

In the matter of:

NYKOMB SYNERGETICS TECHNOLOGY HOLDING AB, Claimant

v.

THE REPUBLIC OF LATVIA, Respondent

SCC Arbitration No. 118/2001

OPINION OF

ADNAN AMKHAN

HEAD OF LEGAL AFFAIRS
ENERGY CHARTER SECRETARIAT
BRUSSELS

INTRODUCTION

1. My name is Adnan Amkhan. I am the Head of the Legal Affairs Unit of the Energy Charter Secretariat, a post I have held since 1 May 2000. In addition, I act as an external examiner of the postgraduate course in international economic law for the University of London and various courses in energy law for the Centre for Energy, Petroleum and Mineral Law & Policy at Dundee University. I also hold the position of Honorary Fellow at the University of Edinburgh, a position which entails leading a number of postgraduate seminars in international investment law and international commercial arbitration.
2. Prior to joining the Energy Charter Secretariat, I was a lecturer in law at the University of Edinburgh where I taught and supervised postgraduate students in international law, international economic law and international commercial arbitration.
3. I have advised governments, international organisations, multinational companies and private clients on matters relating to international law, WTO law, international investment law, energy law and international commercial arbitration.
4. I have given expert legal opinions before domestic and international courts and tribunals, including the International Court of Justice and the International Chamber of Commerce.
5. At present, I am writing a detailed article-by-article legal commentary of the Energy Charter Treaty.

6. I have been asked by the Republic of Latvia to give my opinion on matters concerning Article 22(1) of the Energy Charter Treaty raised by the case of *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC Arbitration No. 118/2001) and, in particular, to answer the following questions:

- What is the scope of Article 22(1) of the Energy Charter Treaty (the “Treaty”)?
- Does Article 22(1) of the Treaty provide for an independent obligation from the obligations incumbent on a Contracting Party under Part III of the Treaty?
- In your opinion, does Article 22(1) provide for a general rule of State responsibility for breach of obligations under Part III of the Treaty by a Contracting Party?
- In your view, what is the relationship between Article 22(1) and the Treaty Articles listed under its Part III?
- More specifically, what, if any, is the relationship between Article 22(1) and last sentence of Article 10(1) of the Treaty?
- In your view, what are the legal differences between Article 22 and 23 of the Treaty?
- As a question of jurisdiction, does a tribunal established under Article 26(1) of the Treaty have jurisdiction to entertain a claim for breach of Article 22(1)?

7. In this connection, Mr. Wennerholm of Setterwalls Law Firm has supplied me with copies of the following documents:

- Request for Arbitration, dated 11 December 2001;
- Latvia’s Response to the Request for Arbitration, dated 15 May 2002;
- Statement of Claim, dated 16 September 2002;
- Statement of Defence, dated 27 November 2002;
- Reply to Statement of Defence, dated 18 February 2003;
- Claimant’s Brief and Preliminary Statement of Evidence, dated 21 March 2003;
- Rejoinder to Claimant’s Reply, dated 4 April 2003;

8. At the outset, I should think it appropriate to draw the Arbitral Tribunal’s attention to the background and circumstances of my involvement as an expert in this case.

9. On 8 April 2003, the Minister of Economics of the Republic of Latvia, Mr. Juris Lujāns, wrote to the Secretary General of the Energy Charter Secretariat, Ms Ria Kemper, requesting her agreement to nominate me as an expert witness in this arbitration. The Secretary General agreed to this request on the condition that “...it being understood that [Mr Amkhan’s role] ...will be to give an independent and unbiased expert legal opinion on matters regarding the Energy Charter Treaty and relevant international law.” The Latvian State Secretary of the Ministry of Economics of the Republic of Latvia responded, accepting these terms.¹

10. In light of the above understanding, the sole purpose of this opinion is to assist the Tribunal; therefore this opinion should not be considered as representing the points of view of any party to this dispute.

11. To the best of my knowledge, the opinion and conclusions contained herein are true.

12. The pertinent facts and issues in dispute, and the positions of the parties in this matter are fully set forth in the documents I have cited in paragraph 7, and will be referred to only as necessary in this Opinion.

