Document information

Publication

Journal of International Dispute Settlement

Bibliographic Reference

Kaj Hobér, 'Investment Arbitration and the Energy Charter Treaty', in Thomas Schultz (ed), Journal of International Dispute Settlement, (© The Author(s); Oxford University Press 2010, Volume 1, Issue 1), pp. 153 - 190

Investment Arbitration and the Energy Charter Treaty

(*)

1. *Introduction*

The purpose of this contribution is to give an overview of the investment protection regime of the Energy Charter treaty (the 'ECT') and of the arbitration mechanism therein, as well as to comment on some of the arbitral awards rendered so far under the ECT. To date, 23 cases have been brought by investors to international arbitration under the ECT. (1) Fifteen of these cases are still pending, (2) and two have been settled by the parties.
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(3) In three cases under the Rules of the Stockholm Chamber of Commerce—*Nykomb Synergetics Technology Holding AB v the Republic of Latvia*; *Petrobart Limited v the Kyrgyz Republic* and *Amto v Ukraine*—and in one case before the International Centre for Settlement of Investment Disputes ("ICSID")—*Plama Consortium Limited v Republic of Bulgaria*—the respective arbitral tribunals have issued final awards on the merits. In the ICSID arbitration *Ioannis Kardossopoulos v Georgia* the tribunal has issued an award on jurisdiction. Thus, decisions rendered on the investment protection provisions of the ECT are still rather limited in number, but the growing number of awards has nevertheless raised several issues of general interest for the application of the ECT.

2. *Overview of the Energy Charter Treaty*

A. *Background*

In the early 1990s ideas were discussed on how to develop the energy cooperation between Eastern and Western Europe. Russia and many of its neighbouring countries were rich in energy but in great need of investment to be able to reconstruct their economies at the same time as West European countries were trying to diversify their sources of energy supplies to decrease their potential dependence on other parts of the world. There was therefore a recognized need to set up a commonly accepted foundation for energy cooperation between the states of the Eurasian continent, out of which the Energy Charter Process was born. (4)

The first formal step in the Energy Charter process was the adoption and signing of the European Energy Charter (EEC), in December 1991. As a political declaration of principles which the signatories declared they wished to pursue, the EEC did not constitute a binding international treaty. However, the EEC also contained guidelines for the negotiation of a subsequent binding treaty—later to become the ECT—and a set of protocols. (5)

The ECT and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into force in April 1998. As of today,
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the ECT has been signed by 51 states and the European Union. The European Union and 45 states have ratified the treaty. (6) It is noteworthy that the Russian Federation has signed but not ratified the treaty. Russia has, however, accepted provisional application of the treaty. (7)

The ECT is a multilateral treaty with binding force, limited in its scope to the energy sector. The purpose of the ECT, as stipulated in Article 2, is to 'promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter'. It is the only binding multilateral instrument dealing with inter-governmental cooperation in the energy sector, and contains far-reaching undertakings for the contracting parties. The ECT includes provisions regarding investment protection, provisions on trade, transit of energy, energy efficiency and environmental protection and dispute resolution.

B. *Investment Promotion and Protection*

The provisions of the ECT regarding foreign investments are considered to be the cornerstone of the treaty. The aim of the foreign investment regime is to create a 'level playing field' for investments in the energy sector and to minimize the non-commercial

risks associated with such investments. Under the ECT a distinction is made between the pre-investment phase of making an investment and the post-investment phase relating to investments already made. While the provisions concerning the pre-investment phase primarily set up a 'soft' regime of 'best endeavour' obligations, the ECT creates a 'hard' regime for the post-investment phase with binding obligations for the contracting states similar to the investment protection provisions of the North American Free Trade Agreement (NAFTA) and bilateral investment treaties (BITs). (8) The investment protection regime is discussed in more detail in Section 3.

C. *Dispute Settlement*

Dispute settlement is regulated in Part V of the ECT (Articles 26–28). Article 26 of the ECT governs investment disputes between private investors and contracting states, and extends to investors a right to arbitration of such disputes (see Section 4). Article 27 regulates resolution of state-to-state disputes between contracting parties concerning
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the application or interpretation of the ECT (not limited to matters of investments). The ECT also contains special provisions for the resolution of trade disputes (see Section 2D), a conciliation procedure for transit disputes (see Section 2E) and consultation procedures for competition and environmental disputes. (9)

3. *Investment Protection*

A. *Introduction*

The investment protection provisions of the ECT are found in Part III of the ECT. The aim of the provisions is to establish equal conditions for investments in the energy sector and thereby limit the non-commercial risks connected with such investments. The ECT separates two phases of investment protection and affords them different levels of protection. As indicated in Section 2B above, the provisions concerning the pre-investment-phase primarily set up a 'soft' regime of 'best endeavour' obligations, whereas the ECT creates a 'hard' regime for the post-investment phase with binding obligations for the contracting states similar to the investment protection provisions of the NAFTA and BITs. (10)

B. *Scope of Protection*

The investment protection provisions of Part III of the ECT (post-investment phase) are applicable to *Investments of Investors*. 'Investment' and 'Investor' as referred to in the ECT are defined in Article 1.

An 'Investor' is a natural person having the citizenship or nationality of, or is a permanent resident in, a contracting state in accordance with its applicable law, or a company or other organization organized in accordance with the law applicable in that contracting state.

'Investment' means every kind of asset associated with an economic activity in the energy sector which is owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to a contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any
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right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any 'Economic Activity in the Energy Sector'.

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

The scope of protection pursuant to Part III of the ECT also delineates the right to arbitration under Article 26, since the Investor's right to arbitration is limited to disputes between a 'Contracting Party' and an 'Investor' of another 'Contracting Party' relating to an 'Investment' of the 'Investor' in the Area of the first 'Contracting Party'.

C. *Minimum Standard of Investment Protection—Article 10(1)*

Article 10(1) sets out a number of basic principles for the treatment of foreign investments that are frequently found in BITs. Article 10(1) provides 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. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties *fair and equitable treatment*. Such Investments shall also enjoy the most constant *protection and security* and no Contracting Party shall in any way impair by *unreasonable or discriminatory measures* their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall *observe any obligations it has entered into* with an Investor or an Investment of an Investor of any other Contracting Party.

(i) *Fair and equitable treatment*

Whereas the first sentence of Article 10(1) is a general statement regarding the favourable investment climate that contracting parties are to maintain for investments protected by the ECT, the second sentence of Article 10(1) explains that such favourable conditions 'shall include a commitment to accord at all times to Investments of Investors ... fair and equitable treatment'. This standard of 'fair and equitable treatment' is derived from international law, and has, through its frequent application by tribunals in BIT and NAFTA arbitrations, become an important principle of investment protection. Although certain principles have developed in arbitral practice (good faith, protection of legitimate expectations, due process, proportionality, etc. (11)), the exact scope and meaning of fair and equitable treatment is not easily described in general terms. The application of the principle is often fact-specific and requires in-depth factual assessment as well as application of standards of good-government conduct. (12) As with any flexible standard, it is a challenge for counsel and arbitrators to establish sources for good-government conduct that are relevant and suitable in the context of an individual case. There is otherwise a risk that a case will be decided on the basis of the arbitrators' individual perceptions of what is fair and equitable in the circumstances of the case.

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As indicated above, tribunals applying the principle of fair and equitable treatment have found it to include principles such as the protection of legitimate investor expectations with respect to the maintenance of a stable and predictable business and legal environment by the host government, the principle of transparency, the good-faith and abuse of rights principles, due process, proportionality and the prohibition on arbitrariness. (13) References to the prohibition on arbitrariness and requirements of transparency are frequently made within the general framework of due process, which must be observed by courts and authorities of the host state.

(ii) *Most constant protection and security*

The first part of the third sentence of Article 10(1) provides that investments shall enjoy the 'most constant protection and security'. The precise meaning of these standards within the context of the ECT is somewhat unclear, but it has been argued that they include—apart from police protection from riots and similar physical attacks on the investment—a duty of the state to protect the normal ability of the investor's business to function in a level playing field. (14)

(iii) *Discrimination*

The second part of the third sentence of Article 10(1) provides that the management, maintenance, use, enjoyment or disposal of investments is not to be impaired by '*unreasonable or discriminatory measures*'. The reference to unreasonable or discriminatory measures links the standard laid down in the third sentence of Article 10(1) to the principle of fair and equitable treatment. Thus, there is a certain overlap between the two standards. In the first award ever issued under the ECT, *Nykomb Synergetics Technology Holding AB v the Republic of Latvia*, the tribunal found that Latvia had breached its obligation under the ECT not to discriminate against the foreign investor by offering higher tariffs for electricity to other companies and failing to present any evidence why those companies were different (see Section 5A).

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(iv) *Umbrella clause*

The last sentence of Article 10(1) emphasises the principle of *pacta sunt servanda* by making it an obligation of each Contracting Party to 'observe any obligations it has entered into with an Investor or an Investment of an Investor of any other contracting party'. Thus, a breach of such an obligation covered by Article 10.1 may constitute a violation of a Contracting Party's obligations under the ECT. The precise scope of this so-called 'umbrella clause'—in particular whether it encompasses purely commercial conduct of, for instance, state owned companies or only conduct that involves some elements of government authority—remains to be determined by tribunals applying the ECT. Most tribunals applying similar clauses in BITs have attempted to draw a line excluding purely, or predominantly, commercial disputes. However, even if such a distinction is accepted also for the ECT, the difficult task of deciding what is commercial and governmental remains. (15)

It should be noted that Articles 26(3)(c) and 27(2) of the ECT allow for the contracting parties listed in Annex IA to exclude disputes covered by the umbrella clause from ECT dispute resolution under Article 26. (16)

It could also be argued that the umbrella clause of Article 10(1), when read together with Article 22, may have far-reaching implications on commercial contracts for the sale of goods, delivery of services etc. which have been entered into by an investor and a legal entity controlled or owned by the host state. According to Article 22(1), a state enterprise of the host state '... shall conduct its activities in relation to the sale of or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty'. In the light of Article 10(1), assuming a wide interpretation of the umbrella clause, it could be argued that the host state may become responsible under the ECT (in addition to any liability of the state owned company under the commercial agreement) for a wide range of actions or omissions of state enterprises in the fulfilment of agreements for the sale of goods and delivery of services etc.

