016 at 3.

³ *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent Bifurcated Preliminary Objection, 20 April 2016, at 151, 152.

2.02 These elements will be discussed in reverse order in the following.

A. 'In accordance with the objectives and principles of the Charter'

2.03 Article 2 of the ECT makes clear that the promotion of **long-term cooperation in the energy field** should not take place in a vacuum. Rather, it should be carried out in search of complementarities and mutual benefits, and, moreover, it should be **in accordance with the objectives and principles of the Charter**. It is thus essential to determine what those 'objectives' and 'principles' are.

2.04 The ECT itself does not contain a separate section on objectives and principles but refers to the principles and objectives of the European Energy Charter (1991) (see Article 1(1) ECT for a definition) ('EEC'). The EEC lists its objectives in Article 1. Accordingly the signatories of the EEC strive to:

- improve the security of energy supply;
- maximise the efficiency of production, conversion, transport, distribution and use of energy;
- enhance safety and minimise environmental problems on an acceptable economic basis.

Moreover:

within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better-functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.⁴

2.05 States will, in accordance with the principles, take action in the following fields:

- development of trade in energy consistent with major relevant multilateral agreements;
- cooperation in the energy field (see further below); and
- energy efficiency and environmental protection.⁵

The modernisation of the ECT contemplates the introduction of a reference to the 2015 International Energy Charter (see Commentary of Article 1; hereafter 'IEC') into the definition of 'the Charter' in Article 1(1). The objectives included in the IEC are similar to the ones included in the ECC yet introduce additional notions on sustainability. Title I IEC reads 'The signatories are desirous of sustainable energy development, improving energy security and maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety in a manner which would

4 Article 1 EEC.

5 Ibid.

be socially acceptable, economically viable, and environmentally sound'. The IEC, in similar wording as already included in the EEC, stresses amongst others the principle of State sovereignty over its natural resources, and its rights to regulate energy transmission and transportation. The section on objectives further includes several points of action that the signatories will undertake in the area of development of trade in energy, cooperation, energy efficiency and environmental protection, which are largely similar to the ones included in the EEC and in some instances go beyond those included in the EEC. An example of this is the inclusion of 'promotion of cooperation to reduce, as much as possible, gas flaring and venting; sharing of best practices on clean energy development and investment; promotion and use of low emission technologies'⁶ as suggested activities in the area of energy efficiency and environmental protection.

These objectives and principles have further been developed and concretised through several Awards that have interpreted Article 2 of the ECT. 2.06

Accordingly, for example regarding trade, emphasis has been placed on the transparency element. The EEC 'points to the goal of a stable investment regime. In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade'.⁷ Further, the Energy Charter provisions 'show that, in interpreting [the] ECT's obligation to accord fair and equitable treatment, interpreters must be mindful of the agreed objectives of legal stability and transparency'.⁸ Further, taking recourse to paragraph II(4) of the EEC, it has been held that: 2.07

[i]n order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. In sum, the ECT aims to promote cooperation and the flow of international investment in the energy field to serve the ultimate goal of creating and maintaining a stable and efficient energy market.⁹

The Energy Charter Secretariat has observed that: 2.08

the ECT establishes a multilateral legal framework for cross-border energy cooperation. It covers energy trade, investment and transit in a comprehensive manner. It also deals with the issue of energy efficiency and includes binding dispute resolution procedures. The ECT *aims to encourage and facilitate international energy cooperation*. Its key principles of *openness* of energy markets and *non-discrimination* have the potential to stimulate foreign direct investment and cross-border trade.

6 Article 1(3) IEC.

7 *Eiser Infrastructure Ltd and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, *supra* note 1, 378–9; as further confirmed in *Greentech AS and others v. Spain*, SCC Arbitration V (2015/150), *Final Award*, 14 November 2018 at 350.

8 *Ibid.*

9 *Vattenfall A.B and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12; Decision on the Achmea Issue, 31 August 2018, at 197f.

This will contribute towards securing energy supply of energy importing countries and increasing capital inflows into energy exporting countries. Economies in transition need capital to develop and upgrade their energy industries.¹⁰

Thus, the principles of ‘openness’ and ‘non-discrimination’ are also cornerstones of the regime laid down by the ECT.