ANSWERS TO QUESTIONS PUT TO ME BY THE REPUBLIC OF LATVIA

13. In this section, I shall answer the Republic of Latvia’s questions in the order that they have been put to me. I shall refer to the

¹ Copies of the correspondence between the Minister and the Secretary General are attached to this Opinion as Annex 1.

arguments of the parties, as I understand them, only wherever necessary.

Question 1

What is the scope of Article 22 (1) of the Energy Charter Treaty (the “Treaty”)?

14. Article 22 entitled “**State and Privileged Enterprises**” is set out in **Part IV** of the Treaty. Paragraphs 1 and 2 of Article 22 provide for certain obligations in relation to *state enterprises*, whereas paragraphs 3 and 4 provide for certain obligations in relation to *privileged entities*.

15. The Treaty defines neither the phrase “state enterprise” nor “privileged entities”, even though, in paragraph 5 of Article 22, “entity” is said to include any enterprise, agency or other organization or individual.

16. Article 22 (1) reads as follows:

“Each Contracting Party *shall ensure* that any state enterprise which it maintains or establishes shall conduct *its activities in relation to the sale or provision of goods and services* in its Area in a manner consistent with *the Contracting Party’s obligations under Part III of this Treaty.*” (italics mine).

The provisions of Article 22(1) of the Treaty consist of three interrelated elements. First, the expression “Each Contracting Party *shall ensure...*” leaves no doubt that Article 22(1) provides for a separate and specific treaty obligation on each of the Contracting Parties to the Treaty. Secondly, the conduct of a state enterprise is specifically qualified in terms of and limited to the enterprise’s “...activities *in relation to the sale or provision of goods and services* ...”.

17. Article 22(1) is therefore concerned only with the sale or provision of goods and services, to the exclusion of all other activities which a state enterprise might undertake. To illustrate this point it may be appropriate to compare Article 22 (1) and Article XVII(1)(a) of the GATT 1994. The latter Article which only applies to goods also extends to “purchase”, whereas Article 22(1) of the Treaty does not cover such an activity. Consequently, a Contracting Party’s obligation under Article 22(1) relate to these specific activities of its state enterprises. As such, to hold a Contracting Party to the Treaty in breach of its obligation under Article 22(1), it is also essential to establish that there is an obligation(s) incumbent on that Contracting Party, under Part III of the Treaty. Put differently, for the purposes of finding a breach of Article 22(1) of the Treaty, it should also be established there is a direct obligation incumbent on a Contracting Party under Part III of the Treaty, independent from the obligation set out in Article 22(1).

Question 2

Does Article 22(1) of the Treaty provide for an independent obligation from the obligations incumbent on a Contracting Party under Part III of the Treaty?

18. As stated above, Article 22(1) provides for a self-contained obligation separate from the obligations set out in Part III of the Treaty. However, the connection between Article 22(1) obligation and Part III obligations of the Treaty is a simple one: a breach of one (i.e. Article 22(1)) is conditional on the existence of the other (i.e. an obligation under Part III).

19. What also confirms that Article 22(1) provides for an independent and separate obligation in its own right is Article 32 of the Treaty entitled “**Transitional Arrangements**”. This Article allowed any Contracting Party to the Treaty, listed in Annex T, to suspend full compliance with obligations under one or more of the

Treaty provisions. Article 22(1) and (3) is listed as one of those Articles that a Contracting Party may suspend compliance with. This leaves no doubt that Article 22(1) does provide for an obligation independent from the obligations listed in Part III of the Treaty.

20. Without prejudging the issue, the Claimant, in the Statement of Claim, observes that “[t]he Republic is in breach of Articles 10(1), 10(3) and 22(1) of the Treaty”.² However, after correctly observing that Article 22(1) is found in Part IV of the Treaty, the Claimant observes that: “Article 22(1) does not create new obligations for the Contracting Party, but rather clarifies the obligations already set out in Part III of the Treaty.”³ However, if Article 22(1) does not create a new obligation independent of the obligations set out in Part III, its breach cannot be invoked as a separate legal ground for which a relief is sought, simply because there is no obligation to breach in the first place.