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D. *Most Favoured Nation Treatment*

The fourth sentence of Article 10(1) states that investments in no case shall be accorded 'treatment less favourable than that required by international law, including treaty obligations' and Article 10(7) provides that:

> Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

Thus, according to Article 10(1), if another treaty to which the state hosting the investment is a party requires a better treatment for investments, this treatment must be 'imported' into the ECT. The wording 'treaty obligations', however, does not include decisions taken by international organizations or treaties entered into force before 1 January 1970, according to an Understanding in the Final Act of the Energy Charter Conference. Thus, stronger investment protections and guarantees contained in a bilateral investment treaty to which the host state is a party will be available to an investor, even if the investor's home state does not have a bilateral investment treaty with the host state.

Article 10(7) expresses the principle of national, or most-favoured-nation (MFN) treatment. This treatment is afforded not only to the investments of investors but also to activities related to investments including management, maintenance, use, enjoyment or disposal.

The national treatment standard implies non-discrimination since the treatment of investments shall be 'no less favourable than that which it accords to Investments of its own Investors'. However, in comparison with WTO law or EU law, the concept of non-discrimination is less developed in investment law. (17)

Thus, the most-favoured-nation treatment implies the incorporation of standards and rights contained in other treaties, or legislation, or beneficial treatment otherwise afforded to other investors into the protection offered to investors by the ECT.

Another interesting and important provision is Article 10(12) of the ECT. This provision

stipulates that '/e/ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investments agreements, and investment authorizations'.

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This provision was applied in the Petrobart case. (18)

E. *Article 13—Expropriation*

One of the most fundamental provisions of the investment protection regime of the ECT is Article 13, which deals with expropriation. Article 13(1), which resembles similar provisions of BITs and which confirms the principle of full compensation following expropriation, provides that:

> Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

Article 13(1) also provides that the compensation must amount to the fair market value of the investment immediately before the expropriation, or impending expropriation, became known in such a manner as to affect the value of the investment. Interest at a commercial rate established from the date of expropriation until the date of payment is also included in the compensation.

The significance of the protection against expropriation is not primarily the protection against outright takings of investments by the host state, but rather the protections against 'measures having equivalent effect to nationalisation or expropriation', ie various forms of indirect or creeping expropriation such as exorbitant regulations or confiscatory taxation that undermines the operation or enjoyment of the investment.

The effect of the protection provided by Article 13 is that irrespective of whether an expropriation is 'lawful', ie carried out in accordance with the conditions set out in Article 13, or 'unlawful', the investor is entitled to prompt, adequate and effective compensation. In the first case, compensation is a precondition for the lawfulness of the expropriation, and, in the latter case, compensation is equivalent to damages for the loss suffered by the investor as a result of the unlawful expropriation. Where an international treaty, such as the ECT, provides a standard of compensation for 'lawful compensation', tribunals applying NAFTA or BITs, generally apply the same standard of compensation whether the expropriation is lawful or unlawful. (19)

F. *Article 17—Non-application of Part III in Certain Circumstances*

In accordance with Article 17, each contracting party reserves the right to deny the advantages of Part III to an entity owned or controlled by investors of a state that is not a party to the ECT, if that entity has no substantial business activities in the area of the contracting party where it is organized.

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Furthermore, contracting parties can deny the advantages of Part III if it is established that the investment is an investment of an investor of a state that is not a party to the ECT, with which the host state does not maintain diplomatic relations, or as to which the host state upholds trade restrictions.

As has been evidenced by recent arbitral awards of tribunals established under the ECT the interpretation of Article 17 raises difficult issues as to the meaning and effect of Article 17(1) (see Section 6).

4. *Settlement of Disputes between an Investor and a Contracting Party*

A. *Introduction*

The right to arbitration—or other dispute resolution mechanism (see Section 3C below)—of investment disputes set out in Article 26 is only one of many dispute resolution mechanisms of the ECT, but arguably the most significant. Article 26(1) covers: 'disputes between a Contracting Party and an *Investor* of another Contracting Party *relating to an Investment* of the latter in the Area of the former, which concern an *alleged breach of an obligation of the former under Part III*'. The definitions of these terms and thus the scope of the investor's right to dispute resolution in accordance with Article 26 have been

described in Section 2B above.

It should be emphasised that the right to arbitration, or other methods of dispute resolution, under Article 26 arises solely out of the ECT and is not subject to any requirement of exhaustion of local remedies, or any contractual dispute resolution mechanisms.

B. *Amicable Settlement*

In accordance with the first paragraph of Article 26, investment disputes (as defined above) must, if possible, be settled amicably. The investor may not submit a dispute for resolution in accordance with Article 26 until three months have elapsed from the date on which either party to the dispute requested amicable settlement. However, if a dispute cannot be settled amicably within three months, the dispute shall be resolved in a forum elected by the investor, as set forth in Article 26.

C. *The Investor's Choice of Forum for Dispute Resolution*

The investor has the choice of submitting an unresolved dispute covered by Article 26 to one of the following fora under Article 26(2)(a)–(c):

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- the national court or administrative tribunals of the contracting party where the Investment was made,
- in accordance with a previously agreed dispute settlement procedure, or
- international arbitration.

Among the above three forms of dispute resolution, the right to international arbitration of investment disputes is by far the most important remedy available to investors for enforcing their rights under the ECT. According to Article 26(4), investors may elect any of the following forms of international arbitration:

- ICSID-arbitration (provided that both the host state *and* the investor's state have ratified the ICSID Convention);
- arbitration under the ICSID Additional Facility Rules (where either the host state *or* the home state of the foreign national, but not both states, have ratified the ICSID Convention);
- a sole arbitrator or *ad hoc* arbitral tribunal established under the UNCITRAL Arbitration Rules; or
- arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce.

Thus, pursuant to Article 26(3)(a) each contracting party gives 'unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this article'. This unconditional consent implies that a state cannot withdraw its consent, or withdraw from the ECT, upon the request of an investor to commence arbitral proceedings. The state's consent is irrevocable and its withdrawal would not be legally effective. In the case of a withdrawal from the ECT, the contracting party remains bound to honour its investment protection obligations for a period of 20 years following the effective date of its withdrawal, according to Article 47 of the ECT.

However, according to Article 26(3)(b), the consent to international arbitration of the contracting parties listed in Annex ID, is subject to the limitation that where the investor previously has submitted the dispute to the national courts of the host state or under another previously agreed dispute settlement procedure it may not then pursue international arbitration in respect of the same dispute. Almost half of the contracting parties have made such a 'fork in the road' reservation. Furthermore, as described above in Section 2C, according to Article 26(3)(c), the contracting parties listed in Annex IA have limited their consent with respect to disputes arising under the umbrella clause in the last sentence of Article 10(1). (20)

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D. *Applicable Law*

Article 26(6) provides that an arbitral tribunal established under para 26(4) shall decide the issues in dispute in accordance with the ECT and the rules and principles of international law.

E. *Local Companies Controlled by Foreign Investors*

As regards the nationality of an investor, Article 26(7) ECT states that a legal entity which has the nationality of the contracting party to the dispute, but before the dispute between it and the contracting party arose, the local party was controlled by investors of another contracting party, the local party shall be treated as a 'national of another Contracting State' for the purpose of Article 25(2)(b) of the ICSID Convention, and a 'national of another State' for the purpose of Article 1(6) of the Additional Facility Rules. Hence, if the majority of shares of an investor of the same nationality as the host state are controlled by investors of another contracting state, the investor is to be viewed as an investor of another contracting party for purposes of establishing 'diversity' jurisdiction for an arbitral tribunal constituted under the ICSID Rules or the ICSID Additional Facility Rules. Accordingly, the ECT creates a possibility for 'local companies', which are owned or controlled by investors of another contracting party, to request international arbitration under the ECT against their 'home states', and benefit from the investor protection of the ECT which may be more favourable than the protection available under national law. Difficult questions of parallel proceedings may arise, however, if claims under the ECT are brought simultaneously against the host state by the local company and its foreign shareholder.

5. *Provisional Application of the ECT*

A. *Provisional Application of Treaty Obligations*

Provisional application of a treaty means that treaty obligations are given effect prior to a state's formal ratification or accession to a treaty. The reasons for introducing the concept of provisional application may include, *inter alia*, that there is some urgency to implement a treaty before the treaty is ratified, that the negotiators are certain that the treaty will obtain the required domestic approval for ratification, or that there is a desire to circumvent political or other obstacles to the entry into force of a treaty. (21)

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The Vienna Convention on the Law of Treaties 1969 (the 'Vienna Convention') explicitly allows for provisional application of treaties. Firstly, Article 18 of the Vienna Convention imposes the obligation on a state to refrain from acts which would defeat the object and purpose of a treaty when the treaty has been *signed*, or when the state has expressed its consent to be bound by the treaty pending its entry into force. In addition, Article 25 of the Vienna Convention provides that a '*treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating states have in some other manner so agreed*' (emphasis added).

Article 45, in its entirety, reads as follows:

> PROVISIONAL APPLICATION
>
> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
>
> (2)
>
> (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.
>
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
>
> (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
>
> (3)
>
> (a) Any signatory may terminate its provisional application of this

Treaty by written notification to the Depositary of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depositary.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depositary of its request therefore.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

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(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

Article 45 of the ECT resulted in the provisional application of the treaty by all signatory states between December 1994 and its entry into force in April 1998, unless a member state expressly declared that it was unable to apply the ECT provisionally. After April 1998, the provisional application was restricted to those signatory states which had not yet ratified the treaty. In the Russian Federation, for example, the ratification procedure commenced with the introduction of the project in the State Duma in 1996. Parliamentary hearings began in 1998, but the Duma postponed ratification several times due to ongoing negotiations and disputes about the Transit Protocol to the Energy Charter Treaty. When signing the ECT in 1994, the Russian Federation did not register a declaration of non-application according to Article 45(2). Therefore the Russian Federation applies the ECT on a provisional basis within the framework of Article 45. (22)

B. *The Relationship between International Law and Municipal Law*

The crucial aspect of Article 45 is its first paragraph, which provides for provisional application by a signatory state 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'. This provision seems to give national law priority over the treaty as long as it is applied provisionally. The language could be interpreted in one of two ways, or both, namely (i) provisional application itself must not be inconsistent with municipal law and/or (ii) the substantive provisions of the treaty must not be inconsistent with substantive provisions of municipal law. (23)

With respect to the Russian Federation, I will briefly look at the first issue.

