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**TEMPORAL EFFECT OF A DENIAL OF BENEFITS IN ENERGY CHARTER
TREATY ARBITRATION**

Master's thesis

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Tartu
2026

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INTRODUCTION

The globalization of trade and commerce since the beginning of the 1950s has led to a rise in international investment treaties. While earlier forms of treaties also touched upon commerce and foreign investment, such as treaties of friendship, commerce and navigation treaties (FCNs), which date back as far as the 18th century, bilateral investment treaties (BITs) were the first form of treaties to specifically focus on foreign investment. Since the 1990s, multilateral investment treaties have also become a staple of modern investment treaty practice. On the whole, such BITs and MITs carry the aim of creating a stable legal framework for the promotion and protection of foreign investment as well as stimulate the flow of such investments in the Contracting Parties.¹

As of today, international investment agreements (IIAs) have become a pervasive feature of international law – according to the United Nations Conference on Trade and Development’s Investment Policy Hub (UNCTAD), there are currently 2823 IIAs in force.²

Investment treaties typically provide a broad definition for an “investor” in order to promote foreign investments and offer a greater incentive for potential investors to invest into the host state. However, such definitions have raised legal concerns about potential “free riders”³ and “back-end treaty shoppers”⁴ where parties seek to benefit from treaty protection without being the intended beneficiaries. The phrase “free riders” refers to entities who lack a genuine link to the host state, thus bringing no economic development to the latter.⁵ The phrase “back end treaty shopper” refers to a legal entity making changes to its structure when a specific dispute is foreseeable in order to gain jurisdiction under a specific investment treaty.⁶

¹ See generally J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012) paras 1.23-1.30; Jordan Behlman, ‘Out on a Rim: *Pacific Rim’s* Venture into CAFTA’s Denial of Benefits Clause’ (2014) 45(2) *University of Miami Inter-American Law Review* 397-398.

² United Nations Conference on Trade and Development ‘International Investment Agreements Navigator’ – <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> accessed 28 April 2026.

³ Herman Walker Jr, ‘Provisions on Companies in United States Commercial Treaties’ (1956) 50 AJIL 373, 388; Loukas A. Mistelis and Crina Mihaela Baltag, ‘Denial of Benefits and Article 17 of the Energy Charter Treaty’ (2009) 113 Penn St L Rev 1301, 1302; Apruva Mudliar, ‘Article 17: Non-Application of Part III in Certain Circumstances’ in Rafael Leal-Arcas (ed), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018) 249–250, para 17.01.

⁴ Lindsay Gastrell and Paul-Jean Le Cannu, ‘Procedural Requirements of “Denial-of-Benefits” Clauses in Investment Treaties: A Review of Arbitral Decisions’ (2015) 30 ICSID Rev 80. See also Christoph Schreuer, ‘Nationality of Investors: Legitimate Restrictions vs Business Interests’ ICSID Review (2009) 24(2) 521.

⁵ Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 176.

⁶ *Venezuela Holdings BV and others (formerly known as Mobil Corporation, Venezuela Holdings BV and others) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010) paras 190-91.

One way in which these concerns have been addressed is through the inclusion of denial of benefits (DoB) clauses in investment treaties. The purpose of such clauses is to deny the advantages, benefits or protections⁷ of the specific investment treaty to third parties seeking to claim the benefits of a treaty without assuming its obligations. As such, DoB clauses act as a safeguard for the principle of reciprocity embodied in such treaties.⁸

The Energy Charter Treaty⁹ (ECT) contains such a clause in Article 17. The ECT is a multilateral treaty, which regulates trade and transit as well as protection of investments and dispute settlement in the energy sector.¹⁰ The ECT constitutes the most ratified multilateral investment treaty to date,¹¹ even though its application is confined to the energy sector. As of today, the ECT has 49 Contracting States, which are all situated on the Eurasian continent.

This master's thesis will specifically focus on Article 17(1) of the ECT, under which a Contracting Party reserves the right to deny the advantages of Part III of the ECT to a legal entity that has no substantial business activities in the Area of the Contracting Party in which it is organized and if it is owned or controlled by citizens or nationals of a third state.

As of today, case law relating to Article 17(1) of the ECT stands at a crossroads. Whereas the majority of investment treaty practice concerning investment treaties other than the ECT has recognized that DoB clauses may operate retrospectively,¹² ECT case law has, since *Plama v. Bulgaria*,¹³ consistently favoured a prospective interpretation to DoB clauses.¹⁴ Consequently,

⁷ Advantages, benefits and protections will be used interchangeably throughout this master's thesis.

⁸ Mistelis and Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (n 3) 1302. See also Gastrell and Le Cannu (n 4) 81; Walker (n 3) 388.

⁹ Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

¹⁰ Mistelis and Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (n 3) 1302.

¹¹ Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011) 8.

¹² *Empresa Eléctrica del Ecuador Inc v Republic of Ecuador*, ICSID Case No ARB/05/9, Award (2 June 2009) para 71; *Ulysseas Inc v Republic of Ecuador*, UNCITRAL, Interim Award (28 September 2010) paras 172-73; *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections (1 June 2012) paras 4.83-5; *Guaracachi America Inc and Rurelec PLC v Plurinational State of Bolivia*, PCA Case No 2011-17, Award (31 January 2014) paras 375-79; *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v Republic of Colombia*, ICSID Case No ARB/18/23, Decision on the Bifurcated Jurisdictional Issue (23 November 2020) paras 126-32.

¹³ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, (8 February 2005) paras 159-65.

¹⁴ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras 458-59; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No ARB/07/14, Award (22 June 2010) paras 224-26; *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011) para 550; *Khan Resources Inc, Khan Resources BV and CAUC Holding Company Ltd v The Government of Mongolia and MonAtom LLC*, PCA Case No 2011-09, Decision on Jurisdiction (25 July 2012) paras 426-29; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Kazakhstan*, SCC Case No V 116/2010, Award (19 December 2013) para 745; *Isolux Infrastructure Netherlands BV v Kingdom of Spain*, SCC Case No V2013/153, Award (12 July 2016) para 715; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) paras 237-39.

DoB case law under the ECT has appeared as a diverging outlier compared to the interpretation of DoB clauses in other investment treaties.

Until recently, the *Plama* tribunal's prospective interpretation of Article 17(1) of the ECT remained, at least expressly, unchallenged. More recent decisions in ECT arbitrations—most notably *Zaur v. Azerbaijan*,¹⁵ which leaned toward a retrospective interpretation, and the majority opinion of *RSE v. Latvia*, which has been widely reported in the press¹⁶ and expressly recognized the retrospective application of Article 17(1) of the ECT – have marked a shift in the case law.

In light of this shift in case law, this master's thesis seeks to answer the following research questions:

1. Is the ECT's divergent case law on the temporal effect of DoB clauses warranted by any particularities of the ECT itself in comparison to other investment treaties and DoB clauses;
2. What is the temporal effect of the exercise of Article 17(1) of the ECT – prospective or retrospective;
3. Does the retrospective interpretation of Article 17(1) of the ECT endorsed by the tribunals of *Zaur v. Azerbaijan* and the majority opinion of *RSE v. Latvia* represent a justified doctrinal development in the understanding of the effects of a DoB clause under the ECT, or are these decisions more likely to remain an anomaly within ECT jurisprudence?

This broadly disputed issue is practically significant. If a DoB clause is considered to operate with prospective effect only, an investor ceases to benefit from the protection of a treaty only from the date on which the host state exercises a DoB. Consequently, a tribunal can address any breach of treaty protections occurring prior to that date.¹⁷ On the other hand, a retrospective¹⁸ effect means that a DoB applies from the moment the relevant advantage of the

¹⁵ *Zaur Leshkasheli and Rosserlane Consultants Limited v Republic of Azerbaijan*, ICSID Case No ARB/20/20, Final Awards on Jurisdiction, Merits or Damages (21 March 2025) paras 567 and 575.

¹⁶ Jack Ballantyne, 'Latvia Defeats ECT Claim with Denial of Benefits' *Global Arbitration Review* (4 June 2025) – <https://globalarbitrationreview.com/article/latvia-defeats-ect-claim-after-invoking-denial-of-benefits> accessed 15 April 2026; Lisa Bohmer, 'Revealed: In RSE v Latvia, Arbitrators Disagree on Whether ECT's Denial of Benefits Provision Has Retrospective Effect; Tribunal Majority Dismisses Case Brought by Russian-Controlled Claimant' *Investment Arbitration Reporter* (12 June 2025) – <https://www.iareporter.com/articles/revealed-in-rse-v-latvia-arbitrators-disagree-on-whether-ects-denial-of-benefits-provision-has-retrospective-effect-tribunal-majority-dismisses-case-brought-by-russian-controlled-claimant/> accessed 15 April 2026.

¹⁷ Loukas A. Mistelis and Crina Mihaela Baltag, "'Denial of Benefits' Clause in Investment Treaty Arbitration" (2018) *Queen Mary University of London, School of Law Legal Studies Research Paper* No 293/2018 26.

¹⁸ The terms 'retrospective' and 'retroactive' will be used interchangeably in this master's thesis.

investment treaty allegedly arose for the investment, which is under dispute.¹⁹ Here a successful DoB would thus bar the investor's claim altogether.

The master's thesis is structured into three chapters. Chapter 1 provides the framework, origin, evolution and function of DoB clauses, as well as the historical development and structure of the ECT necessary to answer the research questions of this master's thesis. Chapter 2 lays down the rules of interpretation applicable to Article 17(1) of the ECT, thus providing a structured interpretative framework tailored to determine the temporal effect of Article 17(1) of the ECT. Chapter 3 applies the framework established in Chapters 1 and 2 with the aim of answering the research questions of this master's thesis.

This master's thesis adopts a doctrinal legal analysis of the temporal effect of Article 17(1) of the ECT under the rules of interpretation, which is carried out through combining the following research methods – analytical, historical and comparative. The analytical method applies the rules of interpretation, general principles of international law and practice of investment tribunals in order to interpret the temporal effect of Article 17(1) of the ECT and answer the research questions of this master's thesis. The historical method is applied in order to interpret the temporal effect of Article 17(1) of the ECT through the *travaux préparatoires* of the ECT as well as the origin and purpose of DoB clauses. The comparative method is employed to examine Article 17(1) of the ECT alongside similarly worded DoB clauses, compare the object and purpose of the ECT with those of other investment treaties, and compare the reasoning adopted by ECT and non-ECT investment tribunals in relation to the temporal effect of DoB clauses.

The primary sources for this master's thesis are the practice, reasoning and interpretative methods employed by investment tribunals, as well as scholarly work, relating both to the ECT and the Vienna Convention on the Law of the Treaties²⁰ (VCLT) as the source for the rules of interpretation of the ECT. The thesis also relies on the *travaux préparatoires* of the ECT and the practice of interpretation of DoB clauses by non-ECT investment tribunals. The term “investment tribunals” will hereafter refer to arbitral tribunals constituted under the ECT; BITs; MITs and FTAs.²¹

¹⁹ *Plama (Jurisdiction)* (n 13) para 158.

²⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²¹ For the purposes of this thesis, any case law or legal literature published after 01.04.2026 will not be analysed.

This master's thesis will not address the substantive requirements of Article 17 of the ECT, such as the question when business activities of the legal entity invoking the ECT are considered "substantial" within the meaning of Article 17(1) of the ECT. This is because there is a large body of case law²² on the substantive requirements of Article 17(1) of the ECT, for example on the definition of substantial business activities, the application of which is consistent compared to the question of temporal effect. This master's thesis will also not address the substantive requirements for the denial of benefits under Article 17(2) of the ECT, as it has been invoked significantly less frequently in practice than Article 17(1) of the ECT and the provisions operate entirely differently to each other. Article 17(1) of the ECT is contingent on circumstances that the putative investor controls, whereas Article 17(2) of the ECT hinges on circumstances that the Contracting Party controls. Furthermore, this master's thesis will not address the procedural effect of Article 17(1) of the ECT – whether a DoB should be characterised as an issue of jurisdiction or admissibility. This question is also broadly disputed, as numerous investment tribunals and scholars have considered a DoB to be an issue of admissibility,²³ while other investment tribunals and scholars have characterised it as an issue of jurisdiction.²⁴ Such divergence in interpretation would merit a master's thesis of its own.

Keywords: denial of benefits; Energy Charter Treaty; public international law; investor–State arbitration; international investment law; treaty interpretation.

²² See e.g. *Plama (Jurisdiction)* (n 13) paras 168-169; *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003, Arbitral Award (29 March 2005) 63; *Limited Liability Company Amto v Ukraine*, SCC Case No 080/2005, Final Award (26 March 2008) para 69; paras 54-68; *Yukos* (n 14) para 456; *Masdar* (n 14) paras 253-54.

²³ See e.g. *Plama (Jurisdiction)* (n 13) para 149-51; *Yukos* (n 14) paras 441 and 443; *Khan* (n 14) para 411; *Luxtona Limited v The Russian Federation*, PCA Case No 2014-09, Interim Award on Respondent's Objections to the Jurisdiction of the Tribunal (22 March 2017) para 239. See also Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) para 874.

²⁴ *ACF Renewable Energy Limited and Ace Capital Partners S.A. v Republic of Bulgaria*, ICSID Case No ARB/18/1, Award (5 January 2024) paras 1462-63; *Ulysseas* (n 12) para 172; *Guaracachi* (n 12) para 381. See also Christer Söderlund and Elena Burova, 'Is There Such a Thing as Admissibility in Investment Arbitration?' (2018) 33(2) *ICSID Review* 542.

1. FRAMEWORK OF “DENIAL OF BENEFITS” CLAUSES

1.1 Historical overview of the framework and purpose of denial of benefits clauses

DoB clauses are considered to have originated from the treaty practice of the United States (U.S.),²⁵ in particular Article XXVI(5) of the 1946 Treaty of Friendship, Commerce and Navigation between the U.S. and China²⁶, according to which each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party which is directly or indirectly owned or controlled, through majority stock ownership or otherwise, by nationals, corporations or associations of any third country or countries. Similarly, Article XII(1)(f) of the Treaty of Amity and Economic Relations between the U.S. and Thailand²⁷ states that nothing shall preclude the denial of the advantages of the Treaty to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest. However, neither of these treaties provided for investor-state dispute settlement.

The first notable DoB clauses in investment treaties were Article 1(c) of the U.S.-Panama BIT,²⁸ Article 1(2) of the U.S.-Turkey BIT,²⁹ Article 1(b) of the U.S.-Congo BIT³⁰ and Article XII of the 1994 U.S. Model BIT.³¹ However, since then, the incorporation of DoB clauses have become more wide-spread in the U.S. treaty practice and as well as beyond.³² For example, such clauses are included in Article 2(2) of the Australia-Czech Republic BIT³³, Article 10 of the Jordan-Austria BIT,³⁴ Article 18 of the 2004 Canadian Model BIT,³⁵ Article

²⁵ Stephen Jagusch and Anthony Sinclair, ‘Denial of Advantages under Article 17(1)’ in Graham Coop and Clarisse Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (JurisNet, LLC 2008) 17, 24; Mistelis and Baltag, “‘Denial of Benefits’ Clause in Investment Treaty Arbitration” (n 17) 4-5.

²⁶ Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, signed on November 4, 1946, entered into force 30 November 1948.

²⁷ Thailand and United States of America Treaty of Amity and Economic Relations, signed on 29 May 1966, entered into force 1968.

²⁸ Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investments (US–Panama BIT) (signed 27 October 1982, entered into force 30 May 1991).

²⁹ Treaty between the United States of America and the Republic of Turkey concerning the Reciprocal Encouragement and Protection of Investments (US–Turkey BIT) (signed 3 December 1985, entered into force 18 May 1990).

³⁰ Democratic Republic of the Congo and United States Bilateral Investment Treaty, signed 3 August 1984, entered into force 28 July 1989.

³¹ United States Model Bilateral Investment Treaty (1994) – <https://edit.wti.org/document/show/ec28ef20-b998-47eb-b804-d3c998527d55> accessed 16 April 2026.

³² Mistelis and Baltag, ‘Denial of Benefits and Article 17 of the Energy Charter Treaty’ (n 3) 1307.

³³ Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments, signed on 30 September 1993, entered into force 29 June 1994.

³⁴ Agreement between the Hashemite Kingdom of Jordan and the Republic of Austria for the Promotion and Protection of Investments, signed on 23 January 2001 and entered into force 25 November 2001.

³⁵ Canadian Model BIT (2004) – <https://edit.wti.org/document/show/d15e4f5d-0310-4db4-a1ed-85e5d19f8ee1> accessed 15 April 2026.

17 the 2004 U.S. Model BIT³⁶ and Article 10.11 of the United States-Australia Free Trade Agreement;³⁷ Article 1113 of the North American Free Trade Agreement³⁸ (NAFTA) and Article 14.14 of the United States-Mexico-Canada Agreement,³⁹ the successor to NAFTA; Article I(2) of the Ukraine-US BIT;⁴⁰ Article 10.12 of the United States-Panama Trade Promotion Agreement;⁴¹ Article 814 of the Free Trade Agreement between Canada and the Republic of Colombia.⁴² As of today, DoB clauses have gradually gained prevalence in IIAs – according to UNCTADs Investment Policy Hub UNCTAD, 421 IIAs contain a DoB clause out of a total of 2823 IIAs listed.⁴³

Substantively, DoB clauses generally permit a host state to deny the treaty’s benefits in two alternative instances. First, if legal entities are owned or controlled by a non-contracting party to the relevant investment treaty and lack substantial business activities in the host state. Second, if a legal entity or investment of that entity is owned by a national of a state that does not have diplomatic relations with the host state.⁴⁴ A DoB clause enables the host state to pierce the “corporate veil”, thus narrowing the scope of the treaty⁴⁵ to *bona fide* investors.⁴⁶ In essence, a DoB clause operates as a safeguard for the principle of reciprocity embodied in IIAs⁴⁷ and a guarantee against an abuse of treaty rights.⁴⁸

³⁶ United States Model Bilateral Investment Treaty (2004) <https://edit.wti.org/document/show/436f41b6-7f59-47c2-a03f-cd45914597ef> accessed 16 April 2026.

³⁷ Free Trade Agreement between the United States of America and Australia (United States–Australia FTA) (signed 18 May 2004, entered into force 1 January 2005).

³⁸ North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289.

³⁹ Agreement between the United States of America, the United Mexican States and Canada (signed 30 November 2018, entered into force 1 July 2020).

⁴⁰ Treaty between Ukraine and the United States of America concerning the Encouragement and Reciprocal Protection of Investment (Ukraine–United States BIT) (signed 4 March 1994, entered into force 16 November 1996).

⁴¹ Free Trade Agreement between the United States of America and the Republic of Panama (United States–Panama FTA) (signed 28 June 2007, entered into force 31 October 2012).

⁴² Free Trade Agreement between Canada and the Republic of Colombia (signed 21 November 2008, entered into force 15 August 2011).

⁴³ UNCTAD, ‘International Investment Agreements Navigator’ (n 2).

⁴⁴ Jagusch and Sinclair (n 25) 27.

⁴⁵ Mudliar ‘Article 17’ (n 3) 249-50, para 17.01; Mark Feldman, ‘Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration’ (2012) 27(2) *ICSID Review* 281, 283.

⁴⁶ Ramya Ramachanderan, ‘Enabling Retrospective Application of the Denial of Benefits Clause: An Analysis of Decisions of Tribunals under the Energy Charter Treaty’ (2018) 26(1) *University of Miami International and Comparative Law Review* 211, 212. See also generally Muthucumaraswamy Sornarajah, ‘Good Faith, Corporate Nationality, and Denial of Benefits’ in Andrew D Mitchell, Muthucumaraswamy Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 117, 119.

⁴⁷ Pyoungkeun Kang, ‘The Relationship between the Investor–State Dispute Settlement and the Denial of Benefits with Specific Reference to the Energy Charter Treaty’ (2017) 19(15) *Asian Business Lawyer* 33.

⁴⁸ Mistelis and Baltag ‘“Denial of Benefits” Clause in Investment Treaty Arbitration’ (n 17) 1; Mistelis and Baltag, ‘Denial of Benefits and Article 17 of the Energy Charter Treaty’ (n 3) 1302. See also Anthony Sinclair, ‘Investment Protection for “Mailbox Companies” under the 1994 Energy Charter Treaty’ (5 November 2005) 2(5) *Transnational Dispute Management* 3.

The most common form of a DoB clause in investment treaties grants the host state discretion – as opposed to an obligation – to deny the protections of the treaty if the substantive prerequisites are met. The wording of the discretionary right varies from treaty to treaty, examples of such wording are – reserves the right to deny; may deny; neither Party shall be obligated to accord, neither Party shall be obligated to permit; may decide not to extend or may be exercised.