Question 3

In your opinion, does Article 22(1) provide for a general rule of State responsibility for breach of obligations under Part III of the Treaty by a Contracting Party?

21. As I understand it from the parties’ submissions, this question has arisen in connection with certain arguments put forward by the Claimant. For example, the Claimant states: “...Article 22(1) defines and clarifies the meaning of the principle of state responsibility and prescribes what categories of actors the state is responsible for under the Treaty.”⁴ In addition, “Article 22 is

² See paragraph 3 of the Statement of Claim, dated 16 September 2002.

³ See paragraph 5.6 of the Statement of Claim

⁴ See paragraph 5.6. of the statement of Claim.

merely an expression of what already applies under existing customary international law on state responsibility.”⁵

22. In my opinion, attempting to argue that Article 22(1) codifies or defines the general rules of state responsibility as applied to the Treaty obligations in general and to Part III in particular would lead to somewhat undesirable conclusions.

23. I hold this view for the following reason. As explained above, the scope of Article 22(1) is limited only the activities of state enterprises in relation to the *sale or provisions of goods and services*. It cannot therefore be argued that Article 22(1) codifies general international law rules of state responsibility, because this would in effect imply that in relation to state enterprises, the responsibility of a state under international law would always be limited to activities mentioned in Article 22(1). Such an understanding would obviously be detrimental to investors or investments of investors who are engaged in activities other than sale of goods or provision of services.

24. In my opinion, therefore, Article 22(1) cannot be perceived as codifying the general rules of state responsibility under international law, but rather as providing for a specific obligation, a breach of which would entail the responsibility of the Contracting Party. Indeed, this is the case with all the primary obligations set out in the Treaty provisions. This construction corresponds with the general rules of state responsibility as applied to the Treaty pursuant to Article 26 (6) of the Treaty.

⁵ See paragraph 5.1.3.5 of the Reply to Statement of Defence, dated 18 February 2003.

25. I do not find it necessary to burden the Tribunal with a detailed examination of the international law of state responsibility. However, without prejudging any of the issues in this dispute, I would like to state that I find myself in agreement with the general examination of the rules of international state responsibility in the Respondent's Rejoinder.

Question 4

In your view, what is the relationship between Article 22(1) and the Treaty Articles listed under its Part III?

26. In addition to my comments relating to question 1, the relationship between Article 22(1) and Part III of the Treaty is determined essentially by whether or not there is a prior obligation on a Contracting Party under Part III of the Treaty. In other words, a breach of Article 22(1)'s obligation would not be at issue unless there is a clear obligation incumbent on a Contracting Party under Part III (Articles 10-17) of the Treaty. Two examples may make this clear: a Contracting Party to the Treaty is in breach of its obligation under Article 22(1), if one of its enterprises discriminates in supplying goods or services between national investors and foreign investors. Another related example is if a state enterprise provides a particular service to a third state investor but does not offer the same service to an investor of a Contracting Party to the Treaty.

Question 5

More specifically, what, if any, is the relationship between Article 22(1) and the last sentence of Article 10(1) of the Treaty?

27. This question seems to be central to the arguments of the parties and therefore I will attempt to answer it in the simplest possible terms.

28. As stated earlier, for a breach to occur under Article 22(1) it is essential that there is an obligation stemming from Part III of the Treaty. It is common ground that both parties agree that the last sentence of Article 10(1), which reads as follows, falls under Part III of the Treaty:

“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”

29. The most obvious example of an event covered by the last sentence of Article 10(1) would be when a Contracting Party to the Treaty is under obligation to observe agreements it has entered into either with an Investor, or with an Investment of an Investor. The crucial element which is widely overlooked in this obligation is that it refers exclusively to a Contracting Party and nothing else.⁶ In other words, for this obligation to be incumbent on a Contracting Party, there must be a direct obligation (e.g. an agreement) between that Contracting Party and, for example, an Investor or an Investment.