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The constitution of the Russian Federation assigns the right to negotiate and conclude international treaties to the President (Article 86(b)), but leaves their ratification to the Federal Assembly (State Duma and Council of the Federation—Articles 71, 105 and 106(d)). The concept of 'provisional application' is not dealt with in the relevant provision of Article 15 of the Constitution.

(4) Generally accepted principles and rules of international law and

> international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes rules, other than provided for by the law, the rules of the international treaty shall be applied.

The details concerning international treaties are regulated by the 1995 Federal Law on International Treaties of the Russian Federation. Article 23 of the 1995 Federal Law expressly deals with the provisional application of international treaties in the Russian Federation:

> 1. An international treaty or part of a treaty may, before its entry into force, be applied by the Russian Federation provisionally if such has been provided for in the treaty or if an arrangement was reached concerning this with the parties who have signed the treaty.
>
> 2. Decisions concerning the provisional application by the Russian Federation of an international treaty or part thereof shall be adopted by the agency which adopted the decision to sign the international treaty in the procedure established by Article 11 of the present Federal Law.
>
> If an international treaty, the decision concerning consent to the bindingness of which for the Russian Federation is subject in accordance with the present Federal Law to adoption in the form of a Federal Law, provides for the temporary application of the treaty or part thereof or an arrangement concerning this has been reached with the parties in any other way, it shall be submitted to the State Duma within a period of not more than six months from the date of the commencement of the provisional application thereof. By a decision in the form of a Federal Law in the procedure established by Article 17 of the present Federal Law for the ratification of international treaties, the period of provisional application may be extended.
>
> 3. Unless provided otherwise in an international treaty or the respective States agree otherwise, the provisional application by the Russian Federation of a treaty or part thereof shall terminate upon informing the other States which provisionally are applying the treaty of the intention of the Russian Federation not to become a participant of the treaty.

It follows from the foregoing that Russian law acknowledges and accepts provisional application of treaties per se. In this respect, Russian law is thus consistent with Art. 45(1) of the ECT.

C. *Termination and Opting out of Provisional Application of the ECT*

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According to Article 45(2) of the ECT, any signatory state may, when signing the ECT, declare that it is not able to accept provisional application. In such a case, neither a signatory that makes the declaration, nor investors of that signatory state, may claim the benefits of provisional application. Australia, Iceland and Norway made such declarations when they signed the ECT, and as per 20 April 2006 the ECT is not yet in force for those countries. The Russian Federation has thus not delivered a declaration pursuant to Article 45(2) of the ECT.

Any signatory may also terminate its provisional application of the ECT by written notification to the depository of the ECT of its intention not to become a contracting party to the ECT according to Article 45(3) of the ECT. (24)

There is thus an express opting-out provision as per Article 45(2) of the ECT. This notwithstanding, it may be argued that there is still an open question as to whether an ECT signatory is *obliged to declare* that it is not able to accept provisional application, where its legislation is in conflict with the substantive provisions of the ECT, or if it is nevertheless—ie without making any such declaration—entitled to rely on the condition contained in the provisional application provision of Article 45(1), ie that provisional application not be inconsistent with its constitution, laws or regulations.

Assuming that an ECT signatory would be entitled not to make an 'opting-out declaration', it could prove extremely difficult to pass judgment on the extent to which the provisions of the ECT are inconsistent with a particular signatory's constitution, laws or regulations.

As regards the ECT, an important question is whether private parties may rely on the right to arbitration as per Article 26 under the provisional application regime. Provisional

application is a well-established method for giving immediate effect to treaties. The arbitral tribunal in the *Kardassopoulos* case found that provisional application of the ECT imports the application of all of the Treaty's provisions as if they were already in force. (25)

6. *Awards Rendered*

As previously mentioned, the investment protection regime of the ECT has been in force since 1998, but the number of awards rendered so far is rather limited. Out of the 20 cases that so far, 14 have been brought to international arbitration under Article 26 are still pending. To date one award on jurisdiction (*Ioannis Kardossopoulos v Georgia*) and four final awards (*Nykomb Synergetics Technology Holding AB v the Republic of Latvia*; *Petrobart Limited v the Kyrgyz Republic*; *Amto v Ukraine* and *Plama Consortium Limited v Republic of Bulgaria*) have been issued under the ECT. *Nykomb*, *Petrobart* and *Amto* were all arbitrations under the Rules of the Stockholm Chamber of Commerce, whereas *Plama* and *Kardossopoulos* are ICSID cases.

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Due to the limited number of awards, it is not yet possible to identify any clear trends in ECT cases. However, in particular the awards in *Petrobart*, *Plama* and *Kardossopoulos* raise some jurisdictional issues of general interest, which will be discussed in Section 6B. As to the merits, the awards in *Nykomb* and *Petrobart* involve questions concerning the standard of compensation in case of other violations of the ECT than expropriation. Like many BITs, the ECT does not contain any provisions on the standard of compensation to be applied in such cases. This issue will be discussed in Section 6C.

A. *Brief Introduction to the Cases*

(i) *Nykomb Synergetics Technology Holding AB v the Republic of Latvia* (26)

Nykomb v the Republic of Latvia concerned a dispute regarding the purchase of power by the state-owned Latvian company, Latvenergo and the Latvian company Windau, a wholly owned subsidiary of the Swedish company, Nykomb. In 1997, Latvenergo and Windau entered into several agreements for the construction of power plants in Latvia. Pursuant to the agreements Latvenergo undertook to purchase surplus electric power, ie electricity not used for its own consumption, at a tariff which was twice the average electric power sale tariff approved by the Public Utilities Commission of the Republic of Latvia (the 'Double Tariff').

The first plant was ready for operation on 17 September 1999, but Latvenergo refused to purchase the surplus electric power from the plant at the Double Tariff. Due to Latvenergo's refusal Windau was not able to start its production until 28 February 2000. As from that time Latvenergo has purchased surplus electric power from Windau at 75 percent of the average tariff, ie at a tariff which is lower than the average tariff.

In the arbitration Nykomb argued that Windau was entitled to the Double Tariff, since one of the contracts stipulated that the purchase price for surplus energy was to be determined in accordance with the Latvian Law on Entrepreneurial Activities in the Energy Sector. At the time when Windau signed the agreements such law provided that power plants with a certain capacity were entitled to the Double Tariff. Latvia, on the other hand, argued that Windau only was entitled to 75 percent of the average tariff in accordance with the new Energy Law, which had entered into force after Windau and Latvenergo concluded their agreements.

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Nykomb claimed that Latvenergo's refusal to pay the Double Tariff with reference to the new Energy Law, which deprived Windau of its right to the Double Tariff referred to in the agreement, constituted a regulatory taking having effect equivalent to expropriation (Article 13(1)). Nykomb also claimed that such refusal by Latvenergo to pay the double tariff constituted discriminatory measures, since Latvenergo were paying two other companies (SIA 'Latelektro-Gulbene' and Joint Stock Company 'Liepājas Siltums') the Double Tariff for its surplus electric power.

The tribunal found that there was no taking of Windau or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise. It therefore concluded that the refusal to pay the Double Tariff did not qualify as expropriation, or the equivalent thereof, under the ECT. (27) However, as to Nykomb's discrimination claim, the tribunal found that Latvia had breached its obligation under Article 10(1) of the ECT not to discriminate by offering double tariffs to other companies and failing to present any evidence why those companies were different. (28)

(ii) *Petrobart Limited v the Kyrgyz Republic* (29)

The arbitration between Petrobart Ltd of Gibraltar and the Kyrgyz Republic concerned a sales contract between Petrobart and the Kyrgyz state owned company KGM for the purchase by the latter of 200,000 tonnes of gas condensate.

Petrobart delivered five shipments of gas but was only paid for the first two. At the same time as Petrobart turned to domestic courts for recourse, Kyrgyz authorities—as part of a reform of the system for supply of oil and gas in the Kyrgyz Republic—took certain measures that made it impossible for Petrobart to enforce its rights under the contract. The measures included a decision by the Kyrgyz authorities to privatize KGM, and to transfer its assets, but not its liabilities (including monies owed to Petrobart), to a new company as well as a request by the Vice Prime Minister of the Kyrgyz Republic who—referring to KGM's critical financial standing—asked the chairman of a Kyrgyz court that previously had rendered a judgment in favour of Petrobart, to assist in granting a stay of the enforcement of the judgment against KGM. Enforcement was stayed by the court referring to the letter of the Vice Prime Minister, and before the period of stay of execution ended, KGM was declared bankrupt, which meant that enforcement of the judgment was no longer possible.

With reference to the above the tribunal found that the Kyrgyz Government was liable for certain breaches of the ECT, specifically by virtue of its failure to provide fair and equitable treatment by transferring assets from KGM to the above mentioned new company to the detriment of KGM's creditors, including Petrobart (Article 10(1)); and by
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intervening in court proceedings regarding● the stay of execution of a final judgment to the detriment of Petrobart (Article 10(12)). (30)

The award was challenged by the Kyrgyz Republic before the Svea Court of Appeal in Stockholm. The Court of Appeal, however, in a decision dated 19 January 2007 upheld the award. (31)

(iii) *ICSID Case No ARB/03/24 Plama Consortium Limited v Republic of Bulgaria* (32)

Plama Consortium Limited ('Plama') is a Cypriot company, which purchased an equity interest in a Bulgarian company, Nova Plama, owning an oil refinery in Bulgaria. Plama claimed that Bulgaria interfered with the operation of the oil refinery in a manner that was inconsistent with Bulgaria's international law obligations under both the Energy Charter Treaty and the Cyprus-Bulgaria BIT.