2.09 The Energy Charter Secretariat describes the basic elements of the ECT as follows:

- investment protection (e.g. by granting investors non-discriminatory treatment – national treatment and most-favoured nation treatment – compensation in case of expropriation and other losses, free transfer of capital);
- trade in energy, energy products and energy-related equipment, based on the WTO rules;
- freedom of energy transit;
- improvement of energy efficiency;
- international dispute settlement, including investor-state arbitration and interstate arbitration;
- improved legal transparency.¹¹

In other words, the promotion of long-term cooperation in the energy field should be pursued through a legal framework that takes into account these aforementioned objectives and principles. ‘Further to these key elements, the ECT contains commitments on governmental cooperation, for instance with regard to transfer of technology, opening of financial markets, and the development of competition rules’.¹²

2.10 The ECT is said to be based on a united commitment of an economic alliance of countries to achieve the following common goals:

- to provide open energy markets, and to secure and diversify energy supply;
- to stimulate cross-border investment and trade in the energy sector;
- to assist countries in economic transition in the development of their energy strategies and of an appropriate institutional and legal framework for energy, and in the improvement and modernisation of their energy industries.¹³

2.11 It should also be noted that the ECT confirms the principle of national sovereignty over energy resources in Article 18. This provision confirms that ECT member countries retain their freedom to conduct national energy policies and retain their sovereignty over their natural resources, as long as they exercise this sovereignty in accordance with the provisions of the ECT. The ECT does not address the regulation of domestic energy markets, the corporate legal structure of energy companies or rules

10 Energy Charter Secretariat (2002), *The Energy Charter Treaty – A Reader’s Guide*, 85 pp., at 6 (Available at https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT_Guide_ENG.pdf). Emphasis added.

11 *Ibid.*, at 10.

12 *Ibid.*, at 9.

13 *Ibid.*

on third-party access.¹⁴ Finally, the national security exception and other exceptions are enshrined in Article 24 of the ECT.¹⁵

The principles and objectives of the ECT continue to form cornerstones of the work of the Energy Charter. However, it is also acknowledged that the Energy Charter process should adapt to new challenges.¹⁶ 2.12

The objectives and principles of the Treaty include not only the promotion of investments but also the promotion of the economic development of the contracting states in a balanced manner which takes into account whether ‘the totality of the Treaty’s purpose is appropriate.’¹⁷ This finding of the tribunal in *Plama Consortium Ltd v. Republic of Bulgaria* confirms that there is a developmental aspect to the ECT too. Whereas the promotion of investments is an objective, so is the promotion of the economic development of the ECT’s contracting states *through* such investments. In other words, tribunals will always have to consider the balance between the rights of investors and the desired objective of ensuring economic development of the contracting states. This approach was echoed by the tribunal in *El Paso Energy International Co. v. Argentina*: ‘This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow’.¹⁸ 2.13

A final element of the objectives and principles is the need for a transnational (or international) link. The ECT process serves to protect international, as opposed to national, investments. This is a key principle, as was observed by the tribunal in *Cem Cengiz Uzan v. Republic of Turkey*: 2.14

As established by the objectives and the implementation of the Concluding Document of the Hague Conference of the European Energy Charter, the object and purpose of the ECT is to protect ‘the international flow of investments’, and hence to protect international investors. The Claimant, no matter how he frames his arguments, is missing this essential transnational link, in relation both to the time his ‘investment’ was made and when he alleges it was interfered with.¹⁹

In conclusion, the objectives and principles of the Charter are graphically displayed in Table 2.1. 2.15

¹⁴ *Ibid.*, at 9–10.

¹⁵ *Ibid.*

¹⁶ Energy Charter Secretariat (2016), *The International Energy Charter – Consolidated Energy Charter Treaty with Related Documents*, Last Updated: 15 January 2016, Foreword, at 2. Available at <https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

¹⁷ *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, at 166–7.

¹⁸ *El Paso Energy International Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 at 650.

¹⁹ *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent Bifurcated, Preliminary Objection, 20 April 2016, at 151 152.

Table 2.1 EEC Charter objectives and principles

EEC Objectives	Principles
Development of open and efficient energy markets	Non-discrimination: treatment of established investments (post-establishment) as well as the treatment in terms of the making of investments (pre-establishment), both in terms of 'national treatment' and 'most-favoured nation' ('MFN') treatment
Creation of conditions that will stimulate the flow of private investments and the participation of private enterprises	Openness (of international energy markets)
To secure and diversify energy supply	Transparency
To assist countries in economic transition in the development of their energy strategies and of an appropriate institutional and legal framework for energy, and in the improvement and modernisation of their energy industries	<i>Pacta sunt servanda</i> , as part of customary international law
	Confirmation of the principle of sustainable development and State sovereignty over natural resources

B. 'Complementarities and mutual benefits'

- 2.16 The expression '**mutual benefits**' of Article 2 of the ECT refers to the receipt of a benefit by each Contracting Party but does not imply that such benefits must be co-extensive.²⁰ The notion of **complementarities** has not received any attention in dispute settlement as yet.