Most of the DoB clauses do not specify the time when DoB must be exercised. Yet, while earlier clauses are formulated in a border manner, newer DoB clauses have become noticeably more detailed, presumably with the purpose of enhancing legal certainty for foreign investors. For example, pursuant to Article 17 of the 2021 Canada Model BIT,⁴⁹ a denial must be exercised “within a reasonable time and no later than its principal submission on the merits, such as the counter-memorial, in an arbitration under this Agreement.” Article 8(3) of the Iran-Slovakia BIT⁵⁰ specifies that “[f]or avoidance of any doubt the benefits of this Agreement shall be denied if the preconditions set down in paragraph 1 are fulfilled at time when the claim is submitted pursuant to Article 17. Article 19(5) of the 2017 Hong Kong, China SAR – ASEAN Investment Agreement⁵¹ states that: [a] Party’s right to deny the benefits of this Agreement as provided for in this Article may be exercised at any time, including after the institution of arbitration proceedings”. Article 21 of the 2017 China – Hong Kong CEPA Investment Agreement⁵² contains a similarly worded provision.

1.2 Framework of the Energy Charter Treaty, including the denial of benefits clause

The ECT constitutes the most ratified multilateral investment treaty to date, even though its application is confined to the energy sector.⁵³ While most multilateral investment treaties are regional in nature, the ECT has global reach,⁵⁴ as the ECT has 49 Contracting States from the Eurasian continent.

⁴⁹ Canadian Model Bilateral Investment Treaty (2021) – <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> accessed 15 April 2026.

⁵⁰ Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia–Iran BIT) (signed 19 January 2016, entered into force 30 August 2017).

⁵¹ Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and the Member States of the Association of Southeast Asian Nations (ASEAN–Hong Kong Investment Agreement) (signed 12 November 2017, entered into force 17 June 2019).

⁵² Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement (China–Hong Kong CEPA Investment Agreement) (signed and entered into force 28 June 2017).

⁵³ Roe and Happold (n 11) 8.

⁵⁴ *Ibidem*.

The purpose of this section is to establish the distinctive elements of the ECT relevant to this master's thesis – why was the ECT drafted, what are the advantages of Part III of the ECT how are the advantages of Part III of the ECT enforced by Investors and how can a Contracting Party exclude a certain Investors access to these advantages by virtue of Article 17(1) of the ECT.

The origins of the ECT can be traced back to the collapse of the Soviet Union. Russia and many of its neighbouring countries were rich in energy and hydrocarbon resources, however they were also in urgent need of foreign investment to rebuild their economies. On the other hand, Western Europe sought to gain access to the resources of these countries, in exchange for foreign investment and technical cooperation. Thus, the ECT was drafted as part of a larger endeavour to enhance cooperation in the energy sector on the Eurasian continent.⁵⁵

Pursuant to Article 1(7)(a) of the ECT, an Investor is a a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law, or a a company or other organization organized in accordance with the law applicable in that Contracting Party.

Part III of the ECT sets forth the substantive investment obligations imposed upon Contracting Parties and protections granted to Investors.⁵⁶ For example, Part III of the ECT provides the following advantages to Investors – fair and equitable treatment to Investments of Investors, most constant protection and security of Investments, protection against expropriation of Investments, compensation for losses, and guarantee of the freedom of transfer of Investments into and out of the Contracting Party.

If such obligations are breached, Investors are entitled to initiate arbitration against the host state and seek damages for such a breach pursuant to Article 26 of the ECT. Article 17(1) of the ECT limits the scope of foreign investors able to rely on the protections of Part III.

⁵⁵ Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996) 138-39; Mirian Kene Omalu, *NAFTA and the Energy Charter Treaty: Compliance With, Implementation and Effectiveness of International Investment Agreements* (Kluwer Law International 1999) 86; Kaj Hobér, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1(1) *Journal of International Dispute Settlement* 154; Kaj Hobér, *The Energy Charter Treaty: A Commentary* (Oxford University Press 2020) 14-15.

⁵⁶ *Plama (Jurisdiction)* (n 13) para 132; *Veteran Petroleum Limited v The Russian Federation*, PCA Case No AA 228, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 494; *Yukos* (n 14) para 438; *Hulley Enterprises Limited v The Russian Federation*, PCA Case No AA 226, Interim Award on Jurisdiction and Admissibility (30 November 2009) para 437; *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 6.14.

Under the DoB clause contained in Article 17(1) of the ECT, a Contracting Party may deny the advantages of Part III to – (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized or (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third State with or as to which the denying Contracting Party (a) does not maintain diplomatic relations or (b) adopts or maintains measures that (i) prohibit transactions with Investors of that State or (ii) would be violated or circumvented if the benefits of Part III were accorded to Investors of that State or their Investments.⁵⁷

The claimant to the proceeding bears the burden of substantiating their claim, that they satisfy the requirements for Investor under Article 1(7) of the ECT and that their investment satisfies the requirements of Investment under Article 1(6) of the ECT.⁵⁸ If the respondent invokes Article 17(1) of the ECT, the respondent bears the burden to demonstrate that the substantive requirements of the Article 17(1) of the ECT are met. However, the respondent essentially has to prove a negative in relation to matters known by the claimant – that the claimant has no substantial business activities in the host State. Thus, if the respondent has provided sufficient elements to cast doubt on the extent of such activities, the claimant ought to substantiate their business activities in the host State.⁵⁹

Furthermore, “[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 that such control exists.”⁶⁰

⁵⁷ It should be noted that Article 17 of the ECT was amended in 2024, which affects its future operation but not the interpretation of the original clause analysed in this master’s thesis. On 3 December 2024, the Energy Charter Conference adopted an amendment to Article 17 of the ECT, removing the substantial business activities precondition and extending its application to Article 26 of the ECT. Under Article 42(4) of the ECT, the amendment enters into force only once ratified, accepted or approved by at least three-quarters of the Contracting Parties. The amendment applies on a provisional basis from 3 September 2025. However, this does not retroactively alter the meaning of the original DoB clause, which remains relevant to denials made pre-amendment. Moreover, the original Article 17(1) of the ECT remains relevant, as its structure and prerequisites are consistent with various other DoB clauses. See Energy Charter Conference, ‘Decision on Amendments to the Energy Charter Treaty’ (CCDEC 2024 12 GEN, 3 December 2024) 3, 13 – https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2024/CCDEC202412_EN.pdf accessed 28 April 2026.

⁵⁸ See e.g. *Liman* (n 14) para 164; *Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v Ukraine*, SCC Case No V 2015/092, Final Award (4 February 2021) para 326. See also *Generation Ukraine Inc v Ukraine*, ICSID Case No ARB/00/9, Award (16 September 2003) para 15.7; *Ulysseas* (n 12) para 166.

⁵⁹ *Zaur* (n 15) para 490.

⁶⁰ Understanding IV(3) with respect to Article 1(6) of the ECT in *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat 2004) 26.

As of today, the ECT's investment regime has been subject to scrutiny for a multitude of reasons.⁶¹ First, the ECT has been viewed as a substantial threat to the implementation of climate change measures.⁶² This is because the ECT enables potential claims for compensation, which run counter to the goals of the Paris Agreement.⁶³ This has led to a withdrawal of the EU itself⁶⁴ as well as a number of EU Member States from the ECT.⁶⁵

Second, the *Komstroy* case of from the European Court of Justice interpreted Article 26 of the ECT, which concerns the settlement Investor-State disputes through arbitration, as incompatible with the autonomy of the EU and its legal order and that EU treaties to preclude any investor-state dispute settlement between EU Investors and Member States of the EU.⁶⁶

However, Article 47(3) of the ECT provides for a “sunset clause”, under which existing Investments made in the Area of a Contracting Party remain protected for another twenty years after a Contracting Party's withdrawal takes effect. Considering that – (1) the interpretation of the temporal effect of Article 17(1) of the ECT is broadly disputed and (2) the ECT has 49 Contracting Parties in addition to the five countries, who the ECT applies to throughout the sunset period – it is reasonable to expect new and ongoing arbitrations under the ECT, including disputes involving Article 17(1) of the ECT.

⁶¹ For a comprehensive discussion on this matter, see Tibisay Morgandi and Lorand Bartels, ‘Exiting the Energy Charter Treaty under the Law of Treaties’ (2023) 34(1) *King's Law Journal* 145, 146-50; Eleftheria Neframi, ‘Withdrawal from the Energy Charter Treaty in the Light of Mixity’ (College of Europe, Research Paper in Law 02/2024) 2-4 – <https://www.coleurope.eu/withdrawal-energy-charter-treaty-light-mixity> accessed 15 April 2026.

⁶² Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (International Institute for Sustainable Development 2021) 16; Natasha A. Georgiou, ‘A Modernised ECT Reflecting EU Values and Objectives: A Multilateral Framework Promoting Energy Investment in a Sustainable Way?’ (2023) 7(1) *Europe and the World: A Law Review* 4 – <https://doi.org/10.14324/111.444.ewlj.2023.02> accessed 15 April 2026.

⁶³ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3. See also Tibisay Morgandi and Lorand Bartels, ‘Exiting the Energy Charter Treaty under the Law of Treaties’ (2023) 34(1) *King's Law Journal* 146. See generally Kyra Bos and Joyeeta Gupta, ‘Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development’ (2019) 56 *Energy Research & Social Science* 1-15; Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (2020) International Institute for Environment and Development – <https://www.iied.org/17660iied> accessed 15 April 2026.

⁶⁴ For the development of the EU withdrawal from the ECT see European Parliament, ‘Resolution of 24 November 2022 on the Outcome of the Modernisation of the Energy Charter Treaty (2022/2934(RSP))’ para 18; European Commission, ‘Proposal for a Council Decision on the Withdrawal of the Union from the Energy Charter Treaty’ COM(2023) 447 final, 7 July 2023 para 2.3; Energy Charter Secretariat, ‘Written Notification of withdrawal from the Energy Charter Treaty’ (5 July 2024) – <https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-5/> accessed 19 April 2026.

⁶⁵ Italy (withdrawal effective 1 January 2016); Australia (termination of provisional application effective 13 December 2021); France (withdrawal notified 7 December 2022 pursuant to Article 47(3)); Germany (withdrawal notified 19 December 2022 pursuant to Article 47(3)); Poland (withdrawal notified 28 December 2022 pursuant to Article 47(3)).

⁶⁶ Case C-741/19, *Republic of Moldova v Komstroy LLC* (2021) ECLI:EU:C:2021:655, paras 41–66.

Moreover, DoB clauses are widely included in investment treaties other than the ECT, so a careful analysis of the temporal effect of Article 17(1) of the ECT has significance not only for the ECT, but also for the interpretation of DoB clauses in IIAs generally.

To conclude, Chapter 1 provided the foundation to answer the research questions of this master's thesis – the framework, origin, evolution and function of DoB clauses, as well as the historical development and structure of the ECT insofar as it relates to Article 17(1) of the ECT.

2. RULES OF TREATY INTERPRETATION APPLICABLE TO THE DENIAL OF BENEFITS CLAUSE OF THE ENERGY CHARTER TREATY

2.1 Rules of treaty interpretation

Pursuant to Article 26(6) of the ECT, the applicable law in ECT arbitrations is the ECT itself as well as other applicable principles and rules of international law. The interpretation of the ECT, like any other treaty, is governed by the rules of interpretation under public international law. Such rules can be found in the VCLT under Articles 31-33. There is no doubt that the ECT constitutes a treaty within the meaning of Article 2(1) of the VCLT, as it is an international agreement concluded between multiple States in written form and governed by public international law. There is also no doubt that the VCLT applies to the ECT from the temporal perspective because the ECT entered into force on 16 April 1998, i.e. approximately eighteen years after the entry-into-force of the VCLT. Accordingly, the interpretation of the temporal effect of Article 17(1) of the ECT must be based on the rules of interpretation.

The purpose of Chapter 2 is to establish a structured framework for applying the rules of interpretation, which is specifically tailored to determine the temporal effect of Article 17(1) of the ECT. In short, Chapter 2 ensures an accurate and comprehensive interpretation of Article 17(1) of the ECT in Chapter 3.

As Articles 31-33 of the VCLT reflect customary international law,⁶⁷ the rules of interpretation constitute the applicable law for treaty interpretation even in instances where the VCLT itself is not applicable.⁶⁸ This situation could arise in ECT related disputes since not all Contracting Parties to the ECT are Contracting States to the VCLT and *vice versa*.⁶⁹

Article 31(1) of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The International Law Commission (ILC) has emphasised that the four paragraphs of Article 31 of the VCLT form one singular rule, as the process of interpretation is a unity.⁷⁰ While there is an absence of a legal hierarchy between

⁶⁷ *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, para 99; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, para 141; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 65. See also *Methanex Corporation v United States of America*, Final Award on Jurisdiction and Merits (3 August 2005) Part IV, ch. B, para 29.

⁶⁸ *Aguas del Tunari* (n 71) para 88; *Canfor Corporation v United States of America; Terminal Forest Products Ltd v United States of America*, UNCITRAL, Decision on the Preliminary Question (6 June 2006) para 177.

⁶⁹ *Roe and Hapold* (n 11) 28.

⁷⁰ International Law Commission (ILC), 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission Arts 27-28, 219-220, para 8.

each interpretative element of Article 31 of the VCLT⁷¹, the ordinary meaning is widely regarded as the starting point of interpretation.⁷²

In addition, Article 32 of the VCLT provides for supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion. Such supplementary means may be used to confirm the meaning derived from the application of Article 31 of the VCLT or to (1) resolve ambiguity or obscurity or (2) avoid a manifestly absurd or unreasonable result.

Each interpretative element will be augmented with the interpretations of the DoB clause in the ECT and other investment treaties provided by prior investment tribunals, the rules of interpretation, the *travaux préparatoires* of the ECT as well as other persuasive authorities, such as the judgements of the International Court of Justice (ICJ).

While the awards of investment tribunals are only binding to the parties to the arbitration,⁷³ it is common for investment tribunals to pay due consideration to earlier decisions on the subject matter in order to ensure the harmonious development of investment law and legal certainty.⁷⁴ Such reliance by investment tribunals is particularly prevalent where the parties to the arbitration have cited specific case law in their submissions.⁷⁵ This does not, however, mean that later investment tribunals must follow the reasoning of the first tribunal on the

⁷¹ ILC (n 70) Arts 27–28, 220, para 9; *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 91; Weeramantry (n 1) para 3.09.

⁷² Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 580, para 39. See also *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) para 168; *Yukos* (n 14) para 411; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009) 111, para 2.28.

⁷³ See e.g. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, Article 53(1); United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (with Art 1(4) as adopted in 2013 and Art 1(5) as adopted in 2021), Article 34(2).

⁷⁴ *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 293; *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67; *Duke Energy Electroquil Partners & Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 117; *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Award (30 June 2009) para 90.

⁷⁵ *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006) para 39; See also *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction (25 September 1983) para 14; *Marvin Roy Feldman Karpa v United Mexican States (also known as Marvin Feldman v Mexico)*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) para 107; *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004) para 33; *AES Corporation v Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 30-2; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 76.

subject matter.⁷⁶ Thus, previous practice of investment tribunals can be considered a persuasive authority when interpreting the temporal effect of Article 17(1) of the ECT.

2.2 General rules of treaty interpretation

2.2.1 Ordinary meaning

Although Article 31 of the VCLT does not establish a hierarchy among its elements,⁷⁷ “[i]nterpretation must be based above all upon the text of the treaty.”⁷⁸ Thus, the ordinary meaning is widely regarded as the starting point of interpretation,⁷⁹ as the text of the treaty is presumed to be the authentic manifestation of intent of the contracting parties.⁸⁰ However, the ordinary meaning element should only be considered determinative if it is confirmed or supported by the other elements of Article 31 of the VCLT.⁸¹

The ordinary meaning involves a linguistic and grammatical analysis of the treaty.⁸² Investment tribunals frequently consult dictionary definitions to determine the ordinary meaning.⁸³ However, such reliance should be exercised with care,⁸⁴ as the ordinary meaning of the text often goes beyond its mere literal meaning. This is because the ordinary meaning of the text is often influenced by the drafter's professional background and expertise on the subject matter.⁸⁵ The interpretative standard is therefore that of a reasonably informed person on the subject matter of the treaty.⁸⁶

⁷⁶ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004) para 97.

⁷⁷ ILC (n 70) Arts 27–28, 220, para 9; *Aguas del Tunari* (n 71) para 91. See also Weeramantry (n 1) para 3.09.

⁷⁸ *Territorial Dispute (Libya v Chad)* (Judgment) [1994] ICJ Rep 6 para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279 para 100.

⁷⁹ Dörr, ‘Article 31’ (n 72) 580, para 39. See also *Plama (Award)* (n 72) para 168; *Yukos* (n 14) at para 411; Newcombe and Paradell (n 72) 111, para 2.28.

⁸⁰ ILC (n 70) Arts 27–28, 220, para 11; *Methanex (Final Award)* (n 67) Part II, ch B, para 22; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) para 78.

⁸¹ *Aguas del Tunari* (n 71) para 226; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 336.

⁸² Dörr, ‘Article 31’ (n 72) 581, para 49.

⁸³ *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001) para 75; *Tokios Tokelès v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) paras 28 and 75; *Aguas del Tunari* (n 71) paras 227, 229, 231, and 232; *Alasdair Ross Anderson and others v Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award (19 May 2010) paras 48 and 57.

⁸⁴ *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (7 August 2002) para 136; *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction (3 August 2004) para 92; *Methanex (Final Award)* (n 67) Part II, ch B, para 16.

⁸⁵ *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) para 46; *Aguas del Tunari* (n 71) para 230; *Methanex (Final Award)* (n 67) Part IV, ch B, para 30. See also Weeramantry (n 1) para 3.48.

⁸⁶ Dörr, ‘Article 31’ (n 72) 581, para 40.

The ordinary meaning of the treaty may be displaced where a special meaning can be established under Article 31(4) of the VCLT. However, there is no evidence to support the fact that the Contracting Parties to the ECT intended to attribute special meaning to any terms of Article 17(1) of the ECT.⁸⁷

Under Article 50 of the ECT, the ECT was authenticated in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic. As such, due consideration must also be given to Article 33 of the VCLT when interpreting the ECT. Article 33(3) of the VCLT presumes that the terms of the treaty have the same meaning in each authentic text. Article 33(4) of the VCLT provides that where a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 of the VCLT does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. Thus, the interpretation of the treaty under the other elements of Article 31(1) of the VCLT can refute the presumption of Article 33(3).⁸⁸ At least in published case law, investment tribunals have not disclosed a difference of meaning in the authentic languages of the ECT in any of the terms of Article 17(1) of the ECT. On the contrary, the *Plama* tribunal indicated that certain phrases of Article 17(1) of the ECT have the same meaning in each authentic text.⁸⁹ Considering that the substantial amount of case law regarding Article 17(1) of the ECT is silent in relation to Article 33 of the VCLT, it is reasonable to presume that there is no divergence between the authentic languages of the ECT with respect to Article 17(1) of the ECT.

2.2.2 Context

However, “there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted.”⁹⁰ Rather, the terms of a treaty are to be interpreted within the context of its systematic structure and even beyond that,⁹¹ as illustrated by Article 31(2) and (3) of the VCLT. In essence, “[t]he word obtains its meaning from the context in which it is used”.⁹² Under Article 31(2) of the VCLT, due consideration must be granted to the entire text of the treaty, including its preamble, annexes,

⁸⁷ *Plama (Jurisdiction)* (n 13) para 194.

⁸⁸ Oliver Dörr, ‘Article 33’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 648, para 35.

⁸⁹ *Plama (Jurisdiction)* (n 13) para 147.

⁹⁰ Ian R Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 121.

⁹¹ Dörr, ‘Article 31’ (n 72) 582, para 43.

⁹² *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 158.

agreements by all parties connected with the treaty's conclusion and instruments relating to the treaty's conclusion made by one or more parties and accepted by the other parties.

It is widely accepted in legal literature that the Understandings and Decisions relating to the ECT, included in its Final Act, are to be considered as part of the context element under Article 31(2) of the VCLT.⁹³ At the same time, the Declarations made by individual States at the ECT's conclusion are not considered to form a part of the context element of the ECT.⁹⁴ The Understandings relating to the ECT as a whole will be interpreted under the object and purpose element, as its substance overlaps with the Charter's objectives. The Understandings made with respect to specific provisions of the ECT do not contain interpretative relevance in relation to the temporal effect of Article 17(1) of the ECT. The same goes for the decisions made with respect to the ECT.

For Article 31(2) of the VCLT, it is important to distinguish material falling under Article 31(2) of the VCLT from the *travaux préparatoires*, which constitute a supplementary means of interpretation under Article 32 of the VCLT. Material falling under Article 31(2) of the VCLT requires an agreement between the negotiating parties.⁹⁵ On the other hand, preparatory work includes "successive drafts of the treaty, conference records, explanatory statements of an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee",⁹⁶ "record of discussions leading up to agreement upon the final text of [a provision] whether such record consists of negotiating drafts or any other matters".⁹⁷ The preparatory works of the ECT will be interpreted under Article 32 of the VCLT.