In its decision on jurisdiction of 8 February 2005, the tribunal retained jurisdiction to consider the merits of Plama's argument that Bulgaria had breached the ECT, while determining that it did not have jurisdiction under the Cyprus-Bulgaria BIT. The BIT claims will not be dealt with any further in this article. (33)

In its award on the merits, the tribunal accepted Bulgarias's factual allegation that Plama was guilty of misrepresentation. When the Bulgarian government consented to Plama's purchase of shares in Nova Plama it had clearly understood that two large commercial entities were the owners of Plama. The true owner of Plama, a private individual, did nothing, however, to remove this understanding, of which he undoubtedly was aware. (34) The tribunal viewed Plama's behaviour to be contrary to relevant provisions of Bulgarian law and to international law. The tribunal stated that the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of the law and quoted the introductory note to the ECT that reads: '[t]he fundamental aim of the Energy Charter
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Treaty is to strengthen the rule of law on energy● issues [...]'. The tribunal concluded that the substantive protections of the ECT cannot apply to investments that are made contrary to law. (35)

The tribunal went on to identify the applicable rules and principles of international law. The tribunal found guidance in two earlier investment arbitration decisions cited by Bulgaria, namely *Inceysa v El Salvador* (36) and *World Duty Free v Kenya*. (37) The tribunal was of the view that granting protection to Plama would be contrary to the principle *nemo auditor propriam turpitudinem allegans*—that nobody can benefit from his own wrong—invoked in the *Inceysa* case. (38)

The tribunal also found that Plama's conduct was contrary to the principle of good faith which is part of both Bulgarian and international law. In the view of the tribunal, this principle includes an obligation for the investor to provide the host state with relevant and material information concerning the investor and the investment. That obligation is particularly important when the information is necessary for obtaining the state's

approval of the investment. (39)

Even though the tribunal could not grant the substantive protections of the ECT to Plama, it went on to consider the further arguments presented in the case. This consideration led to the conclusion that Plama's claims on the merits would have failed in any case. (40) In the tribunal's view, Plama's investment was a high risk project. The plan to get the refinery to yield a profit did not work for reasons which were not attributable to any unlawful actions of Bulgaria. (41)

(iv) *Amto v Ukraine* (42)

Amto v Ukraine concerned a dispute arising out of the bankruptcy of the Zaporozhskaya AES nuclear power plant ('ZAES') in Ukraine. Amto, registered in Latvia, invested in the Ukrainian stock company EYUM-10 from 1999 and onwards. ZAES is the largest nuclear power plant in Ukraine. It is a separate division of the national nuclear power generating company 'Energoatom' that is owned by the State of Ukraine. EYUM-10 was a supplier of services to ZAES, which was also EYUM-10's largest debtor.

In 2002 and 2003, EYUM-10 commenced court proceedings in Ukrainian commercial courts in respect of amounts owed to EYUM-10 by ZAES. The claims were successful and EYUM-10 received judgments against ZAES for a total amount of approximately 28 million Ukrainian hryvni (UAH). Execution of the judgments were stayed however, due to six
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separate bankruptcy proceedings against Energoatom which were commenced between March 2002 and December 2003. EYUM-10 complained of the delays, errors and the tolerance of procedural abuse by the Ukraine courts in these proceedings. On May 15, 2006 EYUM-10 and Energoatom signed an agreement relating to Energoatom's outstanding debts to EYUM-10. The latter claimed that this agreement never entered into force because Energoatom did not provide a bank guarantee which was a condition precedent. Energoatom did, however, pay in accordance with the agreed time schedule. The agreement was amended and re-executed on 11 August 2006, but with no bank guarantee.

In its decision on jurisdiction, the tribunal rejected all of Ukraine's jurisdictional objections which, *inter alia*, included an objection that the case was inadmissible since Ukraine denied Amto the advantages of part III of the ECT on the basis of Article 17(1). (43)

The tribunal concluded that Amto had failed to demonstrate any denial of justice in the courts' handling of the proceedings or any series of circumstances that cumulatively amounted to a denial of justice in violation of Article 10(1) of the ECT. The tribunal also dismissed Amto's claim that the Ukrainian bankruptcy legislation was clearly inadequate and did not live up to the standard required by international law, which Amto claimed would have constituted a breach of Article 10(12). The tribunal also dismissed Amto's further claims eg that the Ukrainian government had interfered in the ongoing bankruptcy proceedings, that EYUM-10 had been the victim of aggressive conduct on behalf of the tax authorities and several allegations relating to the conduct of Energoatom. In all, the tribunal found that no breach of the ECT by or attributable to Ukraine had been established and accordingly, all of Amto's claims were denied. (44)

(v) *ICSID Case No ARB/05/18 Ioannis Kardassopoulos v Georgia—decision on jurisdiction* (45)

The dispute concerns allegations that the Republic of Georgia ('Georgia') has breached its obligations to Kardassopoulos under the BIT between Greece and Georgia and also under the ECT in respect of Kardassopoulos' interest in an oil and gas concession in Georgia.

On 3 March 1992, the American company Tramex entered into a joint venture agreement with the Georgian state-owned oil company SakNavtobi. This agreement resulted in GTI Ltd. ('GTI'), a joint venture vehicle owned in equal shares. The purpose of the joint venture was to, *inter alia*, construct new oil refineries and pipelines in order to exploit the Georgian oil fields. In 1993, GTI was granted a 30-year concession for Georgia's pipelines
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by Transneft, the state-owned entity which held the rights over the pipelines. Subsequently, Tramex, directly or through GTI, made a series of investments related to the pipelines, including engaging an engineering company for the construction of a pipeline and purchases of land and equipment. In February 1996, Georgia adopted a new decree which provided that the new state owned company GIOC would represent Georgia in a contract regarding the construction and exploitation of the Samgori-Batumi pipeline. The new decree also cancelled all rights given earlier that contradicted the new decree. In March 1996, Georgia signed a 30-year contract for the transportation of oil through

Georgia with a consortium of major oil corporations, whereby GIOC was appointed to construct the Samgori-Batumi pipeline instead of GTI. In 1997, a committee was set up to review Tramex' incurred expenses and determine possible reimbursement. In 2004, an independent audit commissioned by the Georgian government estimated Tramex' losses at USD 106.3 million. No payment was made by Georgia. Later in 2004, the new Georgian government established another compensation commission and later informed Kardassopoulos that this commission had decided that there were no legal grounds for holding Georgia liable for the claim. The commission reasoned that the Georgian government could not be held liable for Tramex' claims since the government had not represented a party to any of the agreements which were concluded by Tramex in Georgia. The parties to the joint venture agreement and the concession were SakNavtobi and Transneft, respectively. Both these entities, although state owned, were legal entities distinct and independent from the state, acted on their own behalf and were thus responsible for their own obligations.

In its decision on jurisdiction of 6 July 2007, the tribunal decided that Georgia's objections to the tribunal's jurisdiction *ratione materiae* under the ECT and the BIT, as well as Georgia's objection to the tribunal's jurisdiction *ratione temporis* under the ECT, were denied. However, Georgia's objection to the tribunal's jurisdiction *ratione temporis* under the BIT was joined to the merits. (46) Since Georgia claimed that the acts which caused Kardassopoulos' alleged loss occurred prior to the entry into force of the ECT on 16 April 1998, one of the issues that was addressed by the tribunal was if the ECT became provisionally applicable prior to that date. (47)

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B. *Jurisdictional Issues*

(i) *Nykomb*

Nykomb did not raise very many jurisdictional issues, but a few findings of the tribunal should nevertheless be briefly noted.

(a) *Investment*

In the arbitration, Latvia argued that the contract between Latvenergo and Windau for the purchase of electric power, upon which Nykomb's claims were based, was a commercial contract and as such not protected by the ECT. Latvia contended that the ECT only applies to investment contracts within the meaning of the ECT, and that Nykomb's claims, which were based on a commercial contract, were outside the scope of the ECT.

The tribunal, however, found that the purchase contract could not be regarded as purely commercial, nor could the action to refuse payment of the double tariff under the contract be considered as purely commercial. As for the objection that the purchase contract was not an investment contract within the meaning of the ECT, the tribunal found that it suffices to note that a contract for provision of energy for eight years 'clearly falls within the Treaty's definition of an investment in Article 1 of the Treaty'. (48)

(b) *Retroactive application*

Latvia also argued that Nykomb was seeking to apply the treaty retroactively because the contract between Windau and Latvenergo had been concluded before the entry into force of the ECT. The tribunal, however, rejected the argument that retroactive application had been asserted, since the alleged breaches occurred after the entry into force of the ECT. (49)

(ii) *Petrobart*

(a) *Investment*

One of the jurisdictional issues in *Petrobart* was whether Petrobart had an 'investment' in the Kyrgyz Republic for purposes of the ECT. In an earlier UNCITRAL arbitration between the same parties, a different tribunal had ruled that Petrobart's sales contract with KGM did not qualify as a foreign 'investment' under the Foreign Investment Law of the Kyrgyz Republic.

The tribunal in the ECT arbitration stressed that the term 'investment' must be interpreted in the context of each particular treaty in which the term is used, (50) and that the question therefore was whether Petrobart's right under the contract to payment for goods delivered under the contract was an asset that constituted an investment under the definition of investment provided by ECT. (51) Article 1(6)(c) of the ECT provides that

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assets constituting an investment shall include 'claims to money and claims to performance pursuant to contract having an economic value and associated with an *Investment*' (emphasis added). However, the tribunal found that the wording of Article 1(6)(c) presented certain ambiguities and the logical problem that the term 'Investment' is not only the term to be defined, but is also used as an integrated part of the definition. The tribunal concluded that 'this means that the definition is in reality a circular one which raises a logical problem and creates some doubt about the correct interpretation'. (52)

Instead the tribunal based its jurisdiction on Article 1(6)(f), which provides that an asset constituting an investment shall also include '*any right* conferred by law *or contract* or by virtue of any licences and permits granted pursuant to law *to undertake any Economic Activity in the Energy Sector*' (emphasis added). 'Economic Activity in the Energy Sector' is in Article 1(5) defined as 'economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises'. It was not disputed in the arbitration that the gas condensate, which Petrobart sold according to the sales agreement, constituted 'Energy Materials and Products' within the meaning of the ECT. With reference to the above, the tribunal found that 'a right conferred by contract, to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty [ECT]. This must also include the right to be paid for such a sale'. (53)

The decision of the tribunal that Petrobart's claim for payment under the sales agreement constituted an investment in the meaning of the ECT was not challenged by the Kyrgyz Republic in the above-mentioned application for the setting aside of the award before the Svea Court of Appeal.