C. 'Long-term cooperation in the energy field'

- 2.17 The purpose of the Treaty is to '**promote long-term cooperation**' (emphasis added) **in the energy area**. There is thus an explicit temporal element to the purpose as stipulated in Article 2. The inclusion of the term '**long-term**' indicates that a predictable and stable framework for cooperation was envisaged by the drafters of the ECT.
- 2.18 The EEC and the IEC both include guidance on what cooperation in the energy field will entail (additions of the IEC in []). Accordingly:

coordination of energy policies, as necessary for promoting the objectives of the Charter; – mutual access to technical and economic data, consistent with proprietary rights; – formulation of stable and transparent legal frameworks creating conditions for the development of energy resources [in

20 *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012, at 421.

the context of sustainable development]; – coordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level; – facilitating the exchange of technology information and knowhow in the energy and environment fields, including training activities; – research, technological development and demonstration projects [and their commercialisation].

The IEC adds that it will further entail ‘exchange of information and experiences relevant for this Charter; enhancing capacity building of the countries involved; [as well as] creating a favourable environment for investments, including joint venture investments, for design, construction and operation of energy installations.’²¹

The ECT does not have any retrospective effect, as this would not be consistent with this ‘**long-term**’ purpose. 2.19

If [...] the right’s exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the ‘long term’ for such an effect (if at all); and indeed such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date.²²

This finding of the tribunal in *Plama Consortium Ltd v. Republic of Bulgaria* was echoed by the tribunal in *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*. The tribunal, in assessing the retroactive effect of the right as provided for in Article 17(1) of the ECT, explained that:

With regard to the question of whether the right under Article 17(1) of the ECT can only be exercised prospectively, the Tribunal considers that the above mentioned notification requirement – on which the Parties agree – can only lead to the conclusion that the notification has prospective but no retroactive effect. Accepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as ‘*to promote long-term co-operation in the energy field*’. Such long-term cooperation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages.²³

Based on these considerations, the tribunal found that Article 17(1) of the ECT did not have retroactive effect. 2.20

The element of ‘**long-term**’ cooperation was also found to be implicitly contained in Article 17(1) by the tribunal in *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Co. Ltd. v. Government of Mongolia*. The tribunal observed that:

The interpretation that Article 17 requires an active exercise of the Contracting Party’s right to deny the benefits of Part III of the ECT is in line with the Treaty’s object and purpose. Article 2 of the ECT describes its purpose to establish ‘a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits’. The provision

21 Energy Charter Secretariat (2016), *supra* note 16, at 15.

22 *Plama Consortium Ltd supra* note 17, at 161–2.

23 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010.

of an option to deny the benefits of Part III of the ECT furthers this goal of ‘long-term cooperation’, as it creates an incentive to join the Treaty for states with a variety of policies with respect to legal entities that fall within the definition of Article 17(1). Thus, both states *that wish to attract the investment of such legal entities, and those that do not wish to extend investment protections to such entities*, are encouraged to become Contracting Parties.²⁴

2.21 In other words, by providing for the option not to extend benefits to the ‘mailbox’ entities identified in Article 17(1), the ECT seeks to provide for a framework that enables member countries to pursue different policy options. This, essentially, is an element of seeking to pursue **‘long-term’ cooperation**, as policy preferences may change over time. Thus, the inclusive approach provided for in Article 17(1) is in line with the objective of providing a framework for long-term cooperation.

Given the fact that energy is a global issue, the Energy Charter process is dynamic and open. ECT member countries seek co-operation with non-members and encourage them to an active dialogue. The ECT therefore establishes an important international policy forum for energy-related issues.²⁵

Further, in *Masdar* the Tribunal was of the opinion that denying ‘benefits retrospectively, after an investment has been made and a dispute has arisen [...] would be contrary to the transparency, co-operation and stability objectives of the ECT and it would lead to anomalous results’.²⁶

D. ‘A legal framework’

2.22 The main operative part of Article 2 of the ECT confirms that the ECT provides for a **‘legal framework’** that is based on the principles and ideas that have been set out earlier. This is addressed in *Antin*, where the Tribunal explicitly concludes that the ‘legal framework referred to in Article 2 of the ECT is one that is stable, transparent, and compliant with international legal standards’.²⁷

2.23 The Tribunal in the same award (as well as in *Novenergia II*) further stipulates that ‘nothing in this wording [of Article 2 ECT] suggests the exclusion of claims by investors who are nationals of an EU Member State who is also a party to the ECT against another EU Member State’.²⁸ The European Court of Justice has addressed this question in *Komstroy v. Moldova* (Case C-741/19) and held that intra-EU

24 *Khan Resources Inc.*, *supra* note 20, at 421.

25 Energy Charter Secretariat (2002), *supra* note 10, at 6.

26 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, at 239.

27 *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, (ICSID Case No. ARB/13/31). Award, 15 June 2018, at 523.