Investment tribunals have relied on related articles in the investment treaty⁹⁸ in order to determine the context of a provision. Similarly, the ICJ has relied on other provisions of the same treaty, which are a necessary consequence to the former⁹⁹ and applied provisions in

⁹³ See e.g. Roe and Happold (n 11) 20; Diego Mejía-Lemos, 'Article 10: Promotion, Protection and Treatment of Investments' in Rafael Leal-Arcas (ed), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018) 168-169, para 10.16; Weeramantry (n 1) para 3.98.

⁹⁴ Weeramantry (n 1) para 3.98; Roe and Happold (n 11) 20.

⁹⁵ *Maritime Dispute (Peru v Chile)* (Judgment) [2014] ICJ Rep 3, para 65.

⁹⁶ Anthony Aust, *Handbook of International Law* (Cambridge University Press 2005) 94-95.

⁹⁷ *Pope & Talbot (Damages)* (n 85) para 37.

⁹⁸ *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997) para 33; *Banro American Resources, Inc and Société Aurifère du Kivu et du Maniema SARL v Democratic Republic of the Congo*, ICSID Case No ARB/98/7, Award (1 September 2000) para 19; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para 133; *Methanex (Final Award)* (n 30) Part IV, ch C, para 15; *Pope & Talbot (Merits, Phase 2)* (n 83) paras 37 and 117; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Decision on Jurisdiction (22 February 2006) paras 78-79.

⁹⁹ *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, para 77.

conjunction with integrally related provisions.¹⁰⁰ Investment tribunals have also been influenced by other paragraphs of the relevant the provision¹⁰¹ and its location in the treaty.¹⁰²

For the interpretation of Article 17(1) of the ECT this means that due consideration must be given to the structure of Part III and provisions related to Article 17 of the ECT.¹⁰³ Such relevant provisions can be found in Articles 17(2), 1(6), 1(7), 10(1) and 26 of the ECT.

The European Energy Charter¹⁰⁴ (Charter) is regarded as part of the context of the ECT.¹⁰⁵ The Charter is defined in Article 1(1) of the ECT as the European Energy Charter of 1991. However, its interpretative relevance stems from Article 2 of the ECT and its repeated references in the preamble of the ECT. For clarity, the Charter and preamble of the ECT will therefore be interpreted under the object and purpose element of Article 31(1) of the VCLT.

Article 31(3) of the VCLT also requires that any subsequent agreements between the parties regarding the interpretation of the treaty or its application (Article 31(3)(a)), subsequent practice in the application of the treaties which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b)) and relevant rules of international law applicable in the relations between the parties be taken into account together with the context (Article 31(3)(c)). These agreements are to be taken into account, together with the context. The application of subsequent agreements and practice has proven a rarity in investment arbitration.¹⁰⁶ It is however relevant to consider that Article 17 of the ECT was amended by the Contracting Parties in 2024, which applies on a provisional basis.¹⁰⁷

¹⁰⁰ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 123.

¹⁰¹ *Plama (Jurisdiction)* (n 13) para 191; *Tokios* (n 83) para 30; *Siemens* (n 84) para 85; *Methanex (Final Award)* (n 67) Part IV, Chap. C, para 14; and *Pope & Talbot (Merits, Phase 2)* (n 83) para 37.

¹⁰² *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) paras 169-70; *SGS v Philippines* (n 76) para 124; *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (9 November 2004) para 77; *Eureko BV v Republic of Poland*, UNCITRAL, Partial Award (19 August 2005) para 259; *Plama (Jurisdiction)* (n 13) para 192.

¹⁰³ *Roe and Happold* (n 11) 29.

¹⁰⁴ 'Concluding Document of the Hague Conference on the European Energy Charter' in Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat 2004) 209–21.

¹⁰⁵ Thomas W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 724, 732; Mejía-Lemos 'Article 10' (n 23) 170, para 10.17.

¹⁰⁶ Weeramantry (n 1) para 3.101.

¹⁰⁷ Energy Charter Conference, 'Decision on Amendments to the Energy Charter Treaty' (n 57) 13.

The element of relevant rules of international law in Article 31(3)(c) of the VCLT requires that any treaty “be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.¹⁰⁸ This requirement is considered to be an implicit reference to Article 38(1) of the Statute of the ICJ¹⁰⁹ (ICJ Statute).¹¹⁰ However, Article 31(3)(c) of the VCLT does require an interpretation to incorporate the entirety of international law into a provision, which only regulates a specific set of issues.¹¹¹ Rather, the rules to be taken into account must be concerned with the subject matter contained in that specific provision.¹¹²

The interpretation of Article 17(1) of the ECT under Article 31(3)(c) of the VCLT can be split into two aspects – (1) in light of similarly worded DoB clauses¹¹³ and (2) together with general principles of law and customary international law.

The terms of a treaty can be interpreted, by way of analogy, in light of the terms of another treaty, where the latter regulates a similar subject matter.¹¹⁴ As such, investment tribunals have relied on the interpretations of treaty provisions identical or similar to treaty provisions interpreted by previous investment tribunals.¹¹⁵ Such reliance must, however, be exercised with caution, as the respective treaty’s context, object and purpose and *travaux préparatoires* will likely differ.¹¹⁶

With regard to general principles of law and customary international law, the principles of good faith, effectiveness, prohibition on the abuse of right, estoppel and acquiescence will be analysed in detail under Chapters 2.2.4 and 3.1.4 due to their inherent connection to good

¹⁰⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 53.

¹⁰⁹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

¹¹⁰ Dörr, ‘Article 31’ (n 72) 604-05, para 95.

¹¹¹ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Separate Opinion of Judge Higgins) [2003] ICJ Rep 225, para 46.

¹¹² *Certain Questions of Mutual Assistance in Criminal Matters* (n 100) para 112; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3, para 89.

¹¹³ Whereas the interpretation of Article 17(1) of the ECT under the context element will examine DoB clauses from other treaties, the object and purpose element will consider the object and purpose of other treaties containing such DoB clauses.

¹¹⁴ Dörr, ‘Article 31’ (n 72) 605-06, para 96.

¹¹⁵ *Lanco International Inc v Argentine Republic*, ICSID Case No ARB/97/6, Decision on Jurisdiction (8 December 1998) para 43; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) para 73; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Objections to Jurisdiction (30 April 2004) para 74. See also Weeramantry (n 1) para 5.12; Gabrielle Kaufmann-Kohler, ‘Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?’ in Loukas A. Mistelis and (ed), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 257, 258.

¹¹⁶ *Methanex (Final Award)* (n 67) Part II, Ch B, para 16; *MOX Plant (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 95, para 51.

faith. In the present case, Article 28 of the VCLT could also be considered a relevant rule of international law when determining the temporal effect of Article 17(1) of the ECT. This is because Article 28 of the VCLT regulates the temporal applicability of a treaty.¹¹⁷ Article 28 of the VCLT is considered to reflect customary international law.¹¹⁸

2.2.3 Object and purpose

A treaty shall be interpreted in the light of its object and purpose, which “is to be used only to clarify the text and not to provide independent sources of meaning that contradict the clear text”.¹¹⁹ The terms of a treaty are to be interpreted in a way that advances the aims of that treaty.¹²⁰ Investment tribunals have often employed the object and purpose element as a means of confirmation¹²¹ rather than an independent determination of an interpretation. However, the object and purpose element is particularly relevant, where one interpretation would frustrate¹²² or be inconsistent with the purpose of a treaty or its provisions.¹²³

Investment tribunals have determined the object and purpose of investment treaties to relate to the protection of foreign investors and their investments¹²⁴, the promotion of economic cooperation through reciprocal encouragement¹²⁵ and stimulation of private economic initiative.¹²⁶ These objectives are thought to be achieved through a stable investment

¹¹⁷ Kerstin von der Decken, ‘Article 28’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 507, para 1.

¹¹⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 100.

¹¹⁹ *The United States of America and the Federal Reserve Bank of New York v The Islamic Republic of Iran and Bank Markazi Iran*, IUSCT Case No A28, Decision No DEC 130-A28-FT (19 December 2000) 36 Iran-US CI Trib Rep 5 para 58.

¹²⁰ Dörr, ‘Article 31’ (n 72) 584, para 52.

¹²¹ *Marvin Roy Feldman Karpa v United Mexican States* (also known as *Marvin Feldman v Mexico*), ICSID Case No ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (6 December 2000) para 35; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007) para 340; *Austrian Airlines v Slovak Republic*, UNCITRAL, Final Award (9 October 2009) para 103.

¹²² *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award (17 February 2000) para 64; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 91.

¹²³ *Tokios* (n 83) paras 32, 46, 77, and 86; *Aguas del Tunari* (n 71) para 247; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* (formerly *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v Argentine Republic*), ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001) para 11.

¹²⁴ *Santa Elena* (n 122) para 64; *El Paso* (n 75) para 68; *Eureko* (n 102) para 248; *Loewen Group Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction (5 January 2001) para 53; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005) para 142; *SGS v Philippines* (n 76) para 116; *Tokios* (n 83) para 32.

¹²⁵ *Ceskoslovenská Obchodní Banka, A.S. v Slovak Republic*, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) para 64; *Philippe Gruslin v Malaysia (II)*, ICSID Case No ARB/99/3, Award (27 November 2000) para 13.8; *Aguas del Tunari* (n 71) paras 153 and 241; *Tokios* (n 83) para 31.

¹²⁶ *Plama (Jurisdiction)* (n 13) paras 141 and 161.

environment.¹²⁷ Recourse to an independent, politically impartial and neutral form of dispute resolution is paramount to achieving these objectives.¹²⁸

While the preamble is generally considered to be the starting point in identifying the object and purpose of a treaty,¹²⁹ the object and purpose of the ECT is expressly set forth in Article 2 of the ECT¹³⁰ titled as the “[p]urpose of the treaty”, which provides four objectives – 1) the establishment of a legal framework aimed at; 2) the promotion of long-term cooperation; 3) based on complementarities and mutual benefits; 4) in accordance with the objectives and principles of the Charter.

The Charter provides in its preamble that the signatories affirm their desire to apply “the principles set out below” which cover the Charter’s “Objectives” under Title I, “Implementation” under Title II, “Specific Agreements” under Title III, and “Final Provisions” under Title IV.¹³¹ The following analysis will only interpret the Charter insofar as it relates to the temporal effect of Article 17(1) of the ECT.

“Long-term cooperation” is ensured through a legal framework that accounts for investment protection, international dispute settlement and improved legal transparency.¹³² Title I of the Charter further references “political and economic cooperation”, “within the framework of State sovereignty and sovereign rights over energy resources”, “to create a climate favourable to the operation of enterprises and to the flow of investments”. Title II(4) of the Charter states that “[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”.¹³³

¹²⁷ *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) para 274; *Tokios* (n 83) para 31; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) para 104; *SGS v Philippines* (n 76) para 116.

¹²⁸ *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 417; *Vivendi* (n 123) para 11; *Enron* (n 75) para 37; *Plama (Jurisdiction)* (n 13) paras 141 and 193; *Aguas del Tunari* (n 71) paras 153 and 247. See also *Ceskoslovenská* (n 125) para 57; *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000) para 31; *Banro* (n 98) paras 16 and 19.

¹²⁹ *Aguas del Tunari* (n 71) para 241; Dörr, ‘Article 31’ (n 72) 585, para 55.

¹³⁰ *Plama (Jurisdiction)* (n 13) paras 160-65; *Yukos* (n 14) paras 458-59; *Liman* (n 14) para 225; *Khan* (n 14) para 426-429; *Isolux* (n 14) para 715; *Masdar* (n 14) para 239; *NextEra* (n 160) paras 268-69; *ACF* (n 24) paras 1467-470; *Littop* (n 58) paras 595-606.

¹³¹ European Energy Charter (n 104) Titles I-IV.

¹³² Leonie Reins, ‘Article 2: Purpose of the Treaty’ in Rafael Leal-Arcas (ed), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018) 51-52, para 2.09.

¹³³ European Energy Charter (n 104) Titles I and II(4).

“Complementarities” are explained in the Charter’s preamble as “[c]ertain that taking advantage of the complementary features of energy sectors within Europe will benefit the world economy” and in Title II as “commercial forms of co-operation may need to be complemented by intergovernmental co-operation, particularly in the area of energy policy formulation and analysis as well as in areas which are essential and not suitable to private capital funding.”¹³⁴

“Mutual benefits” has been clarified in the Charter’s Preamble as the signatories determination “to establish closer, mutually beneficial commercial relations and promote energy investments.”¹³⁵

The objective of establishing “a legal framework” must logically be based on the aforementioned objectives and principles. Thus, the legal framework of the ECT must have a certain degree of foreseeability and consistency in its application.¹³⁶ Furthermore, a landmark function of the ECT is to provide a dispute settlement mechanism to ensure the protection of the objectives and principles.¹³⁷

This purpose is confirmed by Understanding IV(1)(a) of the ECT. Likewise, the Preamble to the ECT has referenced the objectives and principles of the Charter in multiple instances. A cornerstone to long-term cooperation is a legally certain environment for investors, which is guaranteed by a legal framework following the rule of law, predictability, compliance with ECT’s obligations and its application in good faith.¹³⁸

Furthermore, the introductory note to the ECT explicitly references that “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues.”¹³⁹ Investment tribunals have concluded that the ECT must also be interpreted in a manner consistent with the introductory note.¹⁴⁰

2.2.4 General principles of law

General principles of law – the principle of good faith and principles which follow from it – may also affect the interpretation of the temporal effect of Article 17(1) of the ECT as well as preclude or limit the exercise of a DoB in certain circumstances. Article 38(1)(c) of the ICJ

¹³⁴ European Energy Charter (n 104) Preamble and Title II.

¹³⁵ European Energy Charter (n 104) Preamble and Understanding IV(1)(a) of the ECT.

¹³⁶ Cees Verburg, ‘Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor–State Dispute Settlement’ (2019) 20 *Journal of World Investment & Trade* 425, 426.

¹³⁷ Leonie Reins ‘Article 2’ (n 132) 57-58, paras 2.24-2.26.

¹³⁸ *Littop* (n 58) para 596.

¹³⁹ ‘An Introduction to the Energy Charter Treaty’ in *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat 2004) 14.

¹⁴⁰ *Plama (Award)* (n 72) para 139; *Littop* (n 58) paras 488-89.

Statute explicitly recognizes general principles of law as a source of public international law. The principle of good faith constitutes a general principle of law under Article 38(1)(c) of the ICJ Statute.¹⁴¹ The prohibition of abuse of rights is an expression of the principle of good faith, regarded as part of customary international law and a general principle of law under Article 38(1)(c) of the ICJ Statute.¹⁴² The principle of effectiveness has been recognized as a fundamental principle of interpretation of treaties¹⁴³ and constitutes a specific application of the object and purpose and good faith elements.¹⁴⁴ Estoppel and acquiescence both follow from the principle of good faith and constitute general principles of international law under Article 38(1)(c) of the ICJ Statute.¹⁴⁵

The principle of good faith essentially serves as an umbrella covering the whole process of interpretation,¹⁴⁶ constituting “the core principle about which all else revolves.”¹⁴⁷ While the principle of good faith is a cornerstone of interpretation, it is not a source of obligation where no obligation would otherwise exist.¹⁴⁸ The principle of good faith requires Contracting Parties to apply a treaty in a reasonable manner consistent with its purpose¹⁴⁹ and abstain from acts, which would frustrate its purpose.¹⁵⁰ Investment tribunals have considered an interpretation contrary to good faith when it would deprive the investor of any certainty as to its rights and the host country’s obligations at the time of making its investment,¹⁵¹ lead to a gross manipulation of the language of the treaty¹⁵² or permit the abuse or unfair taking advantage of rights granted by treaties.¹⁵³

¹⁴¹ Robert Kolb, ‘General Principles of Procedural Law’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 2.

¹⁴² Kolb (n 141) 2; Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 298; Michael Byers, ‘Abuse of Rights: An Old Principle, A New Age’ (2002) 47 *McGill Law Journal* 389, 397.

¹⁴³ *Territorial Dispute (Libya v Chad)* (n 78) para 51; *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision of the ad hoc Committee (3 May 1985) para 62.

¹⁴⁴ Dörr, ‘Article 31’ (n 72) 578-79, para 34.

¹⁴⁵ Kolb (n 141) 2. See also *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246, para 130.

¹⁴⁶ Dörr, ‘Article 31’ (n 72) 588, paras 59-60.

¹⁴⁷ *Hrvatska Elektroprivreda d.d. v Republic of Slovenia*, ICSID Case No ARB/05/24, Decision on the Treaty Interpretation Issue (12 June 2009) para 191.

¹⁴⁸ *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69, para 94; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, paras 38-9.

¹⁴⁹ *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 para 142.

¹⁵⁰ ILC (n 70) Art 23, 211, para 4.

¹⁵¹ *Plama (Jurisdiction)* (n 13) paras 163-64.

¹⁵² *Plama (Jurisdiction)* (n 13) para 147.

¹⁵³ *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) para 230; *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 107.

Furthermore, the terms of a treaty are to be interpreted in a way that advances the aims of that treaty, i.e. through the principle of effectiveness.¹⁵⁴ Under this principle, it is presumed that the Contracting Parties intended for all terms of the treaty to have a purpose and thus did not intend to render a provision ineffective.¹⁵⁵ Thus, where a provision is open to multiple interpretations, it must be interpreted to have meaning rather than deprive it of meaning.¹⁵⁶ However, the principle of effectiveness cannot be applied in order to reach a result that contradicts the clear and explicit terms of a provision.¹⁵⁷

Even if the principles of good faith and effectiveness permit a retrospective interpretation, the principles of estoppel or acquiescence may preclude a Contracting Party from invoking Article 17(1) of the ECT in light of specific circumstances. Estoppel and acquiescence both follow from the principle of good faith and constitute general principles of international law under Article 38(1)(c) of the ICJ Statute.¹⁵⁸ The estoppel doctrine binds a party to its previous statement of fact or representation if the party's previous statement was (1) clear and unambiguous, (2) voluntary, unconditional, and authorised; (3) there must be reliance in good faith upon the statement either to the detriment of the party relying on the statement or to the advantage of the party making the statement.¹⁵⁹ The principle of estoppel has also been applied by investment tribunals.¹⁶⁰ On the other hand, acquiescence is "equivalent to a party's tacit recognition manifested by unilateral conduct which the other party may properly interpret as consent."¹⁶¹ Thus, the absence of a reaction may amount to acquiescence, if the conduct of the other party calls for a response.¹⁶² While the principle of acquiescence is

¹⁵⁴ Dörr, 'Article 31' (n 72) 584, para 52. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229.

¹⁵⁵ Weeramantry (n 1) para 5.74. See also Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (Longmans, Green 1934) 69-70.

¹⁵⁶ ILC (n 70) Arts 27-28, 219, para 6; *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990) para 40; *Eureko* (n 102) para 248; *Noble Ventures Inc v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 50; *Maffezini* (n 128) para 36; *El Paso* (n 75) para 110. See also *Empresas Lucchetti SA and Lucchetti Peru SA v Republic of Peru (also known as Industria Nacional de Alimentos SA and Indalsa Perú SA v Republic of Peru)*, ICSID Case No ARB/03/4, Award (7 February 2005) para 59; *Camuzzi International SA v Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005) para 56.

¹⁵⁷ *Banro* (n 98) para 6.

¹⁵⁸ Kolb (n 141) 2. See also *Gulf of Maine Area* (n 141) para 130.

¹⁵⁹ *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para 111; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 421.

¹⁶⁰ *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Kingdom of Spain*, ICSID Case No ARB/14/11, Award (31 May 2019) para 268; *Khan* (n 14) para 429.

¹⁶¹ Crawford (n 159) 232. See also *Gulf of Maine Area* (n 141) para 130.

¹⁶² *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, para 121.

particularly prevalent in the context of maritime delimitation¹⁶³ and territorial disputes,¹⁶⁴ the principle has also been applied by investment tribunals¹⁶⁵ by way of analogy.

In short, estoppel prevents a party from changing its position to the detriment of the other party where the latter relied on the former's assurances, thus creating binding conduct to the former and legitimate expectations to the latter.¹⁶⁶ Acquiescence allows an existing legal or factual situation to continue where an objection could and should have been made, leading in due time to the assumption of consent.¹⁶⁷ The principles of estoppel and acquiescence can both, under specific circumstances, be applied in order to establish a loss of right or preclude a party from exercising a right and thus may limit the exercise of Article 17(1) of the ECT.

2.3 Supplementary means of treaty interpretation

Article 32 of the VCLT allows recourse to supplementary means of interpretation, such as *travaux préparatoires* and the circumstances of its conclusion, either to confirm the meaning reached under Article 31 or (a) to resolve ambiguity or obscurity or (b) avoid a manifestly absurd or unreasonable result. The ICJ has suggested¹⁶⁸ that it is permissible, in the absence of a clear ordinary meaning, to have recourse to supplementary means of interpretation.