(b) *Applicability of the ECT with regard to Gibraltar*

Another jurisdictional issue was whether the ECT was applicable with respect to investors of Gibraltar. When the United Kingdom signed the ECT, it made a declaration under Article 45(1) that the provisional application of the treaty should extend to the United Kingdom of Great Britain and Northern Ireland and to Gibraltar. However, when the United Kingdom ratified the ECT, it was specified in the instrument of ratification, that the ratification was in respect of the United Kingdom of Great Britain and Northern Ireland, the Bailiwick of Jersey and the Isle of Man. Gibraltar was not mentioned in the instrument of ratification. (54) The tribunal therefore had to determine whether the ECT applied to Gibraltar despite the non-inclusion of Gibraltar in the instrument of ratification. The tribunal found that such problem of interpretation had to be resolved through a 'rather formal approach based on the wording of the Treaty', and noted that 'according to the text of the Treaty provisional application ceases if it is terminated either by a special notification under Article 45(3)(a) of the Treaty or by transition from provisional application to a corresponding and final legal commitment resulting from the entry into force of the Treaty. It could indeed be expected that the United Kingdom, if it wished the provisional application of the Treaty to Gibraltar to be terminated as a result of a ratification not including Gibraltar, should have made this clear by making a notification in line with Article 45(3)(a) or a declaration in some other form in connection with the ratification. In the Arbitral Tribunal's opinion, the fact that the ratification, for political or other reasons, did not include Gibraltar does not justify the conclusion that the United Kingdom intended to revoke the application of the Treaty to Gibraltar on a provisional basis'. (55)

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In other words, the tribunal found that the instrument of ratification, which—with respect to the United Kingdom of Great Britain and Northern Ireland (not including Gibraltar)—transformed the provisional application of the ECT into a final legal commitment, should not be interpreted as a termination of the provisional application in relation to Gibraltar.

This issue was part of the Kyrgyz Republic's above-mentioned challenge of the award before the Svea Court of Appeal. In the challenge proceedings, the Kyrgyz Republic argued that the tribunal exceeded its mandate by finding that the ECT applied provisionally to Gibraltar. The Court of Appeal, however, held that the Tribunal had not exceeded its mandate. The Court found that since there is no provision in the ECT which governs the situation where the ECT has been ratified with regard to a territory not corresponding to the territory covered by the provisional application, it could have been expected that the United Kingdom would have made it clear that the ECT no longer applied to Gibraltar, had this been the intention. With reference thereto, the Court found

that the Tribunal had been correct in finding that Gibraltar was still covered by the provisional application of the ECT.

(c) *Article 17 ECT*

The Kyrgyz Republic also argued that Petrobart, according to Article 17(1) ECT, should be denied the protection of the investment protection provisions of Part III of the ECT, since Petrobart was owned or controlled by nationals of a non-contracting party to the ECT, and since Petrobart had no substantial business activities in Gibraltar. The tribunal, however, attached weight to Petrobart's information that it was managed by an English company that handled many of Petrobart's strategic and administrative matters. This contradicted, according to the tribunal, the view that Petrobart was owned or controlled by nationals of a state other than the UK and that Petrobart did not have substantial business in the UK. (56)

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The tribunal did not specifically address the question whether the non-application in certain circumstances of Part III as provided for in Article 17 goes to the jurisdiction of the tribunal or constitutes a defence on the merits of the case. However, the reference by the tribunal to Article 10(2) of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, regarding the time when jurisdictional objections should be made, indicates that the tribunal viewed Article 17 as a jurisdictional defence. The distinction is of importance, since matters of jurisdiction may be open for review by local courts at the place of arbitration (or an ICSID *ad hoc* committee) on the grounds that the tribunal has exceeded its jurisdiction.

Curiously, the Kyrgyz Republic did not argue before the Swedish Court of Appeal in the above-mentioned challenge of the award, that a misapplication of Article 17 would constitute an excess of mandate by the Tribunal. The question whether the non-application in certain circumstances of Part III as provided for in Article 17 goes to the jurisdiction of the tribunal or constitutes a defence on the merits of the case was therefore not determined by the Court of Appeal. Rather, the Kyrgyz Republic initially argued that the tribunal exceeded its mandate by not scrutinizing the ownership and status of Petrobart in greater detail. This claim, however, appears subsequently to have been withdrawn.

(d) *Res Judicata*

The case also involved matters of *res judicata* and *estoppel* in relation to a previous UNCITRAL arbitration under the Foreign Investment Law of the Kyrgyz Republic previously initiated by Petrobart against the Kyrgyz Republic regarding the same investment. In the UNCITRAL arbitration, a different tribunal had ruled that Petrobart's sales contract with KGM did not qualify as a foreign 'investment' under the Foreign Investment Law of the Kyrgyz Republic. With reference hereto, The Kyrgyz Republic argued in the present proceedings under the ECT that the decision of the tribunal in the UNCITRAL arbitration should operate to bar such proceedings on grounds of *res judicata*. The tribunal, however, rejected the *res judicata* defence since the two arbitrations were based on different arbitration clauses, *viz*., the first clause in the Foreign Investment Law and the other in the ECT, and since the first arbitration dealt with investments under Kyrgyz law and the other with alleged violations of the ECT. (57) For similar reasons the initiation of the first proceedings without simultaneously initiating the ECT proceedings did not prevent Petrobart—on grounds of *estoppel* - from later initiating ECT proceedings based on the same factual allegations. (58)

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(iii) *Plama*

(a) *Burden of proof*

In *Plama*, the tribunal discussed the burden of proof with regard to jurisdictional requirements, and adopted the test previously advocated by Judge Higgins in her separate opinion in the *Oil Platforms Case*. (59) In such case Judge Higgins held that:

> the only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them. (60)

She also held that:

> the Court should ... see if, on the facts as alleged by [Claimant], the [Respondent's] actions complained of might violate the Treaty articles (§ 33) ... Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases ... and to protect the integrity of the proceedings on the merits ... what is for the merits, (and which remains pristine and untouched by this approach to the jurisdictional issue) is to determine what exactly the facts are, whether as finally determined they do sustain a violation of ... [the treaty] and if so, whether there is a defence to that violation ... In short it is at the merits that one sees 'whether there really has been a breach'. (61)

The tribunal concluded that it did not understand Judge Higgins' approach to be controversial and stated that it would apply such approach to the jurisdictional issues in dispute in the present arbitration. (62)

(b) *Investment*

In its objection to jurisdiction, Bulgaria argued that Plama had not made an 'Investment', as defined in the ECT. Bulgaria claimed that Plama had misrepresented or wilfully failed to disclose its true ownership to the Bulgarian authorities in violation of Bulgarian law. Accordingly, the consent of Bulgaria's Privatization Agency to Plama's purchase of shares in the local company was null and void under Bulgarian law. Therefore Plama had failed to make a valid investment. (63)

The tribunal found that as for the application of the definitions of 'Investor' and 'Investment' in the ECT, it is irrelevant who owns or controls the claimant, and that
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'applying Judge Higgins' approach to disputed facts, the Tribunal● must accept, pro tem, the investment as alleged by the Claimant; and on this ground alone, the Tribunal decides that Bulgaria's submission fails'. (64) The tribunal also found that as Bulgaria's commitment to arbitrate was based on the ECT and not the agreement for purchase of the shares, the agreement to arbitrate remained effective even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of misrepresentation by the Claimant. (65)

(c) *Article 17 ECT*

Bulgaria also argued that its consent to submit disputes to arbitration under Article 26(1) ECT was expressly limited to disputes concerning an alleged breach of an obligation arising under Part III of the ECT. Part III contains Article 17, which reserves to a contracting party, the right to deny advantages of that Party to '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'. Bulgaria claimed that by denying to the claimant, in accordance with Article 17(1), the protections afforded by Part III, Bulgaria's consent to submit disputes concerning alleged breaches of obligations under Part III, did not provide a basis for jurisdiction in this case. (66)

In its assessment of the parties' arguments, the tribunal agreed with Bulgaria that the jurisdiction of the tribunal under Article 26 ECT is limited to the host state's obligations under Part III of the ECT. However, the tribunal found that, with reference to the wording of Article 17(1), 'each Contracting Party reserves the right *to deny* the advantages of this Part [Part III]' (emphasis added), and interpreted in good faith in accordance with its ordinary contextual meaning, such denial applies only to advantages under Part III. The tribunal concluded that 'it would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT'. (67)

The tribunal noted that a contracting state can only deny the advantages of Part III if the specific criteria of Article 17(1) are satisfied. The tribunal further noted that the question whether such criteria are met could raise wide-ranging, complex and highly controversial disputes, as in the present case, and that in the absence of Article 26 as a remedy available to the parties, the tribunal questioned how such disputes could ever be decided. (68) The tribunal concluded that it would be a 'license for injustice' and that 'the Contracting State invoking the application of Article 17(1) is the judge in its own
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cause', if arbitration● under Article 26 would not be available to the investor for purposes of determining whether the conditions of Article 17(1) have been met. (69)

The tribunal also addressed certain other issues concerning Article 17. The tribunal

considered whether Article 17 in itself provided sufficient notice to the investor that it could not enjoy the protection of the ECT (assuming the criteria for its application are satisfied) or if further notice was required. Given the wording of Article 17(1) ('reserves the right *to deny*'), the tribunal took the view that interpretation of Article 17(1) of the ECT in accordance with Article 31(1) of the Vienna Convention (70) required that the right of denial be actively exercised by the contracting state. (71)

Since Bulgaria had not made such notice until after Plama made its request for arbitration and not until 4 years after Plama made its investment, the tribunal also had to determine whether such a notice applied retrospectively or only prospectively. Again invoking Article 31(1) of the Vienna Convention, stressing in particular the objects and purpose of the ECT, the tribunal concluded that the exercise by a contracting party of its right under Article 17(1) should not have retrospective effect as it would not be consistent with the purpose of the ECT 'to promote the long term co-operation in the energy field'. The tribunal pointed out that such unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date and that the investor could not plan in the long-term for such an effect. (72)