30. It is with this understanding that the relationship between Article 22(1) and the last sentence of Article 10(1) must be understood. Clearly, there would be no relationship whatsoever between Article 22(1) and the last sentence of Article 10(1) if there is no prior agreement between a Contracting Party of the Treaty and an Investor or an Investment of an Investor.

31. It is clear to me from the facts of this case (and indeed, appears to be common ground between the parties) that the Republic of Latvia, as a Contracting Party to the Treaty, did not enter into an

⁶ Article 1(2) of the Treaty defines the term “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.”

agreement with either the Investor Nykomb or its Investment Windau. There is therefore no connection between Latvia's obligation under Article 22(1) and the obligation under the last sentence of Article 10(1).

Question 6

In your view, what are the legal differences between Article 22 and 23 of the Treaty?

32. The obvious difference is that the subject matter of Article 22 pertains to state enterprises and privileged entities, whereas the subject matter of Article 23 deals first with the general principle that "Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty," and, subsequently, provides for the a specific obligation vis-à-vis the observance of the Treaty obligations by regional and local governments and authorities.
33. Another significant difference is that Article 23 makes an explicit reference in its paragraph 2 to certain dispute settlement provisions set forth in the Treaty, whereas Articles 22 makes no such reference. This implies that the state-to-state arbitration set out in Article 27 applies exclusively to Article 22.

Question 7

As a question of jurisdiction, does a tribunal established under Article 26 of Treaty have jurisdiction to entertain a claim for breach of Article 22(1)?

34. Before answering this question, I should like to draw the Tribunal's attention that I answered all the proceeding questions independent of whether an Article 26 tribunal has jurisdiction to entertain a claim based on Article 22(1) of the Treaty.

35. No doubt the Tribunal is fully aware that, according to Article 26(1) its jurisdiction in terms of subject matter extends only to claims concerning “an alleged breach of an obligation of [a Contracting Party] under Part III [of the Treaty].”

36. Article 22 (1) provides for an obligation of a Contracting Party under Part IV and not under Part III. It would therefore follow that under Article 26, an arbitral tribunal lacks jurisdiction to entertain claims for a breach of Article 22(1) of the Treaty. This does not mean that there is no remedy for a breach of Article 22. A breach of Article 22 as a whole falls within the ambit of Article 27, entitled “Settlement of Disputes Between Contracting Parties”; that this is so is made clear by the overall structure of Article 22.

37. The Claimant attempts to overcome this by arguing that: “Article 22(1) does not create new obligation for the Contracting Party, but rather clarifies the obligations already set out in part III or the Treaty”;⁷ further, that Article 22 defines “... the meaning of “State” throughout the Treaty”⁸; and finally that the provisions in Part IV, which include Article 22, “are not carved-out to create and stand-alone obligations.”⁹

38. I have carefully examined these and other similar arguments, but as I explained above, Article 22(1) falls under Part IV of the Treaty and provides for a separate and independent obligation on each Contracting Party of the Treaty.

39. Therefore, I would suggest that, as a question of jurisdiction, any arbitral tribunal established under Article 26 of the Treaty

⁷ See Statement of Claim, paragraph 5.6.

⁸ See Reply to the Statement of Defence, paragraph 5.1.3.2.

⁹ See Reply to the Statement of Defence, paragraph 5.1.3.3.

would encounter serious difficulty in justifying hearing a claim based on an alleged breach of a Treaty obligation set out in Article 22(1).

CONCLUSIONS

40. I am of the opinion that Article 22 in general and paragraph (1) in particular provide for a self-contained obligation, separate from the Treaty's Part III obligations. I am also of the opinion that according to the wording of Article 22(1), its scope is confined to state enterprises activities in relation to the sale of goods and provision of services. I also hold the view that Article 22 falls outside an arbitral tribunal's jurisdiction entertaining a claim under Article 26 of the Treaty.

Adnan Amkhan

30 May 2003

Brussels.