The distinction between primary and supplementary means of interpretation is based on the proximity to the presumed intentions of the parties, as Article 31 relates to express agreements between the parties, whereas Article 32 does not pose such a requirement.¹⁶⁹ The preparatory work referenced includes all documents relevant to the treaty during its preparation up to its conclusion.¹⁷⁰ The circumstances of a treaty's conclusion have a low reference rate,¹⁷¹ as they tend to overlap with the criteria of Article 31(2) of the VCLT.

¹⁶³ *Gulf of Maine* (n 141) para 130.

¹⁶⁴ *Sovereignty over Pedra Branca/Pulau Batu Puteh* (n 158) para 121.

¹⁶⁵ *NextEra* (n 160) para 269. See also *Liman* (n 14) paras 226-27; *ACF* (n 24) para 1471.

¹⁶⁶ Crawford, (n 159) 421; Kolb (n 141) 52; *Pope & Talbot Inc (Interim Award)* (n 159) para 111.

¹⁶⁷ Crawford (n 159) 422; *NextEra* (n 160) para 269.

¹⁶⁸ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Separate Opinion of Judge Sir Gerald Fitzmaurice) [1962] ICJ Rep 198, 209.

¹⁶⁹ Oliver Dörr, 'Article 32' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 617, para 2.

¹⁷⁰ *Ibidem* 621, para 13.

¹⁷¹ Ian R. Sinclair (n 90) 142.

The first alternative of Article 32 of the VCLT is the confirmation of meaning resulting from Article 31 of the VCLT. This alternative has been applied as a means of confirmation,¹⁷² to hold that the supplementary means do not preclude the interpretation of Article 31 of the VCLT¹⁷³ and to dismiss certain interpretations presented by a party to a dispute.¹⁷⁴

The second alternative is Article 32(a) of the VCLT, which is employed to determine the meaning in cases where there is no clear meaning.¹⁷⁵ Such recourse requires a “sufficient element of ambiguity about the exact intention and effect [of a provision].”¹⁷⁶ The *Methanex v. U.S.* tribunal has held that borderline ambiguity or obscurity is not sufficient to resort to Article 32(a) of the VCLT, rather it must be “demonstrably” ambiguous or obscure.¹⁷⁷

The third alternative is Article 32(b) of the VCLT, which is employed to determine the meaning where the interpretation under Article 31 of the VCLT leads to a result which is manifestly absurd or unreasonable. This refers to instances where the result “cannot work as envisaged or if the outcome is in clear and significant contradiction to a principal feature or objective of the treaty”.¹⁷⁸

Many of the *travaux préparatoires* leading to the adoption of the ECT are not publicly available.¹⁷⁹ Thus, the *travaux préparatoires* will be referred to in a fragmentary manner – (1) those that are publicly available and (2) those cited in an anonymized arbitral award¹⁸⁰ made available to the author of this master’s thesis.

Investment tribunals have typically not interpreted Article 17(1) of the ECT through Article 32 of the VCLT.¹⁸¹ One reason for this could be that much of the *travaux préparatoires* for multilateral treaties consist of unilateral statements,¹⁸² which may not reflect the parties

¹⁷² *Territorial Dispute (Libya v Chad)* (n 78) para 55. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, para 147.

¹⁷³ *LaGrand* (n 67) para 104.

¹⁷⁴ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, para 58; *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, para 86.

¹⁷⁵ ILC (n 70) Arts 27-28, 223, para 19.

¹⁷⁶ *Certain Expenses* (n 168) 209.

¹⁷⁷ *Methanex (Final Award)* (n 67) Part II, ch H, para 24.

¹⁷⁸ Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ (n 105) 779; Weeramantry (n 1) para 4.43.

¹⁷⁹ Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ (n 105) 750.

¹⁸⁰ An anonymized arbitral award (*the Award*) and the dissenting opinion to the *Award* have been disclosed to the author under strict confidentiality obligations. In order to comply with these obligations, the *Award* will only be referenced in a fragmentary and anonymized form throughout this master’s thesis.

¹⁸¹ This was the case in *the Award* (n 180) paras 329-34.

¹⁸² Hobér, *The Energy Charter Treaty: A Commentary* (n 55) 36.

common intentions. Thus, reliance on the *travaux préparatoires* of the ECT should be exercised with caution.¹⁸³

Moreover, the lack of reliance on the *travaux préparatoires* of the ECT may also be a matter of practicality. The *travaux préparatoires* of the ECT is collected by the ECT Secretariat,¹⁸⁴ however a considerable amount of the documents are not publicly available. Thus, gaining access to the *travaux préparatoires* would inevitably take time and resources. This is reinforced by the *Plama* tribunal, which affirmed that the parties had not relied on the *travaux préparatoires*,¹⁸⁵ yet did not issue any further orders to change that.

Finally, in the face of established case law, the relevance of supplementary means of interpretation “must inevitably decline.”¹⁸⁶ The majority of investment tribunals have followed the reasoning of the *Plama* tribunal.¹⁸⁷ However, the *Plama* tribunal expressly acknowledged that the parties did not rely on Article 32 of the VCLT and accordingly made an interpretation “turning on a relatively few words”, which was “a short point of almost first impression.”¹⁸⁸ As such, the supplementary means of interpretation may still maintain interpretative relevance despite voluminous case law on the matter.

In conclusion, as the rules of interpretation constitute a general rule intended to apply to all facets of treaty interpretation,¹⁸⁹ it was essential to specifically tailor each interpretative element for Article 17(1) of the ECT. Thus, Chapter 2 established a structured framework for applying the rules of interpretation to determine the temporal effect of Article 17(1) of the ECT, the interpretation of which will be carried out in Chapter 3 of this master’s thesis.

¹⁸³ Roe and Happold (n 11) 31-32.

¹⁸⁴ Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ (n 105) 778.

¹⁸⁵ *Plama (Jurisdiction)* (n 13) para 160.

¹⁸⁶ *Methanex (Final Award)* (n 67) Part II, ch H, para 24.

¹⁸⁷ *Yukos* (n 14) paras 458-59; *Liman* (n 14) paras 224-26; *Libananco* (n 14) para 550; *Khan* (n 14) paras 426-29; *Stati* (n 14) para 745; *Isolux* (n 14) para 715; *Masdar* (n 14) paras 237-39.

¹⁸⁸ *Plama (Jurisdiction)* (n 13) para 160.

¹⁸⁹ *ILC* (n 70) 220, para 8.

3. TEMPORAL EFFECT OF THE DENIAL OF BENEFITS CLAUSE IN THE ENERGY CHARTER TREATY

3.1 Interpretation of the denial of benefits clause in the Energy Charter Treaty through general rules of treaty interpretation

3.1.1 Ordinary meaning of the denial of benefits clause in the Energy Charter Treaty

Chapter 3 is divided into five sections, which will each interpret the temporal effect of Article 17(1) of the ECT under a specific rule of interpretation – ordinary meaning (ch 3.1.1), context (ch 3.1.2), object and purpose (ch 3.1.3), general principles of law (3.1.4) and supplementary means of interpretation (ch 3.2). This interpretation will enable the master's thesis to answer the research questions raised in the introduction of this master's thesis.

The interpretation of the ordinary meaning of Article 17(1) of the ECT will be divided into three aspects – its title, heading and the wording of subsection (1).

The title of Article 17 of the ECT reads: “Non-Application of Part III in Certain Circumstances”. As the title does not read “Partial Non-Application” or “Prospective Non-Application”,¹⁹⁰ it cannot influence the interpretation of the temporal effect of Article 17 of the ECT. Any other conclusion would contravene the rules of interpretation. This is because a tribunal cannot presume an interpretation that is absent from the text of the treaty.¹⁹¹ It follows that the title has no effect in determining the temporal effect of Article 17(1) of the ECT.

The heading of Article 17 of the ECT states that “[e]ach Contracting Party reserves the right to deny the advantages of this Part”.

The phrase “reserves the right to deny” suggests that a Contracting Party retains the discretion to invoke Article 17 of the ECT.¹⁹² It does not, however, shed any light on the temporal effect of Article 17 of the ECT.¹⁹³ Legal literature has similarly refrained from projecting any temporal meaning onto the phrase “reserves the right to deny”, which is used interchangeably with the phrase “may deny”.¹⁹⁴

¹⁹⁰ A similar point was articulated in *the Award* (n 180) para 297-98.

¹⁹¹ *Tokios* (n 83) para 77; *Sempra* (n 124) para 146.

¹⁹² *Khan* (n 14) para 419.

¹⁹³ *Zaur* (n 15) para 556.

¹⁹⁴ *Roe and Happold* (n 11) 85.

The verb “deny” means “to refuse to grant” and is used synonymously with the verb “refuse”.¹⁹⁵ One could argue that as a denial occurs in the present, it can only affect a person’s ability to do something in the future. This reasoning would imply prospective effect. However, the author takes a different approach. “To refuse to grant” could just as well mean that the person never had permission to begin with. Considering the multitude of interpretations, it would be unwarranted to impose a temporal limitation to Article 17(1) of the ECT solely from the verb “deny”.

Finally, the wording of Article 17(1) of the ECT itself must be interpreted. While the *Plama* tribunal held that the wording suggests a prospective effect, as it is drafted in the present tense – own or control; has no substantial business activities; is organized – it refrained from basing its interpretation on “such semantic indications only”¹⁹⁶ and proceeded to apply the other elements of Article 31 of the VCLT. Other tribunals have considered the use of present tense as insufficient in determining the temporal effect of Article 17(1) of the ECT.¹⁹⁷ The *Aris Mining v. Colombia* tribunal concluded, relating to a DoB clause with analogous prerequisites,¹⁹⁸ that such wording is non-temporal in nature.¹⁹⁹ Rather than implying a temporal scope, the aforementioned terms describe the legal entity targeted by Article 17(1) of the ECT.²⁰⁰ Ultimately, the fact that the Contracting Parties refrained from setting an explicit temporal limitation to Article 17(1) of the ECT carries greater interpretative weight than the grammatical form of certain phrases.

In conclusion, while it is relevant to consider what the text of a treaty says, it is also equally relevant what it does not say.²⁰¹ It is not for tribunals to impose a temporal limitation onto a provision where the Contracting Parties chose not to specify such effect.²⁰² As Article 17(1) of the ECT does not expressly refer to a temporal limitation, it would be unwarranted to assume the existence of one from its wording. As such, recourse must be had to the other elements of Article 31(1) of the VCLT.

¹⁹⁵ Merriam-Webster, ‘deny’ (Merriam-Webster Online Dictionary) – <https://www.merriam-webster.com/dictionary/deny> accessed 28 March 2026.

¹⁹⁶ *Plama (Jurisdiction)* (n 13) para 159.

¹⁹⁷ *Litpop* (n 58) para 594; A similar point was articulated in *The Award* (n 180) para 304.

¹⁹⁸ Article 814(2) of the FTA between Canada and the Republic of Colombia.

¹⁹⁹ *Aris Mining* (n 12) para 126.

²⁰⁰ A similar point was articulated in *the Award* (n 180) para 304.

²⁰¹ *Zaur* (n 15) para 554; *Aris Mining* (n 12) para 126; *Khan* (n 14) para 425.

²⁰² *Aris Mining* (n 12) paras 126-127; *Zaur* (n 15) paras 556 and 560.

3.1.2 Context of the denial of benefits clause in the Energy Charter Treaty

The interpretation of Article 17(1) of the ECT under the context element is divided into two parts. First, the context which arises from the structure and wording of the ECT itself. Second, the relevant rules of international law under Article 31(3)(c) of the VCLT.

For the context, the starting point is Article 17(2) of the ECT, under which “the denying Contracting Party establishes” whether an investment meets the requirements of subsection (a) or (b). The *Zaur* tribunal held that the Contracting Party should also be able to “establish” these circumstances in the course of arbitral proceedings, as if this was not possible, “this additional wording would serve no purpose”. Thus, Article 17(2) of the ECT can apply retrospectively. There is no sound reason why Article 17(1) of the ECT should be treated any differently, although the *Zaur* tribunal did not consider this decisive under the context element.²⁰³

Article 1(7) of the ECT, which defines the term “Investor”, can also offer interpretative guidance with regards to Article 17(1) of the ECT. Applying both provisions in conjunction with each other indicates that the ECT sets forth two classes of Investors – (1) an Investor with an indefeasible right to the ECT’s protection and (2) an Investor with a defeasible right to the ECT’s protection, which is subject to the host State’s discretionary right to exercise a denial under Article 17(1) of the ECT.²⁰⁴ In order to qualify as an Investor, a legal entity must make an investment in the form of an active and meaningful contribution.²⁰⁵ Article 17(1) of the ECT grants the host State a discretionary right to narrow the scope of the treaty²⁰⁶ to *bona fide* investors and investments.²⁰⁷ Thus, the second class of investors' access to Part III of the ECT is conditional from the outset and remains so over the course of the investment. The connection between Article 1(7) and 17(1) of the ECT supports the possibility that a DoB clause forms a part of the treaty’s scope of application.

Article 17 of the ECT is situated in Part III of the ECT. The title of Part III of the ECT reads: “Investment Promotion and Protection”. Investment promotion relates to the encouragement of foreign investments, whereas protection relates to how an investment, once made, must be treated.²⁰⁸ Tribunals have generally refrained from relying on the provisions of Part III of the

²⁰³ *Zaur* (n 15) para 561.

²⁰⁴ *Amto* (n 22) para 61.

²⁰⁵ *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No ARB/08/13, Excerpts of Award (16 July 2012) para 350.

²⁰⁶ Mudliar ‘Article 17’ (n 3) 249-50, para 17.01; Feldman (n 45) 283.

²⁰⁷ Ramachandran (n 46) 212 See also Sornarajah, ‘Good Faith, Corporate Nationality, and Denial of Benefits’ (n 46) 119.

²⁰⁸ Roe and Happold (n 11) 104-05.

ECT to determine the temporal effect of Article 17(1) of the ECT.²⁰⁹ However, Article 10(1) of the ECT clarifies that each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make investments in its Area.

The *Khan Resources v. Mongolia* tribunal held that Article 10(1) of the ECT creates an obligation to Contracting Parties to provide transparent conditions for a denial.²¹⁰ The obligation for transparent conditions can be read as a requirement to be forthcoming about intended changes in policy and regulations that may significantly affect investments in order to ensure an investor-friendly environment and protect an investor's legitimate expectations.²¹¹ Investment tribunals have held that a proper invocation of Article 17(1) of the ECT contains a notification requirement.²¹² The *Liman v. Kazakhstan* tribunal concluded that the existence of this notification requirement can only lead to one conclusion – that Article 17(1) of the ECT has only prospective effect.²¹³

On the other hand, it can just as well be argued that Article 17 of the ECT does not have a prior notification requirement. This is because Article 17 of the ECT is silent on how and when a denial must be exercised nor does it provide for a prior notification requirement. By contrast, Article 7(10)(a)(ii) and Annex N (transit definition); Article 26(3)(b)(i) and Annex ID (fork-in-the-road exclusion); Article 26(3)(c) and Annex IA (no consent to umbrella-claim); Article 45(3)(c) and Annex PA (non-acceptance of provisional application) all explicitly reference the requirement of a prior notification of a Contracting Parties position.²¹⁴ Thus, the ECT has, on multiple occasions, expressly provided an advance notification requirement. On the other hand, Article 17(1) of the ECT is silent on the matter.

²⁰⁹ *Litpop* (n 58) para 594; *Plama (Jurisdiction)* (n 13) paras 159-60; A similar point was articulated in *the Award* (n 180) para 306.

²¹⁰ *Khan* (n 14) para 427. For a different view, see *Zaur* (n 15) para 563.

²¹¹ *Electrabel* (n 56) para 7.79.

²¹² *Liman* (n 14) para 224; *Plama (Jurisdiction)* (n 13) para 157; *Khan* (n 14) paras 425-30; *Masdar* (n 14) paras 232-36.

²¹³ *Liman* (n 14) para 225.

²¹⁴ *Jagusch and Sinclair* (n 25) 36-37.

Other investment treaties have expressly provided for notification requirements in their DoB clauses.²¹⁵ Significantly, the Contracting Parties refrained from imposing such a requirement for Article 17 of the ECT.

Indeed, numerous investment tribunals have considered that an investor is already placed on notice in advance of a possible DoB from the moment the treaty enters into force.²¹⁶ This is because an investor is aware or at the very least, should be assumed to be aware of the risk that it may not be able to rely on the treaty's protection if it chooses not to structure its legal entity in accordance with the substantive preconditions set forth in the DoB clause.²¹⁷

The lack of a notification requirement is reinforced by the amended Article 17(2) of the ECT, under which a denial may be exercised without any prior publicity or any other additional formality indicating an intention to exercise a denial.²¹⁸ Though not determinative by itself, it could well be interpreted as an attempt of the Contracting Parties to clarify the intended proper manner in which the original Article 17 of the ECT should have been exercised.

Comparative DoB clauses to Article 17(1) of the ECT have expressly regulated when a denial can be invoked. Under Article 19(5) of the Hong Kong and Asean Investment Agreement, a denial can be invoked “at any time, including after the institution of arbitration proceedings”. Article 21(1) of the 2017 China – Hong Kong CEPA Investment Agreement contains a similarly worded provision. Under Article 17 of the 2021 Canada Model BIT, a denial must be exercised “within a reasonable time and no later than its principal submission on the merits, such as the counter-memorial, in an arbitration under this Agreement.” Article 8(3) of the Iran-Slovakia BIT specifies that “[f]or avoidance of any doubt the benefits of this Agreement shall be denied if the preconditions set down in paragraph 1 are fulfilled at time when the claim is submitted pursuant to Article 17.

²¹⁵ See e.g. NAFTA Article 1113(2) (“Subject to prior notification and consultation [...]”); Agreement between the Government of the Republic of Moldova and the Government of the State of Qatar for the Reciprocal Promotion and Protection of Investments (signed 10 December 2012, entered into force 28 October 2013), Article 8 (“Following notification [...]”); Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA) (signed 5 August 2004, entered into force 1 March 2006) Article 10.12(2) (“Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits [...]”); Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (signed 27 February 2009, entered into force 10 January 2010) Article 11(1) (“Following notification [...]”).

²¹⁶ *Aris Mining* (n 12) paras 127 and 130; *Zaur* (n 15) para 558; *Pac Rim* (n 12) para 4.85; *Guaracachi* (n 12) para 377; A similar point was articulated in *The Award* (n 180) para 227.

²¹⁷ *Aris Mining* (n 12) para 130; *Zaur* (n 15) para 558; *Guaracachi* (n 12) para 375.

²¹⁸ Energy Charter Conference, ‘Decision on Amendments to the Energy Charter Treaty’ (n 57) 13.

Article 17 of the ECT offers no such wording.²¹⁹ The fact that Contracting Parties did not impose a time limit on when a denial can be invoked thus carries considerable weight.²²⁰

Article 17 of the ECT is closely linked to Article 26 of the ECT, which governs the settlement of disputes concerning an alleged breach of Part III²²¹ and enables an Investor to enforce the post-investment obligations of a Contracting Party through arbitration.²²² A denial is generally “activated” after a putative investor claims the advantages of the treaty.²²³ Contrarily, multiple investment tribunals have held that the DoB clause only applies if a DoB is invoked before a dispute arose²²⁴ or arbitration commenced.²²⁵ The author considers this reasoning unpersuasive for two reasons.

First, this issue is practically significant for the temporal effect of Article 17(1) of the ECT, as a specific arbitration occurs in relation to the host State’s acts and omissions, which occurred in the past. Thus, a prospective denial in the course of arbitration proceedings would not affect the existing claim and could only deny the investor any future advantages.

The ECT does not require Contracting Parties to monitor the putative investors' corporate structures, nor does it oblige a putative investor to disclose the extent of their business activities or whether they meet the requirements of Article 1(6) and (7) of the ECT. Thus, unless domestic law requires disclosure of a putative investor’s ownership and control structure, there is seldom incentive or necessity for Contracting Parties to analyse if the conditions for a denial are met before an investor decides to invoke their advantages under the ECT.²²⁶ In practice, the determination of whether to exercise a denial is often made after raising the DoB defence in the counter-memorial phase.²²⁷ Therefore, a prospective interpretation would render the discretionary right of Article 17(1) of the ECT ineffective. Such an interpretation would contravene the principle of effectiveness (see more ch 3.1.4).

²¹⁹ NextEra (n 160) para 262.

²²⁰ *Aris Mining* (n 12) para 127; *Guaracachi* (n 12) para 377.

²²¹ Mejía-Lemos ‘Article 10’ (n 23) 163, para 10.11.

²²² Thomas W. Wälde, ‘Investment Arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation’ (1996) 12(4) *Arbitration International* 429, 439.

²²³ *Guaracachi* (n 12) para 376; *Empresa Eléctrica* (n 12) para 71.

²²⁴ *Stati* (n 14) para 745.

²²⁵ *Plama (Jurisdiction)* (n 13) para 162; *Isolux* (n 14) para 715. See also *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction (1 February 2016) para 170.

²²⁶ *Zaur* (n 15) paras 562 and 564. See also *Guaracachi* (n 12) paras 378-79.