(iv) *Amto*

(a) *Investment*

One of the jurisdictional objections raised by Ukraine was that Amto's shares in EYUM-10 did not constitute a qualified investment under the ECT since EYUM-10's operations were not associated with an economic activity in the energy sector as required by Article 1(6) of the ECT. EYUM-10 provided technical services such as installations, repairs and upgrades to ZAES. Ukraine submitted that the mere contractual relationship with an entity engaged in the energy sector is not sufficient to be 'associated with that activity'. The tribunal pointed out that ZAES/Energoatom was engaged in an economic activity in the energy sector as its activity concerned the production of electrical energy. The
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tribunal concluded that the close association of EYUM-10 with ZAES in the provision of technical services directly related to energy production meant that Amto's shareholding in EYUM-10 was an investment in the meaning of the ECT. (73)

(b) *Article 17 ECT*

Ukraine also objected that the State's 'right' to deny advantages under Article 17 is not subject to arbitration, such that the State is the sole and exclusive judge whether the Investor has the characteristics described in Article 17(1). The objection had a terminological basis. Article 26(1) entitles an Investor to submit to arbitration an alleged dispute relating to breaches of the State's 'obligations'. Article 17 of the ECT, however, refers to a 'right' to deny advantages. Therefore, Ukraine argued, the tribunal had no jurisdiction *rationae materiae*. The tribunal dismissed this objection. It explained, with reference to the *competence/competence* principle in international arbitration, that a dispute regarding an obligation includes a dispute relating to the existence of the obligation. Ukraine's exercise of its right to deny advantages was an aspect of the dispute submitted to arbitration by Amto. It was thus within the jurisdiction of the tribunal. (74)

Ukraine also argued that the case was inadmissible since Ukraine denied the advantage of part III of the ECT on the basis of Article 17(1). The tribunal explained that there are two cumulative requirements that must be met before Ukraine can exercise its right to deny. First, the investor must be owned or controlled by citizens or nationals of a third state (ie a state that is not a contracting party). Secondly, the investor must have 'no substantial business activities' in the state of its incorporation. The tribunal found that Amto was incorporated in Latvia and wholly owned by a company incorporated in Liechtenstein. That company was in turn wholly owned by a Liechtenstein foundation whose ultimate beneficiaries were Russian nationals. This raised the issue whether Russia is a 'third state' within the meaning of the first requirement of Article 17(1). However, the tribunal found that the second requirement under Article 17(1) had not been met. It was satisfied that Amto had substantial business activity in Latvia and consequently, Ukraine had no right to deny Amto the advantages of Part III. Thus, the tribunal did not need to determine whether Russia qualified as a 'third state' for the purposes of Article 17(1), or whether the State could exercise its right to deny advantages at any time, including after
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the initiation of an arbitration. (75)

(v) *Kardassopoulos*

(a) *Jurisdiction Ratione Materiae*

Georgia challenged the tribunal's jurisdiction *ratione materiae* on two independent grounds. *First*, it submitted that Kardassopoulos had no interest in the joint venture vehicle GTI. Georgia, among other things, claimed that the interest in GTI was held by Tramex USA and not by Tramex Panama, the company in which Kardassopoulos held an interest. The tribunal concluded that the indirect ownership of shares by Kardassopoulos constituted an 'investment' under the BIT and the ECT. (76) It went on to say that, contrary to Georgia's contention, Tramex Panama did indeed exist before the joint venture agreement was executed, (77) that the joint venture agreement was entered into by Tramex Panama (78) and that Kardassopoulos held an interest in Tramex Panama at the time of the execution of the joint venture agreement. (79)

Georgia's *second* objection to the tribunal's jurisdiction *ratione materiae* was that the joint venture agreement and the concession were void *ab initio* under Georgian law. In Georgia's view, neither SakNavtobi nor Transneft was authorized to grant the rights conferred to GTI under the joint venture agreement, or the concession, or to even enter into those agreements. Article 12 of the BIT sets forth an express provision that precludes the treaty's application in respect of investments that were inconsistent with Georgia's legislation. Georgia submitted that even though the ECT did not contain a provision to the same effect, Kardassopoulos could not argue that the ECT protects an investment that is illegal under Georgian law.

Kardassopoulos on the other hand, stated that the issue of whether his investment was made in accordance with the ECT and the BIT should be resolved solely under those treaties and not by reference to Georgian law. The tribunal stated that it must decide the issues in dispute in accordance with the applicable rules and principles of international law. It cited the relevant provisions of the ICSID Convention (Article 42(1)), the ECT (Article 26(6)) and the BIT (Article 9(4)). The tribunal further declared that even though it was not authorized to apply Georgian law, it is a well established fact that there are provisions of international agreements that can only be given meaning by reference to municipal law. In the present case, Georgian law was relevant to determine whether Kardassopoulos' investment was covered by the terms of the ECT and the BIT. (80) Notwithstanding the fact that the joint venture agreement and the concession might have been void *ab initio* under Georgian law, the tribunal found that the investment was nonetheless protected
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under the BIT and the ECT. As the tribunal observed, Georgia did not allege that it was Kardassopoulos that had committed any act in violation of Georgian law. Rather, Georgia argued that its very own state-owned enterprises had violated Georgian law by exceeding their authority. Since the agreements in question had been entered into with Georgian state-owned entities and because their content was approved by Georgian government officials without objection for many years thereafter, Kardassopoulos had every reason to believe that the agreements were in accordance with Georgian law. Therefore, Kardassopoulos had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Consequently, the tribunal denied Georgia's objection. (81)

(b) *Provisional application*

Georgia also challenged the tribunal's jurisdiction *ratione temporis* under both the ECT and the BIT. In essence, Georgia claimed that the acts which caused Kardassopoulos' alleged loss, including the various government decrees, occurred prior to the entry into force of the ECT on 16 April 1998. As stated above, Article 45 of the ECT stipulates that each signatory agrees to apply the Treaty provisionally pending its entry into force for such signatory to the extent that such application is not inconsistent with its constitution, laws or regulations. Georgia argued that neither Greek nor Georgian law permitted the provisional application of the ECT. Therefore, Kardassopoulos was not entitled to the ECT's protection until 16 April 1998.

According to Article 1(6) of the ECT,

> ... the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

The tribunal stated that it followed from Article 1(6) that both States' domestic laws had to be considered, because in order to determine which is the 'later' of the two dates of entry into force of the ECT (for Georgia and for Greece) it was necessary to identify each date, since only then could the 'later' of them be determined. The tribunal found no support for Georgia's claim that provisional application of treaties was inconsistent with Georgian and Greek domestic laws. Consequently, the ECT provisionally applied to Georgia and to Greece from the date of signature on 17 December 1994 until 16 April 1998 when the ECT definitively entered into force. (82)

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The question for the tribunal was therefore whether for the purposes of the definition of 'Effective date' in Article 1(6) of the ECT, the date from which the ECT became provisionally applicable is to be treated as its 'date of entry into force'. The tribunal stated that the language used in Article 45(1) is to be interpreted such that each signatory state is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so. (83) One reason for this interpretation was that if 'entry into force' in Article 1(6) was to mean only definitive entry into force, it would mean that investments during the period of provisional application would be excluded from the ECT. Such a result would strike at the heart of the clearly intended provisional application regime, according to the tribunal. (84) Provisional application imports the application of all the treaty's provisions as if they were already in force, even though the treaty's definitive entry into force had not yet occurred. (85)

(vi) *Concluding remarks on jurisdiction*

(a) *Article 17 ECT*

As mentioned above, there are still too few arbitral awards under the ECT to draw any general conclusions regarding jurisdictional issues arising under the ECT. It is interesting to note, however, that both *Petrobart*, *Plama* and *Amto* involved the application of Article 17, either as a jurisdictional defence, or as a defence on the merits.

In the *Plama* award, the tribunal had to determine two issues regarding the application and interpretation of Article 17. The *first* question is whether Article 17 goes to the jurisdiction of the tribunal or whether it goes to the merits. The tribunal in *Plama* dismissed Bulgaria's argument that the applicability of Article 17 would affect the jurisdiction of the tribunal, whereas the tribunal in *Petrobart* did not make any express decision on whether Article 17 was a jurisdictional or merits issue. Neither did the tribunal in the *Amto* award, even though by examining Ukraine's claim in this regard the tribunal seems to have accepted that the applicability of Article 17 may affect its jurisdiction.

The *second* issue in relation to Article 17 that arose in *Plama* is whether the provision means that treaty protection is excluded as soon as the conditions in 17(1) are fulfilled, or whether an additional express notice by the state to the investor prior to the occurrence of the allegedly wrongful acts is required. The tribunal in *Plama* considered such an additional notice to be required, whereas the tribunals in *Petrobart* and *Amto* did not expressly determine this issue.

Thus, the cases discussed in this contribution show that there is, for the time being, no general approach to the application of Article 17. Only time will tell if there will ever be such a general approach.

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(b) *Provisional Application*

In *Petrobart*, the issue of provisional application of the ECT in relation to Gibraltar was addressed. Further issues regarding the provisional application are likely to arise in the future, since both Belarus and the Russian Federation are signatories that apply the ECT provisionally in the sense that they have signed the ECT without submitting a declaration that it is not able to accept provisional application in accordance with Article 45(2). In *Kardassopoulos*, the tribunal found that provisional application imports the application of all the ECT's provisions—ie including provisions on dispute settlement—as if they were already in force, even though the Treaty's definitive entry into force has not yet occurred.

(c) *Investment*

As is frequent also in arbitrations under BITs, the tribunals in all five arbitrations discussed above had to determine objections by the State-party that the investor had not made an 'Investment' protected by the ECT. As evidenced by the award in *Plama*, the determination of such issues may involve questions of what issues properly belong to the

tribunal's decision on jurisdiction and what issues should be left for the determination of the merits.

C. *Compensation Standards*

The ECT (like most BITs as well as NAFTA), does not contain any provision, nor language, addressing the issue of compensation in case of violation of other investment protection provisions (fair and equitable treatment, non-discrimination, etc) than expropriation. In this context, it may be of interest that the awards both in *Nykomb* and *Petrobart* dealt with the issue of compensation in case of violations of Article 10 of the ECT. Since the investors' claims for compensation in the *Plama* and *Amto* cases were denied, those awards will not be discussed in the following.