28 *Ibid.*, at 216 and *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063 Award, 15 February 2018, at 454, as well as *Vattenfall A.B and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 at 200.

investment arbitration proceedings under the ECT multilateral are incompatible with EU law (for a more in-depth discussion see the Commentary of Article 20). The intra-EU application has been one of the key subjects of attention in the modernisation process of the ECT. The suggested text confirms that an investor from a Contracting Party that is part of a regional economic integration organisation (REIO), such as the European Union, like the EU, cannot bring an investor-state dispute settlement ('ISDS') claim against another Contracting Party member of the same REIO (see also, for a more in-depth discussion, the Commentary of Article 24).

The ECT lays down a rules-based system through which the Contracting Parties seek to achieve the objectives that they have jointly developed. Importantly, the legal framework provided by the ECT is multilateral in nature.²⁹ 2.24

As the Secretariat of the ECT observes, the ECT has a pioneering role in treaty-based international energy cooperation, as it: 2.25

- [i]s unique in covering all forms of international energy cooperation simultaneously, i.e. investment, trade, transit and energy efficiency;
- may create an intermediary step towards WTO membership for those ECT countries that are not yet WTO members;
- is the first binding multilateral agreement on the promotion and protection of foreign investment, covering all important investment issues and providing high standards of protection, including a fully developed dispute settlement mechanism;
- is the first multilateral treaty on energy transit issues and energy efficiency;
- establishes a permanent discussion forum between members concerning all aspects of international energy cooperation.³⁰

Thus, the legal framework established by the ECT provides, broadly speaking for two functions: (1) a negotiating pillar, i.e. a permanent discussion forum for the members; and (2) a fully developed dispute settlement mechanism that provides members with the possibility of having their disputes resolved through various means. 2.26

Part VII of the ECT entitled 'Structure and Institutions' provides for the first function of the legal framework laid down in the ECT. Article 33(1) of the ECT indeed explicitly provides that '[t]he Charter Conference may authorise the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter'. Moreover, Article 34(1) provides that '[t]he Contracting Parties shall meet periodically in the Energy Charter Conference (referred to herein as the "Charter Conference") at which each Contracting Party shall be entitled to have 2.27

²⁹ Ibid., at 12.

³⁰ Ibid.

one representative. Ordinary meetings shall be held at intervals determined by the Charter Conference'. Thus, these articles in effect provide for the negotiating function that is part of the ECT's legal framework.

- 2.28 The dispute settlement function of the legal framework of the ECT is provided for in Part V thereof. Both an investor-state (Art. 26) and a state-to-state dispute settlement mechanism are foreseen. Indeed, as the dissent of arbitrator Ulriksson in the *Stati* case, confirms:

The states offer various types of solutions for issues arising in respect of the various disputes stated in the treaty. With respect to disputes between the parties to the treaty, Art. 27 provides that such disputes shall preferably be resolved through diplomatic contacts and, if that does not succeed within a reasonable period of time, the dispute may be referred to an ad hoc tribunal. Art. 26 provides various solutions for disputes – including arbitration in accordance with the SCC's rules – in respect of disputes between a state and an investor from another state that is a party to the treaty. If the investor acts in accordance with the provisions of the article, the agreement thus arises which renders the appointed arbitral tribunal competent to decide the dispute.³¹

Thus, in essence the ECT provides for a legal framework, comprised of a negotiation and a dispute settlement function, which is based upon the objectives and principles as enshrined in the Treaty.

E. Modernisation of the ECT

- 2.29 In November 2017, the Energy Charter Conference confirmed in Ashgabat the launching of a discussion on the potential modernisation of the Energy Charter Treaty (ECT). Whereas the text of Article 2 has not been changed as part of the modernisation, and therefore the provision on the purpose of the Treaty has remained the same, it remains an open question whether the additional references to 'sustainability'-related considerations are capable of indirectly altering the object and purpose of the ECT. Within the framework set out by the Conference, the modernisation focussed on the following issues:

pre-investment; Definition of 'charter'; Definition of 'economic activity in the energy sector'; Definition of investment; Definition of investor; Right to regulate; Definition of Fair and Equitable Treatment (FET); MFN Clause; Clarification of 'most constant protection and security'; Definition of indirect expropriation; Compensation for losses; Umbrella clause; Denial of benefits; Transfers related to investments; Frivolous claims; Transparency; Security for costs; Valuation of damages; Third party funding; Sustainable development and corporate social responsibility; Definition of 'transit'; Access to infrastructure (including denial of access and available capacities); Definition and principles of tariff setting; REIO and obsolete provision.³²

These changes will be further discussed in the commentaries of the respective articles.

31 *Anatolie Stati*, *supra* note 2, at 3.

32 (CCDEC2018 21).