²²⁷ *Ibidem*.

Second, a prospective interpretation of Article 17(1) of the ECT would place an impractical, if not impossible, administrative burden on Contracting Parties.²²⁸ They would need to monitor each foreign investment, the extent of every foreign investor's business activities and its corporate structures.²²⁹ It is difficult to envisage that a Contracting Party ought to have a crystal ball to monitor all circumstances relating to Article 17(1) of the ECT (own or control, has no substantial business activities, is organized). The fulfilment of this can vary on a day-to-day basis.²³⁰

A prospective approach does not anticipate the complexity of the corporate structures of foreign investors.²³¹ Inevitably, the decision for invoking a denial takes time and "careful consideration."²³² Thus, a prospective interpretation would require a Contracting Party to conduct day-to-day data-gathering, monitoring, and decision-making on a frankly astronomical scale.²³³ For example, in 2024, Germany, France and Japan, all subject to the ECT,²³⁴ received inward foreign direct investment flows of 5.716, 33.736 and 13.357 billion USD respectively.²³⁵ The sheer volume of foreign investments and often opaque corporate structures of foreign investors would place an unimaginable administrative and economic burden on Contracting Parties²³⁶ to comply with a prospective reading of Article 17(1) of the ECT.

The functional link between Articles 17 and 26 ECT is reinforced by the amended Article 17 of the ECT. The newly amended version of Article 17 extends the denial of benefits to both, Part III and Article 26 of the ECT. Moreover, the Contracting Party must exercise a denial "no later than the date a tribunal or court determines for the submission of arguments on preliminary questions".²³⁷ Though not determinative by itself, it could well be interpreted as an attempt of the Contracting Parties to clarify the intended effect and time-limit of the original Article 17 of the ECT.

²²⁸ Mistelis and Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty' (n 3) 1315.

²²⁹ *Pac Rim* (n 12) para 4.56.

²³⁰ *Guaracachi* (n 12) paras 378-79; *Zaur* (n 15) para 564; *Ulysseas* (n 12) para 173.

²³¹ *Kang* (n 47) 40.

²³² *Pac Rim* (n 12) para 4.84.

²³³ *Jagus* and *Sinclair* (n 25) 42.

²³⁴ The United Kingdom and Japan remain Contracting Parties to the ECT. The ECT still applies to France and Germany by virtue of Article 47(3) of the ECT.

²³⁵ United Nations Conference on Trade and Development, 'Foreign direct investment: Inward and outward flows and stock, annual' (last updated 1 September 2025) – <https://unctadstat.unctad.org/datacentre/dataviewer/US.FdiFlowsStock> accessed 25 April 2026.

²³⁶ *Khan* (n 14) para 268. See also *Pac Rim* (n 12) para 4.56.

²³⁷ Energy Charter Conference, 'Decision on Amendments to the Energy Charter Treaty' (n 57) 13.

Under Art 26(3)(a) of the ECT, a Contracting Party gives its unconditional consent to the submission of a dispute to international arbitration. One may argue that the unconditional consent offered precludes a Contracting Party from invoking Article 17(1) of the ECT. However, this is not the case. Article 26(3)(a) of the ECT is the “arbitration without privity” clause of the treaty, which enables a foreign investor to initiate arbitration against the host state without any prior arbitral agreement.²³⁸ However, this does not bar the host state from invoking Art 17(1) of the ECT. A DoB cannot be equated to the withdrawal of unconditional consent.²³⁹ Such an interpretation would contravene the principle of effectiveness and the doctrine on the prohibition of the abuse of right (see more ch 3.1.4.).

The advantages of Part III of the ECT are generally enforced by a putative claimant through Article 26 of the ECT.²⁴⁰ Thus, the functional link between Articles 17 and 26 of the ECT supports the view that the exercise of a DoB is not confined to the moment an Investment is made. Even after arbitration commences, Contracting Parties often require assistance from forensic accountants, investigators and the disclosure of relevant documents.²⁴¹ There is no evidence to support the premise that Article 17(1) of the ECT cannot operate after the commencement of arbitration,²⁴² which ultimately supports a retrospective interpretation.

On the other hand, the exercise of Article 17 of the ECT is not strictly limited to disputes submitted under Article 26 of the ECT. This is illustrated by the declarations of Switzerland,²⁴³ Germany,²⁴⁴ the United Kingdom,²⁴⁵ and the European Union.²⁴⁶ In these declarations, the aforementioned Parties denied the advantages of Part III of the ECT to any

²³⁸ Fernando Dias Simões, ‘Article 26: Settlement of Disputes between an Investor and a Contracting Party’ in Rafael Leal-Arcas (ed), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018) 346-47, para 26.15.

²³⁹ *Guaracachi* (n 12) para 371.

²⁴⁰ Wälde, ‘Investment Arbitration under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation’ (n 222) 439. See also *Guaracachi* (n 12) para 378.

²⁴¹ Jagusch and Sinclair (n 25) 42. See also *Zaur* (n 15) para 579.

²⁴² *Zaur* (n 15) para 567. See also *Aris Mining* (n 12) para 130; *Pac Rim* (n 12) para 4.85; *Guaracachi* (n 12) para 377; *Ulysseas* (n 12) para 173; *ACF* (n 24) para 1467.

²⁴³ Swiss Confederation, ‘Communication in Relation to Article 17 of the Energy Charter Treaty’ (29 September 2025)

<https://www.energycharter.org/media/news/article/swiss-confederation-denies-advantages-of-part-iii-under-article-17-of-the-ect/> accessed 22 March 2026.

²⁴⁴ Germany, Federal Ministry for Economic Affairs and Climate Action, ‘Denial of the Advantages of Part III of the Energy Charter Treaty’ (letter to the Energy Charter Secretariat, 17 March 2023) – <https://www.energycharter.org/media/news/article/germany-denies-advantages-of-part-iii-under-article-17-of-the-ect/> accessed 22 March 2026.

²⁴⁵ United Kingdom, Department for Business and Trade, ‘Denial of the Advantages of Part III of the Energy Charter Treaty’ (letter to the Energy Charter Secretariat, 29 September 2023) – <https://www.energycharter.org/media/news/article/the-united-kingdom-denies-advantages-of-part-iii-under-article-17-of-the-ect/> accessed 22 March 2026.

²⁴⁶ Council Decision (EU) 2024/1852 of 25 June 2024 on the denial of advantages under Part III of the Energy Charter Treaty by the Union to investors and investments of the Russian Federation and the Republic of Belarus [2024] OJ L 1852/1.

legal entities owned or controlled by any citizens or nationals of the Russian Federation where those entities have no substantial business activities in the Area of the Contracting Party in which they are organised. None of these declarations were made in relation to a specific dispute between an Investor and the respective state. Nonetheless, this does not alter the fact that Article 17(1) of the ECT can also be invoked after a putative Investor has submitted a claim. If a dispute were to arise in connection with the aforementioned Parties and a legal entity allegedly connected with the Russian Federation, a denial would still need to be substantiated in that specific dispute. As Article 17(1) of the ECT does not impose a time-limit by when it must be invoked, the Contracting Parties right to exercise a DoB can essentially lie dormant until they choose to invoke it in a specific dispute. The aforementioned Parties simply chose to exercise a DoB before any specific dispute arose in relation to legal entities connected with the Russian Federation.

The next relevant question for the context element is whether a retrospective interpretation would contravene the principle of non-retroactivity of Article 28 of the VCLT. This provision provides that unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. Thus, the principle of non-retroactivity precludes a state's application of a treaty to factual circumstances, which occurred before the treaty's entry into force.²⁴⁷ As such, Article 28 of the VCLT would be relevant if a Contracting Party invoked Article 17(1) of the ECT to factual circumstances before the ECT's entry into force on 16 April 1998.

By contrast, the temporal effect of Article 17(1) of the ECT concerns whether, once the ECT is already in force, a proper invocation can deny an Investor the advantages of Part III of the ECT from the moment the relevant advantage allegedly arose for the investment. Thus, Article 28 of the VCLT does not offer any direct guidance for the temporal effect of Article 17(1) of the ECT.

One could argue that there is no fundamental difference between the two questions – the retrospective application of the ECT prior to its entry into force and the retrospective application of Article 17(1) of the ECT to a point in time before its exercise – as the former concerns to retroactive establishment of obligations and the latter their retroactive dissolution. However, the author finds this unconvincing.

²⁴⁷ A similar point was articulated in *the Award* (n 180) para 325.

Article 28 of the VCLT expressly limits its own scope to the temporal application of treaties in relation to acts or facts preceding its entry into force, rather than the temporal operation of particular treaty provisions once a treaty is already in force. Nothing in existing case law²⁴⁸ or legal literature²⁴⁹ suggests that the principle of non-retroactivity extends beyond the entry into force element. While it is relevant to consider what the text of a treaty says, it is equally relevant what it leaves unsaid.²⁵⁰ Extending Article 28 of the VCLT beyond its text and established understanding in order to bar the retrospective effect of Article 17(1) of the ECT would extend the DoB clause to have meaning in a matter it is silent on.

In conclusion, the context of Article 17(1) of the ECT speaks in favour of a retrospective effect. First, this is because the Contracting Parties did not impose a time limit on when a denial can be invoked. Second, due to the functional connection between Articles 17 and 26 of the ECT. A prospective interpretation would deprive Article 17(1) of the ECT of any effect in the course of investment arbitration. In turn, a prospective interpretation of Article 17(1) of the ECT would present an unimaginable administrative and economic burden for Contracting Parties for the DoB clause to have any practical effect. Finally, a retrospective interpretation does not contravene the principle of non-retroactivity.

3.1.3 Object and purpose of the Energy Charter Treaty

The interpretation of Article 17(1) of the ECT under the object and purpose element is divided into two parts. First, the analysis of Article 17(1) of the ECT in light of Article 2 of the ECT. Second, an analysis of other investment treaties object and purpose, which contain similar DoB clauses.

The majority of investment tribunals have relied on the object and purpose of the ECT in order to determine the temporal effect of Article 17(1) of the ECT.²⁵¹ In *Plama*, the tribunal held that a retrospective interpretation is inconsistent with the long-term cooperation objective of the ECT, as an investor could not plan its investments in the “long term”.²⁵² In turn, this would undermine the legitimate expectations for treaty protection and legal certainty of a putative investor, i.e. a retrospective interpretation “could lure putative investors with

²⁴⁸ See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v Armenia)* (Judgment) [2024] ICJ Rep 1058, para 43; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 100.

²⁴⁹ See e.g. von der Decken, ‘Article 28’ (n 117) 507-518, paras 1-27; ILC (n 70) Art 23, 211-13, paras 1-5.

²⁵⁰ *Zaur* (n 15) para 554; *Aris Mining* (n 12) para 126; *Khan* (n 14) para 425.

²⁵¹ *Plama (Jurisdiction)* (n 13) paras 160-65; *Yukos* (n 14) paras 458-59; *Liman* (n 14) para 225; *Khan* (n 14) para 426-429; *Isolux* (n 14) para 715; *Masdar* (n 14) para 239; *NextEra* (n 160) paras 268-69; *ACF* (n 24) paras 1467-470; *Littop* (n 58) paras 595-606.

²⁵² *Plama (Jurisdiction)* (n 13) paras 161-62.

legitimate expectations only to have those expectations made retrospectively false at a much later date”.²⁵³ Subsequent tribunals held that a retrospective interpretation would be incompatible with the ECT’s objective of long term co-operation²⁵⁴, lead to anomalous results²⁵⁵ and create a highly unpredictable situation diminishing an Investor’s legal certainty contrary to the ECT’s object and purpose.²⁵⁶

Similarly, the *Liman* tribunal precluded retrospectivity, as an Investor must be able to rely on the advantages of Part III of the ECT until the host State explicitly invoked a denial.²⁵⁷ The legal uncertainty would thus impede an investor's evaluation of whether to make a specific investment or not.²⁵⁸ The *Masdar v. Spain* tribunal held that a retrospective interpretation would be contrary to the ECT’s “transparency, co-operation and stability objectives”.²⁵⁹

The reasoning adopted by the *Plama* tribunal and subsequent tribunals is problematic for two reasons. First, a retrospective interpretation does not inherently cause legal uncertainty or frustrate long-term cooperation. A retrospective interpretation of a DoB clause encourages investors to be “upfront about ownership, control, nationality, and citizenship.”²⁶⁰ One could argue that this in fact encourages long-term cooperation²⁶¹ between Investors with legitimate expectations and the host State.

The advantages of Part III exist alongside Article 17(1) of the ECT from the outset, i.e. a putative investor's access to Part III is subject to the conditions of Article 17 of the ECT throughout the life of the investment.²⁶² A denial can only be properly invoked in the event that the substantial requirements of Article 17(1) of the ECT are met, requirements which the investor solely controls. A commercially prudent Investor is thus aware that a Contracting Party may invoke Article 17(1) of the ECT if the preconditions are met in the same way as it is aware of its advantages under Part III²⁶³ and would “structure its investment in such a way so as to avoid the risk of having the host State deny benefits”.²⁶⁴

²⁵³ *Plama (Jurisdiction)* (n 13) paras 162-63.

²⁵⁴ *Liman* (n 14) para 225; *Yukos* (n 14) para 458; *Hulley* (n 56) para 457.

²⁵⁵ *Masdar* (n 14) para 239.

²⁵⁶ *Khan* (n 14) paras 426-27.

²⁵⁷ *Liman* (n 14) para 225.

²⁵⁸ *Khan* (n 14) para 426.

²⁵⁹ *Masdar* (n 14) para 239.

²⁶⁰ James Chalker, ‘Making the Energy Charter Treaty Too Investor Friendly: *Plama Consortium Limited v Republic of Bulgaria*’ (2006) 3 *Transnational Dispute Management* 15 in Mistelis and Baltag, ‘Denial of Benefits and Article 17 of the Energy Charter Treaty’ (n 3) 1321; Behlman (n 1) 406.

²⁶¹ *Ibidem*.

²⁶² A similar point was articulated in *the Award* (n 180) para 318. See also *Ulysseas* (n 12) para 173.

²⁶³ *Zaur* (n 15) para 566; *Littop* (n 58) paras 592 and 601. See also *Ulysseas* (n 12) para 173; *Aris Mining* (n 12) para 130; *Guaracachi* (n 12) para 32.

²⁶⁴ *Zaur* (n 15) para 566.

Consequently, it is difficult to maintain that a DoB, even after the commencement of arbitration, would come as a total surprise to an Investor.²⁶⁵ Article 17 of the ECT represents “an inherent business risk akin to the risk of changes to the laws in the host country on which the investor relies.”²⁶⁶ In any event, this limitation would only apply to a small group of investors²⁶⁷ and not deprive the broader group of Investors under Article 1(7)(a)(ii) of the ECT.

Second, even if one was to consider a retrospective interpretation contrary to a strict reading of the long-term cooperation objective, this cooperation is expressly based on complementarities and mutual benefits. Notoriously, the *Plama* tribunal omitted this phrase when quoting Article 2 of the ECT,²⁶⁸ an approach followed by subsequent tribunals.²⁶⁹ This approach has garnered criticism, as it elevated the interests of investors far above the host state²⁷⁰ and constituted a selective reading of Article 2 of the ECT with a “remarkable” omission²⁷¹ of the reciprocal elements of ECT’s object and purpose.

The long-term cooperation objective does not exist in a vacuum, rather it should be read in accordance with the other objectives of Article 2 of the ECT.²⁷² The object and purpose of the ECT is not limited to the promotion of investments, it also extends to the promotion of economic development of the Contracting Parties through such investments.²⁷³ Thus, a balance must be struck between the rights of Investors and the objectives of the Contracting Parties.²⁷⁴ While Investors should be able to rely on a predictable legal framework, the Contracting Party should be able to limit the scope of the treaty’s protection to Investors and Investments, which comply with the ECT.²⁷⁵ The application of Article 17(1) of the ECT cannot be contrary to the ECT’s object and purpose *per se*, as it is a provision agreed upon by all Contracting Parties.²⁷⁶ The purpose of Article 17(1) of the ECT is to deny benefits to an investor²⁷⁷ and thus, there is no bar to its retrospective effect. It is “difficult to imagine” how extending the advantages of Part III to a legal entity who meets the requirements of Article 17(1) of the ECT would promote long-term cooperation based on complementarities and

²⁶⁵ *Guaracachi* (n 12) para 383.

²⁶⁶ *Littop* (n 58) para 604.

²⁶⁷ A similar point was articulated in *the Award* (n 180) para 318.

²⁶⁸ *Plama (Jurisdiction)* (n 13) para 161.

²⁶⁹ *Yukos* (n 14) para 458; *Liman* (n 14) para 225; *Khan* (n 14) paras 426-27.

²⁷⁰ *Littop* (n 58) paras 596-597; Jagusch and Sinclair (n 25) 21-22.

²⁷¹ *Zaur* (n 15) para 573.

²⁷² Leonie Reins ‘Article 2’ (n 132) 50, para 2.03.

²⁷³ *Ibidem* 53, para 2.13. See also *El Paso* (n 75) para 70.

²⁷⁴ *Ibidem* 53, para 2.13.

²⁷⁵ Mistelis and Baltag “‘Denial of Benefits’ Clause in Investment Treaty Arbitration” (n 17) 29.

²⁷⁶ *Littop* (n 58) para 597.

²⁷⁷ *Littop* (n 58) para 605.

mutual benefits.²⁷⁸ The objectives of Article 2 of the ECT are unlikely to materialise if the prerequisites of Article 17 of the ECT are met,²⁷⁹ as the advantages of Part III were intended to be limited to Investors seeking to claim the benefits of the ECT while also assuming its obligations.²⁸⁰

One could argue that a retrospective interpretation would allow Contracting Parties to invoke Article 17(1) of the ECT to evade liability when faced with a dispute, thus sacrificing legal certainty in favour of the mutual benefits and complementarities objectives. As such, the protection of the putative investor would be at the whims and mercy of a Contracting Party.

In the author's view, this approach is not entirely correct. A putative investor can enforce the obligations of a treaty against Contracting Parties through investment arbitration, i.e. an independent, politically impartial and neutral form of dispute resolution.²⁸¹ This inherently provides a level playing field to foreign investors.²⁸² The invocation of a DoB by a Contracting Party does not, in itself, deprive a putative investor of access to dispute settlement. Rather, it is for the tribunal to decide whether a Contracting Party's exercise of a DoB was justified. A commercially prudent Investor is aware that a DoB may be invoked by the Contracting Party, just as it is aware of the advantages of Part III.²⁸³ The fact that a putative investor failed to account for Article 17(1) of the ECT, a provision known to a commercially prudent Investor, represents a business risk of the investor.²⁸⁴ Therefore, the objective of legal certainty remains intact for an Investor who abides by the principle of reciprocity, i.e. assumes the obligations of the ECT in order to claim its benefits. Extending the protection of legal certainty to free riders and back end treaty shoppers would defeat the very purpose of a DoB clause.

Furthermore, considering the divergence in interpretations between ECT and non-ECT case law on the temporal effect of DoB clauses, it is apposite to compare the object and purpose of the ECT to that of other investment treaties containing similar DoB clauses.

²⁷⁸ *Zaur* (n 15) para 568.

²⁷⁹ *Amto* (n 22) para 61.

²⁸⁰ *Zaur* (n 15) para 574.

²⁸¹ *CME* (n 128) para 417; *Aguas del Tunari* (n 71) paras 153 and 247; *Plama (Jurisdiction)* (n 13) paras 141 and 193; *Banro* (n 98) paras 16 and 19; *Maffezini* (n 128) para 31; *Vivendi* (n 123) para 11; *Ceskoslovenská* (n 125) para 57; *Enron* (n 75) para 37.

²⁸² Craig S. Bamberger, Jan Linehan and Thomas W. Wälde, 'Energy Charter Treaty in 2000: In a New Phase' (2000) 18(4) *Journal of Energy and Natural Resources Law* 30; Hobér, 'Investment Arbitration and the Energy Charter Treaty' (n 55) 155.

²⁸³ *Zaur* (n 15) para 566; *Littop* (n 58) paras 592 and 601. See also *Ulysseas* (n 12) para 173; *Aris Mining* (n 12) para 130.

²⁸⁴ *Littop* (n 58) para 604.

In *Guaracachi v. Bolivia*, the tribunal held that Article 12 of the U.S.–Bolivia BIT²⁸⁵ should be applied retrospectively, as the very purpose of a DoB is to grant the host state the opportunity to withdraw the benefits of a treaty from an investor invoking those benefits.²⁸⁶ All investors are aware of the possibility of a DoB when making an investment, therefore a denial cannot frustrate the legitimate expectations of an investor.²⁸⁷ It follows that a commercially prudent investor could have pre-emptively precluded the host state from invoking the DoB clause.²⁸⁸

The purpose, according to the preamble of the U.S.–Bolivia BIT, is to “promote greater economic cooperation between [the Parties]”, “stimulate the flow of private capital and the economic development of the Parties”, agreeing on the necessity of “a stable framework for investment” and the “encouragement and reciprocal protection of investment”.²⁸⁹

Of course, the U.S.–Bolivia BIT and the ECT are not directly comparable – with the ECT being a multilateral treaty confined to the energy sector²⁹⁰ emphasizing intergovernmental cooperation in the energy sector²⁹¹ – however both treaties have the same overarching aims.