(i) *Nykomb*

As mentioned above in Section 3(1)(1), in *Nykomb*, the tribunal found that Latvia had breached its obligation under Article 10 of the ECT not to *discriminate* against foreign investors by offering the so-called 'double tariff' to certain other companies but not to Nykomb's Latvian subsidiary, Windau, and by failing to present any evidence why those companies were different.

As to the standard of compensation applicable in the event of such discrimination, the tribunal noted that the principles of compensation provided for in Article 13(1) of the ECT, in the event of expropriation, were not applicable to the assessment of damages or losses caused by violations of Article 10. The tribunal found that 'the question of remedies to compensate for losses or damages caused by the Respondent's violation of
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its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility adopted in November 2001'. (86)

The tribunal further noted that according to Articles 34 and 35 of the ILC Draft Articles, restitution was the primary remedy. However, with respect to the case before it, the tribunal found that restitution was a suitable remedy primarily where the state had instituted actions directly against the investor. Where the actions were directed against its subsidiary, the tribunal instead found the appropriate remedy to be compensation for the losses or damage inflicted on the investor's investment. (87)

Nykomb claimed damages corresponding to the difference between the 'double tariff' and the tariff that actually had been paid to Windau. However, the tribunal decided not to give Nykomb the full difference between the two sets of tariffs because the higher payments would not have gone directly to Nykomb. The tribunal stated that 'the money would have been subject to Latvian taxes etc., would have been used to cover Windau's costs and down payments on Windau's loans etc., and disbursements to the shareholder would be subject to restrictions in Latvian company law on payment of dividends'. (88)

Taking into account the requirements under applicable customary international law of causation, foreseeability and the reasonableness of the result, the tribunal nevertheless found that the reduced earnings of Windau constituted the best available basis for the assessment also of Nykomb's losses. It came to the conclusion that a discretionary award of one third of the estimated loss in purchase prices of electricity up to the time of the award would serve as a reasonable basis for the quantification of Nykomb's assumed losses up to the time of the award. (89)

As regards Nykomb's alleged losses on delivery of electric power to Latvenergo for the remainder of the 8-year contractual period, the tribunal considered this potential loss too uncertain and speculative to form the basis for an award of monetary compensation. The tribunal, however, considered it to be a continuing obligation of Latvia to ensure payment at the double tariff for electrical power delivered under the contract for the rest of the 8-year contractual period. It therefore ordered Latvia to fulfil its obligation to pay the double tariff for future deliveries during the remainder of the contractual period. (90)
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(ii) *Petrobart*

In *Petrobart*, the tribunal found that the Kyrgyz Republic had violated its obligations under Articles 10.1 and 10.12 of the ECT (see Section 3D). With reference to the *Chorzów Factory Case* and to ILC's Draft Articles on State Responsibility, the tribunal found that

Petrobart had suffered damage as a result of the Kyrgyz Republic's breaches of the ECT and that Petrobart had, as far as possible, to be placed financially in the position in which it would have found itself, had the breaches not occurred. (91)

Petrobart essentially claimed compensation for (i) the unpaid invoices for gas condensate actually delivered by Petrobart to KGM; and (ii) loss of profit with regard to the remaining deliveries under the contract.

The tribunal found that due to the troublesome financial situation of KGM, KGM would probably not have survived irrespective of the breaches of the ECT committed by the Kyrgyz Republic. (92)

The tribunal nevertheless found that the transfer by the Kyrgyz Republic of substantial assets belonging to KGM to other state entities caused substantial damage to KGM's creditors, including Petrobart. Due to the inadequacy of the information submitted by the parties, the tribunal found that the damage suffered by Petrobart could not be established with precision. The tribunal therefore found it necessary to make a general assessment based on its appreciation of the situation as a whole. In making such assessment, the tribunal found that the Kyrgyz Republic 'as responsible for the transfer and lease of KGM's assets, shall compensate Petrobart for damage which the Arbitral Tribunal estimates at 75% of its justified claims against KGM'. (93)

With regard to Petrobart's claim for lost profit, the tribunal found that there remained a great deal of uncertainty as to the consequences of the breakdown of the business relations between Petrobart and KGM. The tribunal therefore concluded that Petrobart had not established that it was entitled to compensation for loss of future profits. (94)

(iii) ***Concluding remarks regarding compensation***

Since most of the respective tribunals' findings regarding damages in *Nykomb* and *Petrobart* are rather fact specific, only limited conclusions can be drawn from such cases. It should be noted, however, that in the absence of express provisions on the standard of compensation, the tribunals in both cases relied upon customary international law. This is consistent with the findings of other tribunals awarding compensation for violations of
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the standards of fair and equitable treatment, non-discrimination etc. under BITs and NAFTA. (95) Guidance is usually sought from the ILC Articles on State Responsibility which in turn build on the principles laid down in the *Chorzow Factory* case. This is, however, only the first step in that it establishes the *standard* of compensation. As stated in Article 31 of the ILC Articles the standard is 'full reparation'.

When it comes to the *method* of establishing and calculating 'full reparation', customary international law does not provide much guidance. The cases discussed above—as well as the above mentioned BIT and NAFTA case—illustrate that the method chosen depends on, and varies with, the circumstances of each individual case, including, *inter alia*, the nature of the violation of the fair and equitable treatment standard and the kind and nature of the investment in question. Sometimes the starting point might be the amount actually invested, in other cases it might be more appropriate to focus on lost future profits as established by using the DCF method.

An additional observation that may be made is that it would seem that the issue of causality has the potential of creating more problems in this context than in relation to compensation for expropriation. One possible explanation is that violation of the fair and equitable treatment standard, non discrimination standard etc. do not automatically result in the elimination of the investment, as is mostly the case with expropriation, but rather results in a decline in the business in question, or in other negative impact on it. The difficulty is to determine the extent to which this is caused by the violation of the fair and equitable treatment standard.

For instance in Nykomb, where the investment—the local subsidiary Windau—was still in operation and the contract for delivery of electric power was still in force between Windau and Latvenergo, the tribunal made a clear distinction between the damage suffered by Nykomb and the damage suffered by Windau. The tribunal only awarded damages that would compensate Nykomb for the damage, that it had actually suffered, and not for losses suffered by Windau. Nykomb's damage was quantified as a proportion of the earnings that would have been generated by Windau, had there not been any breach of the treaty, ie the tribunal estimated the dividends that would have been collected by Nykomb from its subsidiary, rather than establishing a reduction of the
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value (if any) of Nykomb's shares in Windau.

7. *Concluding Remarks*

My observations and conclusions with regard to *Nykomb*, *Petrobart*, *Plama*, *Amto* and *Kardassopoulos* have already been made in relation to the issues of 'jurisdiction' and 'compensation', and shall not be repeated here. It is striking, however, and probably a manifestation of the fact that the ECT still is a rather young and 'untested' investment protection treaty, that the five awards that have been made to date involve so many issues of general interest.

It is likely that also future ECT awards will involve issues of general interest for the application of the ECT. In this regard it may be noted that after a somewhat 'slow start' for the investment protection regime of the ECT, investors have now started to discover the treaty. Of the 20 cases registered under the ECT thus far, 15 have been registered since 2005. With increasing investor awareness of the treaty, we will probably see a
P 190 continued steady stream of cases during the coming years.

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***)** Partner, Mannheimer Swartling, Stockholm. Email: kho@msg.se.

1) ICSID Case No ARB/01/4 *AES Summit Generation Ltd (UK subsidiary of US-based AES Corporation) v Hungary*; SCC Case No 118/2001 *Nykomb Synergetics Technology Holding AB (Sweden) v Latvia*; ICSID Case No ARB/03/24 *Plama Consortium Ltd. (Cyprus) v Bulgaria*; SCC Case No 126/2003 *Petrobart Ltd. (Gibraltar) v Kyrgyzstan*; ICSID Case No ARB/04/10 *Alstom Power Italia SpA, Alstom SpA (Italy) v Mongolia*; *Yukos Universal Ltd. (UK—Isle of Man) v Russian Federation* (UNCITRAL Arbitration Rules); *Hulley Enterprises Ltd. (Cyprus) v Russian Federation* (UNCITRAL Arbitration Rules); *Veteran Petroleum Trust (Cyprus) v Russian Federation* (UNCITRAL Arbitration Rules); ICSID Case No ARB/05/18 *Ioannis Kardossopoulos (Greece) v Georgia*; *Amto (Latvia) v Ukraine* (SCC); ICSID Case No ARB/05/24 *Hrvatska Elektropriveda d.d. (HEP) (Croatia) v Republic of Slovenia*; ICSID Case No ARB/06/8 *Libananco Holdings Co. Limited (Cyprus) v Republic of Turkey*; ICSID Case No ARB/06/15 *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (Netherlands) v Azerbaijan*; ICSID Case No ARB(AF)/06/2 *Cementownia "Nowa Huta" S.A. (Poland) v Republic of Turkey*; *Europe Cement Investment and Trade S.A. (Poland) v the Republic of Turkey* (ICSID); ICSID Case No ARB/07/14 *Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v Republic of Kazakhstan*; ICSID Case No ARB/07/19 *Electrabel S.A. v Republic of Hungary*; ICSID Case No ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v Republic of Hungary*; *Mercuria Energy Group Ltd. v Republic of Poland* (Arbitration Institute of the SCC); ICSID Case No ARB/08/13 *Alapli Elektrik B.V. v Republic of Turkey*; ICSID Case No ARB/09/6 *Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v Federal Republic of Germany*; ICSID Case No ARB/09/10 *EVN AG v The Former Yugoaslav Republic of Macedonia*; PCA Case No 2009-13 *EDF International v Republic of Hungary*.