The ECT also has the purpose to – “promote long-term cooperation”,²⁹² “promote the flow of investments”,²⁹³ agreeing on the necessity for a “stable, transparent legal framework for foreign investments”,²⁹⁴ “encourage...Investors of other Contracting Parties to make investments in its Area”,²⁹⁵ and “establish closer, mutually beneficial commercial relations and promote energy investments”.²⁹⁶

²⁸⁵ Treaty between the Government of the United States of America and the Government of the Republic of Bolivia concerning the Encouragement and Reciprocal Protection of Investment (U.S.–Bolivia BIT) (signed 17 April 1998, entered into force 6 June 2001).

²⁸⁶ *Guaracachi* (n 12) para 376.

²⁸⁷ *Ibidem* paras 372 and 383.

²⁸⁸ *Ibidem* para 375.

²⁸⁹ U.S.–Bolivia BIT (n 285) Preamble.

²⁹⁰ Roe and Happold (n 11) 8.

²⁹¹ European Energy Charter (n 104) Title II.

²⁹² Article 2 of the ECT.

²⁹³ European Energy Charter (n 104) Title II(4).

²⁹⁴ *Ibidem*.

²⁹⁵ Article 10(1) of the ECT.

²⁹⁶ European Energy Charter (n 104) Preamble.

In *Ulysseas v. Ecuador*, the tribunal held that Article I(2) of the U.S.–Ecuador BIT²⁹⁷ applies retrospectively, as the possibility of a DoB is known to the investor from the time of making its investment. Thus, the protection afforded by the BIT is subject to the possibility of a denial throughout the life of the investment.²⁹⁸

The purpose of the U.S.–Ecuador BIT, as provided in its preamble, largely overlaps with the U.S.–Bolivia BIT, i.e. to “promote greater economic cooperation between [the Parties]”, “stimulate the flow of private capital and the economic development of the Parties”, agreeing on the necessity of “a stable framework for investment” and the “encouragement and reciprocal protection of investment”.²⁹⁹ Thus, the U.S.–Ecuador BIT also has the same overarching aims as the ECT.

In *Aris Mining*, the tribunal held that it is not for tribunals to impose a temporal limitation onto a provision where the Contracting Parties chose not to specify such effect.³⁰⁰ Thus, investors are placed on notice in advance and run the risk of not being able to rely on the treaty's advantages if their entities activities contradict that of Article 814(2) of the Canada–Colombia FTA.³⁰¹

The purpose of the FTA, as provided in its preamble, is to “strengthen the special bonds of friendship and cooperation”, “establish clear and mutually advantageous rules”, “ensure a predictable commercial framework for business planning and investment”, “recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity”.³⁰²

Once more, the ECT carries a similar purpose – to “promote long-term cooperation”,³⁰³ “promote the flow of investments”,³⁰⁴ agreeing on the necessity for a “stable, transparent legal framework for foreign investments”,³⁰⁵ “encourage...Investors of other Contracting Parties to

²⁹⁷ Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (US–Ecuador BIT) (signed 27 August 1993, entered into force 11 May 1997).

²⁹⁸ *Ulysseas* (n 12) para 173.

²⁹⁹ US–Ecuador BIT (n 297) Preamble.

³⁰⁰ *Aris Mining* (n 12) paras 126–127.

³⁰¹ *Ibidem* para 130.

³⁰² Canada–Colombia FTA (n 42) Preamble.

³⁰³ Article 2 ECT.

³⁰⁴ European Energy Charter (n 104) Title II (4).

³⁰⁵ *Ibidem*.

make investments in its Area”,³⁰⁶ “establish closer, mutually beneficial commercial relations and promote energy investments”,³⁰⁷ and “strengthen the rule of law on energy issues”.³⁰⁸

While the FTA and the ECT are not directly comparable, with the ECT being a multilateral treaty confined to the energy sector,³⁰⁹ both treaties have the same overarching aims – for a stable, predictable and mutually beneficial framework and environment for investments.

The majority of investment tribunals have relied on the object and purpose of the ECT in order to determine the temporal effect of Article 17(1) of the ECT.³¹⁰ At the same time, investment tribunals have concluded the retrospective application of DoB clauses³¹¹ in investment treaties, which appear to share similar overarching aims to the ECT. Nothing in the ECT’s object and purpose or wording of Article 17(1) of the ECT suggests that it is manifestly unique when compared to other investments treaties and DoB clauses. This makes the divergence in interpretation difficult to reconcile based on the ordinary meaning, context, and object and purpose of DoB clauses and investment treaties.

On the one hand, a retrospective interpretation could undermine an investor's legal certainty and legitimate expectations to the protection of their investments, where an investor may only discover after a dispute arose that it never had treaty protection in the first place.³¹² However, a prospective interpretation would weaken the application of the DoB clause and the host State’s right to exclude free riders and back end treaty shoppers from the scope of the treaty.³¹³

Against this background, it is appropriate to consider the broader principles of investment arbitration. Some investment tribunals have cited a presumption that uncertainties in interpretation should be resolved in favour of the protection of covered investments.³¹⁴ Contrarily, the *Saluka v. Czech Republic* tribunal observed that exaggerating the protection of foreign of investments could dissuade host states from admitting foreign investments and could thus undermine the objective of fostering mutual economic relations between states.³¹⁵ The *Amco v. Indonesia* tribunal suggested that the protection of investments should inherently

³⁰⁶ Article 10(1) of the ECT

³⁰⁷ European Energy Charter (n 104) Preamble.

³⁰⁸ ‘An Introduction to the Energy Charter Treaty’ in *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation* (Energy Charter Secretariat 2004) 14.

³⁰⁹ *Roe and Happold* (n 11) 8.

³¹⁰ *Plama (Jurisdiction)* (n 13) paras 160-65; *Yukos* (n 14) paras 458-59; *Liman* (n 14) para 225; *Khan* (n 14) para 426-429; *Isolux* (n 14) para 715; *Masdar* (n 14) para 239; *NextEra* (n 160) paras 268-69; *ACF* (n 13) paras 1467-470; *Littop* (n 58) paras 595-606.

³¹¹ *Ulysseas* (n 12) paras 172-73; *Pac Rim* (n 12) paras 4.83-85; *Guaracachi* (n 12) paras 375-79; *Aris Mining* (n 12) paras 126-32.

³¹² *Mistelis and Baltag*, “‘Denial of Benefits’ Clause in Investment Treaty Arbitration” (n 17) 29.

³¹³ *Ibidem*.

³¹⁴ *SGS v Philippines* (n 76) para 116.

³¹⁵ *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 300.

also protect the interests of the host State.³¹⁶ The answer is likely found in a middle-ground approach,³¹⁷ as it is with most questions of interpretation. A harmonious interpretation should respect both State sovereignty and its responsibility to establish a functional legal framework for the protection and promotion of investments as well as its continuing flow.³¹⁸ Thus, the protection of foreign investments is not the sole aim of a treaty, rather it should co-exist with the aims of encouraging foreign investment and fostering economic relations between parties.³¹⁹ Ultimately, the aim of international investment law is to enable host states to attract and benefit from foreign investment while providing investors with a predictable, transparent and secure framework for investments.³²⁰ A retrospective interpretation of Article 17(1) of the ECT helps to achieve this balance – by excluding free riders and back end treaty shoppers, while protecting the legal certainty and legitimate expectations of *bona fide* investors.

In conclusion, the object and purpose of the ECT permits a retrospective interpretation of Article 17(1) of the ECT, as it does not cause legal uncertainty or frustrate long-term cooperation. Extending the protection of legal certainty to free riders and back end treaty shoppers would undermine the objectives of complementarities and mutual benefits. The ECT pursues the same overarching aims of a stable, predictable and mutually beneficial framework and environment for investments, thus the divergence between ECT and non-ECT case law is not warranted. However, whether a specific denial is properly invoked will likely rest on the specific circumstances of any given case. Here, the principle of good faith and general principles of international law serve as the guiding light, which will be examined in the following.

3.1.4 Interpretation of the denial of benefits clause in the Energy Charter Treaty through general principles of law

The interpretation of Article 17(1) of the ECT through general principles of law consists of three parts. First, whether the good faith principle permits a retrospective interpretation. Second, whether the principle of effectiveness precludes a prospective interpretation. Third, if the principle of good faith permits a retrospective interpretation, would the principles of

³¹⁶ *Amco* (n 75) para 23.

³¹⁷ *Renta 4 SV SA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valores SICAV SA, Orgor de Valores SICAV SA and GBI 9000 SICAV SA v The Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections (20 March 2009) para 57.

³¹⁸ *El Paso* (n 75) para 70.

³¹⁹ *Saluka* (n 315) para 300.

³²⁰ International Law Association Committee on International Law on Foreign Investment, 'Final Report' in *Report of the Seventy-Third Conference, Rio de Janeiro 2008* (International Law Association 2008) 26.

estoppel or acquiescence, in light of specific circumstances, preclude a Contracting Party from invoking Article 17(1) of the ECT.

Investment tribunals, following the reasoning of the *Plama* tribunal,³²¹ have considered an interpretation contrary to good faith “that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration”.³²² While the aforementioned reasoning is merited to a degree, it also rests on a questionable premise. The protections of the ECT are already inherently applicable, rather than extended, to Investors with legitimate expectations. However, the substantive projections of a treaty cannot extend to investments made contrary to law.³²³ A good faith interpretation does not permit the abuse or unfair taking advantage of rights granted by treaties.³²⁴ In light of this, a strictly prospective interpretation is problematic, as it would extend the ECT’s protection to free riders and back end treaty shoppers.

Here, it is apposite to clarify how extending the ECT’s protection to free riders and back end treaty shoppers constitutes contravenes the prohibition of abuse of rights. While front end treaty shopping can be considered legitimate in relation to future disputes,³²⁵ back end treaty shopping and free riding do not constitute a legitimate interest. A right constitutes the protection of a legitimate interest.³²⁶ An attempt to gain such legitimate protection for purposes alien to those for whom the right was established, such as obtaining an illegitimate advantage or reducing the effectiveness of provisions, is an abuse of right.³²⁷ Examples of such abuse would be a legal entity making changes to its structure when a specific dispute is foreseeable in relation to measures adopted by a State for the sole purpose of acquiring a claim that would not otherwise exist,³²⁸ an attempt to gain jurisdiction under a specific investment treaty³²⁹ or entities lacking a genuine link to the host state, thus bringing no economic development to the latter.³³⁰ Such abuse would constitute an “abusive manipulation

³²¹ *Plama (Jurisdiction)* (n 13) paras 162 and 164.

³²² *Khan* (n 14) para 429; *Masdar* (n 14) para 235.

³²³ *Plama (Award)* (n 72) para 139; *Littop* (n 58) para 488.

³²⁴ *Inceysa* (n 153) para 230; *Phoenix* (n 153) para 107.

³²⁵ *Mobil Corporation v. Venezuela* (n 6) paras 204-05.

³²⁶ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 122–23.

³²⁷ Kolb (n 141) 49.

³²⁸ *Phoenix* (n 153) paras 92 and 113; *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 554.

³²⁹ *Mobil Corporation v. Venezuela* (n 6) paras 204-05.

³³⁰ Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (n 5) 176; *Saluka* (n 315) para 240.

of the system of international investment protection."³³¹ Allowing a treaty to permit such abuse would in itself be contrary to good faith.³³² It follows that extending the protections of the ECT to free riders and back end treaty shoppers constitutes an abuse of arbitral procedure. A prospective interpretation of Article 17(1) of the ECT would limit a Contracting Party's ability to combat such abuse of treaty protection.

Moreover, good faith requires Contracting Parties to apply a treaty in a reasonable manner consistent with its purpose.³³³ Thus, the principle of good faith already operates as a safeguard against Contracting Parties luring Investors into making Investments only to later exercise a denial in bad faith. However, this does not preclude a retrospective interpretation of Article 17(1) of the ECT.

The *Plama* tribunal also considered an interpretation contrary to good faith if it deprives the investor of any certainty as to its rights and the host country's obligations at the time of investment.³³⁴ Thus, one may argue that legal certainty precludes retrospectivity, due to voluminous ECT case law ruling in favour of prospectivity. After all, an investor's legitimate expectations crystallize at the time of making the investment.³³⁵ A stable legal and business environment is directly linked to an investor's legitimate expectations.³³⁶ A sudden change in interpretation could thus unsettle foreign investors, who structured their investments based on a prospective understanding of Article 17(1) of the ECT.

However, this argument is unpersuasive. Just as foreign investors must anticipate changes in the law,³³⁷ they must also anticipate developments in its interpretation, especially on an issue as contentious as the temporal effect of DoB clauses. If a foreign investor fishes in troubled waters expecting to profit from its instability, it cannot at the same time rely on expectations of stability.³³⁸ By way of analogy, an investor cannot claim to have legitimate expectations for the indefinite continuance of a prospective interpretation. The existing divergence between ECT and non-ECT case law arguably already undermines the legal certainty of foreign investors.³³⁹ Thus, a shift to retrospective interpretation of Article 17(1) of the ECT would not deprive investors of legal certainty, nor would it undermine their legitimate expectations.

³³¹ *Phoenix* (n 153) para 144.

³³² Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (n 5) 177.

³³³ *Gabčíkovo–Nagymaros Project* (n 149) para 142.

³³⁴ *Plama (Jurisdiction)* (n 13) para 163-64.

³³⁵ Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (n 5) 273.

³³⁶ *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 154; *CMS* (n 127) para 274; *Duke Energy* (n 74) para 340.

³³⁷ *Methanex (Final Award)* (n 67) Part IV, ch D, para 10.

³³⁸ Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (n 5) 280.

³³⁹ *Verburg* (n 136) 427.

The principles of good faith and effectiveness do not permit an interpretation which would strip a provision of all practical effect.³⁴⁰ The general presumption is that the Contracting Parties did not intend for a provision in a treaty to be rendered ineffective.³⁴¹ Where a provision is open to multiple interpretations, it must be interpreted to have meaning rather than deprive it of meaning.³⁴² There are persuasive arguments both in favour of a prospective and retrospective interpretation of Article 17(1) of the ECT under the object and purpose element (see more ch 3.1.3). On the other hand, a prospective interpretation runs the risk of rendering Article 17(1) of the ECT ineffective (see more ch 3.1.2) and extending the scope of the ECT to free riders and back end treaty shoppers, which would defeat the very purpose of a DoB clause (see more ch 3.1.3). Consequently, the principles of good faith and effectiveness present a strong case that Article 17(1) of the ECT should be interpreted to have retrospective effect in order to give the provision meaning – in a manner that can be realistically invoked by Contracting Parties once the conditions of Article 17(1) of the ECT are met.

On the other hand, a retrospective interpretation of Article 17(1) of the ECT is by no means absolute. Even the most well established rights can be refused recognition on the grounds that their exercise constitutes an abuse of right.³⁴³ Thus, a case-by-case analysis of the invocation of Article 17(1) of the ECT is required.³⁴⁴

An absolute interpretation of the retrospective application of Article 17(1) of the ECT would mean that a denial applies *ab initio* as of the putative investor's investment, so as to deny the putative investor the advantages of Part III from the moment the Investment was first made. Such an interpretation could permit an abuse of rights in specific circumstances. For example, if a putative investor makes an investment in 2015 and alleges that a Contracting Party's breached their ECT obligations between 2015-2025. In this scenario, if the putative investor met the substantive requirements of Article 17(1) of the ECT from 2015-2020 but did not meet the requirements from 2020-2025, then the putative investor should still be able to claim their advantages for 2015-2020. This is because the denial crystallizes from the moment the substantive requirements of Article 17(1) of the ECT are met. If a successful denial covered the Investment from the moment it was made, the putative investor would not be able to claim

³⁴⁰ Weeramantry (n 1) para 3.24.

³⁴¹ *Ibidem* para 5.74. See also Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (n 155) 69-70.

³⁴² ILC (n 70) Arts 27–28, 219, para 6; *AAPL* (n 156) para 40; *Eureko* (n 102) para 248; *Noble Ventures* n 156) para 50; *Maffezini* (n 128) para 36; *El Paso* (n 75) para 110. See also *Lucchetti* (n 152) para 59; *Camuzzi* (n 156) para 56.

³⁴³ Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 164.

³⁴⁴ *Littop* (n 58) para 593.

their advantages for 2015-2020. A Contracting Party can deny the advantages of Part III of the ECT insofar as Article 17(1) of the ECT permits.

Under specific circumstances, the retrospective application of Article 17(1) of the ECT may also find its limits in the principles of estoppel and acquiescence. The application and effects of both principles will be analysed in turn.

The Contracting Party may be estopped from invoking Article 17(1) of the ECT if it actively encouraged the investment with full knowledge that a foreign investor fulfils Article 17(1) of the ECT.³⁴⁵ Similarly, a Contracting Party may be estopped from invoking a DoB, if they were aware of the right to deny benefits, yet consistently assured the Investor about the protection of the Investment during the life of the Investment.³⁴⁶ While the aforementioned tribunals do not expressly reference the principle of estoppel, they appear to apply this principle.

The author considers the aforementioned tribunals reliance on estoppel to be debatable, as non-ECT investment tribunals set a considerably higher bar for invoking this principle. Estoppel requires detrimental reliance on an explicit waiver of rights under a specific treaty.³⁴⁷ An example of such a waiver is found in *Cargill v. Poland*, where Poland agreed to not “raise objections to the jurisdiction of the UNCITRAL tribunal and the arbitration [would] proceed to the merits phase”.³⁴⁸ Furthermore, in order for the waiver to be effective, the claimant and specific nature of the claims being waived must be known to the party making the waiver.³⁴⁹ Lastly, the party relying on estoppel must show that it altered its position by reason of reliance on the conduct of the other party.³⁵⁰ Thus, in order for estoppel to apply, there must be detrimental reliance by an Investor on an explicit waiver of rights by the Contracting Party under the ECT, while the Contracting Party is aware of the claimant and the nature of their claims.

By contrast, acquiescence presents a considerably lower threshold – that the Contracting Party (1) had actual knowledge that the putative investor met the requirements of Article 17(1) of the ECT and (2) tacitly accepted the putative investors assertion to ECT rights.³⁵¹

³⁴⁵ Roe and Happold (n 11) 87; Khan (n 14) para 429; Masdar (n 14) para 235.

³⁴⁶ NextEra (n 160) paras 266-68.

³⁴⁷ Pope & Talbot (Interim Award) (n 159) para 112; Aguas del Tunari (n 71) paras 118-19.

³⁴⁸ Cargill Inc v Republic of Poland, ICSID Case No ARB(AF)/04/2, Final Award (29 February 2008) paras 247 and 250.

³⁴⁹ Littop (n 58) paras 285-286.

³⁵⁰ Pope & Talbot (Interim Award) (n 159) para 112.

³⁵¹ Liman (n 14) para 226; A similar point was articulated in the Award (n 180) para 264.

The determinative factor here is whether a Contracting Party had actual knowledge of their right to exercise a DoB yet refrained from doing so for a prolonged period of time, leading in due time to the assumption of consent.³⁵² A good faith interpretation would not permit a DoB, if the Contracting Party is aware of its right to exercise a DoB, yet opts to delay the exercise of a DoB for more than three years.³⁵³ Similarly, if a Contracting Party is aware of the foreign investors structure since the beginning of the investment yet waited for almost a year after the notice of dispute to invoke a DoB.³⁵⁴

The *Zaur* tribunal took a different view, as a putative investor meeting the requirements of Article 17(1) of the ECT “cannot legitimately expect to benefit from the substantive provisions of Part III of the ECT”, rather it must anticipate a denial.³⁵⁵ The author does not fully agree with this, as due consideration must be given to the divisive and complex nature of Article 17(1) of the ECT. Of course, it ultimately depends on the specific circumstances. Acquiescence does not permit a Contracting Party to remain passive in a scenario, where it was sufficiently clear to them that the putative investor met all of the requirements of Article 17(1) of the ECT and knew of the putative investors intent to enforce the advantages of Part III of the ECT, yet nevertheless refrained from exercising a denial for a prolonged period of time. Any other interpretation would contravene the putative investors legitimate expectations and right to legal certainty.

A DoB can even be exercised after arbitration has commenced in light of specific circumstances.³⁵⁶ If a Contracting Party had no actual knowledge of the putative investors' lack of substantial business activities until the arbitration, then it could not have tacitly accepted the situation.³⁵⁷ A putative investor cannot complain that a DoB was exercised late if it withheld information requested by the Contracting Party necessary to exercise a DoB after the notice of dispute.³⁵⁸ If a putative investor never responds to the Contracting Party's request, it leads to the Contracting Parties assumption that the putative investor lacks substantial business activities.³⁵⁹ After all, an Investor without ulterior motives would have nothing to hide if it was in compliance with the ECT.

³⁵² *Liman* (n 14) paras 226-227; *NextEra* (n 160) paras 268-269; A similar point was articulated in *the Award* (n 180) para 264.

³⁵³ *NextEra* (n 160) para 269.

³⁵⁴ *ACF* (n 24) para 1471.

³⁵⁵ *Zaur* (n 15) para 579.

³⁵⁶ *Littop* (n 58) para 593. See also *Zaur* (n 15) para 567; *Aris Mining* (n 12) para 130; *Pac Rim* (n 12) para 4.85; *Guaracachi* (n 12) para 377; *Ulysseas* (n 12) para 173; *ACF* (n 24) para 1467.

³⁵⁷ A similar point was articulated in *the Award* (n 180) paras 277 and 282.

³⁵⁸ A similar point was articulated in *the Award* (n 180) para 283.

³⁵⁹ A similar point was articulated in *the Award* (n 180) paras 284-85.

In conclusion, a retrospective application of Article 17(1) of the ECT is, in principle, compatible with good faith. The principles of effectiveness indicates that Article 17(1) of the ECT should be interpreted to have retrospective effect in order to give the provision meaning and practical effect. However, subject to specific circumstances, the exercise of Article 17(1) of the ECT finds its limits in the principles of estoppel and acquiescence. Given the high threshold for reliance on estoppel, it will rarely preclude a denial. By contrast, acquiescence will preclude a denial in a wider set of circumstances – where a Contracting Party had actual knowledge that *all* of the preconditions of Article 17(1) of the ECT were met, yet refrained from exercising a denial, leading in due time to the assumption of consent.

3.2 Interpretation of the denial of benefits clause in the Energy Charter Treaty through supplementary means of interpretation

The interpretation of Article 17(1) of the ECT through Article 32 of the VCLT confirms the retrospective interpretation of Article 17(1) of the ECT resulting from the application of Article 31 of the VCLT. Even if the interpretation resulting from Article 31 of the VCLT was to support a prospective interpretation, the supplementary means indicate that such a reading would lead to a manifestly absurd or unreasonable result within the meaning of Article 32(b) of the VCLT.

The drafting documents of the ECT indicate that a proposal to include a DoB mechanism originated from the U.S, who initially suggested for the DoB clause to be added to Article 1 (Definitions) or Article 16 (Promotion, Protection and Treatment of Investments).³⁶⁰

First, the DoB clause was not drafted in isolation. Rather, it emerged from broader discussions on the scope of protections afforded to Investor's and Investment's and reflects a balance struck between Contracting Parties.³⁶¹ The ECT was drafted with “the aim of affording the

³⁶⁰ Basic Agreement 14 (preparatory work for the Energy Charter Treaty, 24 June 1992) para 1.33, 15.

³⁶¹ The sequence of the negotiating of the drafting history is evidenced by the following: Basic Agreement 14 (preparatory work for the Energy Charter Treaty, 24 June 1992) para 1.33, 15; Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the negotiations progress (preparatory work for the Energy Charter Treaty, 15 September 1992), cited in *The Award* (n 180) para 122; Basic Agreement 22 (preparatory work for the Energy Charter Treaty, 21 October 1992) 8; para 1.21, 13 and 75; Working Group II room document on relationship to non-Contracting Parties (preparatory work for the Energy Charter Treaty, 13 November 1992) 2-3, cited in *The Award* (n 180) para 128; Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the 12–16 November meetings of Working Group II (preparatory work for the Energy Charter Treaty, 20 November 1992) 5–6, cited in *the Award* (n 180) para 132; Revised draft of Basic Agreement 37 with handwritten notes (preparatory work for the Energy Charter Treaty, 1 March 1993), cited in *the Award* (n 180) para 142; Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the negotiations progress (preparatory work for the Energy Charter Treaty, 2 March 1993) 2, 4, 7, cited in *the Award* (n 180) paras 143 and 268; Draft 1 of the Energy Charter Treaty, 15 March 1993, Article 19; Draft agenda for the Legal Sub-Group (preparatory work for the Energy Charter Treaty, April 1994) 2, cited in *the Award* (n 180) para 160.

Part III protections to Investors regardless of whether they hold their Investments through an entity in the Contracting Party where the Investments are made”, which would “of course, remain subject to the protections provided for in provisions such as Articles 19 [denial of benefits] and 27 [exceptions]”.³⁶²

This is reaffirmed by a note written by the Legal Counsel of the International Energy Agency, according to which various provisions of the ECT were designed to facilitate specific situations of the Contracting Parties by way of “diverse exceptions”.³⁶³ One of those exceptions is Article 17 of the ECT.

Consequently, Article 17 of the ECT was drafted as a “built-in limitation” to Article 1(6) and (7) of the ECT.³⁶⁴ The negotiations focused on what the DoB clause applies to,³⁶⁵ not how. There were extensive negotiations on whether the DoB clause should apply to the entire treaty, Parts III and V, or only Part III of the ECT.³⁶⁶ Article 17(1) of the ECT was ultimately limited to apply to Part III of the ECT. Significantly no attempts were made to limit its temporal scope, which suggests that the DoB clause was not intended to be limited any further than its substantive scope.

Second, Article 17 of the ECT originates from a U.S. proposed DoB clause, which was intended to be exercised “at some stage on an exceptional basis...if a “brassplate”³⁶⁷ situation existed and was objectionable.”³⁶⁸ Brassplate refers to a legal entity without substantial business activities or any real connection with its state of formation.³⁶⁹ It is not for tribunals to impose limits on a treaty’s scope not evident from the negotiating history.³⁷⁰ As the DoB clause was intended to be exercised at some stage, it is clear that the DoB clause was not intended to be subject to a time limit, much less a temporal limit.

³⁶² Draft agenda for the Legal Sub-Group (preparatory work for the Energy Charter Treaty, April 1994) 2, cited in *the Award* (n 180) para 160.

³⁶³ Note by the Legal Counsel of the International Energy Agency on investment protection provisions of the Energy Charter Treaty (preparatory work for the Energy Charter Treaty, 18 November 1994) paras 24, 27, cited in *The Award* (n 180) paras 174 and 177.

³⁶⁴ A similar point was articulated in *the Award* (n 180) para 331.

³⁶⁵ The sequence of the negotiating of the drafting history is evidenced by the following: Basic Agreement 14 (n 149) para 1.33, p 15; Revised draft of Basic Agreement 37 with handwritten notes (preparatory work for the Energy Charter Treaty, 1 March 1993), cited in *the Award* (n 180) para 142; Draft 1 of the Energy Charter Treaty, 15 March 1993, Article 19.

³⁶⁶ *Ibidem*.

³⁶⁷ ‘Brass plate’ refers to a legal entity without substantial business activities or any real connection with its state of formation. See also Mudliar ‘Article 17’ (n 3) 255, para 17.17.

³⁶⁸ Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the 12–16 November meetings of Working Group II (preparatory work for the Energy Charter Treaty, 20 November 1992) 5–6, cited in *the Award* (n 180) paras 132 and 234; Jagusch and Sinclair (n 25) 38.

³⁶⁹ Mudliar ‘Article 17’ (n 3) 255, para 17.17.

³⁷⁰ *Tokios* (n 83) para 36.

On the other hand, the U.S. suggested that the DoB clause would disallow protection to the dispute settlement provisions among other things.³⁷¹ Ultimately the scope of the DoB clause did not include Part V of the ECT and was limited to Part III of the ECT. One could thus argue that the Contracting Parties would have also excluded access to Part V of the ECT if they intended to exclude protection for existing disputes retroactively. In the author's opinion, this does not remove the connection between Articles 17 and 26 of the ECT. Article 17 of the ECT was intended to limit the scope of Article 1(6) and (7) of the ECT,³⁷² while Article 26 of the ECT represents the procedural gateway through which the Investor enforces their advantages provided by Part III of the ECT.

Third, Norway suggested a prospective DoB clause confined to the pre-investment period, which would automatically exclude mailbox companies.³⁷³ It could be argued that no conclusions can be drawn from the rejection of this proposal.³⁷⁴ The author takes a different view. One reason for this rejection may have been the Contracting Parties reluctance to assume the administrative burden of processing every foreign investor's information during the pre-investment period.³⁷⁵ There is nothing to suggest that they had different intentions for the post-investment period. If anything, this confirms the contextual interpretation of Article 17(1) of the ECT.

In conclusion, there is nothing in the *travaux préparatoires* that would indicate the intent of the Contracting Parties to apply Article 17 of the ECT differently to other DoB clauses.³⁷⁶ Thus, Article 32 of the VCLT can be used as a means of confirmation for the retrospective effect of Article 17(1) of the ECT.

In the event that the interpretation of Article 17(1) of the ECT under Article 31 of the VCLT remains ambiguous or obscure, the *travaux préparatoires* does not impose an explicit temporal limitation onto Article 17(1) of the ECT nor do they clarify its temporal effect in a direct manner. Thus, the ambiguity or obscurity of Article 17(1) of the ECT cannot be solved through supplementary means.

³⁷¹ Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the 12–16 November meetings of Working Group II (preparatory work for the Energy Charter Treaty, 20 November 1992) 5–6, cited in *the Award* (n 180) para 132.

³⁷² The sequence of the negotiating of the drafting history is evidenced by n 354.

³⁷³ Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the negotiations progress (preparatory work for the Energy Charter Treaty, 2 March 1993) 2, 4, 7, cited in *the Award* (n 180) paras 143 and 268; Jagusch and Sinclair (n 25) 38.

³⁷⁴ A similar point was articulated in *the Award* (n 180) para 333.

³⁷⁵ A similar point was articulated in *the Award* (n 180) para 268.

³⁷⁶ Wälde, 'Interpreting Investment Treaties: Experiences and Examples' (n 105) 727.

However, a prospective interpretation may lead to a manifestly absurd or unreasonable result. Article 32(b) of the VCLT refers to instances where the result “cannot work as envisaged or if the outcome is in clear and significant contradiction to a principal feature or objective of the treaty”.³⁷⁷ Article 17 of the ECT functions as a “built-in limitation” and “exception” to Article 1(6) and (7) of the ECT,³⁷⁸ intended to reserve the right for Contracting Parties to deny the advantages “at some stage” in brass plate situations.³⁷⁹ If Article 17(1) of the ECT could only be exercised prospectively, host states would (1) be required to monitor all foreign investors continuously throughout the life of the Investment and (2) be powerless if a brass-plate structure only becomes apparent after a dispute arises. The clause already operates as an “exception” to the ECT’s scope. Limiting its application any further would lead to a scenario where an additional “exception” is interpreted into a provision already designed to operate as the “exception”, which would be manifestly absurd.

³⁷⁷ Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ (n 105) 779; Weeramantry (n 1) para 4.43.

³⁷⁸ A similar point was articulated in *the Award* (n 180) para 331.

³⁷⁹ Memorandum from Craig S. Bamberger to the Organisation for Economic Co-operation and Development on the 12–16 November meetings of Working Group II (preparatory work for the Energy Charter Treaty, 20 November 1992) 5–6, cited in *the Award* (n 180) paras 132 and 234; Jagusch and Sinclair (n 25) 38.

CONCLUSION

The purpose of this master's thesis was to (1) identify whether the ECT's divergent case law on the temporal effect of DoB clauses is warranted by any particularities of the ECT itself in comparison to other investment treaties and DoB clauses; (2) determine the temporal effect of the exercise of Article 17(1) of the ECT – prospective or retrospective and (3) examine whether the retrospective interpretation of Article 17(1) of the ECT endorsed by the tribunals of *Zaur v. Azerbaijan* and the majority opinion of *RSE v. Latvia* represents a justified doctrinal development in the understanding of the effects of a DoB clause under the ECT, or whether these decisions are more likely to remain an anomaly within ECT jurisprudence. The research questions were answered by interpreting Article 17(1) of the ECT through Articles 31-33 of the VCLT.

For the first research question, the author of this master's thesis concluded that the ECT's divergent case law on the temporal effect of DoB clauses is not warranted. This conclusion was reached through a comparison of Article 17(1) of the ECT to investment treaties containing similar DoB clauses, where investment tribunals interpreted such clauses to have retrospective effect. The author of this master's thesis found that nothing in the ECT's object and purpose or wording of Article 17(1) of the ECT suggests that it is manifestly unique when compared to other investments treaties and DoB clauses. Rather, the ECT pursues the same overarching aims of a stable, predictable and mutually beneficial framework and environment for the protection and promotion of investments. This makes the divergence in interpretation difficult to reconcile. Regardless of whether DoB clauses are interpreted to operate prospectively or retrospectively, the ECT and comparable treaties do not provide a principled basis for applying a different temporal approach under Article 17(1) than under other, similarly worded DoB clauses. Thus, the divergent case law of the ECT is not warranted by any particularities in the ECT itself in comparison to other investment treaties and DoB clauses.

This leads to the second research question, under which this master's thesis interpreted Article 17(1) of the ECT to have retrospective effect. As Article 17(1) of the ECT does not expressly refer to a temporal limitation, it would be unwarranted to assume the existence of one from its ordinary meaning. However, the lack of a prior notification requirement in Article 17(1) of the ECT and connection to Article 26 of the ECT indicate that Article 17(1) of the ECT can also be invoked after the commencement of arbitration, which supports a retrospective interpretation under the context element. The object and purpose of the ECT favours a

retrospective interpretation, as a retrospective interpretation does not inherently cause legal uncertainty or frustrate long-term cooperation. Furthermore, a retrospective interpretation of Article 17(1) of the ECT aligns with the complementarities and mutual benefits objectives of the ECT. The protection of foreign investments is not the sole aim of the ECT, rather it should co-exist with the aims of encouraging foreign investment and fostering economic relations between Contracting Parties. Extending the protection of the ECT to free riders and back end treaty shoppers would defeat the very purpose of a DoB clause and, by extension, the ECT. A good faith interpretation does not permit extending the protections of the ECT to back end treaty shoppers and free riders, as this constitutes an abuse of right. A prospective interpretation of Article 17(1) of the ECT would limit a Contracting Party's ability to combat such abuse of treaty protection. The author of this master's thesis concluded that the principle of good faith already operates as a safeguard against Contracting Parties luring Investors into making Investments only to later exercise a denial in bad faith. The principle of effectiveness indicates that Article 17(1) of the ECT should be interpreted to have retrospective effect in order to give the provision meaning – in a manner that can be realistically invoked by Contracting Parties once the conditions for a denial are met. However, the retrospective exercise of Article 17(1) of the ECT finds its limits in the principles of estoppel and acquiescence. Both the principle of estoppel and acquiescence can preclude a Contracting Party from invoking Article 17(1) of the ECT. The *travaux preparatoires* of the ECT confirm the retrospective interpretation of Article 17(1) of the ECT resulting from Article 31 of the VCLT. This is because the negotiations of the ECT did limit the substantive scope of Article 17 of the ECT, however no attempts were made to subject it to a time limit, much less a temporal limit. Alternatively, a prospective interpretation could lead to a manifestly absurd or unreasonable result. Article 17 of the ECT was intended to operate as an exception to the ECT's scope. Limiting its application any further would lead to a scenario where an additional "exception" is interpreted into a provision already designed to operate as the "exception". Thus, Article 17(1) of the ECT has retrospective effect.

For the third research question, this master's thesis considered the retrospective interpretation of Article 17(1) of the ECT endorsed by the tribunals of *Zaur v. Azerbaijan* and the majority opinion of *RSE v. Latvia* to represent a justified doctrinal development in the understanding of the effects of a DoB clause under the ECT. The tribunal of *Plama v. Bulgaria* based its interpretation of the temporal effect of Article 17(1) of the ECT primarily on the object and purpose of the ECT, which is stated in Article 2 of the ECT. However, the tribunal omitted the objectives of "complementarities" and "mutual benefits" and solely focused on the "long term

cooperation” objective. This reasoning was adopted by a line of subsequent investment tribunals. This master’s thesis considers that the interpretations of *Zaur v. Azerbaijan* and the majority opinion of *RSE v. Latvia* will signal a shift in interpretation of the temporal effect of Article 17(1) of the ECT, as they present a more balanced interpretation of Article 2 of the ECT. Favouring one objective of the ECT to the other objectives runs the risk of elevating the interests of the investors or the host state above the other party, which would undermine the objectives of the ECT and contradict the rules of treaty interpretation. A prospective interpretation of Article 17(1) of the ECT enables such a scenario. On the other hand, the author of this master’s thesis considers a retrospective interpretation Article 17(1) of the ECT to be in accordance with the objectives of the ECT, principle of reciprocity embodied in investment treaties and the rules of treaty interpretation.

EELISTE TAGAMISEST KEELDUMISE SÄTTE AJALINE KEHTIVUS ENERGIAHARTA LEPINGU VAHEKOHTUMENETLUSES

Riikidevahelised investeeringute soodustamine ja vastastikuse kaitse lepingud („investeeringute kaitse lepingud“) sisustavad „investori“ mõistet üldjuhul laialt, eesmärgiga soodustada välisinvesteeringute tegemist lepingupoole riigis. Küll aga on sellised mõisted loonud õigusliku probleemi seoses n-ö *free rider* (eesti keeles “lepingu kaitse ära kasutaja”) *back end treaty shopping* (eesti keeles “lepingu kaitse tagantjärgi otsija”) juhtumitega, kus investorid püüavad lepingukaitses kasu saada olemata ise selle kaitse adressaatideks. *Free rider* tähendab juriidilist isikut, kellel puudub tegelik seos lepingupoolega ega panusta riigi majanduse arengusse. *Back end treaty shopping* tähendab olukorda, kus investor muudab juriidilise isiku struktuuri tagantjärgi eesmärgiga omandada nõue konkreetse investeeringute kaitse lepingu alusel. Nii *free rider* kui ka *back end treaty shopping* juhtumeid peetakse investeeringute kaitse lepingust tulenevate eeliste kuritarvitamiseks.

Üheks võimaluseks vältida investeeringute kaitse lepingutes sisalduva kaitse laiendamist kolmandatele isikutele on olnud n-ö *Denial of Benefits* (DoB, eesti keeles “Eeliste tagamisest keeldumine – EtK”) sätete lisamine investeeringute kaitse lepingutesse. Selliste sätete eesmärk on võimaldada vastuvõtval riigil keelduda investeeringute kaitse lepingu eeliste tagamisest kolmandatele isikutele, kes soovivad lepingu kaitsest kasu saada, kuid ei võta lepingust tulenevaid kohustusi enda kanda. DoB sätted toimivad seeläbi vastastikkuse põhimõtte kaitsemehhanismina.

Energiaharta lepingus (EhL) paikneb DoB säte artiklis 17. EhL on mitmepoolne leping, mis reguleerib kaubandust ja transiiti, samuti investeeringute kaitset ja vaidluste lahendamist energia sektoris. EhL on tänaseks enim ratifitseeritud mitmepoolne investeeringute kaitse leping maailmas, kuigi selle kohaldamisala piirdub energia sektoriga. Tänase seisuga on EhL-il 49 lepingupoolt, millest kõik paiknevad Euraasia mandril.

Käesolevas magistritöös uuritakse EhL artikli 17 lg-t 1, mille kohaselt jätab lepingupool endale õiguse keelduda EhL-i III. peatükis ette nähtud eeliste tagamisest juriidilisele isikule juhul, kui kolmanda riigi kodanikud omavad või kontrollivad seda juriidilist isikut ning juhul, kui see isik ei arenda olulist äritegevust selle lepingupoole tegevuspiirkonnas.

Magistritöö õiguslikuks probleemiks on EhL artikli 17 lg-d 1 käsitleva kohtupraktika ebaselgus. Valdavas enamuses rahvusvahelises investori ja riigi vahelises vahekohtumenetluse praktikas (vahekohtu praktikas) on tuginetud arusaamisele, et DoB sätted omavad tagasiulatuvat kehtivust. Seevastu on EhL-i vahekohtu praktika, 2005. aasta *Plama v.*

Bulgaria otsusest alates, järjepidevalt leidnud, et DoB sätted omavad üksnes edasiulatuvat kehtivust. Seetõttu on EhL-il põhinev vahekohtu praktika osutunud lahknevaks erandiks võrreldes ülejäänud vahekohtu praktikaga DoB sätetel. Magistritöö eesmärk ongi vastata küsimusele, kas EhL artikkel 17 lg 1 omab edasiulatuvat või ka tagasiulatuvat kehtivust.

Plama vahekohtu tõlgendus EhL artikli 17 lg 1 edasiulatuva kehtivuse osas on jäänud aastakümneid püsima ning seda tõlgendust ei ole, vähemasti selgesõnaliselt, kummutatud teiste EhL-i vahekohtute poolt. Hiljutised EhL vahekohtu otsused on olnud aga vastuolulised eelneva praktikaga. 2025. aastal tehtud otsus *Zaur v. Azerbaijan* asjas kaldus tagasiulatuva kehtivuse poole. Mõni kuu hiljem tunnistati *RSE v. Latvia* enamuse arvamuses tehtud otsuses sõnaselgelt EhL artikli 17 lg 1 tagasiulatuvat kehtivust. Eelnevad kaks vahekohtu otsust on ilmekad näited võimalikest muudatustest seni kehtinud vahekohtu praktikas.