2) *Yukos Universal Ltd. (UK—Isle of Man) v Russian Federation* (UNCITRAL Arbitration Rules); *Hulley Enterprises Ltd. (Cyprus) v Russian Federation* (UNCITRAL Arbitration Rules); *Veteran Petroleum Trust (Cyprus) v Russian Federation* (UNCITRAL Arbitration Rules); ICSID Case No ARB/05/18 *Ioannis Kardossopoulos (Greece) v Georgia*; ICSID Case No ARB/05/24 *Hrvatska Elektropriveda d.d. (HEP) (Croatia) v Republic of Slovenia*; ICSID Case No ARB/06/8 *Libananco Holdings Co. Limited (Cyprus) v Republic of Turkey*; ICSID Case No ARB/06/15 *Azpetrol International Holdings B.V, Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. (Netherlands) v Azerbaijan*; ICSID Case No ARB/09/6 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v Federal Republic of Germany*; ICSID Case No ARB/09/10 *EVN AG v The Former Yugoaslav Republic of Macedonia*; PCA Case No 2009-13 *EDF International v Republic of Hungary*; ICSID Case No ARB/07/14 *Liman Caspian Oil B.V. (the Netherlands) and NCL Dutch Investment B.V. (the Netherlands) v Republic of Kazakhstan*; ICSID Case No ARB/07/19 *Electrabel S.A. v Republic of Hungary*; ICSID Case No ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v Republic of Hungary*; *Mercuria Energy Group Ltd. v Republic of Poland* (Arbitration Institute of the SCC); ICSID Case No ARB/08/13 *Alapli Elektrik B.V. v Republic of Turkey*.

3) ICSID Case No ARB/01/4AES *Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) v Hungary* and ICSID Case No ARB/04/10 *Alstom Power Italia SpA, Alstom SpA (Italy) v Mongolia*.
4) See eg Graham Coop, 'The Energy Charter Treaty: More than a MIT' in C Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty*, 4–9.
5) Bamberger and others, 'The Energy Charter Treaty in 2000: In a New Phase Energy Law in Europe' in Martha M Roggenkamp and others (eds) *Energy Law in Europe*. Oxford University Press, Oxford 2001.
6) The ECT has been signed by Albania, Armenia, Austria, Australia, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldavia, Mongolia, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, Uzbekistan, United Kingdom. Signatory States that have not yet ratified the ECT are Australia, Belarus, Iceland, Norway, Russian Federation.
7) See Section 5.
8) Cf Bamberger and others (n 5).
9) For a general overview of the various dispute settlement mechanisms of the ECT, see eg L Gouiffes, 'The Dispute Settlement Mechanisms of the Energy Charter Treaty' in C Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* 22–34. JurisNet, Huntington (2006).
10) T. Wälde, 'Investment Arbitration Under the Energy Charter Treaty – From Dispute Settlement to Treaty Implementation' (1996) 12 Arb Intl 437.
11) See eg ICSID Case No ARB/01/7 *MTD, Equity Sdn. Bhd. & MTD Chile S.A. v Chile* (Malaysia/Chile BIT) (25 May 2004); ICSID Case No ARB (AF)/00/3 *Waste Management, Inc. v Mexico (Number 2)* (NAFTA) (30 April 2004); ICSID Case No ARB/01/8 *CMS Gas Transmission Company v Argentina* (United States/Argentina BIT) (12 May 2005); ICSID Case No ARB(AF)/97/2 *Azinian, Davitian & Baca v Mexico* (NAFTA) (1 November 1999); ICSID Case No ARB(AF)/97/1 *Metalclad Corporation v Mexico* (NAFTA) (30 August 2000); ICSID Case No ARB (AF)/00/2 *Tecnicas Medioambientales Tecmed, S.A. v Mexico* (Spain/Mexico BIT) (29 May 2003).
12) Cf T Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues', (2004) 1 Transnational Dispute Management.
13) See n 11 above.
14) Wälde (n 12).
15) See eg T Wälde, 'Contract Claims under the Energy Charter Treaty's Umbrella Clause: Original Intentions versus Emerging Jurisprudence' in C Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* 205–36.
16) Australia, Hungary and Norway have made such reservations.
17) Bamberger and others (n 5).
18) See Section 6.
19) A Sheppard, 'The Distinction between Lawful and Unlawful Expropriation' in C Ribeiro (ed.) *Investment Arbitration and the Energy Charter Treaty* 169–99.
20) Australia, Hungary and Norway have made such reservations.
21) A Michie, 'The Provisional Application of Arms Control Treaties' (2005) 10 JC&SL 346–7.
22) In the three arbitrations pending against the Russian Federation referred to in n 1 above, the Russian Federation has argued that the ECT is not provisionally applicable to it. The tribunals sitting in these cases will thus in due course address this issue.
23) The issue of whether provisional application itself was inconsistent with Greek and Georgian law arose in the *Kardassopoulos* case, see Section 6B(v).
24) A similar situation arose in the *Petrobart* case, see Section 6B(ii).
25) See Section 6B(v).
26) The full text of the award is available in K Hobér, Investment Arbitration in Eastern Europe: In Search of a Definition of Expropriation (Juris Net, LLC, Huntington 2007) Appendix 11. For a complete analysis of the case, see Hobér, Investment Arbitration in Eastern Europe 202; and T Wälde and K Hobér, 'The First Energy Charter Award' (2005) 22 J Int'l Arb 83–103.
27) *Nykomb v Synergetics Technology Holding AB v the Republic of Latvia* s 4(3)(1).
28) Ibid s 4(3)(2)(a).
29) The full text of the award is available in Hobér (n 26) Appendix 12.

30) *Petrobart Limited v the Kyrgyz Republic* 76.
31) Case No T 5208-05 *The Republic of Kirgizistan v Petrobart Ltd* (Svea Court of Appeal, Judgment of 19 January 2007.
32) The full text of the award is available at http://www.encharter.org/fileadmin/user_upload/document/Plama_Bulgaria_Award.pdf. November 12, 2009.
33) The Cyprus-Bulgaria BIT only provided for jurisdiction with regard to claims of expropriation. Since Plama's claim concerned other alleged breaches of the Cyprus-Bulgaria BIT, Plama tried to rely on the MFN-clause in the Cyprus-Bulgaria BIT to be able to invoke the dispute resolution clauses in other Bulgarian BITs, which gave investors the option to pursue dispute resolution for all breaches of the treaty. However, the tribunal found that the MFN treatment obligation contained in the Cyprus-Bulgaria BIT did not extend to Plama the protection of dispute resolution provisions set out in other Bulgarian investment treaties. The tribunal emphasised that it is a well-established principle, both in domestic and international law that the parties to an arbitration must clearly express their agreement to arbitrate, and that 'doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference' such as through an MFN clause (see *Plama Consortium Limited v Republic of Bulgaria* 63 [199]).
34) *Plama Consortium Limited v Republic of Bulgaria* 35 [128–9].
35) Ibid 40 [139].
36) ICSID Case No ARB/03/26 *Inceysa Vallisoletana S.L. v Republic of El Salvador*, Award of 2 August 2006 ('Inceysa').
37) ICSID Case No Arb/00/7 *World Duty Free Company Limited v The Republic of Kenya*, Award of 4 October 2006.
38) *Plama Consortium Limited v Republic of Bulgaria* 42 [143].
39) Ibid 42 [144].
40) Ibid 43 [147].
41) Ibid 92 [305].
42) The full text of the award is available at http://www.encharter.org/fileadmin/user_upload/document/Amto_Ukraine_Award.pdf. November 12, 2009.
43) See Section 6B(iv).
44) *Limited Liability Company Amto v Ukraine* 64 [115].
45) The full text of the decision is available at http://www.encharter.org/fileadmin/user_upload/document/Kardassopoulos.pdf. November 12, 2009.
46) *Ioannis Kardassopulos v Georgia* 69 [262].
47) See Section 6B(v).
48) *Nykomb v Synergetics Technology Holding AB v the Republic of Latvia* s 4.3.3(d).
49) Ibid s 4.3.3(a).
50) *Petrobart Limited v the Kyrgyz Republic* 69.
51) Ibid 71.
52) Ibid 72.
53) Ibid 72.
54) Ibid 62.
55) Ibid 62–3.
56) Ibid 63.
57) Ibid 64–6.
58) Ibid 66–8.
59) Oil Platforms (*Islamic Republic of Iran v United States of America*), Preliminary Objection, Judgment, ICJ Reports 1996, p. 803.
60) *Islamic Republic of Iran v United States of America* [32].
61) *Islamic Republic of Iran v United States of America* [34].
62) *Plama Consortium Limited v Republic of Bulgaria* 36 [119].
63) Ibid 38 [126].
64) Ibid 38–9 [128].
65) Ibid 39 [130].
66) Ibid 14 [32].
67) Ibid 45–6 [147].
68) Ibid 46 [149].
69) Ibid 47 [149].

70) Article 31(1) of the Vienna Convention reads: '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'.
71) *Plama Consortium Limited v Republic of Bulgaria* 49–50 [155–8].
72) Ibid 50–3 [159–65].
73) *Limited Liability Company Amto v Ukraine* 31 [43].
74) Ibid 39 [60].
75) Ibid 44 [70].
76) *Ioannis Kardassopulos v Georgia* 34 [124].
77) Ibid 35 [129].
78) Ibid 37 [135].
79) Ibid 38 [141].
80) Ibid 39 [144–6].
81) Ibid 53 [194].
82) Ibid 63 [239] and 65 [246].
83) Ibid 57 [211].
84) Ibid 59 [222].
85) Ibid 58 [219].
86) *Nykomb v Synergetics Technology Holding AB v the Republic of Latvia* (2005) 1 Stockholm International Arbitration Review 104–5.
87) Ibid 105–8.
88) Ibid 105.
89) Ibid 107.
90) Ibid 108.
91) *Petrobart Limited v the Kyrgyz Republic* 77–8.
92) Ibid 81.
93) Ibid 83–4.
94) Ibid 86–7.
95) See eg ICSID Case No ARB/01/7 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, Award of 25 May 2004; ICSID Case No ARB/01/8 *CMS Gas Transmission Company v The Argentine Republic*, Award of 12 May 2005; ICSID Case No ARB/01/12 *Azurix Corp v The Argentine Republic*, Award of 14 July 2006; *S.D. Myers, Inc. v Canada*, 8 ICSID Reports (2005) 18; ICSID Case No ARB(AF)/99/1 *Marvin Feldman v Mexico*, Award of 16 December 2002.