DoB ajalise kehtivuse ebaselgusest tulenevalt tõstatub praktiline probleem. Nimelt tekib seetõttu ebakindlus ajas, millal algab investori jaoks investeeringute kaitse lepingu alusel tehtud investeeringute kaitse. Kui DoB säte omab üksnes edasiulatuvat kehtivust, siis kaotab investor lepingu kaitse alles alates kuupäevast, mil vastuvõtja riik rakendab oma õigust DoB-le ning vahekohus saab läbi vaadata kõiki väidetavaid investeeringu kaitse lepingu nõuete rikkumisi, mis toimusid enne DoB rakendamise kuupäeva. Tagasiulatuva kehtivus tähendab seevastu, et DoB kehtib alates hetkest, mil väidetavalt tekkis vaidlusalusele investeeringule vastav eelis. Sellisel juhul välistaks edukas DoB investori nõude täielikult.

Õigusliku probleemi lahendamiseks ja püstitatud eesmärgi saavutamiseks on magistritöös esitatud järgnevad uurimisküsimused:

- 1) Kas EhL-i lahknev vahekohtu praktika DoB sätete ajalise kehtivuse tõlgenduse osas on õigustatud EhL-i enda eesmärgiliste ja ülesehituslikud eripärade tõttu võrreldes teiste investeeringute kaitse lepingute ja DoB sätetega;
- 2) Milline on EhL artikli 17 lg 1 kohaldamise ajaline kehtivus – kas edasiulatuva või tagasiulatuva;
- 3) Kas *Zaur v. Azerbaijan* ja *RSE v. Latvia* tehtud otsustes omaks võetud tõlgendus EhL artikli 17 lg 1 tagasiulatuva kehtivuse kohta kujutab endas põhjendatud doktrinaalset muudatust DoB ajalise kehtivuse tõlgendamisel EhL-i kohaldamise praktikas või on tegemist vahekohtu otsustega, mis jäävad vaid üksikuteks eranditeks EhL-i vahekohtu praktikas?

Magistritöö koosneb kolmest peatükist. Esimene peatükk loob probleemi ja selle võimalike lahenduste mõistmiseks vajaliku raamistiku, käsitledes DoB sätete kujunemislugu, arengut ja funktsiooni ning EhL-i ajaloolist tausta ja struktuuri. Teises peatükis on esitatud struktureeritud raamistik tõlgendusmeetodite rakendamiseks Rahvusvaheliste lepingute õiguse Viini konventsiooni (RLÕK) artiklite 31–33 alusel, mis on kohandatud just EhL artikli 17 lg 1 ajalise kehtivuse tuvastamiseks. Peatükis analüüsitakse eri tõlgendamismeetodeid, mis võimaldavad magistritöö kolmandas peatükis argumenteerida võimalikult täpselt ja kõikehõlmavalt autori poolt esitatud tõlgendust EhL artikli 17 lg 1 ajalise kehtivuse tuvastamiseks ning sellega seonduvatele uurimisküsimustele vastamiseks.

Magistritöö koostamiseks kasutas autor õigusdogmaatilist uurimismeetodit, et analüüsida vahekohtu praktikat, õiguskirjandust, tõlgendusmeetodeid ja õiguse üldprintsipi. Vastava meetodi kasutamise eesmärk oli vastata töös püstitatud uurimisküsimustele eelkõige just EhL artikkel 17 lg 1 ajalise kehtivuse osas. Samuti kasutas autor kirjutamiseks ajaloolist uurimismeetodit, et tõlgendada EhL artikkel 17 lg 1 ajalist kehtivust EhL-i ettevalmistavate dokumentide ja DoB sätete kujunemisloos ning arengu valguses. Viimaks kasutas autor võrdlevat uurimismeetodit, et teleoloogiliselt võrrelda EhL-i eesmärki teiste DoB sätteid sisaldavate investeeringute kaitse lepingutega, ning võrrelda EhL artikkel 17 lg 1 vahekohtu praktikat teiste investeeringute kaitse lepingute vahekohtu praktikaga DoB sätetel.

Magistritöö kolmas peatükk koosneb viiest alapeatükist, millest iga alapeatükk rakendab spetsiifilist RLÕK artiklites 31–33 sisalduvat tõlgendusmeetodit.

Esiteks lähtus magistritöö autor EhL artikli 17 lg 1 grammatilisest tõlgendusmeetodist, mida peetakse tõlgendamise lähtepunktiks. Grammatilise tõlgendusmeetodi all tõlgendas magistritöö autor EhL artikli 17 pealkirja, sissejuhatavat lauset ja lg 1 sõnastust. EhL artikkel 17 lg 1 sõnastuses endas klausli ajalise kehtivuse osas selgitust ei anta. Ühelt poolt on oluline arvestada, mida lepingu sõnastus ütleb, kuid võrdväärselt oluline on arvestada, mida on lepingu tekstis ütle mata jäetud. Vahekohtud ei saa tuletada ajalist piirangut õigusnormi kehtivusele, ilma et selleks oleks alust normi enda sõnastuses. Seetõttu ei ole EhL artikli 17 lg 1 ajalise kehtivuse tuvastamiseks piisav grammatilise tõlgendamise kasutamine, vaid tuleb tugineda ka teistele tõlgendusmeetoditele.

Järgnevalt rakendas magistritöö autor EhL artikkel 17 lg 1 tõlgendamisel süstemaatilist tõlgendusmeetodit, mida saab jagada kaheks osaks. Esiteks on magistritöös uuritud EhL artikkel 17 lg 1 konteksti ehk EhL-i struktuuri ning EhL artikkel 17 lg-ga seotud sätteid,

milleks olid põhiliselt EhL artiklid 10 lg 1 ja 26. Teiseks tõlgendas autor EhL artikkel 17 lg-t 1 sarnaste investeeringu kaitse lepingute DoB sätete valguses.

Vahekohtu praktikas võib leida otsuseid, kus on EhL artikkel 17 lg 1 etteulatuvat kehtivust järeldatud DoB sätte kohaldamise teavitamiskohustusest. Mitmed vahekohtu otsused on järeldanud, et EhL artikkel 17 lg 1 sisaldab kohaldamisele eelnevat teavitamiskohustust, kuivõrd EhL artikkel 10 lg 1 kohustab lepingupooli tagama läbipaistva raamistiku investeeringute tegemiseks. Magistritöös on autor leidnud, et EhL artikkel 17 lg 1 ei sisalda eelnevat teavitamiskohustust. EhL-s on mitmel korral sõnaselgelt viidatud teavitamiskohustusele, kuid EhL artikkel 17 lg 1 sellist kohustust ei sätesta. Seevastu on mitmed DoB sätted teistes investeeringute kaitse lepingutes sõnaselgelt sätestanud eelneva teavitamiskohustuse. Magistritöö autor leidis, et DoB kohaldamise risk on investorile juba EhL-i jõustumise hetkest teada. See tähendab, et investor kannab riski DoB kohaldamise võimalusest kui investor ei juhindu oma ettevõtte ja investeeringute struktureerimisel EhL artikkel 17 lg 1 materiaaloiguslikest eeldustest. Järelikult ei sisalda EhL artikkel 17 lg 1 eelnevat teavitamiskohustust.

Magistritöös on leitud, et EhL artikkel 17 lg 1 on olemuslikult seotud EhL artikliga 26, mis võimaldab investoril jõustada EhL III. peatüki alusel tulenevaid investeeringu tegemise järgseid kohustusi lepingupoolte suhtes vahekohtumenetluses. Mitmed vahekohtud on järeldanud, et DoB sätet saab rakendada üksnes enne vaidluse tekkimist või vahekohtumenetluse algust. Magistritöö autor peab eelnevat lähenemist küsitavaks kahel põhjusel. Esiteks, investori konkreetne nõue vahekohtumenetluses puudutab riigi varasemaid tegusid või tegevusetust. Seetõttu ei omaks edasiulatuva kehtivusega DoB investori esitatud nõude osas mingisugust mõju, kuna lepingupool saaks üksnes keelduda tulevaste eeliste tagamisest investorile. Üldjuhul ei ole lepingupool teadlik kõikide tema riigis tegutsevate välisinvestorite struktuuridest või äritegevuse ulatusest, kuivõrd EhL ei sätesta sellist kohustust. Järelikult, kui tõlgendada EhL artikkel 17 lg 1 ajalist kehtivust üksnes edasiulatuvalt, muutuks sätte praktiline rakendatavus sisuliselt olematuks. Teiseks võtab DoB nõuetekohane kohaldamine paratamatult aega arvestades välisinvestorite struktuurset keerukust ning välisinvesteeringute märkimisväärsset mahtu. EhL artikli 17 lg 1 tõlgendamine üksnes etteulatuva kehtivusega sätteks eeldaks lepingupooltelt igapäevast andmekogumist, jälgimist ja otsuste langetamist väga suures mahus. Seega oleks edasiulatuva tõlgenduse puhul lepingupoolte ainus viis DoB sätte praktilise toime tagamiseks luua eraldi mehhanism, mis tooks aga kaasa täiendava majandusliku ja halduskoormuse. Kokkuvõtteks on magistritöös

asutud seisukohale, et EhL artiklite 26 ja 17 lg 1 olemuslik seotus toetab tõlgendust, mille kohaselt saab DoB sätet kohaldada ka pärast vahekohtumenetluse algust ja tagasiulatuvalt.

Seejärel rakendas magistritöö autor EhL artikkel 17 lg 1 suhtes teleoloogilist tõlgendusmeetodit. Selle meetodiga tuleks eelistada tõlgendust, mis edendab EhL-i eesmärki. EhL-i eesmärk on sätestatud EhL artiklis 2, mille kohaselt loob EhL õigusliku raamistiku, et edendada pikaajalist energeetikaalast koostööd, mis põhineb vastastikusel kasul ja on kooskõlas Euroopa Energiahartas esitatud eesmärkide ning põhimõtetega. Valdav enamik EhL vahekohtuid on järeldanud EhL artikkel 17 lg 1 edasiulatuvat kehtivust just teleoloogilise tõlgendusmeetodi kaudu. Peamiselt on põhjendatud, et tõlgendus, mille kohaselt on EhL artikkel 17 lg 1 tagasiulatuva kehtivusega, läheb vastuollu pikaajalise koostöö eesmärgiga, õõnestab investorite õiguspäraseid ootusi ja õiguskindlust ning loob investoritele äärmiselt ettearvamatu õigusliku olukorra.

Käesoleva magistritöö autor jõuab teistsugusele järeldusele. Nimelt ei saa DoB tagasiulatuva tõlgendus olemuslikult õõnestada õiguskindlust ja õiguspärast ootust. Investor tugineb EhL III. peatüki eelistele ja on nende olemasolust teadlik. Täpselt samamoodi peaks investor olema teadlik ka DoB kohaldamise võimalikkusest. Investor omab täielikku kontrolli selle üle, kas ta vastab EhL artikkel 17 lg 1 materiaaõiguslikele eeldustele. Seetõttu kujundaks ärilisest kaalutlusest juhitud investor oma investeeringuid vastavalt. Eelistest keeldumine ei saa tulla investorile täieliku üllatusena. Pigem kujutab DoB võimalikkus äririski, mis on võrreldav investorile oluliste kohalike õigusaktide muutmise riskiga. Järelikult ei õõnesta DoB tagasiulatuva tõlgendus investori õiguskindlust ega ka õiguspärast ootust.

Samas, isegi kui leida, et tagasiulatuva tõlgendus on vastuolus pikaajalise koostöö eesmärgiga, siis tuleb arvesse võtta, et eelnimetatud koostöö põhineb just „vastastikusel kasul”. *Plama* vahekohtu otsus jättis selle väljendi tähelepanuta ja juhindus EhL artikkel 17 lg-le 1 etteulatuva kehtivuse andmisel üksnes pikaajalise koostöö eesmärgist. Valdav enamus EhL vahekohtuid on järginud *Plama* vahekohtu otsuse tõlgendust. Samas, pikaajalise koostöö eesmärk ei eksisteeri vaakumis. Pigem tuleb seda eesmärki kõrvutada ja tõlgendada koos teiste EhL artikli 2 eesmärkidega. EhL-i eesmärk ei piirdu üksnes investeeringute kaitsmise ja edendamisega, vaid laieneb ka lepingupoole majanduse arendamisele läbi just nende investeeringute. EhL III. peatüki eeliste kohaldamisala piirdub investoritega, kes soovivad EhL-st tulenevaid eeliseid ning on nõus ka EhL-st tulenevaid kohustusi enda kanda võtma. EhL-i kohaldamisala laiendamine *free rider* ja *back end treaty shopping* juhtumitele oleks vastuolus vastastikuse kasu eesmärgiga. Tõlgendus, mille kohaselt omab EhL artikkel 17 lg 1

ainult edasiulatuvat kehtivust piiraks sätte kohaldamist viisil, mis võimaldaks just sellist EhL-i kohaldamisala laiendamist.

Investoril on võimalik jõustada EhL III. peatüki alusel tulenevaid kohustusi lepingupoolte suhtes vahekohtumenetluses, mis tagab mõlemale poolele sõltumatu ja poliitiliselt erapooletu vaidluste lahendamise viisi. Investori ligipääs vahekohtumenetlusele juba olemuslikult kaitseb investoreid DoB rakendamise eest olukorras, kus EhL artikkel 17 lg 1 materiaaõiguslikud eeldused ei ole täidetud. Küll aga ei tohiks EhL-i kaitset laiendada investoritele, kes ei järgi vastastikkuse põhimõtet. Õiguskindluse ja õiguspärase ootuse kaitse laiendamine *free rider* ja *back end treaty shopping* juhtumitele õõnestaks EhL artikkel 17 lg 1 ja artikkel 2 eesmärgi.

Magistritöös võrreldi EhL-i mõtet ja eesmärki teiste investeeringute kaitse lepingutega, mis sisaldavad sarnaselt sõnastatud DoB sätteid ning kus vahekohtud mõõnsid DoB sätte tagasiulatuvat kehtivust. Kõikide võrreldud investeeringute kaitse lepingute eesmärkideks on investeeringutele stabiilse, prognoositava ja vastastikusel kasul põhineva raamistiku ja keskkonna loomine. Järelikult ei ole EhL-i eesmärgi kaudu võimalik põhjendada, mistõttu on EhL vahekohtud ja teised vahekohtud jõudnud vastupidiste tõlgendusteni DoB sätete ajalise kehtivuse osas. Eelnevast järeldub ka vastus esimesele uurimisküsimusele – EhL-i vahekohtute lahknev praktika DoB sätte ajalise kehtivuse osas ei ole õigustatud. Magistritöö autor leiab, et EhL artikkel 17 lg-d 1 tuleks tõlgendada tagasiulatuvalt, tuginedes teleoloogilisele tõlgendusmeetodile.

Järgmisena kasutas magistritöö autor EhL artikkel 17 lg 1 tõlgendamisel hea usu põhimõtet ja sellest tulenevaid õiguse üldprintsiipe Rahvusvahelise Kohtu statuudi artikkel 38 lg 1 p c tähenduses. Nimelt ei ole hea usu põhimõtte kohaselt lubatud tõlgendus, mis võimaldab õiguste kuritarvitamist või ebaõiglast ärakasutamist. Lepingu kaitse laiendamine *free rider* ja *back end treaty shopping* juhtumitele võimaldaks just sellist õiguse kuritarvitamist.

Tõhususe põhimõtte üldine presumptsioon on, et lepingupoolte kavatsus ei olnud luua säte, millel puudub mõju. Võttes arvesse süstemaatilise ja teleoloogilise tõlgendusmeetoditel põhinevaid järeldusi, looks edasiulatuv tõlgendus riski, et EhL artikkel 17 lg 1 praktiline rakendatavus välistatakse, eriti just vaidluste tekkimise või vahekohtumenetluse algatamise järel. Tagasiulatuv tõlgendus on seevastu tõhususe põhimõttega kooskõlas.

EhL artikli 17 lg-le 1 tagasiulatuva jõu andmine sätte tõlgendamise kaudu ei saa olla piiramatut. Nimelt võivad EhL artikli 17 lg-le 1 tuginemise õigust välistada järgnevad õiguse üldprintsiibid nagu vastuolulise käitumise keeld (*estoppel*) ja vaikiv nõustumine.

Vastuolulise käitumise keelu põhimõtte kohaldamiseks on vahekohtu praktikas kehtestatud ranged eeldused. Eeldusteks on järgmiste asjaolude esinemine: (1) poolele tekkis kahju põhjusel, et ta tugines teise poole selgesõnalisele loobumisele konkreetse õiguse osas; (2) loobuvale poolele peab olema teada nõude esitaja isik ja konkreetne nõue, mille takistamisest loobutakse; (3) pool, mis tugineb vastuolulise käitumise keelu põhimõttele peab tõendama, et ta muutis oma seisukohta teise poole käitumise tõttu.

DoB kohaldamise õiguse välistamine vaikiva nõustumise tõttu on samuti lubatud ainult teatud eelduste olemasolul. Nendeks eeldusteks on lepingupoole teadlikkus (1) asjaolust, et investor vastab kõikidele EhL artikkel 17 lg 1 eeldustele ja (2) investori kavatsusest esitada EhL-il põhinev nõue. Kui eelnevad eeldused kestavad pikema ajaperioodi vältel, siis võib eeldada lepingupoole vaikivat nõusolekut vahekohtumenetluse suhtes. Samas ei saa investor lepingupoolele hilist keeldumist ette heita kui investor ei avaldanud lepingupoolele teavet, mis oli vajalik EhL artikkel 17 lg 1 kohaldamiseks. Lepingupool ei saa vaikimisi nõustuda olukorraga, millest ta ei olnud täienisti teadlik.

Järgnevalt rakendas magistritöö autor EhL artikkel 17 lg 1 ajalise kehtivuse tuvastamisel ajaloolist tõlgendusmeetodit. Selleks uuriti magistritöös EhL-i ettevalmistavad dokumente, mis kinnitavad EhL artikkel 17 lg 1 tagasiulatuvat toimet. Läbirääkimistest ei nähtu, et lepingupooled soovisid DoB sätte ajalist kohaldamisala piirata, kuna lepingupooled tegelesid ainult küsimusega, millistele EhL peatükkidele säte kohaldub, mitte aga sätte ajalise kehtivusega. Viimaks leidis magistritöö autor, et EhL artikkel 17 lg-le 1 edasiulatuva toime andmine võib viia absurdse või ebamõistliku tulemuseni. Läbirääkimistest järeldub, et EhL artikkel 17 loodi erandiks EhL artikkel 1 lg-de 6 ja 7 kohaldamisalale. EhL artikkel 17 lg 1 ajaline piiramine aga tähendaks, et sättele, mille eesmärgiks oli olla erandiks EhL üldisele kohaldamisalale, tõlgendatakse täiendav erand juurde.

Magistritöö autor on asunud teise uurimisküsimuse osas seisukohale, et EhL artikkel 17 lg 1 omab tagasiulatuvat kehtivust. Vastates kolmandale uurimisküsimusele, asus magistritöö autor seisukohale, et *Zaur* ja *RSE* otsustes omaks võetud tõlgendus EhL artikli 17 lg 1 tagasiulatuva kehtivuse kohta on doktrinaalselt põhjendatud. Erinevalt *Plama* otsusest, kus põhjendati edasiulatuvat kehtivust üksnes pikaajalise koostöö eesmärgi pinnalt, tõlgendasid *Zaur* ja *RSE* otsused EhL artikli 2 eesmärke ühtse tervikuna. Ühe eesmärgi eelistamine teistele loob ohu, et ühe poole huvid seatakse teise poole huvidest kõrgemale. EhL artikkel 17 lg 1 edasiulatuv tõlgendus õõnestaks EhL-i kui rahvusvahelise lepingu toimet, mõjutaks negatiivselt investeeringute kaitse vahekohtumenetlust ja ei ole kooskõlas õiguse tõlgendamise reeglitega.

LIST OF ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CAFTA	Free Trade Agreement between Central America, the Dominican Republic and the United States of America
CEPA	Closer Economic Partnership Arrangement
DoB	Denial of Benefits
ECT	Energy Charter Treaty
EhL	<i>Energiaharta leping</i>
EtK	<i>Eeliste tagamisest keeldumine</i>
EU	European Union
FCN	Treaty of Friendship, Commerce and Navigation
FTA	Free Trade Agreement
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran–United States Claims Tribunal
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
OJ	Official Journal of the European Union
PCA	Permanent Court of Arbitration
RLÕK	<i>Rahvusvaheliste lepingute õiguse Viini konventsioon</i>
SAR	Special Administrative Region
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
TDM	Transnational Dispute Management
U.S.	United States of America

UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties

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